No. F085800

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

CIVIL RIGHTS DEPARTMENT, FORMERLY THE DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING, AN AGENCY OF THE STATE OF CALIFORNIA,

Plaintiff and Appellant,

v.

CATHY'S CREATIONS, INC., D/B/A TASTRIES, A CALIFORNIA CORPORATION, AND CATHARINE MILLER,

Defendants and Respondents; and

EILEEN RODRIGUEZ-DEL RIO AND MIREYA RODRIGUEZ-DEL RIO,

Real Parties in Interest.

BRIEF OF THE CHURCH-STATE COUNCIL AND THE ISLAM AND RELIGIOUS FREEDOM ACTION TEAM OF THE RELIGIOUS FREEDOM INSTITUTE AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

APPEAL FROM THE SUPERIOR COURT OF KERN COUNTY,
CASE NO. BCV-18-102633
THE HONORABLE J. ERIC BRADSHAW

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to Rule 8.208, I hereby certify as follows:

Amicus Church-State Council is a California nonprofit public benefit corporation, and a wholly owned subsidiary of the Pacific Union Conference of Seventh-day Adventists. Amicus knows of no other person or entity related to it with an interest in the outcome.

Amicus Islam and Religious Freedom Action Team is part of the Religious Freedom Institute, a nonprofit corporation headquartered in Washington, D.C. Amicus knows of no other person or entity related to it with an interest in the outcome.

April 11, 2024 /s/ Alan J. Reinach

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INTEREST OF THE AMICI

The Church-State Council is a California nonprofit public benefit corporation, and a wholly owned subsidiary of the Pacific Union Conference of Seventh-day Adventists, devoted to the protection of liberty of conscience and the separation of church and state.

The Islam and Religious Freedom Action Team is part of the Religious Freedom Institute, a Washington, D.C.-based nonprofit organization dedicated to promoting religious freedom as a fundamental human right. The Action Team serves as a Muslim voice for religious freedom for all, grounded in the traditions of Islam, and to that end, engages in research, education, and advocacy. The Islam and Religious Freedom Action Team submits this brief because the issues of compelled expression against conscience and issues regarding complicity in activities against religious conscience are important issues to the Muslim community and to religious liberty as it contributes to the common good.

Amici, organizations representing different religious traditions, but each dedicated to furthering the religious freedom of all persons and faith groups, believe that this case raises important issues of religious expression and religious conscience that merit a full and thorough briefing to aid the Court in its decision. They believe that this brief does not duplicate the briefs of the parties, but, as set forth in the Introduction below, will provide a helpful perspective for the Court on two central issues in the case and a way to reduce conflicts between LGBT rights and religious conscience.

INTRODUCTION

Amici submit this brief to highlight two issues in this case of profound importance to persons of many different religious traditions.

The first issue involves government compulsion of symbolic speech in violation of conscience. Much religious speech is symbolic in nature, and symbolic speech is given full First Amendment protection. The trial court in this case correctly assessed that crafting a wedding cake was symbolic speech entitled to constitutional protection. At the same time, government compulsion of symbolic speech can raise grave constitutional issues. This is implicated by the government applying public accommodation laws broadly without regard to issues of compelled speech. The government requiring a Jewish craftsman to build a cross, requiring a Christian printer to make posters with symbols of witchcraft, or requiring a Muslim t-shirt maker to print images of the Prophet Mohammed, all could constitute compelled government speech that would violate the Free Speech Clause. The trial court properly held that requiring Ms. Miller to make a celebratory wedding cake in violation of her conscience violated the Free Speech Clause.

The second issue involves the Free Exercise Clause's protection against forced complicity in actions in violation of religious conscience. Diverse religious communities have doctrines of moral complicity, preventing them from engaging in or facilitating acts that they believe constitute moral wrongdoings. Courts have accommodated complicity-based religious requests in a variety of contexts, and Ms. Miller's free exercise claim fits within that line of cases.

The government also does not have a valid reason for violating Ms. Miller's free exercise rights. In fact, the government is unnecessarily pursuing a zero-sum approach to this conflict of rights. The trial court in this case held correctly that Ms. Miller's referral process serves the government's interest in providing full and equal access to same-sex couples. More generally, referrals offer a win-win solution for other conflicts between religious objectors and same-sex couples. The government's interest in preventing dignitary harm is also insufficient, particularly because it ignores the dignitary harm inflicted on Ms. Miller.

