IN THE COURT OF APPEALS OF THE STATE OF BROADWAY
APPEAL NO. 2015-1

HENRY HIGGINS and AVENUE Q BAKERY, INC. **Appellants (Respondents Below)** **v.** **GEORGES SMITH and ALBIN JONES** **Appellees (Complainants Below)** **and** **BROADWAY CIVIL RIGHTS COMMISSION** **Appellee**	**Direct Appeal from a Final Decision of the Broadway Civil Rights Commission**

OPINION OF THE COURT

VonTrapp, CJ (for the court); Bowles, Kelly, Valjean, and Daaé, JJ (concurring)

This case juxtaposes the rights of a same-sex couple, Georges Smith ("Smith") and Albin Jones ("Jones"), under Broadway's public accommodations law, to obtain a wedding cake against the rights of Henry Higgins ("Higgins") and his bakery, Avenue Q Bakery, Inc. ("Avenue Q"), who contend requiring them to provide such a wedding cake violates their federal constitutional rights to free speech and free exercise of religion.

The text of the First Amendment to the United States Constitution, made applicable to the States via the Fourteenth Amendment, is:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

U.S. Const. Amend. I.

This appeal arises from the Broadway Civil Rights Commission's administrative decision in favor of Smith and Jones. We affirm that decision.

I. Facts and Procedural Background

In July 2012, Smith and Jones visited Avenue Q, a bakery in Fleet Street, Broadway, and asked Higgins to design and create a cake to celebrate their same-sex wedding.[1] Higgins declined, telling them he does not create wedding cakes for same-sex weddings because of his religious beliefs, but advising Smith and Jones he would be happy to make and sell them any other baked goods. Smith and Jones promptly left Avenue Q without discussing with Higgins any details of their wedding cake.

Higgins has been a Christian for approximately thirty-five years and believes in Jesus Christ as his Lord and savior. He believes decorating cakes is a form of art, he can honor God through his artistic talents, and he would displease God by creating cakes for same-sex marriages.

After Higgins refused to bake them a cake, Smith and Jones filed charges of discrimination with the Broadway Civil Rights Division ("Division") alleging public accommodation discrimination based on sexual orientation under the Broadway Anti-Discrimination Act ("BADA"), Broadway Rev. Stat. §§ 24-34-301 to -804 (2014).[2] The parties did not dispute any material facts. Avenue Q and Higgins admitted: (1) the bakery is a place of public accommodation, and (2) they refused to sell Smith and Jones a cake because of their intent to engage in a same-sex marriage.[3] The Administrative Law Judge ("ALJ") granted Smith's and Jones' summary judgment motion and denied Higgins' summary judgment motion. Higgins appealed to the Broadway Civil Rights Commission ("Commission"), which affirmed the ALJ's decision.

The Commission ordered Higgins to cease and desist from discriminating against Smith and Jones or other same-sex couples "by refusing to sell them wedding cakes or any product [he] would sell to heterosexual couples." The order also instructed Higgins to (1) take remedial measures, including comprehensive staff training and alteration to the company's policies to ensure compliance with BADA, and (2) file quarterly compliance reports for two years with the Division describing the remedial measures taken to comply with BADA and documenting all patrons who are denied service and the reasons for the

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[1] The Broadway Supreme Court first recognized same-sex marriage in January 2012. On June 26, 2015, the United States Supreme Court announced *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604 (2015), reaffirming that the "right to marry is a fundamental right inherent in the liberty of the person" and holding that the Due Process and Equal Protection Clauses of the Fourteenth Amendment guarantee same-sex couples a fundamental right to marry.

[2] BADA prevents discrimination in public accommodations on the basis of disability, race, religion, color, sex, sexual orientation, marital status, national origin, or ancestry. Broadway Rev. Stat. § 24-34-601(2)(a).

[3] BADA allows complaints only against businesses. But Avenue Q is a closely held business. Higgins is the sole owner and corporate officer. The parties agree, while Avenue Q and Higgins each possess rights under the First Amendment to the United States Constitution, their rights are essentially fused in this situation. Accordingly, we will generally identify the man and his business collectively as "Higgins."

denials.

Higgins appealed the Commission's order directly to us. We affirm.

The parties stipulated the conversation between Higgins and Smith and Jones was very brief, with no discussion between the parties about what the cake would look like. Apparently, the entire interaction lasted no more than 20 seconds. It is undisputed Higgins declined to serve Smith and Jones without any consideration of whether the cake would be pre-made or custom-made, and regardless of what elements or design the particular cake would include. Indeed, the Commission found as follows:

> We recognize a wedding cake, in some circumstances, may convey a particularized message celebrating same-sex marriage and, in such cases, First Amendment speech protections may be implicated. However, we need not reach this issue. We note, again, Higgins denied Smith's and Jones' request without any discussion regarding the wedding cake's design or any possible written inscriptions. Indeed, in cases involving requests to create cakes featuring specific designs or messages offensive to the vendor, Broadway law dictates a different result. The Broadway Civil Rights Division has dismissed complaints by a customer who claimed three bakeries refused to serve him because of his religion when they declined to create specific, custom-designed cakes featuring particular messages. The customer had requested the bakeries make cakes shaped like an open Bible, inscribed with messages such as "Homosexuality is a detestable sin. Leviticus 18:2" or images such as two groomsmen holding hands before a cross, with a red "X" over them. Each bakery refused to create cakes with those specific designs. The Division concluded none of the bakeries had refused service because of the customer's religious beliefs, and they all would have refused to create cakes "for anyone, regardless of religion, where a customer requests derogatory language or imagery."

We affirm the Commission because Higgins denied goods and services otherwise generally available to the public because of the people involved, not the message those people requested. That alone undermines both the Free Speech and Free Exercise claims.

II. FREE SPEECH

Higgins contends the Commission's cease and desist order compels speech in violation of the First Amendment by requiring him to create wedding cakes for same-sex weddings. He argues wedding cakes inherently convey a celebratory message about marriage, and, therefore, the Commission's order unconstitutionally compels him to convey a celebratory message about same-sex marriage in conflict with his religious beliefs. We disagree. Rather, the Commission's order merely requires Higgins not to discriminate against potential customers in violation of BADA.

A. The Legal Framework for Compelled Speech/Expressive Conduct

The freedom of speech protected by the First Amendment includes the "right to refrain from speaking" and prohibits the government from telling people what they must say. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977); *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.,* 547 U.S. 47, 61 (2006) ("*FAIR*").

The compelled speech doctrine, on which Higgins relies, was first articulated by the Supreme Court in *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943), and has been applied in two lines of cases.

The first line of cases prohibits the government from requiring that an individual "speak the government's message." *FAIR, 547 U.S. at 63; see also Wooley,* 430 U.S. at 715-17 (holding New Hampshire could not require individuals to have its slogan "Live Free or Die" on their license plates); *Barnette*, 319 U.S. at 642 (holding West Virginia could not require students to salute the American flag and recite the Pledge of Allegiance).

These cases establish the government cannot "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion" by forcing individuals to publicly disseminate its own ideological message. *Barnette*, 319 U.S. at 642. The government also cannot require "the dissemination of an ideological message by displaying it on [an individual's] private property in a manner and for the express purpose that it be observed and read by the public." *Wooley*, 430 U.S. at 713; *Barnette*, 319 U.S. at 642 (observing the state cannot "invade[] the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control").

The second line of compelled speech cases establishes the government may not require an individual "to host or accommodate another speaker's message." *FAIR*, 547 U.S. at 63. For example, in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 244 (1974), the Supreme Court invalidated a Florida law requiring local newspapers that criticized any political candidate to publish, free of charge, the candidate's reply to the criticism at the candidate's request. Similarly, in *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 475 U.S. 1, 4 (1986), the Supreme Court struck down a California Public Utilities Commission regulation that forced utilities to allow those who object to the utility's rates to include messages in billing envelops the utilities distributed to customers. These cases establish the government may not commandeer a private speaker's means of accessing its audience by requiring the speaker to disseminate a third-party's message.

The Supreme Court has also recognized some forms of conduct are symbolic speech and deserve First Amendment protections. *United States v. O'Brien*, 391 U.S. 367, 376 (1968) (holding the public burning of draft cards during anti-war protest is a form of expressive conduct). However, because "[i]t is possible to find some kernel of expression in almost every activity a person undertakes," *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989), the Supreme Court has rejected the view that "conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea," *FAIR*, 547 U.S. at 65-66. Rather, First Amendment protections may extend only to

"inherently expressive" conduct. *Id.*

The test for what conduct is inherently expressive originated in *Spence v. Washington*, 418 U.S. 405 (1974). There, the U.S. Supreme Court held that a particular act counts as expressive conduct if there is "[a]n intent to convey a particularized message was present, and in the surrounding circumstances, the likelihood was great that the message would be understood by those who viewed it." *Id.* at 410-11. The Supreme Court later liberalized this test, however, emphasizing that "a narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a 'particularized message,' would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schonberg, or Jabberwocky verse of Lewis Carroll." *Hurley v. Irish-Am., Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 569 (1995). "Thus, in determining whether conduct is expressive, we ask whether the reasonable person would interpret it as some sort of message, not whether an observer would necessarily infer a specific message." *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1270 (11th Cir. 2004) (same). The party asserting conduct is expressive bears the burden of demonstrating the First Amendment applies, and the party must advance more than a mere "plausible contention" that its conduct is expressive. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 n.5 (1984).

