Compelled Speech in *Masterpiece Cakeshop*: What the Supreme Court's June 2018 Decisions Tell Us About the Unresolved Questions

By James A. Campbell

Note from the Editor:

This article discusses the unresolved compelled-speech questions in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*. It argues that the Court hinted at how it will ultimately resolve those questions in the various *Masterpiece Cakeshop* opinions and in its opinions in *Janus v. AFSCME* and *NIFLA v. Becerra*.

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• Dahlia Lithwich, Leah Litman, Mark Joseph Stern, *Kneecapping Unions and Weaponizing the First Amendment*, Slate (July 2, 2018), *audio and transcript available at* https://slate.com/news-and-politics/2018/07/janus-becerra-masterpiece-cakeshop-the-supreme-court-terms-big-cases.html.

• Catherine Fisk, *Compulsion and Complicity*, Take Care, https://takecareblog.com/blog/compulsion-and-complicity.

• Brief of Freedom of Speech Scholars as Amici Curiae Supporting Respondents, Masterpiece Cakeshop v. Colorado Civil Rights Commission, 138 S. Ct. 1719 (2018) (No. 16-111), *available at* http://www.scotusblog.com/wp-content/uploads/2017/11/16-111_bsac_freedom_of_speech_scholars.pdf.

• Brief of First Amendment Scholars as Amici Curiae Supporting Respondents, Masterpiece Cakeshop v. Colorado Civil Rights Commission, 138 S. Ct. 1719 (2018) (No. 16-111), *available at* http://www.scotusblog.com/wp-content/uploads/2017/11/16-111_bsac_first-amendment-scholars.pdf.

About the Author:

James A. Campbell serves as senior counsel with Alliance Defending Freedom, where he is director of the Center for Cultural Engagement and Scholarship. He represents Jack Phillips in Masterpiece Cakeshop v. Colorado Civil Rights Commission.

Many legal commentators expected the Supreme Court of the United States to make a big splash on freedom of speech in the summer of 2018. Most eyes were focused on *Masterpiece Cakeshop v. Colorado Civil Rights Commission*.[1] So when early June 2018 brought a decision in *Masterpiece* that focused on religious exercise, many assumed that the Court simply withheld guidance on the hotly debated compelled-speech questions raised in that case.

But tucked amidst the Court's free-exercise analysis, *Masterpiece* provides insight into how the speech question should be resolved. And later in June, the Court issued two other decisions addressing compelled speech: *National Institute of Family and Life Advocates (NIFLA) v. Becerra*[2] and *Janus v. American Federation of State, County, and Municipal Employees, Council 31 (AFSCME)*.[3] Together, these three decisions—*Masterpiece*, *NIFLA*, and *Janus*—support the right of creative professionals to decline to create speech or artistic expression that violates their conscience.

Part I of this article discusses the background of the *Masterpiece* case. Part II explores the various opinions issued in *Masterpiece*. Part III provides a brief overview of key portions of the majority opinions in *NIFLA* and *Janus*. Part IV identifies two speech-related issues—one statutory and one constitutional—that courts must resolve after *Masterpiece*, and it discusses two ongoing cases that illustrate the contours of those issues. Finally, Parts V and VI analyze how relevant portions of *Masterpiece*, *NIFLA*, and *Janus* point toward a resolution of the compelled-speech questions that will enable creative professionals to make a living without violating their consciences.

I. *Masterpiece Cakeshop*

Jack Phillips, the owner of Masterpiece Cakeshop, is a cake artist.[4] He uses his skills as a pastry chef, sculptor, and painter to create works of art in the form of elaborate, custom-designed cakes. The crown jewels of Phillips's artistry are his custom-designed wedding cakes. Phillips is also a man of deep religious faith whose beliefs guide his work.[5] Those convictions inspire him to serve people from all walks of life, but to decline to create cakes that express messages or celebrate events in violation of the tenets of his faith. His decisions on whether to design a custom cake have never focused on *who* the customer is, but on *what* the custom cake will express or celebrate.

In the summer of 2012, a same-sex couple entered Masterpiece Cakeshop to discuss a wedding cake celebrating their marriage.[6] Phillips told the gentlemen that he could not create such a cake, but that he would sell them anything else in his shop or design a cake for them for a different occasion.[7] Phillips does

1 138 S. Ct. 1719 (2018).

2 138 S. Ct. 2361 (2018).

3 138 S. Ct. 2448 (2018).

4 *Masterpiece*, 138 S. Ct. at 1724 (describing Phillips as an "expert baker").

5 *Id.* ("Phillips is a devout Christian.").

6 *Id.*

7 *Id.*

not create wedding cakes celebrating same-sex marriage because doing so would require him to express through his art celebration for a view of marriage that conflicts with his religious beliefs.[8]

The two men filed complaints with the state of Colorado, alleging that Phillips discriminated against them because of their sexual orientation.[9] Phillips argued that he did not turn the men away because of their sexual orientation, but because of the message that he would have communicated through a wedding cake celebrating a same-sex marriage. Phillips also contended that the government could not punish him under these circumstances because doing so would violate his freedoms of religion and speech guaranteed under the First Amendment.[10]

After an investigation and hearings, the Colorado Civil Rights Commission (Commission) found that Phillips had engaged in unlawful discrimination.[11] It ordered him to do three things.[12] First, he had to either start designing cakes celebrating same-sex weddings or stop creating wedding cakes altogether. Second, he had to implement staff training on compliance with nondiscrimination law, which would require him to tell his staff, most of whom are his family members, that he was wrong to decline requests to design custom wedding cakes celebrating same-sex marriages. Third, he had to submit periodic reports disclosing the cake requests he declined and explaining the reasons.