ARGUMENT

I. The Trial Court Properly Found That Requiring Ms. Miller To Craft A Cake For A Wedding In Violation Of Her Conscience Violated The Free Speech Clause of the First Amendment

A. Crafting a Wedding Cake is Symbolic Speech and an Expressive Act Protected Under the First Amendment

"The annals of human history reveal the transcendent importance of marriage . . . . Marriage is sacred to those who live by their religions and offers unique fulfillment to those who find meaning in the secular realm." *Obergefell v. Hodges*, 576 U.S. 644, 656-57 (2015). A wedding ceremony and reception is a culturally and often religiously significant celebration of this profound union and serves to express to participants and observers its transcendent purpose, including by using symbols.

The First Amendment protects not only speech through words but also through symbols, for "symbolism is a[n] . . . effective way of communicating ideas." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1943) (finding First Amendment right not to

participate in Pledge of Allegiance); *see also Spence v. Washington*, 418 U.S. 405, 409 (1974) (holding that displaying of a flag with an upside down peace symbol taped to it is constitutionally protected symbolic expression); *see also United States v. O'Brien*, 391 U.S. 367, 376 (1968) (holding that communication of ideas by conduct can be protected expression); *Brown v. Louisiana,* 383 U.S. 131, 142 (1966) (holding that sitting can communicate a message).

Symbols involving colors and particular designs are common ways of diverse groups to express meaning. "Causes and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followings to . . . a color or design . . . ." *Barnette*, 319 U.S. at 632. In the Christian, Jewish, and Muslim religions, for example, there is specific expression in colors and/or shapes of a Roman Catholic priest's vestment, a Cross, a Chuppah, and the Crescent Moon and Star. The vestment of a Roman Catholic priest utilizes different colors for dual purposes: "first, the colors highlight the liturgical season, and second, the colors highlight a particular event or particular mystery of faith." Fr. William Saunders, *The Color of Liturgical Vestments*, THE ARLINGTON CATHOLIC HERALD (Mar. 16, 1995), https://www.ewtn.com/catholicism/library/color-of-liturgical-vestments-1071. Likewise, "the cross has long been a preeminent Christian symbol." *Am. Legion v. Am. Humanist Ass'n*, 588 U.S. 29, 38 (2019). A Chuppah is a canopy under which many Jewish couples get married and "symbolizes the home that the couple will build together in their married life." Karen Cinnamon, *Jewish Wedding Traditions Explained–The Chuppah,* SMASHINGTHEGLASS (Jan. 01, 2023), https://www.smashingtheglass.com. The faith of

Islam is often symbolized by the Crescent and Star. *Skoros v. City of New York*, 437 F.3d 1, 3 (2d Cir. 2006). The Crescent is the early phase of the moon and represents progress and the star signifies illumination with the light of knowledge. *10 Religious Symbols in Stained Glass*, BRANDON UNIV., https://www.brandonu.ca (last visited March 19, 2024).

In a similar way, the color, shape, and style of a wedding cake have strong cultural meaning for the celebration of a marriage. A wedding "convey[s] important messages about the couple, their beliefs, and their relationship to each other and to their community." *Kaahumanu v. Hawaii*, 682 F.3d 789, 799 (9th Cir. 2012). A wedding cake is an important focal point at a wedding reception, and the cutting of the cake typically serves as a cultural ritual. *See* Brief of the United States as Amicus Curiae at 25, *Masterpiece Cakeshop v. Colorado Civil Rights Comm'n*, 584 U.S. 617 (2018) (No. 16-111) ("Wedding cakes are iconic symbols that serve as the centerpiece of a ritual in which the married couple cuts the cake in front of their guests, marking the celebratory start to their marriage.") (citing SIMON R. CHARSLEY, WEDDING CAKES AND CULTURAL HISTORY 116-118 (1992)). Sociologist Bradford Wilcox has said that "[t]he wedding cake can be a symbol of how important the couple takes the ceremony, and also the relationship as well," and that "[i]n our secular culture, for some, the wedding cake is possibly the ultimate sacrament now." Glenn Collins, *Extravagant Wedding Cakes Rise Again*, N.Y. TIMES (June 6, 2014), https://www.nytimes.com/2014/06/08/fashion/weddings/extravagant-wedding-cakes-rise-again.html.