It is also of great importance to this case that the U.S. Supreme Court's compelled speech/expressive conduct decisions have consistently differentiated between laws targeting speech or altering the message of private expressive associations, and laws regulating commercial business practices without regard to content or viewpoint. *Compare e.g., Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000); *Hurley,* 515 U.S. 557; *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795-801 (1988) (striking down state statute provision explicitly requiring professional fundraisers to tell all potential donors the average percentage of gross receipts the fundraisers actually turn over to charities; *with Hishon v. King & Spalding*, 467 U.S. 69 (1984) (rejecting male law partners' claim that application of federal non-discrimination law to partnership decisions violated their First Amendment rights to free speech and free expression); *Pittsburgh Press Co. v. Pittsburgh Comm'n on Hum*. *Relations*, 413 U.S. 376 (1973) (rejecting newspaper's claim that application of a local non-discrimination ordinance to placement of help-wanted ads in sex-specific columns violated the paper's First Amendment right to free speech).

"Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy." *R.A.V. v. City of St. Paul, Minn*., 505 U.S. 377, 390 (1992). Thus, "[t]he Constitution does not guarantee a right to choose employees, customers, suppliers, or those with whom one engages in simple commercial transactions, without restraint from the State." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 634 (1984) (O'Connor, J., concurring).

If a content-neutral law directly restrains or compels expressive conduct, however, the law is subject to limited First Amendment scrutiny. See *FAIR*, 547 U.S. at 65-66; *United States* v. *O'Brien*, 391 U.S. 367, 376-377 (1968). The U.S. Supreme Court has recognized that "when 'speech' and 'non-speech' elements are combined in the same

course of conduct, a sufficiently important governmental interest in regulating the non-speech element can justify incidental limitations on First Amendment freedoms." *O'Brien*, 391 U.S. at 376.

B. Analysis of this Case

Higgins contends wedding cakes inherently communicate a celebratory message about marriage, and, by forcing him to make cakes for same-sex weddings, the Commission's order unconstitutionally compels him to express a celebratory message about same-sex marriage he does not support. We disagree.

1. The Commission's Application of BADA Does Not Compel Speech

BADA, Broadway's anti-discrimination law, is a content- and viewpoint-neutral regulation of business conduct, not a law targeting speech. It applies to all businesses offering goods or services to the general public, and merely requires them not to discriminate against their customers on the basis of certain protected characteristics. In enforcing the statute here, the Commission did not target Higgins' speech, it targeted his discriminatory conduct – his blanket refusal to bake any wedding cake for any same-sex couple under any circumstances. The Commission's order does not compel Higgins to express any particular message. It does not require him to affirm his support for the anti-discrimination goals of BADA, for any of the groups BADA protects from discrimination, or for the marriages of same sex couples. It simply requires him to treat same-sex couples the same as opposite-sex couples.

Higgins' argument to the contrary ignores the U.S. Supreme Court's decision in *FAIR*, 547 U.S. 47. There, as here, an entity sought to avoid a non-discrimination mandate by asserting that complying with the law would compel it to express a message of which it disapproved. *FAIR* involved a challenge to the Solomon Amendment, which required law schools to provide equal access to military recruiters and non-military recruiters alike. *Id*. at 54. At the time, the federal government's "Don't Ask, Don't Tell" policy forbade lesbians and gay men from serving openly in the military. A coalition of law schools argued the Solomon Amendment violated their First Amendment rights by requiring them to endorse the military recruiters' message that gay people should not serve in the armed forces by allowing the recruiters access to campus. *Id.* at 52. The Court rejected the law schools' free speech claim, stressing the Solomon Amendment did "not dictate the content of the [law schools'] speech at all." *Id*. at 62.

The Solomon Amendment, the Court found, "regulates conduct, not speech. It affects what law schools must do – afford equal access to military recruiters – not what they may or may not say." *Id*. at 60 (emphasis in original). "Congress, for example, can prohibit employers from discriminating on the basis of race. The fact that this will require an employer to take down a sign reading 'White Applicants Only' hardly means that the law should be analyzed as one regulating the employer's speech rather than conduct." *Id*. at 62. The Court acknowledged the schools' assistance to recruiters "often includes elements of speech. For example, schools may send e-mails or post notices on bulletin boards on an employer's behalf . . . ." But the Court found this was "a far cry" from being

required to pledge allegiance to the flag or bear a state motto on one's license plate, citing *Barnette*, 319 U.S. at 642 and *Wooley*, 430 U.S. at 717. *FAIR*, 547 U.S. at 62.

The *FAIR* Court explained, "[t]he Solomon Amendment, unlike the laws at issue in those cases, does not dictate the content of the speech at all, which is only 'compelled' if, and to the extent, the school provides such speech for other recruiters." *Id.* The same is true here. Higgins need not sell wedding cakes to anyone, but he may not discriminate based on protected characteristics by selling wedding cakes to opposite-sex couples while refusing to sell them to same-sex couples.

2. The Commission's Application of BADA Does Not Require Higgins to Disseminate a Third-Party's Message

FAIR also forecloses Higgins' argument that the Act unconstitutionally requires him to promote an unwanted message endorsing same sex marriage by providing a wedding cake to same sex couples. The law schools in *FAIR* likewise argued that "if they treat military and nonmilitary recruiters alike in order to comply with the Solomon Amendment, they could be viewed as sending the message that they see nothing wrong with the military's policies, when they do." 547 U.S. at 64-65.

The U.S. Supreme Court dismissed the law schools' concerns as unwarranted, observing that even "high school students can appreciate the difference between speech a school sponsors and speech the school permits because legally required to do so, pursuant to an equal access policy." *Id.* at 65. The same is true of consumers in Broadway. No reasonable observer would understand Higgins' provision of a cake to a gay couple as an expression of his approval of the customers' marriage rather than a result of his need to comply with anti-discrimination laws by serving all persons those laws protect. It is well known to the public that those who bake wedding cakes are hired by paying customers and may not share a happy couple's views.

Moreover, BADA's requirement that Avenue Q post a notice stating that the law prohibits discrimination because of protected characteristics, including sexual orientation, eliminates any plausible risk of confusion. BCRD Rule 20.1. If Higgins is concerned customers might mistakenly interpret his provision of wedding cakes on an equal basis to mean something other than mere compliance with BADA, even in the face of the required notice, he is free to post a notice in Avenue Q's window (and on Avenue Q's website) saying that the bakery and its owner do <u>*not*</u> support or endorse customers' events for which they provide baked goods. *See PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 87 (1980) (requiring shopping mall to permit literature distribution on premises is not compelled speech, in part because mall owner can easily post disclaimers noting that materials distributed do not reflect its views).

Our dissenting colleagues argue that "the government made me do it" is not an answer to the asserted Free Speech violation but the source of the problem. However, they conflate two separate lines of cases. True, "the government made me do it" is no response to laws involving <u>*government*</u>-mandated messages, such as the state motto "Live Free or Die." But this case does not involve a government-mandated message. It

involves a content- and viewpoint-neutral regulation of business conduct, and "the government made me do it" is highly relevant to whether anyone would reasonably understand Higgins' compliance with a requirement not to discriminate against gay and lesbian customers as an expression of his viewpoint. *See FAIR*, 547 U.S. at 64-65.

3. Selling Wedding Cakes to the Public Is Not Inherently Expressive Conduct

The conduct Higgins seeks to define as inherently expressive is the process of creating unique wedding cakes. He believes that regardless of what the cake looks like, a reasonable person who sees a cake at a same-sex wedding reception immediately concludes *the baker* supports same-sex marriage. This goes too far. The act of designing and selling wedding cakes to all customers free of discrimination does not convey a celebratory message about same-sex weddings. Here, as in *Rumsfeld*, Higgins' compliance with the law by serving same-sex couples on the same terms as heterosexual couples would not communicate any message attributable to him.

BADA does not regulate the process of designing or baking cakes, it merely prohibits the discriminatory refusal to provide goods and services to gay and lesbian customers on the same terms as others. Higgins remains free to make whatever aesthetic judgments he chooses with respect to cake design. But his blanket refusal to make wedding cakes for same-sex couples is not an aesthetic judgment; it is a decision to deny service based on a characteristic protected by Broadway's non-discrimination law. That could not be clearer than here where, as the record shows, Higgins did not even discuss the kind or design of wedding cake Smith and Jones wanted. Instead, he decided to deny them service based solely and simply on the fact they told him they were a same-sex couple planning to marry.