Soon after the Commission issued its order, the commissioners discussed Phillips's case again at one of their public hearings. During that meeting, the commissioners expressed outright hostility toward Phillips's claim that he should be free to create his custom cake art consistently with his faith. One commissioner, with no objection from the others, said:

> I would also like to reiterate what we said in the hearing or the last meeting. Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust, whether it be—I mean, we—we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others.[13]

Phillips appealed the Commission's order to the Colorado Court of Appeals, which affirmed it.[14] In its opinion, the court acknowledged that Phillips declined the cake request because of his beliefs about marriage rather than his "opposition to [the customers'] sexual orientation."[15] Nonetheless, the court reasoned that the state public-accommodation law requires no "showing of 'animus'" against individuals[16] and held that Phillips violated the statute simply by declining "to create a wedding cake for [the customers'] same-sex wedding celebration."[17] As part of that analysis, the court of appeals distinguished three other cases—decided around the same time—in which the Commission found no discrimination when three cake artists refused a religious man's requests for cakes criticizing same-sex marriage on religious grounds.[18] Those other cake artists, the court explained, "did not refuse the patron's request because of his [religion], but rather because of the offensive nature of the requested message."[19] The court of appeals also rejected all of Phillips's First Amendment claims. Concerning his free-speech claim, the court held that Phillips "does not convey a message supporting same-sex marriages merely by abiding by the law" because "a reasonable observer would understand that [his] compliance with the law is not a reflection of [his] own beliefs."[20]

After the Colorado Supreme Court declined to hear his case, Phillips raised two issues to the Supreme Court of the United States. The first was his free-speech claim that the government violated his expressive freedom by requiring him to create custom wedding cakes celebrating same-sex marriage. Phillips argued that the First Amendment's protection against compelled speech, which should shield him in this case, applies when two factors are satisfied: (1) when a customer asks a creative professional to create a custom work that qualifies as constitutionally protected expression; and (2) when the professional declines the request because of the message that the custom work would communicate rather than simply because of who the customer is.[21]

The state, in contrast, argued that the compelled-speech doctrine offers no protection when governments apply public-accommodation laws to people who earn a living by creating and selling expression. Under this view, whether Phillips's custom wedding cakes qualify as speech is irrelevant because, even if they do, the First Amendment affords him no relief. The state argued that this rule will not result in widespread compulsions of speech because governments apply public-accommodation laws to speech only when expressive professionals decline to create for some the same words, designs, or messages that they have created for others.[22]

Phillips based his second claim on the Free Exercise Clause, arguing that the Commission violated his religious freedom by manifesting hostility toward his faith and by treating his religious

8 *Id.* at 1743 (Thomas, J., concurring) ("To [Phillips], a wedding cake inherently communicates that 'a wedding has occurred, a marriage has begun, and the couple should be celebrated.'").

9 *Id.* at 1725.

10 *Id.* at 1726.

11 *Id.*

12 *Id.*

13 *Id.* at 1729.

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

15 *Id.* at 279.

16 *Id.* at 282.

17 *Id.* at 283.

18 *Id.* at 282 n.8.

19 *Id.*

20 *Id.* at 286.

21 Reply Br. for Pet'rs at 13, Masterpiece Cakeshop v. Colo. Civil Rights Comm'n, No. 16-111 (U.S. Nov. 22, 2017).

22 Br. for Resp't Colo. Civil Rights Comm'n at 24–25, 48–49, Masterpiece Cakeshop v. Colo. Civil Rights Comm'n, No. 16-111 (U.S. Oct. 23, 2017).

decision not to celebrate same-sex marriage worse than the decisions of other cake artists not to criticize same-sex marriage.

II. The *Masterpiece* Opinions

The Supreme Court ruled 7-2 in Phillips's favor. It did so exclusively on free-exercise grounds. Because the government's hostility toward Phillips's faith was so apparent, the Court did not need to reach the free-speech question.

A. The Majority Opinion

The majority opinion held that the Commission displayed "clear and impermissible hostility toward [Phillips's] sincere religious beliefs" about marriage and that it therefore violated his right to free exercise of religion.[23] It pointed to two ways the Commission displayed hostility. For one, the Court found an "indication of hostility [in] the difference in treatment between Phillips'[s] case and the cases of other bakers who objected . . . on the basis of conscience" to requests for "cakes with images that conveyed disapproval of same-sex marriage."[24] While the Commission punished Phillips for following his conscience, it gave the other cake artists a pass. The Commission "found no violation . . . in the other cases in part because each bakery was willing to sell other products . . . to the prospective customers."[25] But it "dismissed Phillips'[s] willingness to sell [other items] to gay and lesbian customers as irrelevant."[26]

In addition, the Court discerned hostility "at the Commission's formal, public hearings."[27] The majority highlighted a number of comments that "show[ed] lack of due consideration for Phillips'[s] free exercise rights and the dilemma he faced."[28] Some of those statements "endorsed the view that religious beliefs cannot legitimately be carried into the public sphere or commercial domain, implying that religious beliefs and persons are less than fully welcome in Colorado's business community."[29] And another comment—the one quoted above—described Phillips's reliance on his conscience as a "despicable piece[] of rhetoric."[30]

The combination of unequal treatment and hostile remarks left no doubt that the government failed to consider Phillips's religious claims "with the neutrality that the Free Exercise Clause requires."[31] Although the Court did not reach the free-speech question, it provided lower courts with some guidance for resolving cases that raise a "confluence of speech and free exercise principles."[32] It admonished courts to balance respect for the fundamental First Amendment freedoms of religious adherents who believe that marriage is the union of a man and a woman with respect for the dignity of LGBT individuals.[33] Notably, the Court did not reject or foreclose any free-speech argument that Phillips raised in the case. In fact, as explained in Section VI, the free-speech roadmap that the *Masterpiece* majority laid out is consistent with the position that Phillips advocated.

B. Justice Kagan's Concurrence

Justice Kagan, who joined the majority, also authored a concurrence. She explained that the state's actions were particularly "disquieting" because an "obvious" basis existed for "distinguishing" Phillips's case from the cases involving the other three cake artists.[34] While Phillips declined to create "a wedding cake that [he] would have made for an opposite-sex couple"[35]—one "suitable for use at same-sex and opposite-sex weddings alike"[36]—the other cake artists, Justice Kagan wrote, declined "to make a cake . . . that they would not have made for any customer."[37] "In refusing that request, the bakers did not single out [that customer] because of his religion, but instead treated him in the same way they would have treated anyone else—just as [the public-accommodation law] requires."[38] In short, she said, a "vendor can choose the products he sells, but not the customers he serves."[39] Justice Kagan thus adopted a variation of the state's argument that business owners violate a public-accommodation law only when they decline to create for one person an item containing the same words, symbols, and messages that they created for another.

C. Justice Gorsuch's Concurrence

Justice Gorsuch also wrote a concurring opinion, which Justice Alito joined. That opinion explained that Phillips's case and those of the bakers who refused to make cakes opposing same-sex marriage "share all legally salient features":[40]

> [T]here's no indication the bakers actually *intended* to refuse service *because of* a customer's protected characteristic.