Limitations on pure speech are subject to strict scrutiny. *See 303 Creative LLC v. Elenis*, 600 U.S. 570, 583, 589 (2023). Courts have found that pure speech includes a wide range of communicative media other than the written or spoken word. *See, e.g., Kaplan v. California*, 413 U.S. 115, 119 (1973) (pictures, films, paintings, drawings, and engravings have First Amendment protection); *Cressman v. Thompson*, 798 F.3d 938, 952 (10th Cir. 2015) (collecting Supreme Court and lower court cases holding that pure speech includes music without words, theater, movies, pictures, paintings, drawings, engravings, tattoos, custom-painted clothing, and stained-glass windows). In *Brown v. Ent. Merch. Ass'n,* 564 U.S. 786, 790 (2011), the Supreme Court held that even violent video games warrant some level of First Amendment protection because they "communicate ideas—and even social messages—through many familiar literary devices (such as characters, dialogue, plot, and music) and through features distinctive to the medium (such as the player's interaction with the virtual world)."

"Artist[s] practicing in a visual medium" are creating pure speech protected by the First Amendment. *Buehrle v. City of Key West*, 813 F.3d 973, 978 (11th Cir. 2015). As one court aptly noted: "Visual art is as wide ranging in its depiction of ideas, concepts, and emotions as any . . . writing, and is similarly entitled to full First Amendment protection." *Bery v. City of New York*, 97 F.3d 689, 695 (2d Cir. 1996). The elements of a wedding cake vary in "number of tiers, type of cake, ingredients, flavors, colors, frosting, decorations, and finish" and Ms. Miller "is personally involved in every production related aspect of her bakery." AA02538. Ms. Miller intends the wedding cakes she crafts, whether designed from scratch or crafted from one of her templates, to express her joy

and her faith in the celebration of a marriage. Her *Wedding Cake Worksheet* cites Bible passages and states that the cutting of the cake she creates "is a ceremonial representation of the hospitality you will show to others, together as a new family unit." Respondents' Brief at 17. Accordingly, her crafting of a cake for weddings falls squarely within the concept of symbolic speech recognized by the Supreme Court and other courts. The Superior Court's decision categorizing Ms. Miller's cakes as pure speech was correct and should be affirmed. *See* AO02556 ("defendants' wedding cakes are pure speech, designed and intended—genuinely and primarily—as an artistic expression of support for a man and woman uniting in the sacrament of marriage, and a collaboration with them in the celebration of their marriage.").

In addition to "pure speech," the First Amendment protects expressive conduct that is "sufficiently imbued with elements of communication." *Texas v. Johnson*, 491 U.S. 397, 414, 404 (1989) (protecting burning of flag as expressive conduct). Expressive conduct is protected speech if there is "an intent to convey a particularized message," and "the likelihood is great that the message will be understood by those who view it." *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1058 (9th Cir. 2010) (holding that tattooing is at least expressive conduct); *see also Spence*, 418 U.S. at 409 (laws dealing with flag burning and misuse are related to the expression of activity and could not be used to bar student from displaying flag with upside-down peace symbol taped on it); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505 (1969) (recognizing the expressive nature of students' wearing black armbands to protest American military).

In addition to being pure speech, the act of crafting and delivering a cake for use at a wedding is expressive conduct. A wedding is an intrinsically expressive event—conveying "important messages about the couple, their beliefs, and their relationship to each other and to their community." *Kaahumanu*, 682 F.3d at 799. Wedding cakes, unlike other goods baked with no specific customer in mind, are baked for a specific couple and a specific celebration. Creating and delivering a wedding cake for Ms. Miller are expressive acts which are intended to convey, and do in fact convey, a celebratory message about a marriage and messages about elements of marriage, such as hospitality and union. *See* Respondents' Brief at 17. The trial court correctly concluded that the crafting of speech constituted protected symbolic speech and protected expressive conduct.

B. The Plaintiff's Demands on Ms. Miller Constitute Compelled Speech Against Her Conscience in Violation of the First Amendment

Compelled speech is a particularly onerous infringement on free speech. The First Amendment "includes both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (individuals could not be forced to display a message on license plates). Compelled speech forces "individuals . . . into betraying their convictions." *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2464 (2018). "The First Amendment envisions the United States as a rich and complex place where all persons are free to think and speak as they wish, not as the government demands." *303 Creative*, 600 U.S. at 603.