Even if a commercial bakery's sale of wedding cakes to the general public were deemed to be expressive conduct, enforcement of BADA against Higgins in this situation would not violate the First Amendment because any burdens on speech are incidental to the law's generally applicable regulation of conduct. The United States Supreme Court has said the government may regulate expressive conduct if the law,

> is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

O'Brien, 391 U.S. at 377. BADA easily satisfies this standard. "[A]cts of invidious discrimination in the distribution of publicly available goods, services and other advantages cause unique evils that government has a compelling interest to prevent." *Roberts*, 468 U.S. at 628. Anti-discrimination laws such as BADA are thus "well within the State's usual power to enact." *Hurley*, 515 U.S. at 572. BADA "does not, on its face, target speech or discriminate on the basis of its content," and the State's interest in prohibiting discrimination in public accommodations is unrelated to the communicative

value, if any, of baking and selling wedding cakes to the public. *Id.* Furthermore, as explained below, BADA, in prohibiting discrimination, furthers not merely an important or substantial governmental interest, but a compelling one, and it is precisely tailored to further that interest. In short, the most precisely tailored way to stop discrimination against LGBT citizens is to pass a law that bans discrimination against LGBT citizens. Thus, it survives constitutional scrutiny under *O'Brien* even if BADA places an incidental burden on expressive conduct.

4. Our Holding is Consistent with the Decisions of Other Courts Addressing the Intersection Between Non-Discrimination Laws and Free Speech, including the Supreme Court's Opinion in *Hurley*

Applying the same distinction between laws targeting speech and laws imposing generally applicable regulations of a business's conduct we apply above, other state courts and administrative tribunals have consistently ruled that enforcing a non-discrimination law against a business does not violate the First Amendment simply because the business objects to providing goods and services – even goods and services of an expressive or artistic nature – to same-sex couples on the same terms as it provides them to opposite-sex couples. *See, e.g., Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013) (photographer), *cert. denied*, 134 S. Ct. 1787 (2014); *Gifford v. McCarthy*, 23 N.Y.S.3d 422 (App. Div. 3d Dep't 2016) (wedding venue); *State v. Arlene's Flowers, Inc.*, No. 13-2-00871-5 (Wash. Super. Ct., Benton Cty. Feb. 18, 2015) (flower shop), appeal pending, No. 91615-2 (Wash.); *Bernstein v. Ocean Grove Camp Meeting Ass'n*, No. CRT 614509, at 13 (N.J. Div. Civil Rights Oct. 22, 2012), available at http://perma.cc/G5VF-ZS2M (wedding venue).

Under Higgins' theory, any business could claim a safe harbor from any content-neutral commercial regulation simply by claiming that it believes complying with the law would send a message with which it disagrees. That would eviscerate the Government's ability to regulate almost any aspect of commercial transactions, from wage and hour laws to health and safety codes to anti-discrimination protections. The First Amendment does not require that result. "[T]he State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity." *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978).

Hurley is not to the contrary, despite Higgins' misplaced reliance on it. The question in *Hurley* was whether the organizers of Boston's St. Patrick's Day parade could be compelled to include in the parade a contingent of marchers carrying what the organizers deemed a dissonant message in favor of lesbian and gay rights. Because the parade in *Hurley* was organized by a private association for expressive purposes, the Court held that the state's requirement that the parade include a gay and lesbian group, bearing its banner over the objection of the parade organizers, violated the First Amendment. This case, by contrast, does not involve a private expressive event but a business providing goods and services to the public. That distinction is critical. The "focal point" of anti-discrimination legislation, as *Hurley* noted, is "the act of discriminating against individuals in the provision of publicly available goods, privileges, and services on the proscribed grounds." 515 U.S. at 572. When applied in that context, such laws,

including Broadway's ban on sexual orientation discrimination, "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, and they do not, as a general matter, violate the First or Fourteenth Amendments." *Id.* at 572-73.

Finally, Higgins suggests the exemption he is seeking from BADA would be limited to only those businesses selling goods and services that involve expression or artistry. But that describes countless businesses. For example, hair salons, tailors, restaurants, architecture firms, florists, jewelers, theaters, and dance schools use artistic skills when serving customers or clients. That these businesses make artistic and creative choices does not insulate them from public accommodations laws when they offer goods or services for hire to the general public. *See, e.g., Denny v. Elizabeth Arden Salons, Inc*., 456 F.3d 427, 429 (4th Cir. 2006) (applying anti- discrimination law to beauty salon providing hair styling and "makeup artistry"); *Elane Photography*, 309 P.3d at 66.

II. FREE EXERCISE OF RELIGION

Higgins contends the Commission's order unconstitutionally infringes on his right to the free exercise of religion guaranteed by the First Amendment of the United States Constitution. We conclude that BADA is a neutral law of general applicability. Its application here does not violate the First Amendment.

A. The Legal Framework for Free Exercise Cases

"The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires." *Emp't Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 877 (1990). Free exercise of religion also involves the "performance of (or abstention from) physical acts." *Id.*

Before the U.S. Supreme Court's decision in *Smith*, the Court consistently used a balancing test to determine whether a challenged government action violated the Free Exercise Clause of the First Amendment. *See Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972); *Sherbert v. Verner*, 374 U.S. 398, 403 (1963). That test considered whether the challenged government action imposed a substantial burden on the practice of religion, and, if so, whether that burden was justified by a compelling government interest. *Sherbert*, 374 U.S. at 403.

In *Smith*, the Court disavowed *Sherbert's* balancing test and concluded that the Free Exercise Clause "does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Smith*, 494 U.S. at 879 (internal quotation marks omitted). The Court held that a neutral law of general applicability need only be rationally related to a legitimate governmental interest in order to survive a constitutional challenge. *Id*. As a general rule, such laws do not offend the Free Exercise Clause. However, if a law burdens a religious practice and is not neutral or not generally applicable, it "must be justified by a compelling government interest" and must be narrowly tailored to advance that interest. *Smith*, 494 U.S. at 883. In other words,

it must survive a "strict scrutiny" review.

B. Analysis of this Case

Higgins contends that *Smith* does not apply because BADA is not "neutral and generally applicable." Again, we disagree. We further find, that even if we were to apply "strict scrutiny," BADA's application here would survive that review.

1. BADA is Neutral and Generally Applicable

A law is not neutral "if the object of a law is to infringe upon or restrict practices because of their religious motivation." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993). A law is not generally applicable when it imposes burdens on religiously motivated conduct while permitting exceptions for secular conduct or for favored religions. *Id.* at 543. The U.S. Supreme Court explained that an improper intent to discriminate can be inferred where a law is a "religious gerrymander[]" that burdens religious conduct but exempts similar secular activity. *Id.* at 534. If a law is either not neutral or not generally applicable, it "must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Id.* at 531-32.

The Court has found only one law to be neither neutral nor generally applicable: a municipal ordinance prohibiting ritual animal sacrifice. *Id.* at 534. That ordinance applied to any individual or group that "kills, slaughters, or sacrifices animals for any type of ritual, regardless of whether or not the flesh or blood of the animals is to be consumed." *Id.* at 527

Considering that the ordinance's terms such as "sacrifice" and "ritual" could be either secular or religious, the Court nevertheless concluded the law was not neutral because its purpose was to impede certain practices of the Santeria religion. *Id*. at 534. The Court further concluded the law was not generally applicable because it exempted the killing of animals for several secular purposes, including the killing of animals in secular slaughterhouses, hunting, fishing, euthanasia of unwanted animals, and extermination of pests as well as the killing of animals by some religions, including at kosher slaughterhouses. *Id.* at 526-28, 536-37, 543-44.

Higgins contends – and our dissenting colleagues agree – that, like the law in *Lukumi*, BADA is neither neutral nor generally applicable. They are wrong.

Higgins' rests his entire argument on the fact that the Broadway Civil Rights Division did not found no probable cause to proceed on three charges of discrimination an unrelated party, William Louis, filed against different bakeries and in different factual situations. But in fact, the Civil Rights Division's resolution of these other claims gets Higgins nowhere.

Louis alleged that three different bakeries discriminated against him because of his religion by refusing to fill his orders for specific cakes bearing derogatory messages about gay people. After investigation, the Division found the bakeries in question did not discriminate against Louis because of his Christian religion. In fact, each of the bakeries

had made many cakes with Christian themes for other customers. The Division concluded the bakeries rejected Louis' orders because the messages he requested were derogatory, not because of his religion. Nothing in Broadway law prohibits denying service for this reason.

Higgins mischaracterizes BADA as an edict forcing Avenue Q (and every other Broadway bakery) to make any cake requested on demand. Not so. BADA does not compel Higgins to sell custom cakes (or any cakes) at all. Nor does BADA prohibit Higgins from refusing to sell cakes for any reason not explicitly prohibited by law. All BADA requires is that any goods and services Higgins chooses to sell must be offered to all customers regardless of disability, race, religion, color, sex, sexual orientation, marital status, national origin, or ancestry. Broadway Rev. Stat. § 24-34-601(2)(a). In other words, BADA's purpose is to forbid discrimination based on any of these protected characteristics regardless of what motivates the discrimination. The bakers who rejected Louis' requests did so for a non-discriminatory reason, and the Division's appropriate application of the law to them does not, in any way, suggest that BADA targets those who religiously oppose same sex marriage. It does not. It is a neutral law.