23 *Masterpiece*, 138 S. Ct. at 1729.

24 *Id.* at 1730.

25 *Id.*

26 *Id.*

27 *Id.* at 1729.

28 *Id.*

29 *Id.*

30 *Id. See supra* note 13.

31 *Masterpiece*, 138 S. Ct. at 1731.

32 *Id.* at 1723.

33 *See id.* ("The case presents difficult questions as to the proper reconciliation of at least two principles. The first is the authority of a State and its governmental entities to protect the rights and dignity of gay persons who are, or wish to be, married but who face discrimination when they seek goods or services. The second is the right of all persons to exercise fundamental freedoms under the First Amendment, as applied to the States through the Fourteenth Amendment."); *id.* at 1732 ("The outcome of cases like this in other circumstances must await further elaboration in the courts, all in the context of recognizing that these disputes must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market.").

34 *Id.* at 1733 (Kagan, J., concurring).

35 *Id.*

36 *Id.* at 1733 n.*.

37 *Id.* at 1733; *see also id.* at 1733 n.* (explaining that those three cake artists "would not sell the requested cakes to anyone").

38 *Id.* at 1733.

39 *Id.* at 1733 n.*.

40 *Id.* at 1735 (Gorsuch, J., concurring).

> We know this because all of the bakers explained without contradiction that they would not sell the requested cakes to anyone, while they would sell other cakes to members of the protected class (as well as to anyone else). . . . [I]t was the kind of cake, not the kind of customer, that mattered to the bakers.[41]

Justice Gorsuch disagreed with Justice Kagan's view that Phillips's case is distinguishable from the cases brought against the three other cake artists. In particular, he objected to (1) Justice Kagan's characterization of Phillips's case as involving "'wedding cakes'—and not a wedding cake celebrating a same-sex wedding"[42]—and (2) her supposition that all wedding cakes are "indistinguishable."[43] He said that by focusing on wedding cakes instead of wedding cakes celebrating same-sex marriage, both the state and Justice Kagan played with "the level of generality"—"adjusting the dials *just right*."[44] He considered this an "improper" kind of "results-driven reasoning" that "risks denying constitutional protection to religious beliefs that draw distinctions more specific than the government's preferred level of description."[45]

D. Justice Thomas's Concurrence

Justice Thomas wrote another concurrence, which Justice Gorsuch joined. His is the only opinion that squarely addressed the free-speech issue. While public-accommodation laws are constitutional in most of their applications, Justice Thomas explained, "the First Amendment applies with full force" when those laws declare "'speech itself to be the public accommodation.'"[46] Here, Phillips's wedding cakes "do, in fact, communicate" that "a wedding has occurred, a marriage has begun, and the couple should be celebrated."[47] "If an average person walked into a room and saw a white, multi-tiered cake, he would immediately know that he had stumbled upon a wedding."[48] "Forcing Phillips to make custom wedding cakes for same-sex marriages requires him to, at the very least, acknowledge that same-sex weddings are 'weddings' and suggest that they should be celebrated—the precise message he believes his faith forbids."[49]

Justice Thomas also explained why the state's reliance on the "dignity" of potential customers does not justify violating Phillips's free-speech rights.[50] Such "justifications are completely foreign to [the Court's] free-speech jurisprudence."[51] "States cannot punish protected speech because some group finds it offensive, hurtful, stigmatic, unreasonable, or undignified."[52] The government thus cannot force Phillips's artistic expression in order to protect others' dignity.

Justice Thomas concluded by emphasizing that "in future cases, the freedom of speech could be essential to preventing" the government from "vilify[ing] Americans who are unwilling to assent to the new orthodoxy" on marriage.[53] That freedom must "maintain its vitality."[54]

E. Justice Ginsburg's Dissent

Justice Ginsburg, together with Justice Sotomayor, dissented. They disagreed with the majority's conclusion that "Phillips'[s] religious objection was not considered with the neutrality that the Free Exercise Clause requires."[55] Beginning with the unequal treatment between the various cake artists, Justice Ginsburg regarded the cases as "hardly comparable."[56] "The bakers would have refused to make a cake with [the religious customer's] requested message for any customer, regardless of his or her religion. And the bakers . . . would have sold [that customer] any baked goods they would have sold anyone else."[57] That customer, in other words, "was treated as any other customer would have been treated—no better, no worse."[58] In contrast, Justice Ginsburg said, Phillips refused to design "a cake of the kind he regularly sold to others."[59] The dissenters placed great weight on the distinction between declining a custom item "with a particular design and one whose form was never even discussed."[60]

Furthermore, Justice Ginsburg saw "no reason why the comments of one or two Commissioners should be taken to overcome" what she viewed as Phillips's unlawful actions.[61] She emphasized that the Colorado proceedings involved "several layers" of decisionmaking: (1) the Colorado Civil Rights Division, (2) an administrative law judge, (3) the Commission, and (4) the Colorado Court of Appeals.[62] Because she discerned no prejudice outside of the commissioners' hostile comments, she did not think that bias during that part of the proceedings could render Phillips's punishment unconstitutional.[63]

41 *Id.* at 1735-36.

42 *Id.* at 1738.

43 *Id.* at 1739.

44 *Id.*

45 *Id.*

46 *Id.* at 1741 (Thomas, J., concurring) (quoting Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp. of Bos., 515 U.S. 557, 573 (1995)).

47 *Id.* at 1743.

48 *Id.*

49 *Id.* at 1744.

50 *Id.* at 1746–47.

51 *Id.* at 1746.

52 *Id.*

53 *Id.* at 1748 (quotation marks and citation omitted).

54 *Id.*

55 *Id.* at 1748–49 (Ginsburg, J., dissenting).

56 *Id.* at 1750.

57 *Id.*

58 *Id.*

59 *Id.*

60 *Id.* at 1751 n.5.

61 *Id.* at 1751.

62 *Id.*

63 *Id.*

III. Two June 2018 Compelled-Speech Decisions

Although the *Masterpiece* majority did not decide the case on compelled-speech grounds, the Court resolved two other cases in June 2018—*NIFLA* and *Janus*—exclusively on that basis. Both of them shed light on how courts should analyze the speech question left undecided in *Masterpiece*.