The First Amendment is grounded in a "respect for the conscience of the individual [that] honors the sanctity of thought and belief." *Public Utilities Comm'n v. Pollak*, 343 U.S. 451, 468 (1952) (Douglas, J., dissenting). Justice Black similarly stated: "I can think of few plainer, more direct abridgments of the freedoms of the First Amendment than to compel persons to support candidates, parties, ideologies or causes that they are against." *Lathrop v. Donohue*, 367 U.S. 820, 873 (1961) (Black, J., dissenting). It is anathema to the Constitution "to force an individual to 'utter what is not in [her] mind' about a question of political and religious significance." *303 Creative*, 600 U.S. at 596 (citing *Barnette*, 319 U.S. at 634). Accordingly, "laws that compel speakers to utter or distribute speech bearing a particular message are subject to the most exacting scrutiny." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994) (cleaned up).

Ms. Miller views her creation of a wedding cake for a couple to be an expression of endorsement of the wedding. She tells couples that the wedding cakes she creates are "a Centerpiece to Your Celebration." AA02539. The bakery's design standards state that Ms. Miller will not create "Designs that violate fundamental Christian principals [sic]," and specifically that "wedding cakes must not contradict God's sacrament of marriage between a man and a woman." AA02540. Requiring Ms. Miller to craft a cake for a same-sex marriage thus requires her to engage in expression in violation of her conscience.

The Appellant places a great deal of emphasis on the argument that the cake was to be crafted from a pre-designed template. *See* Appellant's Opening Brf. at 13, 14, 33, 47–48, 51, 59. This overlooks the fact that so many of the compelled speech cases have

involved pre-set statements or symbols that violate a speaker's conscience when compelled to repeat it. *See, e.g., Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 585 U.S. 755 (2018) ("*NIFLA*") (unconstitutional compelled speech to force health clinics to provide specific information about abortion); *Wooley v. Maynard*, 430 U. S. 705 (1977) (unconstitutional compelled speech to requiring display of license with the slogan "live free or die"); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633 (1943) (forcing school students to recite the pledge of allegiance was unconstitutional compelled speech); *Frudden v. Pilling*, 742 F.3d 1199, 1208 (9th Cir. 2014) (requirement of affixing words "Tomorrow's Leaders" on uniform was unconstitutional compelled speech); *Cressman v. Thompson*, 719 F.3d 1139 (10th Cir. 2013) (requiring display of image of a Native American on license plate in opposition with Plaintiff's religious beliefs was unconstitutional); *Axson-Flynn v. Johnson*, 356 F.3d 1277 (10th Cir. 2004) (upholding student's constitutional objection to reciting offensive language in theater script).

These cases, all involving pre-designed symbols or text, demonstrate the core principle "that the United States does not and cannot require 'orthodoxy' on any one way of thinking." *Barnette*, 319 U.S. at 632-34. This is true regardless of how reasonable the view seems to the majority, or how out-of-step the objector may seem to others. As the Supreme Court instructed in *Wooley v. Maynard*, 430 U.S. 705, 717 (1977), "where the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message." *See also Bennett v. Metropolitan Gov't of Nashville &*

Davidson Cty., 977 F.3d 530, 554 (6th Cir. 2020) ("the First Amendment would serve no purpose if it safeguarded only 'majority views'").

Public accommodation laws serve an important purpose to ensure equal access to goods and services and end patterns of discrimination. They "are well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 572 (1995). But the Supreme Court has repeatedly held that "no public accommodations law is immune from the demands of the Constitution." *303 Creative*, 600 U.S. at 592. Accordingly, public accommodation laws such as the California Unruh Civil Rights Act cannot compel speech in violation of conscience. As the Court held in *303 Creative*, "public accommodations statutes can sweep too broadly when deployed to compel speech." *Id. See also Boy Scouts of Am. v. Dale*, 530 U.S. 640, 659 (2000) (holding that public accommodation law requiring reinstatement of gay adult leader "would significantly burden the organization's right to oppose or disfavor homosexual conduct").

The state has a valid and important interest in ensuring that all citizens can access goods and services. That interest, however, is met through Ms. Miller's willingness to sell products to anyone without regard to their race, sex, sexual orientation, or any other protected classification, and her proactive arrangement to provide referrals to other bakers for orders for wedding cakes for same-sex weddings. Forcing Ms. Miller to engage in expression against her conscience here thus cannot be justified by any compelling governmental interest.

An aggressive application of public accommodation laws can impose severe burdens on people generally, and people of strong religious faith in particular. For many Muslims, depictions of the Prophet Mohammed are prohibited. Thus, requiring an objecting Muslim printer to produce such an image, which a customer might want for his own religious purposes, would be compelled speech in violation of the printer's conscience. A Jewish craftsman might be forced to accept a job to build a cross for the front of a Christian sanctuary. And a Christian graphic artist might be required to accept a job involving symbols of witchcraft. The trial court correctly recognized the serious constitutional injury that occurs when the government requires a person to speak in a manner that violates his or her conscience, and should be upheld.