BADA is also generally applicable. Contrary to Higgins' claims, it does not impose burdens on religious conduct while providing exemptions for secular conduct or favored religious conduct. In *Lukumi*, the statues in question were riddled with exemptions for almost everyone who slaughtered animals except practitioners of the Santeria religion, accordingly the Court found they were underinclusive, making them not generally applicable. In contrast, BADA incorporates only two exemptions: (1) for "places principally used for religious purposes" such as churches, synagogues, and mosques, and (2) for places restricting admission to one gender because of a bona fide relationship to services provided. *See* BADA at § 24-34-601(1) & (3). Neither of these exemptions applies to commercial bakeries. Nor did the Division create new, de facto "exemptions" for any of the bakeries Louis visited. Rather, the Division investigated each of Louis' allegations and determined as a factual matter his complaints were not substantiated because none of the bakeries engaged in discriminatory conduct that violated the Act. That does not render BADA underinclusive. BADA is generally applicable.

BADA does not compel Higgins to support or endorse any particular religious views. The law merely prohibits him from discriminating against potential customers on account of their sexual orientation. As one court observed in addressing a similar free exercise challenge to the 1964 Civil Right Act:

> Undoubtedly defendant . . . has a constitutional right to espouse the religious beliefs of his own choosing, however, he does not have the absolute right to exercise and practice such beliefs in utter disregard of the clear constitutional rights of other citizens. This Court refuses to lend credence or support to his position that he has a constitutional right to refuse to serve members of the Negro race in his business establishment upon the ground that to do so would violate his sacred religious beliefs.

Newman v. Piggie Park Enters., Inc., 256 F. Supp. 941, 945 (D.S.C. 1966), *aff'd in relevant part and rev'd in part on other grounds*, 377 F.2d 433 (4th Cir. 1967), *aff'd and modified on other grounds*, 390 U.S. 400 (1968). Likewise, Higgins remains free to continue espousing his religious beliefs, including his opposition to same-sex marriage. However, if he wishes to operate as a public accommodation and conduct business within the State of Broadway, BADA prohibits him from denying service to customers based on their sexual orientation

BADA was not designed to impede religious conduct and does not impose burdens on religious conduct not imposed on secular conduct. Accordingly, BADA is a neutral law of general applicability.

2. BADA Passes Rational Basis Review (and Would Withstand Strict Scrutiny if that Standard Were Applicable)

Having concluded BADA is neutral and generally applicable, it need only serve a legitimate state interest. BADA easily satisfies that standard. The U.S. Supreme Court and numerous lower courts have repeatedly recognized that the government interest in combating discrimination is not merely legitimate, but compelling, and that anti-discrimination laws are the least restrictive means of achieving that purpose. *See, e.g., Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) (rejecting religious university's Free Exercise challenge to anti-discrimination policy of the Internal Revenue Service); *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389 (4th Cir. 1990) (rejecting church-operated school's Free Exercise defense to discrimination prohibited by the Fair Labor Standards Act); *EEOC v. Fremont Christian Sch*., 781 F.2d 1362, 1364 (9th Cir. 1986) (rejecting religious school's Free Exercise defense to discrimination prohibited by Title VII); *EEOC v. Miss. Coll*., 626 F.2d 477, 488-89 (5th Cir. 1980) (same).

"[A]cts of invidious discrimination in the distribution of publicly available goods, services, and other advantages cause unique evils that government has a compelling interest to prevent." *Roberts*, 468 U.S. at 628. Discrimination "both deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life." Id. at 625. Anti-discrimination laws ensure equal access to the "transactions and endeavors that constitute ordinary civic life in a free society," *Romer v. Evans*, 517 U.S. 620, 631 (1996), and are "precisely tailored" to achieve the goal of equal opportunity. *Burwell v. Hobby Lobby Stores, Inc*., 134 S. Ct. 2751, 2783 (2014).

Contrary to the dissent's suggestion, the relevant inquiry is not whether a customer denied services for discriminatory reasons is able to obtain goods or services elsewhere. To frame the inquiry that way both misunderstands the nature of the government interest at stake and trivializes the profound dignitary harm that people experience when they are turned away from a business because of who they are. *See Roberts*, 468 U.S. at 625 (recognizing "personal harms" caused by discrimination); *Heart of Atl. Motel v. United States*, 379 U.S. 241, 250 (1964) (noting that denial of equal access to public accommodations causes "deprivation of personal dignity"). It is no answer to say that Jones and Smith could shop somewhere else for their wedding cake, just as it was no answer in 1966 to say that African-American customers could eat at another restaurant.

See Newman v. Piggie Park Enters., Inc., 256 F. Supp. at 945. The issue is not access to baked goods; it is full inclusion and participation in civic life.

Higgins' request for an exemption here echoes the free exercise claims lodged against an earlier generation of civil rights laws prohibiting discrimination based on race and sex. *See, e.g., Bob Jones Univ*., 461 U.S. 574 (rejecting religious university's Free Exercise challenge to race discrimination prohibited by Internal Revenue Service policy); *Dole*, 899 F.2d at 1392 (rejecting church-operated school's Free Exercise defense to sex discrimination prohibited by the Fair Labor Standards Act). Time and again, the U.S. Supreme Court and many lower courts have rejected such free exercise challenges and found that sincerely held religious beliefs do not entitle businesses to discriminate in violation of the law. We do the same here in affirming the Commission's Order.

IN THE COURT OF APPEALS OF THE STATE OF BROADWAY
APPEAL NO. 2015-1

HENRY HIGGINS and AVENUE Q BAKERY, INC. **Appellants (Respondents Below)** **v.** **GEORGES SMITH and ALBIN JONES** **Appellees (Complainants Below)** **and** **BROADWAY CIVIL RIGHTS COMMISSION** **Appellee**	**Direct Appeal from a Final Decision of the Broadway Civil Rights Commission**

DISSENTING OPINION

VonSchraeder, J (dissenting); Hill, Oakley, and Tugger JJ (concur in dissent)

Henry Higgins serves all people but believes he cannot convey all ideas or celebrate all events. He seeks to pursue his profession and craft his art consistently with his religious identity. The First Amendment Speech and Religion clauses guarantee him that freedom. Therefore, we dissent.

I. The Free Speech Clause Applies to Higgins' Custom Wedding Cakes

The Free Speech Clause protects both expression and expressive conduct. We believe the majority erred by not initially deciding whether Higgins' custom wedding cakes are artistic expression. *See Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 60-68 (2006) ("*FAIR*") (assessing whether the litigants were engaged in speech before asking if their conduct was expressive). Because his wedding cakes clearly qualify as expression, we believe the majority's expressive-conduct analysis was unnecessary. *See Wooley v. Maynard*, 430 U.S. 705, 713 (1977) (declining to reach the expressive-conduct issue).

A. Higgins' Custom Wedding Cakes Are His Artistic Expression

"[T]he Constitution looks beyond written or spoken words as mediums of expression," *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 569 (1995), and protects artistic expression as pure speech, *see, e.g., Ashcroft v. Free Speech Coal.,* 535 U.S. 234, 246 (2002) (noting the First Amendment protects expression with artistic value).

Protected artistic expression is a broad category. It includes traditional forms of visual art such as "pictures, films, paintings, drawing, and engravings," *Kaplan v. California*, 413 U.S. 115, 119 (1973), encompassing even abstract works like the unintelligible "painting[s] of Jackson Pollock," *Hurley*, 515 U.S. at 569. And it extends further still, shielding atonal instrumentals, *see id.* (mentioning Arnold Schöenberg's music), and even sexually explicit materials, *see Jacobellis v. Ohio*, 378 U.S. 184, 191 (1964).[4]

Higgins' custom wedding cakes are his artistic expression because he intends to, and does in fact, communicate through them. *See Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 790 (2011) (concluding video games are protected expression because they "communicate"); *Cressman*, 798 F.3d at 952-53 (explaining that "the animating principle behind pure-speech protection" is "safeguarding self- expression"); *White v. City of Sparks*, 500 F.3d 953, 956 (9th Cir. 2007) (similar). Those ornately decorated, elaborately constructed, and typically tiered cakes serve as the centerpiece of wedding celebrations. Their iconic presence at weddings speaks to all who see them. *Cf. Pleasant Grove City v. Summum*, 555 U.S. 460, 470- 71 (2009) (discussing the expressiveness of monuments).

In one sense, those cakes announce a basic message: this event is a wedding and the couple's union is a marriage. But in another sense, Higgins' wedding cakes also declare an opinion: the couple's wedding "should be celebrated." *Id.; see Kaahumanu v. Hawaii*, 682 F.3d 789, 799 (9th Cir. 2012) ("The core of the message in a wedding is a celebration of marriage and the uniting of two people ...."). Each of his wedding cakes also expresses unique aspects of the couple's personalities and abstract messages such as Higgins' "sense of form, topic, and perspective." *White*, 500 F.3d at 956. Like any good work of art, Higgins' wedding cakes convey messages that address not only "the intellect" but also "the emotions" of observers. *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989).