A. NIFLA v. Becerra

The Court in *NIFLA*, ruling on a motion for preliminary injunction, held that a California statute mandating certain speech by pro-life pregnancy centers likely violates the First Amendment.[64] The pregnancy centers that challenged that law come alongside women experiencing unexpected pregnancies, provide them with tangible resources and emotional support, and encourage them to keep their babies. The California law required medically licensed pro-life centers to "provide a government-drafted script about the availability" of state-funded abortions, "as well as contact information for how to obtain them."[65] The Court called this the "licensed notice." California also mandated that the remaining pro-life centers—those that are not medically licensed—include in all their digital and print advertisements a 29-word disclaimer about their nonmedical status in multiple languages and font at least as large as the text of the advertisement itself.[66] The Court referred to this as the "unlicensed notice." The pregnancy centers argued to the Supreme Court that both of these requirements compelled them to speak unwanted messages in violation of their First Amendment rights.

The Court, in a 5-4 decision, held that the law likely violates the First Amendment. The majority opinion, written by Justice Thomas, began by announcing that the licensed notice "is a content-based regulation of speech."[67] Whenever a law "compel[s] individuals to speak a particular message," it "'alte[rs] the content of [their] speech'" and qualifies as a content-based regulation.[68] Because California forced the licensed pro-life centers "to inform women how they can obtain state-subsidized abortions—at the same time [they] try to dissuade women from choosing that option—the licensed notice plainly 'alters the content' of [their] speech."[69]

The Court refused to afford lesser constitutional protection to "a separate category of speech" that some "Courts of Appeals have [labeled as] 'professional speech.'"[70] "Professional speech" is speech by "individuals who provide personalized services to clients and who are subject to a . . . licensing and regulatory regime" when that speech "is based on their expert knowledge and judgment or . . . within the confines of the professional relationship."[71] The majority declined to carve out this subset of speech and subject it to lesser constitutional protection because it was concerned that doing so would enable governments to "suppress unpopular ideas"[72] and deprive the people of "an uninhibited marketplace of ideas in which truth will ultimately prevail."[73] "States cannot choose the protection that speech receives under the First Amendment, as that would give them a powerful tool to impose 'invidious discrimination of disfavored subjects.'"[74] Nor did the majority accept California's argument that laws compelling speech are problematic only if they "require a statement or endorsement of belief,"[75] "hamper [the speaker's] ability to present [its] own messages,"[76] or are understood by viewers as the speaker's "self-expression."[77] The Court was uninterested in tacking these requirements onto the compelled-speech doctrine.

After discussing the First Amendment flaws with the licensed notice, the majority found constitutional infirmities in the unlicensed notice. For that notice, California targeted "a curiously narrow subset of speakers,"[78] raising the specter that it "has left unburdened those speakers whose messages are in accord with its own views."[79] And the majority said that the mandated notice "unduly burden[ed]" the pro-life centers' protected speech[80] by "drown[ing] out the facility's own message" and "effectively rul[ing] out" many forms of advertising.[81]

Justice Kennedy wrote a concurring opinion. In it, he gave a particularly stinging rebuke to California and a ringing endorsement of freedom from compelled speech:

> The California Legislature included in its official history the congratulatory statement that the Act was part of California's legacy of "forward thinking." But it is not forward thinking to force individuals to be an instrument for fostering public adherence to an ideological point of view they find unacceptable. It is forward thinking to begin by reading the First Amendment as ratified in 1791; to understand the history of authoritarian government as the Founders then knew it; to confirm that history since then shows how

64 *NIFLA*, 138 S. Ct. at 2378.

65 *Id.* at 2371.

66 *Id.* at 2369–70.

67 *Id.* at 2371.

68 *Id.* (quoting Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 795 (1988)).

69 *Id.* (quoting *Riley*, 487 U.S. at 795). While laws that alter the content of speech ordinarily must survive strict scrutiny, the majority determined that it need not apply that standard because "the licensed notice cannot survive even intermediate scrutiny." *Id.* at 2375.

70 *Id.* at 2371.

71 *Id.* (quotation marks, alterations, and citations omitted).

72 *Id.* at 2374 (quoting Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641 (1994)).

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

74 *Id.* at 2375 (quoting Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 423–24 n.19 (1993)).

75 Br. for State Resp'ts at 38, NIFLA v. Becerra, No. 16-1140 (U.S. Feb. 20, 2018) (capitalization omitted).

76 *Id.* at 42 (capitalization omitted).

77 *Id.* at 43.

78 *NIFLA*, 138 S. Ct. at 2377.

79 *Id.* at 2378 (quoting Sorrell v. IMS Health Inc., 564 U.S. 552, 580 (2011)).

80 *Id.* at 2377.

81 *Id.* at 2378 (citation omitted).

> relentless authoritarian regimes are in their attempts to stifle free speech; and to carry those lessons onward as we seek to preserve and teach the necessity of freedom of speech for the generations to come. Governments must not be allowed to force persons to express a message contrary to their deepest convictions. Freedom of speech secures freedom of thought and belief. This law imperils those liberties.[82]

B. Janus v. AFSCME

The day after the Court ruled in *NIFLA*, it issued its decision in *Janus*, in which a five-Justice majority struck down an Illinois law requiring government employees to pay agency fees to unions. Because the money that the state forced employees to pay funded union speech to which some employees objected, the case was fundamentally about compelled speech. Justice Alito wrote he Court's opinion—joined by Chief Justice Roberts and Justices Thomas, Kennedy, and Gorsuch—that overruled *Abood v. Detroit Board of Education*[83] and invalidated the challenged Illinois law.[84]

The majority's opinion decried the "damage" that compelled speech creates.[85] "Compelling individuals to mouth support for views they find objectionable violates [a] cardinal constitutional command, and in most contexts, any such effort would be universally condemned."[86] The Court quoted Thomas Jefferson, who "denounced compelled support for [] beliefs as 'sinful and tyrannical.'"[87] The Court also recognized that government efforts to mandate speech strike against the dignity of the compelled speakers who are treated as mindless mouthpieces rather than free and independent thinkers. "When speech is compelled, . . . individuals are coerced into betraying their convictions. Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning."[88] For that reason, compelling speech is even worse than mandating silence, and "a law commanding 'involuntary affirmation' of objected-to beliefs would require 'even more immediate and urgent grounds' than a law demanding silence."[89]

Janus rejected the argument that "the First Amendment was not originally understood to provide *any* protection for the free speech rights of public employees."[90] "Taking away free speech protection for public employees would mean overturning decades of landmark precedent," so the Court refused to strip free-speech protection from an entire category of speakers just as it refused to do in *NIFLA* with respect to professionals.[91]

The Court also said that issues relating to "sexual orientation"—topics on which the Illinois unions speak—are "controversial subjects," "sensitive political topics," and "matters of profound 'value and concern to the public.'"[92] Speech on such vital and sensitive matters "occupies the highest rung of the hierarchy of First Amendment values,"[93] and it "merits 'special protection.'"[94] With this decision in *Janus*, the Court ended its term with the free-speech splash that many expected.