II. The Government Cannot Force Individuals To Perform Acts That Make Them Complicit In Moral Wrongdoing

Our law recognizes that the government cannot force individuals to perform acts that make them complicit in moral wrongdoing. One becomes complicit in something when one performs actions that contribute to or assist someone else's wrongdoing in a non-negligible way. GREGORY MELLEMA, COMPLICITY AND MORAL ACCOUNTABILITY 10

(2016). Many religious faiths, including Catholicism[1], Judaism[2], and Islam[3], have doctrines of moral complicity. And courts—including the Supreme Court—have accommodated religious adherents when they object on complicity grounds.

In *Thomas v. Review Board of Indiana Employment Security Division*, 450 U.S. 707 (1981), Thomas—a Jehovah's Witness—resigned from his job at a factory because he objected to manufacturing tank parts, which he believed contributed to warfare, in violation of his religious beliefs. *Id.* at 709. When he applied for unemployment benefits, the government denied his claim, stating that he had left his job voluntarily without good cause. *Id.* Thomas argued that continuing to manufacture tank parts would make him complicit in actions that contradicted his deeply held religious convictions. *Id.* at 710-11. The Court granted him a religious accommodation, holding that "a person may not be compelled to choose between the exercise of a First Amendment right and participation in an otherwise available public program." *Id.* at 716.

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[1] POPE JOHN PAUL II, EVANGELIUM VITAE 73 (1995) (teaching that "there is a grave and clear obligation to oppose [intrinsically unjust laws] by conscientious objection."). This obligation is born out of an "obedience to God-to whom alone is due that fear which is acknowledgment of his absolute sovereignty-that the strength and the courage to resist unjust human laws are born." *Id.*

[2] *See Chometz After Pesach*, YOUNG ISRAEL SHOMRAI EMUNAH OF GREATER WASHINGTON (Apr. 29, 2011), http://wp.yise.org/chometz-after-pesach/ (explaining that Judaism prohibits Jewish consumers from purchasing "bread or other chametz for 2 weeks after Pesach" from Jewish stores or distributors that "did not sell their chametz before Pesach.").

[3] NIK MOHAMED AFFANDI BIN NIK YUSOFF, ISLAM & BUSINESS 231 (Ismail Noor ed., 2002) (explaining Islam's teaching that "whatever is conducive towards what is prohibited is itself forbidden.").

In *Wisconsin v. Yoder*, 406 U.S. 205 (1972), Amish parents claimed that compulsory education beyond the eighth grade conflicted with their religious beliefs and way of life, which emphasized a simple, agrarian existence and limited exposure to worldly influences. *Id.* at 210. They argued that sending their children to high school would expose the children to secular values and temptations, thereby undermining the religious and cultural values instilled in them within the Amish community. *Id.* at 209. The Court ruled in favor of the parents, reasoning that "a State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause." *Id.* at 214. The landmark decision affirmed the principle that religious freedom extends to protecting individuals and communities from being compelled to engage in activities that would violate their sincerely held beliefs.

In one of the most recent Supreme Court cases on complicity, the Christian owners of Hobby Lobby, a closely held company, sincerely believe that life begins at conception, and that it would violate their religious beliefs to provide contraceptive drugs or devices that impact the development of that life after conception. After Department of Health and Human Services (HHS) regulations mandated that the owners provide contraceptives through their employee health insurance program, they sued, and in *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), the Supreme Court held in their favor. The Court recognized that the HHS regulations compelled the Hobby Lobby owners to facilitate "conduct that seriously violates their sincere religious belief." *Id.* at 720.

Dolal v. Metropolitan Airports Comm'n, No. 07-1657, slip op. at 4 (Minn. Ct. App. Sept. 9, 2008), also involved a complicity-based claim. There, a taxi driver refused to transport alcohol as required by the city's taxi commission. *Id.* His refusal was based on his religious beliefs as a Muslim, which prohibited him from both consuming and facilitating the consumption of alcohol. *Id.* Dolal argued that transporting alcohol would facilitate that alcohol consumption, making him complicit in an action that violated his religious convictions. *Id.*

Across these and other cases, accommodating religious objectors does not require endorsement or even agreement with the objector's beliefs. As the Court noted in *Thomas*, petitioner "drew a line, and it is not for us to say that the line he drew was an unreasonable one." 450 U.S. at 715. *Accord Hobby Lobby*, 573 U.S. at 725. Instead, courts simply evaluate the sincerity of the objector's beliefs regarding complicity and weigh the government's interest in restricting religious freedom against the First Amendment right.