As with other visual artists, Higgins' artistic design process involves extraordinary

[4] We note that federal courts of appeals have recognized forms of protected artistic expression as diverse as tattooing, *Buehrle v. City of Key West*, 813 F.3d 973, 976 (11th Cir. 2015); *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1061 (9th Cir. 2010), custom-painted clothing, *Mastrovincenzo v. City of N.Y.*, 435 F.3d 78, 96 (2d Cir. 2006), and stained-glass windows, *Piarowski v. Ill. Cmty. Coll. Dist*. 515, 759 F.2d 625, 628 (7th Cir. 1985); *see also Cressman v. Thompson*, 798 F.3d 938, 952-53 (10th Cir. 2015) (explaining that the First Amendment protects original artistic expression as "pure speech").

effort: drawing the cake on paper (often many times); painting elaborate designs and decorations on it; and sculpting the cake's form and its decorations. *See* The Essential Guide to Cake Decorating, p. 5 (2001) (noting the cake artist has "mastered" the arts of "sculpture" and "painting"). It does not matter that Higgins writes, paints, and sculpts using mostly edible materials like icing and fondant rather than ink and clay. "[T]he basic principles of freedom of speech ... do not vary when a new and different medium for communication appears." *Brown*, 564 U.S. at 790 (quotation marks omitted). Higgins is as shielded by the Free Speech Clause as a modern painter or sculptor, and his greatest masterpieces – his custom wedding cakes – are just as worthy of constitutional protection as an abstract painting like Piet Mondrian's Broadway Boogie Woogie, a modern sculpture like Alexander Calder's Flamingo, or a temporary artistic structure like Christo and Jeanne-Claude's Running Fence.

The First Amendment protects Higgins' wedding cakes regardless of whether he writes words on them or adorns them with bride and groom figurines. All his wedding cakes are custom-designed and distinctly recognizable as "markers for weddings." *See* Simon R. Charsley, Wedding Cakes and Cultural History at 121 (1992). Each of them communicates messages about marriage and the couple.

That is why Higgins declined Smith's and Jones' request before learning all the details of the cake they wanted. They were reviewing photographs of custom cakes when they told Higgins they wanted him to make a cake for their wedding. When he heard this, Higgins immediately knew any wedding cake he would design for them would express messages about their union that he could not in good conscience communicate. Expressing such messages would contradict his core beliefs about marriage.

Indeed, Higgins, like many adherents of the Abrahamic faiths, believes marriage has a "spiritual significance," *Turner v. Safley*, 482 U.S. 78, 96 (1987), to the point of being "sacred," *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604 (2015). What he expresses through his custom wedding cakes carries great religious meaning for him. Consequently, he considers sacrilegious the ideas he would express if coerced into creating custom wedding cakes celebrating same-sex marriages.

Evidence indicates Smith and Jones intended to ask Higgins to design "a rainbow-layered [wedding] cake" for them.[5] In fact, that is the very cake another cake artist later created for their wedding. Given the rainbow's status as the preeminent symbol of gay pride, Smith and Jones' wedding cake undeniably expressed support for same-sex marriage.[6] Because a cake like that is so obviously expressive, it should easily fall within the Commission's finding that a wedding cake "could ... be expressive and could therefore

[5] Meredith and Will C. Holden, Cake Shop Says Business Booming, Fox 31 Denver, July 30, 2012, http://bit.ly/2uQZhJO; Smith and Jones' Rebuttal to Higgins's Position Statement at n.1.

[6] *See* Katherine McFarland Bruce, Pride Parades: How a Parade Changed the World 170 (2016) (explaining, "cultural symbols like the rainbow flag" are "associat[ed] with the LGBT community").

implicate the First Amendment," Broadway Opp. Br. at 15, particularly if it "feature[s] specific designs ... that are offensive" to its creator, *id*. at 11.

This concession raises another problem for the majority. It leaves no doubt that the Commission's rigid order – which requires Higgins to craft wedding cakes for same-sex marriages if he designs them for opposite-sex marriages – infringes Higgins' expressive freedom. For example, if Higgins inscribes a Bible verse declaring that a husband and wife become "one flesh" in marriage, he must write those same words about a same-sex marriage and express a written message that he believes to be false. Surely the First Amendment protects Higgins from that.

B. Alternatively, Higgins' Creation of Custom Wedding Cakes Constitutes Expressive Conduct

Higgins' creation of custom wedding cakes at least qualifies as a form of expressive conduct. Our colleagues in the majority properly articulate the expressive conduct test that the U.S. Supreme Court adopted in *Spence v. Washington*, 418 U.S. 405 (1974), and modified in *Hurley,* 515 U.S. at 569. But they misapply it here.

A person viewing one of Higgins' custom wedding cakes would understand that it celebrates and expresses support for the couple's marriage. Higgins plays a direct and substantial role in creating that expression. He not only designs and handcrafts the cake, which is a thoroughly artistic process, he delivers it to the event, and he often interacts with the wedding guests. All this serves to further associate Higgins with his cake and the wedding. In fact, many who view Higgins' designs at a wedding later ask him to create a cake for them. *Id.*

In *Spence*, the Supreme Court held that displaying an upside-down American flag with a peace symbol during a time of international and domestic turmoil is expressive conduct. 418 U.S. at 410 (noting the importance of "the context"). We believe that handcrafting the centerpiece displayed at an inherently celebratory event like a wedding falls squarely into the same category.

Here, the majority takes a different route, concluding instead "that the act of designing and selling a wedding cake to all customers free of discrimination does not convey a celebratory message about same-sex weddings." But they consider the wrong question. The expressive-conduct inquiry should ask whether Higgins' custom wedding cakes – which he not only designs but also delivers to the wedding celebration – constitute expressive conduct. Because they do, the Free Speech Clause applies.

C. The Majority Misapplies the U.S. Supreme Court's Compelled-Speech Precedents

1. *Hurley* Controls this Case

"The First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster ... an idea they find morally objectionable." *Wooley*, 430 U.S. at 715. This promise applies with full force to the

creation of art, which is why "'aesthetic and moral judgments about art ... are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority.'" *Brown*, 564 U.S. at 790 (*quoting United States v. Playboy Entm't Grp., Inc.,* 529 U.S. 803, 818 (2000)). Our "cultural life rest[s] upon this ideal." *Turner Broad*., 512 U.S. at 641 (plurality opinion). No other approach would sufficiently safeguard the "individual freedom of mind," *Wooley*, 430 U.S. at 714, or "comport with the premise of individual dignity and choice" that underlies the First Amendment, *Leathers v. Medlock*, 499 U.S. 439, 449 (1991) (*quoting Cohen*, 403 U.S. at 24).

Upon these principles, the U.S. Supreme Court has developed the compelled-speech doctrine, which forbids the government from (1) forcing citizens (or businesses) to express messages that they deem objectionable or (2) punishing them for declining to convey such messages. *See, e.g., Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795-801 (1988) (forbidding the state from requiring paid commercial fundraisers to inform potential donors of the average percentage of gross receipts the fundraisers actually turn over to charities); *Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Cal.*, 475 U.S. 1, 9-21 (1986) (plurality opinion) ("PG&E") (forbidding the state from requiring a business to include a third party's expression in its billing envelope); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 254-58 (1974) (forbidding the state from requiring a newspaper to publish a third party's article).

Of particular note, the U.S. Supreme Court has recognized that states may not apply public-accommodation laws like BADA to compel or otherwise interfere with expression. *See, e.g., Boy Scouts of Am. v. Dale*, 530 U.S. 640, 656-59 (2000); *Hurley*, 515 U.S. at 572-75. Yet as states have dramatically expanded those laws, the "potential for conflict" between them and First Amendment rights "has increased" substantially. *Dale*, 530 U.S. at 657; *see id.* at 656 n.2 ("Some municipal ordinances have even expanded to cover criteria such as prior criminal record, prior psychiatric treatment, military status, personal appearance, source of income, place of residence, and political ideology").

That conflict manifested itself in *Hurley*. There, the organizers of Boston's St. Patrick's Day Parade invited members of the public to march in their parade, accepted nearly every group that applied, permitted LGBT individuals to participate, but refused an LGBT group's request to march as a distinct contingent. *Id.* at 561-62, 572. The Massachusetts courts held that the parade organizers had engaged in unlawful discrimination and ordered them to include the LGBT group. *Id.* at 561-65.

The U.S. Supreme Court unanimously reversed. *Id.* at 581. The Court explained that the state applied its public-accommodation law "in a peculiar way," when it required the parade organizers to alter the content of their expression to accommodate "any contingent of protected individuals with a message." *Id.* at 572-73. This violated the First Amendment right of speakers "to choose the content of [their] own message," and decide "what merits celebration," even if the state or some individuals deem those choices "misguided, or even hurtful." *Id.* at 572-74.

We believe *Hurley* establishes that the state cannot apply a public-accommodation

law to force individuals engaged in expression to alter what they communicate, much less to celebrate something they deem objectionable. This is particularly true for speakers, like the parade organizers in *Hurley*, who exclude no class of people but merely decline to express certain ideas. Higgins fits squarely in that mold. He engages in expression through his custom wedding cakes, and he will gladly create art for anyone (including LGBT individuals) so long as the requester does not ask him to create expression that he considers objectionable. *Hurley* guarantees him that freedom.

The Commission here committed the same error as the state in *Hurley*: it declared Higgins' artistic expression "itself to be the public accommodation." *Hurley,* 515 U.S. at 573. In so doing, the Commission directly interfered with Higgins' artistic discretion. It effectively declared that if Higgins communicates on a topic that implicates a protected classification, he must express a contrary message upon request. That, however, "mandates orthodoxy" of expression, "not anti-discrimination." *Ward v. Polite*, 667 F.3d 727, 735 (6th Cir. 2012).