What do *NIFLA* and *Janus* mean for the compelled-speech issue left unresolved in *Masterpiece*? The remainder of this article will explain how they support the compelled-speech arguments of creative professionals like Jack Phillips.

IV. Two Ongoing Cases Illustrating Two Open Questions

Two speech-related questions await answers in the wake of *Masterpiece*—one statutory, and one constitutional. The statutory question is whether public-accommodation laws are properly interpreted when they are used to punish creative professionals who decline requests for custom expression because of the messages that the requested expression will communicate rather than the protected status of the requester. And the constitutional issue is whether governments violate the First Amendment when they apply public-accommodation laws to require those professionals to create speech or art that expresses views in conflict with their conscience.

Lexington-Fayette Urban County Human Rights Commission v. Hands On Originals—a case pending before the Kentucky Supreme Court—illustrates the contexts in which courts are considering the statutory question. That case arose out of a complaint filed against Hands On Originals (HOO), a promotional print shop in Lexington, Kentucky, owned and managed by Blaine Adamson. Adamson and his shop serve all people, but they will not print all messages; as a matter of conscience, Adamson declines to create materials with messages that are contrary to his faith. In 2012, Adamson declined to print shirts promoting a gay pride festival. He did so because what he was asked to print—the words "Lexington Pride Festival" over a rainbow-colored logo—communicates messages about human sexuality that conflict with his religious beliefs. Wanting to help that customer as far as his conscience would allow, Adamson offered to connect him to another business that would print the shirts.

The local human-rights commission determined that Adamson violated the public-accommodation ordinance because his "objection to the printing of the t-shirts was inextricably intertwined with the status of the sexual orientation of members" of the group requesting the shirts.[95] But that decision was reversed

82 *Id.* at 2379 (Kennedy, J., concurring) (citations, quotation marks, and alterations omitted).

83 431 U.S. 209 (1977).

84 *Janus*, 138 S. Ct. at 2460, 2486.

85 *Id.* at 2464.

86 *Id.* at 2463.

87 *Id.* at 2471.

88 *Id.* at 2464.

89 *Id.* (quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 633 (1943)).

90 *Id.* at 2469.

91 *Id.*

92 *Id.* at 2476.

93 *Id.* (quoting Snyder v. Phelps, 562 U.S. 443, 452 (2011)).

94 *Id.* (quoting *Snyder*, 562 U.S. at 452).

95 Baker v. Hands On Originals, Inc., No. 03-12-3135, Order Granting Summ. J. Mot. of Complainants and Den. Summ. J. Mot. of Resp't at 13

by the state trial court, which affirmed Adamson's freedom not to print messages at odds with his faith.[96] The trial court found that "[t]here is no evidence in this record that HOO or its owners refused to print the t-shirts in question based upon the sexual orientation of [the requesting group] or its members"; rather, they "declined to print the t-shirts in question because of the[ir] MESSAGE."[97] Subsequently, the Kentucky Court of Appeals, in a 2-1 decision, upheld the trial court's ruling.[98] "Nothing in the . . . ordinance," the lead opinion concluded, prohibits Adamson from declining orders because of their "*viewpoint* or *message*."[99] That is because "a message in support of a cause or belief . . . is a *point of view* and form of *speech* that could belong to any person, regardless of classification."[100] Thus, declining to print a message does not constitute unlawful discrimination based on a person's status. The Kentucky Supreme Court granted review, and that is where the case now sits. The statutory speech question—whether declining to create speech because of its message violates a public-accommodation law—is squarely before that court.[101]

Another case—*Telescope Media Group v. Lindsey*—paints a good picture of the constitutional speech question. There, the Minnesota Department of Human Rights clearly announced that under its view of the state's public-accommodation law, businesses that engage in wedding-related work, including those who create art or speech, must help celebrate same-sex marriages if asked. The owners of Telescope Media Group, Carl and Angel Larsen, are filmmakers and devout Christians who believe that marriage is the union of a man and a woman. They cannot in good conscience use their skills as artists to celebrate a different view of marriage. Because they want to create films celebrating marriage, they are defending their freedom to do so without violating their faith. If they lose their case and the state enforces the law against them, they face penalties that include jail time.

A federal district court in Minnesota ruled against the Larsens.[102] It did not deny that films are speech, but it nevertheless concluded that the state can apply its public-accommodation law to require the Larsens to create films celebrating same-sex weddings. While acknowledging that the law will have the effect of requiring the Larsens to create speech that they would not otherwise make, the court held that the statute is "content-neutral" and not subject to strict scrutiny.[103] The Larsens appealed to the United States Court of Appeals for the Eighth Circuit, where the case is now pending.

Hands On Originals and *Telescope Media Group* are concrete examples of the contexts in which these speech issues will be litigated going forward. The next two sections explore what *Masterpiece*, *NIFLA*, and *Janus* have to say about both the statutory speech issue and the constitutional one.

V. Answering the Statutory Question

In cases like *Hands On Originals*, courts will need to decide the statutory question—whether creative professionals violate public-accommodation statutes when they decline orders because they disagree with the message they are asked to create. The *Masterpiece* opinions have a lot to say about that, particularly Justice Kagan's concurrence, Justice Gorsuch's concurrence, and Justice Ginsburg's dissent. Each of those opinions—the first joined by Justice Breyer, the next by Justice Alito, and the final by Justice Sotomayor—espouse the view that a creative professional does not violate a typical public-accommodation law by declining to create an expressive item with a message that it would not speak for anyone. Even the state affirmed this view in *Masterpiece*.