A. Ms. Miller Sincerely Believes That Baking A Cake For A Same-Sex Wedding Makes Her Complicit In Moral Wrongdoing

Ms. Miller's Free Exercise claim fits squarely within the line of cases on complicity-based religious claims. She has a sincere religious objection to providing a cake to celebrate a same-sex wedding, on the grounds that this would make her complicit in something she finds to be against her religious faith.

Like many Americans, Ms. Miller understands weddings to be inherently religious events. As a Christian, her religious beliefs teach her that marriage is "very, very sacred"

and that it is a sacrament. AA2538. In this religious ceremony, wedding cakes carry religious significance. Ms. Miller believes by cutting and serving a wedding cake the couple demonstrates its first act of hospitality performed together. Respondents' Brief at 17. And she believes that moment—where all the attendees turn their attention to the couple and the cake—serves as a ceremonial representation of the hospitality the couple will show to others, together as a new family. *Id.*

At the same time, Ms. Miller's religious beliefs define marriage as the union of one man and one woman. AA2538. She believes that if she were to take part in a same-sex wedding by baking a wedding cake for it, she would be "'hurt[ing] [her] Lord and Savior.'" AA2559. As a "steward" of "the Lord's business he put in [her] hands," Ms. Miller would be complicit in a moral wrongdoing if she "participate[d] in something that would hurt him and not abide by his precepts in the Bible." AA2538. Ms. Miller's belief on this matter is so strong that she is willing to turn away business and revenue solely for religious reasons.

By requiring Ms. Miller to create cakes for same-sex weddings, California is forcing Ms. Miller to engage in an act that makes her complicit in what she considers to be a moral wrong.

B. Ms. Miller Objects To What She Is Being Asked To Do, Not Who Is Requesting It

By accommodating Ms. Miller's religious objection, this court would not be granting a license to Ms. Miller and other religious-adherents to refuse service to same-sex persons. Ms. Miller does not object to selling baked goods to LGBTQ persons.

AA2545. She happily serves, employs, and trains LGBTQ individuals at her bakery. *Id.* Her religious objection is to creating wedding cakes for same-sex weddings because doing so would make her culpable in an inherently religious event she deems contrary to God's design for marriage. In this, Ms. Miller is consistent in declining service requests that would require her to violate her sincere religious beliefs; she also declines projects celebrating divorces or involving pornographic images or drugs and alcohol. AA2540.

This case would be different if Miller had a blanket ban on serving or employing LGBTQ individuals, as this would be discrimination against all persons within a protected class and would not be protected by the First Amendment. There is a crucial distinction between declining to render services based on *what* it entails and declining to render services based on *who* requests it. Invidious discrimination is against the person's *identity* (i.e., *who* they are), rather than *what* the person is being asked to do. *Compare Bray v. Alexandria Women's Health Ctr.*, 506 U.S. 263, 271-73 (1993) (disparate treatment of abortion is not sex-based even though only women have abortions), *with id.* at 270 (irrational disfavoring of activities associated only with a particular class of people can indicate intent to disfavor those people).

C. The Government's Asserted Interests Do Not Justify Forcing Individuals To Perform Acts That Make Them Complicit In What They View As Moral Wrongdoing

The government asserts two interests in forcing Ms. Miller to perform acts that make her complicit in what she considers moral wrongdoing: (1) ensuring that the Rodriguez-Del Rios have full and equal access to service; and (2) preventing dignitary

harm to same-sex couples. Neither can serve as the basis for allowing the state to violate the Free Exercise Clause.