Our colleagues in the majority compound the problem by focusing on the wrong thing. They look for expression only in Higgins' decision not to create a wedding cake celebrating a same-sex marriage, but they should have analyzed whether "the wedding cake itself[] constitutes ... expression." Pet.App.28a. *Hurley*, after all, did not ask whether the parade organizers' "conduct" in declining the LGBT group's request was expressive; it considered whether the parade itself was. *See* 515 U.S. at 568-69; *see also FAIR*, 547 U.S. at 63-64 (*discussing Hurley*, *PG&E*, and *Tornillo* and focusing on "the expressive quality of a parade, a newsletter, [and] the editorial page of a newspaper").

The majority also seems fixated on third-party perceptions. The U.S. Supreme Court, however, has not treated that consideration as an essential component of compelled-speech analysis. *Wooley*, for example, found a compelled-speech violation even though, as the dissent emphasized, no observer of a car would reasonably conclude that the driver "endorse[d]" or affirmed belief in the state motto on the license plate. *See* 430 U.S. at 722. Similarly, *PG&E* struck down a state order requiring a business to transmit a third party's newsletter in its billing envelope, even though the newsletter explicitly stated that it was not the business's speech. *See* 475 U.S. at 6-7, 15 n.11 (plurality opinion). Third-party perceptions are not dispositive in compelled-speech analysis.

That makes perfect sense because the compelled-speech doctrine protects each individual's freedom to decide which ideas are worthy of expression and to refuse to convey contrary views. *See Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.,* 133 S. Ct. 2321, 2327 (2013). Whether the Commission invades Higgins' "freedom of mind" does not ultimately depend on what others perceive. *Wooley*, 430 U.S. at 714. Otherwise, the Commission could force a writer to draft a novel if the author's identity remained secret. Nothing supports such a cramped understanding of expressive freedom.

Under their perceptions-focused analysis, the majority reasons that "no reasonable observer would understand Higgins' . . . provision of a cake to gay couple as an expression of [his] approval of the customer's marriage rather than a result of [his] need

to comply with anti-discrimination laws. . . .” Since all compelled speech is mandated by law, however, that reasoning would negate compelled-speech protection entirely. It would transform legal coercion from a predicate of a compelled-speech violation to its antidote. If “the government made me do it” eliminates compelled-speech concerns, the doctrine itself would cease to exist.

The majority also reasons Higgins can alleviate any compelled-speech concerns by publishing a disclaimer that “the bakery and its owner do not support or endorse customers’ events for which they provide baked goods.” Disclaimers may ameliorate First Amendment concerns in some contexts., *see, e.g., PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 87 (1980), But they cannot undo a mandate requiring individuals to create expression they deem objectionable, because the Commission may not “require speakers to affirm in one breath that which they deny in the next,” *Hurley*, 515 U.S. at 576 (*quoting PG&E*, 475 U.S. at 16).

2. The Majority Misapplies *FAIR*

With all due respect, we believe the majority misunderstands and misapplies *FAIR*. In that case, a group of law schools that disagreed with the military’s former “Don’t Ask, Don’t Tell” policy objected to a funding condition that required them to host military recruiters. *FAIR*, 547 U.S. at 51. They claimed that providing those recruiters access to empty rooms would violate their expressive freedom by creating the false appearance that “they see nothing wrong with the military’s policies.” *Id.* at 65.

In *FAIR*, the U.S. Supreme Court analyzed the law schools’ speech arguments separately from their expressive-conduct claim. *See id*. at 60-68. The speech arguments lacked merit, the Supreme Court held, because the schools are “not speaking when they host interviews and recruiting receptions.” *Id.* at 64. Empty rooms do not speak. Here, however, the Commission is hijacking Higgins’ artistic expression, forcing him to design wedding cakes celebrating ideas about marriage that conflict with his faith. *FAIR* is thus distinguishable.

Nor does *FAIR* foreclose Higgins’ expressive-conduct argument. The Court there rejected the law schools’ expressive-conduct claim because any expressiveness in the conduct compelled – giving military recruiters equal access to rooms – “is not created by the conduct itself but by the speech that accompanies it.” *Id.* at 66. What is compelled here, however – a custom-designed wedding cake – is itself artistic expression. Our colleagues overlook this critical distinction and misapply *FAIR*.

D. The Commission’s Content-Based and Viewpoint-Based Application of BADA Demands No Less Than Strict Scrutiny

The majority finds, “[e]ven if a commercial bakery’s sale of wedding cakes to the general public were deemed to be expressive conduct, enforcement of BADA against Higgins in this situation would not violate the First Amendment because any burdens on speech are incidental to [BADA’s] generally applicable regulation of conduct,” and such incidental burdens are acceptable under the test established in *United States v. O’Brien*,

391 U.S. 367, 377 (1968). Not so.

Regardless of whether a case involves expression or expressive conduct, "*O'Brien* does not provide the applicable standard for reviewing a law that discriminates based on content in its application." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 27 (2010) (*citing R.A.V. v. City of St. Paul,* 505 U.S. 377, 385-86 (1992)). The Commission's application of BADA to Higgins' speech discriminated based on content and viewpoint, so strict scrutiny should have been the standard of review here.

Content-based discrimination occurs in at least two ways. First, the U.S. Supreme Court in *Riley* recognized that "[m]andating speech that a speaker would not otherwise make necessarily alters the content" and constitutes "a content-based regulation of speech." 487 U.S. at 795. Because this application of BADA mandates artistic expression Higgins would not otherwise create, it amounts to a content-based application. Second, "[g]overnment regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015). Higgins triggered BADA only because he addressed the topic of marriage through his art (i.e., because he designed custom cakes for opposite-sex weddings). Penalizing an artist because of the topics on which he has chosen to speak is decidedly content based. *See Tornillo*, 418 U.S. at 256 (noting the right-of-reply statute was content based because it was triggered only when the newspaper spoke on the topic of politicians). Indeed, by its own terms, BADA applies to a refusal to express something only when the requested topic or message implicates a classification listed in the statute. *See R.A.V.,* 505 U.S. at 391.

Going beyond mere content discrimination, the Commission has also engaged in viewpoint discrimination. Like the state directive invalidated in *PG&E*, the Commission's order requires Higgins to express ideas diametrically opposed to his own. 475 U.S. at 12-13 (plurality opinion) (finding viewpoint discrimination where the state forced a business to disseminate speech that was contrary to its views). In addition, the Commission's application of BADA favors cake artists who support same-sex marriage over those like Higgins who do not. Even though BADA forbids discrimination based on religion, the Commission has allowed three cake artists to refuse a religious customer's request to create custom cakes with religious messages criticizing same-sex marriage. But the Commission has punished Higgins for declining to express ideas supporting same-sex marriage.[7] Such viewpoint discrimination requires strict-scrutiny – not *O'Brien* – review. And, as described below in Section III of this opinion, BADA, as applied to Higgins' art, cannot survive strict scrutiny.

[7] The majority ignores the fact that after the Commission ordered Higgins to create wedding cakes for same-sex couples if he produced them for opposite-sex couples, Higgins felt he had no choice but to shut down his wedding cake business completely, slashing his income by 40%, forcing the loss of most of his staff, and silencing his artistic voice on marriage.

II. Compelling Higgins to Design Custom Wedding Cakes that Celebrate Same-Sex Marriage Violates the Free Exercise Clause.

For many, including Higgins, marriage has inherently religious significance. Regardless of whether his clients plan an overtly religious wedding, Higgins views those events as forming and celebrating a fundamentally religious relationship. His role as a cake artist is to design a celebratory centerpiece for the wedding festivities, and he considers himself "an active participant" in that sacred event. We believe that the Commission's order, which requires him to bake cakes for same-sex weddings if he would bake them for opposite-sex weddings, burdens his right to exercise his religion freely in violation of the First Amendment.

A. BADA Is Not Neutral or Generally Applicable as Applied.

The manner in which the Commission applies BADA is neither neutral nor generally applicable, and as a result, it "must undergo the most rigorous of scrutiny." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993). Two cases encapsulate the U.S. Supreme Court's doctrine on neutrality and general applicability. *Employment Division v. Smith* held that "an across-the-board criminal prohibition" on illegal drug use satisfied both of those requirements, 494 U.S. 872, 884 (1990), while *Lukumi* concluded that ordinances gerrymandered to punish adherents of one faith fell "well below the minimum standard necessary to protect First Amendment rights," 508 U.S. at 543. The Commission's discriminatory application of BADA distinguishes this case from *Smith*. By punishing Higgins while protecting cake artists who support same-sex marriage, the Commission's actions raise many of the neutrality and general-applicability concerns articulated in *Lukumi*.

1. The Commission Has Not Neutrally Applied BADA

"Official action that targets [specific] religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality." *Lukumi*, 508 U.S. at 534. The Free Exercise Clause "forbids subtle departures from neutrality, and covert suppression of particular religious beliefs." *Id.*. To unmask this, neutrality analysis considers "the effect of a law in its real operation," and "the interpretation given to the [statute]" by the state." *Id.* at 535, 537.

The Commission applied BADA to target Higgins' religious beliefs for adverse treatment. Cake artists who support same-sex marriage may decline to oppose it, while those who oppose same-sex marriage must support it. That is not a neutral interpretation of the law.