Justice Kagan wrote that it is not unlawful for business owners to decline a request for an expressive item that "they would not have made for any customer" because in doing so they treat the requester "in the same way they would have treated anyone else—just as [the public-accommodation law] requires."[104] Stated differently, she acknowledged that business owners do "not engage in unlawful discrimination" when they "would not sell [a] requested [item] to anyone."[105] Justice Ginsburg likewise recognized that businesses do not violate public-accommodation laws by "refus[ing] to make [an item] with [a] requested message for any customer" because people who request that message are "treated as any other customer would have been treated—no better, no worse."[106] And Justice Gorsuch observed that creators of expression do not "*intend[]* to refuse service *because of* a customer's protected characteristic" if "they would not sell the requested [item] to anyone."[107]

All of this directly supports the statutory arguments of people like Blaine Adamson in *Hands On Originals*. He declined the group's request for shirts promoting the pride festival because the message on them conflicted with his faith. He would not print shirts with that message for anyone, regardless of their protected status. He thus treated that group "as any other customer would have been treated—no better, no worse."[108] That does not violate public-accommodation laws. Justices Ginsburg, Sotomayor, Kagan, Breyer, Gorsuch, and Alito—either by authoring or

(Lexington-Fayette Urban Cty. Human Rights Comm'n Oct. 6, 2014).

96 Hands On Originals, Inc. v. Lexington-Fayette Urban Cty. Human Rights Comm'n, No. 14-CI-04474, Op. and Order (Fayette Circuit Court Apr. 27, 2015).

97 *Id.* at 13.

98 Lexington Fayette Urban Cty. Human Rights Comm'n v. Hands on Originals, Inc., No. 2015-CA-000745-MR, 2017 WL 2211381 (Ky. Ct. App. May 12, 2017), *review granted* (Oct. 25, 2017).

99 *Id.* at *7.

100 *Id.*

101 The Kentucky Supreme Court has other issues before it as well. Those include the constitutional compelled-speech question, a claim under the state's Religious Freedom Restoration Act (RFRA), and a constitutional free-exercise claim.

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

103 *Id.* at 1113.

104 *Masterpiece*, 138 S. Ct. at 1733 (Kagan, J., concurring).

105 *Id.* at 1733 n.*; *see also id.* ("A vendor can choose the products he sells, but not the customers he serves").

106 *Id.* at 1750 (Ginsburg, J., dissenting).

107 *Id.* at 1735 (Gorsuch, J., concurring).

108 *Id.* at 1750 (Ginsburg, J., dissenting).

joining an opinion in *Masterpiece*—all recognized that. And none of the other Justices said anything in *Masterpiece* suggesting that they disagree with that view.

This understanding of public-accommodation laws makes perfect sense because a contrary reading would conflict with the purpose of such laws, which is to require equal treatment. Creative professionals like Adamson already treat people equally—if they can in good conscience print a specific message, they will do so for anyone who requests it. What their opponents demand is that they create speech that they will not make for anyone, effectively entitling particular customers to preferred—not equal—treatment and forcing creative professionals like Adamson to expand the services they offer. No reasonable interpretation of public-accommodation laws requires that.

These principles, which are straightforward in a case like *Hands On Originals*, become more difficult to apply in the wedding context. *Masterpiece* illustrates this. On the one hand is the view of Justices Kagan and Ginsburg. They said that the relevant message in *Masterpiece* was a generic expression of celebration for a wedding. On the other hand is Justice Gorsuch's approach. He said that the requested message was more specific—an expression of celebration for a specific kind of wedding. Courts struggling to decide the statutory question in wedding cases will vacillate between those two approaches and maybe even invent other theories along the way. But regardless of where courts land on that issue, it seems likely that sooner or later some of them will need to face the constitutional speech question left unresolved in *Masterpiece*.

VI. Answering the Constitutional Question

On the constitutional speech issue, *Masterpiece*, *NIFLA*, and *Janus* together support the argument that creative professionals who believe that marriage is the union of a man and a woman should be able to live consistently with that belief. Not only are such beliefs "decent and honorable,"[109] as the Court noted when announcing that the Constitution requires states to recognize same-sex marriages, but people must be free to "carr[y]" those beliefs "into the public sphere or commercial domain."[110]

A. No Classes of Speakers Should be Excluded from First Amendment Protection

NIFLA and *Janus* cast grave doubt on the primary speech argument that the state raised in *Masterpiece*. The state argued that the compelled-speech doctrine offers no protection when governments apply public-accommodation laws to people who earn a living creating and selling speech.[111] But *Janus* expressly rejected a similar categorical argument that sought to exclude a class of speakers from the First Amendment's protection against compelled speech.[112] The unions claimed that the First Amendment does not protect the free-speech rights of public employees,[113] but *Janus* found no merit to that claim.[114] *NIFLA* further explained why the Court is skeptical of attempts to strip some speakers of full First Amendment protection. Accepting the state's argument that professional speech is subject to reduced constitutional scrutiny,[115] the Court explained, would empower states to manipulate public discussion and deny citizens an "uninhibited marketplace of ideas in which truth will ultimately prevail."[116] "The best test of truth is the power of the thought to get itself accepted in the competition of the market, and *the people lose when the government is the one deciding which ideas should prevail*."[117]

Similar harm would result if governments were free to wield public-accommodation laws to compel speech without stringent First Amendment oversight. They could, for example, single out speakers whose views they do not like by targeting them for punishment when they decline to speak messages the government favors. By banishing one side of a deeply divisive issue, the government robs the people of the "uninhibited marketplace of ideas" that the First Amendment promises and distorts the search for "truth."[118] This is especially dangerous where the government treats people with unpopular views worse than those with popular views. The five Justices who joined the majority opinions in *Masterpiece*, *NIFLA*, and *Janus* resisted efforts to strip First Amendment protection from categories of speakers. Those arguments will likely face a similar fate in a future case where the government applies a public-accommodation law to compel speech.

B. No Extra Elements Should be Added to a Compelled-Speech Claim

Governments seeking to enforce public-accommodation laws in cases like *Masterpiece*, *Hands On Originals*, and *Telescope Media Group* also argue that simply proving compelled speech is not enough for a compelled-speech claim. They attempt to engraft other requirements onto the compelled-speech doctrine, such as the need to show a burden on the compelled speaker's expression or some other form of harm.[119] The state advanced a similar argument in *NIFLA*, contending that the speech-compelling law posed no First Amendment concern because it did not "hamper [the speaker's] ability to present [its] own messages."[120] The Court did not accept that argument, reasoning instead that courts, "[a]s a general matter," apply strict scrutiny when

109 Obergefell v. Hodges, 135 S. Ct. 2584, 2602 (2015).

110 *Masterpiece*, 138 S. Ct. at 1729.