1. Ms. Miller's Referral Process Offers a Win-Win Solution and Defeats California's Asserted Access Interest.

The trial court properly held that the Rodriguez-Del Rios were not denied full and equal service because Ms. Miller promptly referred them to another bakery that did not have religious objections. AA2551-2552. As the court explained, the "evidence affirmatively shows that Ms. Miller arranged to refer wedding cakes to another good bakery" and that "accommodation was, and is, reasonable under the circumstances, and fulfills the requirement of 'full and equal service.'" *Id.*

Ms. Miller's referral process offers a win-win solution not just to the conflict between Ms. Miller and the Rodriguez-Del Rios but also to the tension between LGBTQ rights and Free Exercise rights more broadly. The Supreme Court decision in *Fulton v. City of Philadelphia*, 593 U.S. 522 (2021), demonstrates such a win-win situation. There, the Court unanimously ruled in favor of Catholic Social Services (CSS), a Catholic foster care agency that declined, based on its religious teachings, to certify same-sex couples as foster parents. *Id.* The Court made clear that Philadelphia had no compelling interest in forcing CSS to certify same-sex couples where CSS had a practice of referring the couples to the numerous other agencies in the city who would certify same-sex couples. *Id.* at 530, 541.

In *Fulton*, because of CSS's referral, each side "won": same-sex couples could find and work with other agencies better suited to meet their needs, and CSS would not

have to violate its religious beliefs. This court should follow *Fulton*'s lead and implement the win-win solution here. Like CSS, Ms. Miller has researched other local bakers that can meet the needs of couples who want a same-sex wedding cake. The state's asserted "access" interest, then, is significantly diminished as Ms. Miller herself has identified ready and willing local bakers for same-sex couples to work with.

This balancing inquiry would be different if Tastries was the only bakery from which any couple could feasibly purchase a wedding cake in that area. The issue of access would be problematic for Appellee under those facts, and the government's interest would be stronger. But those are not the facts before this Court. Here, the same-sex couple can obtain a cake from a different, local baker, and that process is only made more seamless by Ms. Miller's referral. For example, Red Ribbon Bakeshop is 3.4 miles (8 minutes) from Tastries, Nothing Bundt Cakes is 3.9 miles (7 minutes) from Tastries, and Jireh Custom Cakes is 5.6 miles (9 minutes) from Tastries. All bake wedding cakes. [4] As such, California's "access" interest does not justify its Free Exercise violation.

2. This Win-Win Referral Solution Would Not Extend to Race-Based Objections Like California Fears.

California argues that accommodating Ms. Miller's religious objection would open the floodgates and allow wedding vendors to "refuse to serve interracial couples . . . under the same rationale." Appellant's Brief at 60. Reply Brief at 31. Not so. If Ms.

[4] RED RIBBON BAKESHOP, https://locations.redribbonbakeshop.com/ca/bakersfield/5624-stockdale-highway (last visited Mar. 28, 2024); NOTHING BUNDT CAKES, https://www.nothingbundtcakes.com/occasions/?location=0409&fulfillment=03/28/2024 (last visited Mar. 28, 2024); JIREH CUSTOM CAKES, https://www.facebook.com/JirehCustomCakes (last visited Mar. 28, 2024).

Miller objected to baking cakes for interracial weddings, this Court should *not* grant her a complicity-based religious accommodation, even if those beliefs were sincere and even if she was willing to refer the couple elsewhere. This would not be the kind of "win-win situation" like the one we describe here. What, then, is the difference between a religious-objection to baking a cake for an interracial wedding and the same objection to baking a cake for a same-sex wedding?

A body of case law supports granting religious accommodations in cases about a conflict between religion and LGBTQ rights. The opposite is true for race-based religious objections. For example, in *Bob Jones University v. United States*, 461 U.S. 574 (1983), the Supreme Court held that an institution that had rules barring interracial dating and marriage could not qualify for tax-exempt status under the Internal Revenue Code. The university contended that its racially discriminatory policies were based on sincerely held religious beliefs, but the Court held that the government had a compelling interest in eradicating racial discrimination in education. *Bob Jones University*, 461 U.S. at 604. Similarly, in *Loving v. Virginia*, 388 U.S. 1 (1967), the Court unequivocally condemned race-based discrimination as "odious," indicating its commitment to eliminating it. *Loving*, 388 U.S. at 11.

In *Obergefell v. Hodges*, 576 U.S. 644 (2015), multiple amici filing in support of the petitioners urged the Supreme Court to treat the case as analogous to *Loving*.[5] If the

[5] Brief of BiLaw as Amicus Curiae in Support of Petitioners at 28, *Obergefell v. Hodges*, 576 U.S. 644 (2015) (No. 14-556); Brief of the Commonwealth of Virginia as Amicus Curiae in Support of Petitioners at 34-39, *Obergefell v. Hodges*, 576 U.S. 644 (2015) (No. 14-556).