Highlighting this differential treatment, the Commission offered markedly inconsistent analysis when considering whether these two groups of cake artists violate BADA. First, the majority says that the other cake artists could refuse an order because "they disapproved of the derogatory messages . . . requested." But it is undisputed that Higgins declined Smith's and Jones' request because he too did not want to express ideas that offend his religious convictions about marriage. To be sure, the requested

cakes criticizing same-sex marriage included words. But that is no basis for treating Higgins worse. His custom wedding cakes are "highly distinctive structures" that function as "markers for weddings," and as such, they inherently express ideas about marriage. *Charsley, supra*, at 121. Accordingly, Higgins' speech-based decision is entitled to at least as much respect as the speech-based decisions of others.

Second, for the three cake designers who refused to criticize same-sex marriage, the majority considers essential the fact that they served people of all faiths. But for Higgins, his willingness to serve customers of all sexual orientations was dismissed out of hand.

Third, the majority tells Higgins that (1) his custom wedding cakes do not communicate anything, (2) even if they did, the expression was not his but his clients, and (3) no one would attribute meaning to his cakes beyond compliance with BADA. Yet the majority is not at all troubled that the Commission failed to subject the other cake artists to anything remotely resembling that analysis; the Commission readily accepted that the cakes requested of those designers would communicate a message and readily allowed the designers to refuse to express that message.

Fourth, the Commission's one-sided construction of BADA affords broader protection to LGBT consumers than to people of faith. Indeed, the Commission has expanded BADA's sexual-orientation protection by refusing to distinguish between speech and status in that context, while simultaneously diminishing the statute's religious protection by distinguishing between the speech and status of religious people. Such preferential treatment for one group over another contravenes basic notions of neutrality.

All of this reveals something striking: people of faith who do not support same-sex marriage always lose. Whether they are customers requesting an expressive item or professionals declining to create it, the Commission consistently opposes them. This unequal application of the law impermissibly "single[s] out" a specific religious belief "for discriminatory treatment." *Lukumi*, 508 U.S. at 538; *see also Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 165-68 (3d Cir. 2002) (holding that a selective application of a law against a particular religious practice triggers strict scrutiny).

The reason for this discriminatory treatment is not difficult to discern, for the Commission hardly conceals its disdain for Higgins' religious views. At a deliberative hearing in this case, one commissioner, with no disagreement from the others, had this to say:

> I would also like to reiterate what we said in the hearing or the last meeting. Freedom of religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the [H]olocaust, 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.

Pet.App.293a-94a. No one with Higgins' beliefs stands a chance before a government agency that is brazen enough to say such things.

Rather than constraining the Commission's hostility toward Higgins' beliefs with well-defined standards, BADA (at least as the Commission has applied it) permits an "'individualized governmental assessment of the reasons for the [allegedly unlawful] conduct.'" *Lukumi*, 508 U.S. at 537 (*quoting Smith*, 494 U.S. at 884). As the facts here demonstrate, the Commission deems some reasons for declining a request acceptable and others illegal based in part on the "derogatory nature" of the requested speech. But such a hopelessly vague standard—which entails at least as much discretion as the "good cause" standard that *Smith* mentioned, *see* 494 U.S. at 884, and the "test of necessity" that *Lukumi* addressed, 508 U.S. at 537—gives the state far too much leeway to "devalue[] religious reasons" for declining a request. *Id.* And devaluing Higgins' religious reasons for declining Smith and Jones' request is exactly what the Commission has done.

2. The Commission Has Not Generally Applied BADA

A law is not generally applicable if it fails to prohibit nonreligious conduct that endangers the state's asserted "interests in a similar or greater degree" than Higgins' decision not to celebrate same-sex marriages. *Lukumi*, 508 U.S. at 543. *Lukumi's* general-applicability analysis focused on the underinclusiveness and selective application of the laws at issue there. *See id.* at 542-45. Both of those factors establish that BADA is not generally applicable here.

First, BADA is substantially underinclusive in its efforts to achieve the Commission's asserted interests. Respondents have emphasized throughout this litigation the state's interest in preventing dignitary harms. *See* Appellees Br. at 36. Yet the state's anti-religious application of BADA imposes dignitary harm on religious artists like Higgins. And more broadly, BADA allows any expressive professional to refuse to create speech that they deem "derogatory," even if those messages are closely associated with a customer's protected status. Allowing professionals to decline those requests permits the same sorts of harms to consumers that the Commission claims an interest in eliminating here. Hence, BADA is not generally applicable.

Moreover, "[t]he principle that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief is essential to the protection of the rights guaranteed by the Free Exercise Clause." *Lukumi*, 508 U.S. at 543. As discussed in the previous section, the Commission has done just that. It has selectively applied BADA to target artistic and expressive professionals who have a religious objection to celebrating same-sex marriages. Combining this selective application with the substantial underinclusiveness discussed above leads to only one possible conclusion – BADA is not generally applicable.

Smith confirms this. It involved a criminal law that applied across the board and imposed a straightforward ban on the use of "controlled substances." 494 U.S. at 874, 884. BADA is nothing like that. It lacks broad application because of its significant underinclusiveness and selective application. And the Commission's unequal treatment

of similarly situated cake artists proves that BADA is anything but straightforward in its application. Thus, BADA is not the sort of generally applicable law *Smith* intended to insulate from strict-scrutiny review. Accordingly, this application of BADA must satisfy that demanding standard.

III. Respondents Cannot Satisfy Strict Scrutiny

Because this application of BADA infringes Higgins' rights under the Free Speech and Free Exercise Clauses, Respondents must prove it "furthers a compelling interest and is narrowly tailored to achieve that interest." *Reed*, 135 S. Ct. at 2231 (quotation marks omitted); *see also Playboy*, 529 U.S. at 818 (explaining that the burden rests with the government and the government does not get "the benefit of the doubt"). On multiple occasions, states that have applied public-accommodation laws to infringe First Amendment liberties have been unable to satisfy heightened forms of constitutional review. *See, e.g., Hurley*, 515 U.S. at 578-79; *Dale*, 530 U.S. at 659. The Commission's efforts should fare no better.

The majority states, "[Broadway] has a compelling interest in combating discrimination." Yet that characterization of the state interest is far too broad. Strict scrutiny "look[s] beyond broadly formulated interests justifying the general applicability of government mandates" to see whether that standard "is satisfied through application of the challenged law" to "the particular" party. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430-31 (2006). In this context, as *Hurley* illustrates, the majority should have focused not on BADA's general purpose of preventing "denial[s] of access to (or discriminatory treatment in) public accommodations," but on its "apparent object" when "applied to expressive activity in the way it was done here." 515 U.S. at 578.

The Commission must show it has a compelling interest in forcing cake artists who otherwise serve LGBT customers to violate their consciences by creating custom wedding cakes celebrating same-sex marriages. Unlike most applications of BADA, this one would force Higgins to create artistic expression and thus "modify the content" of his speech. *Id.* But as *Hurley* explained, permitting the Commission to compel speech in that manner would "allow exactly what the general rule of speaker's autonomy forbids." *Id.* Even this cursory look at strict-scrutiny analysis thus reveals that Respondents cannot satisfy it.

Diving deeper, it becomes clear that the Commission's broadly cast interest in punishing Higgins includes two specific purposes: (1) the state's concern with ensuring that same-sex couples planning their weddings have ample access to cake artists, and (2) its interest in protecting the dignity of same-sex couples. Neither of those interests satisfies strict scrutiny under these circumstances.

A. The State's Asserted Access Interest Is Not Undermined Here, and Its Efforts to Advance It Are Not Narrowly Tailored.

The majority references the Commission's interest in prohibiting "discrimination in the distribution of publicly available goods, services." But Respondents have introduced no evidence suggesting that same-sex couples have problems accessing cake artists, or

any other creators of expression, willing to celebrate their weddings.

Nor could they. *See* Nathan B. Oman, Doux Commerce, Religion, and the Limits of Antidiscrimination Law, 92 Ind. L.J. 693, 721 (2017) ("[T]here is no evidence of widespread denials of service to gay customers"). The evidence shows that Smith and Jones acquired a custom-made, rainbow-layered wedding cake from another local cake artist. Nothing suggests they had difficulties doing that.

In light of this, affirming Higgins' religious and expressive freedom in these circumstances does not undermine the Commission's asserted interest in ensuring same-sex couples have access to custom wedding cakes. And for the same reasons, punishing Higgins is not narrowly tailored to advance that interest. The state need not strip away Higgins' freedom for same-sex couples to obtain the artistic wedding cakes they seek.

B. The State's Dignitary Interest Does Not Satisfy Strict Scrutiny

Respondents focused much of their argument on the Commission's interest in preventing discrimination that "deprives persons of their individual dignity." And the majority focuses its finding of constitutionality on the same. Yet an interest in avoiding some dignitary harms – though a real concern in certain circumstances – cannot override Higgins' First Amendment freedoms and his own equally important dignitary interests.