111 Br. for Resp't Colo. Civil Rights Comm'n at 24–25, 48–49, Masterpiece Cakeshop v. Colo. Civil Rights Comm'n, No. 16-111 (U.S. Oct. 23, 2017).

112 *Janus*, 138 S. Ct. at 2469–70.

113 *Id.*

114 *Id.*

115 *NIFLA*, 138 S. Ct. at 2371–72, 2374–75.

116 *Id.* at 2374 (quoting *McCullen*, 134 S. Ct. at 2529).

117 *Id.* at 2375 (alterations, quotation marks, and citation omitted; emphasis added).

118 *Id.* at 2374.

119 *E.g.*, *Craig*, 370 P.3d at 288 (concluding that Phillips's speech was not burdened by forcing him to create custom art celebrating same-sex marriage because he was still free to "express[] [his] views on same-sex marriage" and "to disassociate [him]self from [his] customers' viewpoints").

120 Br. for State Resp'ts at 42, NIFLA v. Becerra, No. 16-1140 (U.S. Feb. 20, 2018) (capitalization omitted).

government officials force individuals to "alter the content of [their] speech."[121] Thus, under *NIFLA*'s logic, when government officials use public-accommodation laws to force individuals to create expression, that alters the content of their speech, and strict scrutiny applies.[122]

While *NIFLA* shows that compelled speakers need not demonstrate a burden on their speech, *Janus* tells us that the harm to coerced speakers is inherent and intolerable. When the government mandates that people speak against their consciences, it forces them to "betray[] their convictions" and "endorse ideas they find objectionable."[123] That "is always demeaning,"[124] and the First Amendment demands "immediate and urgent grounds" to justify such a deep intrusion into conscience.[125] Since, as *Janus* says, forcing people "to subsidize . . . speech" that they oppose is "tyrannical," compelling them to create and then distribute such speech—which is what the government requires in cases like *Masterpiece*, *Telescope Media Group*, and *Hands On Originals*—should be unthinkable.[126] When governments do that, their actions should be, in *Janus*'s words, "universally condemned."[127]

In addition, governments routinely insist that the existence of a compelled-speech violation depends on the perceptions of viewers.[128] But the Court in *NIFLA* declined to use third-party perceptions to excuse compelled speech. It considered only whether the law forced the parties to "alter[] the content" of their speech, paying no mind to what others might think about who was speaking.[129] Similarly, Justice Thomas's *Masterpiece* concurrence rejected the Colorado Court of Appeals' conclusion that Phillips was not entitled to compelled-speech protection "because a reasonable observer would think he is merely complying with Colorado's public-accommodations law."[130] The "Court has never accepted" that argument, Justice Thomas explained, because to do so "would justify any law that compelled protected speech."[131] Moreover, jettisoning reliance on viewers' perceptions accords with *Janus*'s recognition that "[f]orcing free and independent individuals to endorse ideas they find objectionable is always demeaning,"[132] regardless of what others might think.

C. The Constitution Protects the Decision to Decline a Request Because of the Message It Would Communicate

In contrast to governments' attempts to diminish the protection provided by the compelled-speech doctrine, Phillips and others who make speech or art for a living argue that compelled-speech principles protect them in a narrow set of circumstances: when a customer asks them to create expression, and they decline the request because of the message communicated by the item rather than the protected characteristic of the requesting person. The vision that the *Masterpiece* majority casts for how courts should decide the compelled-speech issue in future cases supports this constitutional protection, as does Supreme Court precedent.

The *Masterpiece* majority was clearly open to protecting individuals with "religious and philosophical objections to gay marriage" where they are engaged in "protected forms of expression."[133] But, the Court counseled, "any decision in favor of the baker would have to be sufficiently constrained."[134] Constitutional protection limited to creative professionals would square with this vision, the Court implicitly recognized, because "there are no doubt innumerable goods and services that no one could argue implicate the First Amendment."[135] Among creative professionals, the Court appeared to draw the same line that Phillips embraced during the litigation. On the one hand are artists and creators of expression who "refuse[] to sell" even nonexpressive items "for gay weddings."[136] The Court was not disposed to afford them constitutional protection.[137] On the other hand are those who, like Phillips, serve everyone and sell their ready-to-purchase goods to anyone, but who decline "to use [their] artistic skills to make an expressive statement, a wedding endorsement in [their] own voice and of [their] own creation" in violation of their convictions.[138] In those instances, the customers' request constitutes "a demand for [the creative professionals] to exercise the right of [their] own personal expression" in conflict

121 *NIFLA*, 138 S. Ct. at 2371.

122 *NIFLA* also reaffirmed that the Supreme Court does not look favorably on efforts to subject content-based speech regulations to lesser constitutional scrutiny, stating that it "has been especially reluctant to exempt a category of speech from the normal prohibition on content-based restrictions. 138 S. Ct. at 2372 (quotation marks, alterations, and citation omitted).

123 *Janus*, 138 S. Ct. at 2464. And as Justice Kennedy affirmed in his *NIFLA* concurrence, allowing the government to compel speech also "imperils" "freedom of thought and belief." 138 S. Ct. at 2379.

124 *Janus*, 138 S. Ct. at 2464.

125 *Id.* (quoting *Barnette*, 319 U.S. at 633).

126 *Id.* at 2463–64.

127 *Id.* at 2463.

128 *E.g.*, *Craig*, 370 P.3d at 286 (holding that Phillips "does not convey a message supporting same-sex marriages merely by abiding by the law" because "a reasonable observer would understand that [his] compliance with the law is not a reflection of [his] own beliefs"); Br. for State Resp'ts at 43, NIFLA v. Becerra, No. 16-1140 (U.S. Feb. 20, 2018) (arguing that no compelled-speech violation occurred because no reasonable viewer would understand the speech to be the compelled speaker's own "self-expression").

129 *See NIFLA*, 138 S. Ct. at 2371–76 (ignoring third-party perceptions in the compelled-speech analysis).

130 *Masterpiece*, 138 S. Ct. at 1744 (Thomas, J., concurring).

131 *Id.*

132 *Janus*, 138 S. Ct. at 2464.

133 *Masterpiece*, 138 S. Ct. at 1727.

134 *Id.* at 1728 ("[A]ny decision in favor of the baker would have to be sufficiently constrained").

135 *Id.*

136 *Id.*

137 *Id.* (recognizing that such a case "would be a different matter and the State would have a strong case").