Court had done that, it would have effectively prevented any religious accommodation in the LGBTQ context. But the Court chose not to do that. Instead, *Obergefell* established a "safe harbor" so that religious dissenters could continue seeking religious accommodations. *See* Asma T. Uddin, *The Social Psychology of Religious Liberty Depolarization*, BYU L. REV. (forthcoming 2024) (manuscript at 31) (on file with author). The Court explained that religious beliefs about traditional marriage are "decent and honorable," *Obergefell*, 576 U.S. at 672, and have long "been held—and continue[ ] to be held—in good faith by reasonable and sincere people here and throughout the world." *Id.* at 657. *Obergefell* contemplates religious dissenters, like Ms. Miller, who serve same-sex couples but have religious objections to same-sex marriage. For this reason, states should not trample on the rights of "religions, and those who adhere to religious doctrines." *Id.* at 679.

In recent years, the Supreme Court has on multiple occasions modeled that advice. *See Masterpiece Cakeshop v. Colorado Civil Rights Comm'n*, 584 U.S. 617, 625 (2018) (ruling that Colorado violated the Free Exercise Clause when it considered whether a cake shop owner had violated a public accommodations law by refusing to create a wedding cake for a same-sex couple); *303 Creative*, 600 U.S. at 592 (ruling in favor of a religious website designer on speech grounds who objected to making wedding websites for same-sex weddings); *Fulton*, 593 U.S. at 522.

In sum, while the Supreme Court has held that religious objections to interracial dating and marriage are "odious" to our constitutional system, it recently affirmed that traditional beliefs about marriage are "honorable." California's does not have a valid

concern that a ruling in Ms. Miller's favor would also protect race-based religious objections.

3. California's Asserted Interest in Preventing Dignitary Harm Ignores The Permanent Dignitary Harm to Ms. Miller, Which Is Far Greater Than The One-Time Harm To Same-Sex Couples.

The government's second asserted interest is preventing dignitary harm to same-sex couples. It argues that Ms. Miller's religious practice must be suppressed because it offends the Rodriguez-Del Rios. But it is established First Amendment law that offense alone does not constitute a compelling interest warranting the suppression of speech (including religious speech). *See, e.g.*, *McCullen v. Coakley*, 134 S. Ct. 2518, 2531-32 (2014) (abortion counseling); *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (flag burning); *Hustler Magazine v. Falwell*, 485 U.S. 46, 50-57 (1988) (intentional infliction of emotional distress); *Cohen v. California*, 403 U.S. 15, 18-26 (1971) (profanity).

Plus, any consideration of dignitary harm to the Rodriguez-Del Rios must also consider the dignitary harm to Ms. Miller, for whom "free exercise is essential in preserving [her] own dignity." *Burwell v. Hobby Lobby Stores*, 573 U.S. 682, 736 (2014) (Kennedy, J., concurring). *See also Town of Greece v. Galloway*, 572 U.S. 565, 636 (2014) (Kagan, J., dissenting) ("A person's response to [religious] doctrine, language, and imagery . . . reveals a core aspect of identity—who that person is and how she faces the world.").

Each side in this conflict, and in other conflicts between same-sex couples and religious objectors, suffers an emotional harm. There is, however, an objective difference between the two. If this court rules in favor of Ms. Miller, same-sex couples could obtain

wedding cakes from other bakers and still have weddings and receptions. In contrast, if this court reverses the lower court, Ms. Miller would either be forced to repeatedly provide cakes for weddings to which she morally objects or be forced to permanently close her store. She risks either losing her religious identity or losing her occupation. The harm to Ms. Miller is far greater than the one-time dignitary harm to a same-sex couple required to use a different baker to make their wedding cake—especially since the couple was referred to that new baker by Ms. Miller herself.

For these reasons, California's interest in preventing dignitary harm does not justify its Free Exercise violation.

CONCLUSION

For the foregoing reasons, and the reasons set forth in the Respondents' Brief, the judgment of the Superior Court should be affirmed with regard to its Free Speech determination, and reversed with regard to its Free Exercise Clause determination.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the length limits permitted by California Rules of Court rule 8.204(c)(1). The brief is 7,681 words and is written in Times New Roman 13-point font.

/s/ Alan J. Reinach
ALAN J. REINACH

PROOF OF SERVICE

At the time of service, I was over 18 years old and not a party to this action. My business address is 2686 Townsgate Rd., Westlake Village, CA 9136. I served true copies of this Brief of Amici Curiae on the interested parties in this action as follows:

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Executed on April 11, 2024

/s/ Alan J. Reinach

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California Court of Appeal, Fifth Appellate District Case No. F085800

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