138 *Id.*

with their religious beliefs.[139] The Court seemed willing to apply First Amendment protection under those circumstances.

Doing so would be consistent with Supreme Court precedent. In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*,[140] the Court distinguished between a public accommodation's objection to a requested message and a decision to turn people away because of who they are.[141] In that case, parade organizers allowed LGBT individuals to participate in their parade, but they declined a request for an LGBT group to march behind its own pro-LGBT banner.[142] The organizers did not "exclude the [group's members] because of their sexual orientations," but because of the messages that they wanted to communicate by "march[ing] behind [their] banner."[143] Similarly in *Masterpiece*, *Hands On Originals*, and *Telescope Media Group*, the business owners serve LGBT individuals; they simply decline to create art or expression that celebrates views that violate their faith. As the Court did in *Hurley*, courts should incorporate into their compelled-speech analysis the distinction between refusing to serve people because of who they are and declining to express a message because of a disagreement with it.[144]

D. Responding to Counterarguments

Some contend, like the state did in *Masterpiece*, that it is not workable for courts to determine whether a business owner's custom work qualifies as speech. *NIFLA* implies that such an argument will not gain much traction: "While drawing the line between speech and conduct can be difficult, this Court's precedents have long drawn it, and the line is long familiar to the bar."[145] In light of this, it is unlikely that the Court will agree that courts either cannot or should not distinguish between speech and nonspeech. In fact, the Court has frequently drawn that very line by asking whether a particular item "communicate[s] ideas" and whether it is analogous to other kinds of protected speech.[146]

Others argue that protecting creative professionals' freedom from compelled speech could harm the dignity of would-be customers. But their arguments ignore all the ways in which the state is free to shield the dignity of consumers. Where speech is not involved, which *Masterpiece* recognized is the case with "innumerable goods and services,"[147] the compelled-speech doctrine provides no protection, and customer requests cannot be declined on that basis. This means that even if someone creates and sells speech for a living, the compelled-speech doctrine does not apply when they sell items that are not speech. So in *Masterpiece*, while Phillips can decline requests to design custom artistic wedding cakes to celebrate same-sex weddings, he cannot refuse to sell his generic, non-expressive brownies or cookies to anyone. And even when artists like Phillips create expression like a custom-painted cake with words and images, once they finish creating that expression and offer it for sale, they cannot decline to sell it to anyone. Compelled-speech protection is thus narrow enough that it may be afforded without inflicting "a community-wide stigma" on, or a "serious diminishment to [the] dignity and worth" of, any particular group.[148]

To be sure, in the limited situations where the compelled-speech doctrine affords protection, a customer still might allege a dignitary harm. Yet in that narrow circumstance, dignitary interests are at stake for the compelled speaker too. As *Janus* said, it "is always demeaning" to compel people to speak messages that "betray[] their convictions" or "endorse ideas they find objectionable."[149] This is consistent with the Court's longstanding recognition that free-speech protection safeguards "individual dignity"[150] and that a third-party's offense at a decision not to speak is not a sufficient reason to coerce expression.[151] Justice Thomas echoed the latter point in his *Masterpiece* concurrence, explaining that dignity-based "justifications" for compelled speech are "completely foreign to [the Court's] free-speech jurisprudence."[152] "States cannot punish protected speech because some group finds it offensive, hurtful, stigmatic, unreasonable, or undignified."[153]

139 *Id.*

140 515 U.S. 557 (1995).

141 *Id.* at 572 (distinguishing an "intent to exclude homosexuals" from a "disagreement" with a message).

142 *Id.*

143 Boy Scouts of Am. v. Dale, 530 U.S. 640, 653 (2000).

144 Some claim that the Supreme Court rejected this distinction in *Christian Legal Society v. Martinez*, 561 U.S. 661, 689 (2010). But while the Supreme Court rejected a status/conduct distinction in *Martinez*, *see id.* ("Our decisions have declined to distinguish between status and conduct" in the sexual-orientation context), it recognized a status/message distinction in *Hurley*. Creative professionals like Jack Phillips do not differentiate between their customers' status and conduct—by, for example, serving LGBT customers who are not in same-sex relationships but refusing to serve those who are. Instead, like the parade organizers in *Hurley*, the decisionmaking of people like Jack Phillips does not depend on a customer's status or conduct, but only on the messages that customers ask them to express through their custom artistic creations.

145 *NIFLA*, 138 S. Ct. at 2373 (quotation marks and citations omitted).

146 Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 790 (2011).

147 *Masterpiece*, 138 S. Ct. at 1728.

148 *Id.* at 1727.

149 *Janus*, 138 S. Ct. at 2464.

150 Cohen v. California, 403 U.S. 15, 24 (1971).

151 *Hurley*, 515 U.S. at 574 (declining to compel speech because "the point of all speech protection . . . is to shield just those choices of content that in someone's eyes are . . . hurtful."); *see also* Matal v. Tam, 137 S. Ct. 1744, 1764 (2017) (plurality opinion) (rejecting an asserted "interest in preventing speech expressing ideas that offend" because "we protect the freedom to express the thought that we hate") (quotation marks omitted); *Snyder*, 562 U.S. at 458 ("'If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.'") (quoting Texas v. Johnson, 491 U.S. 397, 414 (1989)); Boos v. Barry, 485 U.S. 312, 322 (1988) (expressing grave doubts about the government's "interest in protecting the dignity" of listeners from harmful speech since that is "inconsistent with our longstanding refusal to punish speech because the speech in question may have an adverse emotional impact on the audience") (quotation marks, alterations, and citation omitted).

152 *Masterpiece*, 138 S. Ct. at 1746 (Thomas, J., concurring).

153 *Id.*

VII. Conclusion

Masterpiece, *NIFLA*, and *Janus* together urge future courts to uphold the expressive freedom of creative professionals who serve all people but decline to create speech that communicates messages in violation of their consciences. This narrow constitutional protection honors the directive in *Masterpiece* to respect the religious beliefs and fundamental freedoms of people who create speech for a living while simultaneously respecting the dignity of customers. It guarantees that governments do not "demean[]" creative professionals by forcing them to say what is not in their mind,[154] while also ensuring that no group of customers experiences a "serious diminishment to their own dignity and worth."[155] It provides a promising path forward and a reasonable resolution to a contentious national debate.

154 *Janus*, 138 S. Ct. at 2464.

155 *Masterpiece*, 138 S. Ct. at 1727.