1. The State's Dignitary Interest Is Not Compelling in this Case

"'[C]ontext matters' in applying the compelling interest test." *Gonzales,* 546 U.S. at 431. The context here is a conscientious man of faith who does not engage in invidious discrimination against any class of people. He will create his custom art for everyone, including LGBT patrons, but he declines all requests (regardless of the requester's identity) to create custom artistic expression that conflicts with his faith. Higgins did not categorically refuse to serve Smith and Jones. He only declined to create a custom wedding cake that would celebrate their marriage, while offering to sell them any other items in his store or to design for them something for another occasion. That is neither invidious nor based on the slightest bit of animosity. Rather, it is a reasonable exercise of his artistic discretion based on a "decent and honorable" religious belief about marriage. *Obergefell*, 135 S. Ct. at 2602. Notwithstanding Smith and Jones' response, the Commission simply does not have a compelling interest in punishing Higgins in this case.

Indeed, *Hurley* established that the state's interest in eliminating dignitary harms is not compelling where, as here, the cause of the harm is another person's decision not to engage in expression. The Court there recognized, "the point of all speech protection ... is to shield just those choices of content that in someone's eyes are ... hurtful." 515 U.S. at 574. An interest in preventing dignitary harms thus is not a compelling basis for infringing First Amendment freedoms. *Cf. Johnson*, 491 U.S. at 409 (explaining that "[i]t would be odd" to conclude that the hurtfulness of an expressive decision is the reason both "for according it constitutional protection" and for stripping it of that protection). Some dignitary harms must be tolerated in order to provide "adequate 'breathing space' to the freedoms protected by the First Amendment*." Hustler Magazine, Inc. v. Falwell*, 485 U.S.

46, 56 (1988).

Freedom from compelled speech would be illusory if a person like Higgins could not explicitly decline requests to create custom artistic expression for speech-based reasons. Hence, an artist's statement that he cannot engage in specific expression must be protected, and avoiding a dignitary harm in the listener cannot override it. *See, e.g., Matal v. Tam*, 137 S. Ct. 1744, 1764 (2107) (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"); *Snyder v. Phelps*, 562 U.S. 443, 458 (2011) ("'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 Johnson*, 491 U.S. at 414)).

The broader social context confirms the absence of a compelling dignitary interest here. First, no one is claiming "a right to simply refuse to deal with gay people." Andrew Koppelman, Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law, 88 S. Cal. L. Rev. 619, 643 (2015). Higgins' concern is about the integrity of his own expression – not the inquiring individual's protected status. Second, not only is support for same-sex marriage the majority cultural position; it has reached an all-time high with 62% of Americans favoring it. Support for Same-Sex Marriage Grows, Pew Research Center, June 26, 2017, http://pewrsr.ch/2sX3VBN. Third, few cake artists (or other expressive professionals, for that matter) will decline to celebrate same-sex marriages because anyone who follows that path must be willing to endure steep market costs and the hostile opposition that people like Higgins have experienced. Respondents' asserted dignitary harms thus do not rise to a compelling level. Indeed, this Court has countenanced far worse. *See, e.g., Snyder*, 562 U.S. at 454-56 (permitting outrageous and "particularly hurtful" speech).

The Commission seems to think it will eliminate dignitary harms through this and similar applications of BADA, but that ignores Higgins' dignitary interests. For the Commission to brand as discriminatory Higgins' core religious beliefs, compel him to stop creating his wedding designs, and ostracize him as a member of the community inflicts untold dignitary harm not only on him, but also on his fellow believers. *See Burwell v. Hobby Lobby Stores, Inc*., 134 S. Ct. 2751, 2785 (2014) (Kennedy, J., concurring) (explaining that "free exercise is essential in preserving the[] ... dignity" of religious adherents). People of faith endure extreme emotional turmoil when their government orders them to do something that they sincerely believe will be displeasing to the sovereign God of the universe.

Unlike the dignitary harm Smith and Jones raise, which results from a private actor's decision not to create expression, the government itself inflicts the dignitary harm Higgins must endure. *Cf. Obergefell*, 135 S. Ct. at 2596 (emphasizing that "the state itself" was interfering with the dignity of same-sex couples). Hence, the dignitary interests of Higgins and all others who share similar religious beliefs about marriage weigh strongly against applying BADA under these circumstances.

2. The State's Efforts to Advance Its Dignitary Interest Are Not Narrowly Tailored

The Commission's attempts to end dignitary harms by punishing business owners who serve all people but decline to express all messages is vastly underinclusive and thus not narrowly tailored. Substantial underinclusiveness "is alone enough to defeat" an asserted state interest. *Brown*, 564 U.S. at 802.

The majority finds that cake artists may decline requests for cakes with "designs or messages" that they consider objectionable. If the Commission applies that rule evenhandedly, that means Higgins or another cake artist may decline a same-sex couple's request for a wedding cake that bears written messages or specific designs. But allowing that would have at least as much of an effect on the couple's dignitary interests as what Respondents claim here. In fact, the dignitary harm asserted in that scenario would likely be greater because the couple would be forced to discuss the details of their desired custom cake before the cake designer could decline the request.

The state has also left the citizenry at large free to express various reasons why "same-sex marriage should not be condoned," *Obergefell*, 135 S. Ct. at 2607, and to engage in "hurtful speech" that "inflict[s] great pain," including virulent anti-gay epithets, *Snyder*, 562 U.S. at 461. Also, BADA permits "church[es], synagogue[s], mosque[s], [and] other place[s] that [are] principally used for religious purposes" to refuse same-sex couples seeking a location to marry or host a reception. Pet.App.93a.

By permitting all this speech and conduct that risks comparable dignitary harm to same-sex couples in both commercial and noncommercial contexts, BADA "is wildly underinclusive when judged against its asserted [dignity-based] justification." *Brown*, 564 U.S. at 802. As a result, this application of the statute cannot survive strict scrutiny. *See, e.g., Boos v. Barry*, 485 U.S. 312, 327 (1988) (explaining that the legislature's failure to "protect dignity" in similar contexts demonstrates that the law is not narrowly tailored); *Brown*, 564 U.S. at 801-02 (explaining that a law seeking to limit aggression in children by banning violent video games but failing to ban similar media that also creates aggression is substantially underinclusive); *Reed*, 135 S. Ct. at 2231-32 (explaining that a law forbidding the posting of some signs was "hopelessly underinclusive" in attempting to further the town's interests in "aesthetics" and "traffic safety" because the town allowed other signs to proliferate).

BADA also fails the narrow-tailoring requirement because less restrictive alternatives are available to achieve the state's interest. In particular, the Commission could interpret BADA to allow a professional who serves all people to decline requests to create specific artistic expression or other speech because of what it would communicate. Even if the Commission construed BADA that way, the statute would still prohibit refusals by any professional who categorically declines to work with a class of people. BADA would also apply to artists and other expressive professionals like Higgins when doing something other than creating speech or art. This narrowing construction thus would not exclude Higgins from BADA when, for example, he is selling premade items to the public. *See Hurley*, 515 U.S. at 580-81 (explaining that a state can compel access to a publicly

available benefit but not to speech). And finally, this reading of BADA would not affect the many professionals who do something other than design artistic expression or otherwise create speech for their clients.

The majority's conclusion that the exemption from BADA that Higgins and Avenue Q seek would open the floodgates to other people of faith seeking similar freedom is nothing more than an erroneous acceptance of a speculative and unsupported slippery slope argument. The U.S. Supreme Court has repeatedly rejected such arguments. *See, e.g., Gonzales*, 546 U.S. at 435-36 (rejecting the government's "slippery-slope" argument that "[i]f I make an exception for you, I'll have to make one for everybody, so no exceptions"); *Holt v. Hobbs*, 135 S. Ct. 853, 866 (2015) (same); *Hobby Lobby*, 134 S. Ct. at 2783 (rejecting the government's argument about "a flood of religious objections" because it "made no effort to substantiate [its] prediction"). Our colleagues have erred by "assum[ing] a plausible, less restrictive alternative would be ineffective." *Playboy*, 529 U.S. at 824.

Thus, the Commission's efforts to coerce and punish Higgins are neither necessary nor narrowly tailored.

Time and again, the U.S. Supreme Court has applied the First Amendment to pave the way for people with diverging views on core issues to live together. Our colleagues failed to do so in this case. Therefore, we dissent.

IN THE SUPREME COURT OF THE UNITED STATES
APPEAL NO. 2017-66

HENRY HIGGINS and AVENUE Q BAKERY, INC. **Petitioners (Appellants Below)** **v.** **THE BROADWAY CIVIL RIGHTS COMMISSION, GEORGES SMITH, AND ALBIN JONES** **Respondents (Appellees Below)**	**Direct Appeal from the Broadway Court of Appeals**

ORDER GRANTING CERTIORARI

The petition of Henry Higgins and Avenue Q Bakery, Inc. for an order of certiorari to the Broadway Court of Appeals is GRANTED. Oral argument shall occur on October 21, 2017, in Crawfordsville, Indiana, and be limited to the following issues:

(1) Whether the Broadway Civil Rights Commission's application of Broadway's public accommodations law to Henry Higgins and Avenue Q Bakery violated their First Amendment Free Speech rights.

(2) Whether the Broadway Civil Rights Commission's application of Broadway's public accommodations law to Henry Higgins and his business, Avenue Q Bakery, violated their First Amendment Free Exercise rights.

Petitioners shall open and close the argument.

FOR THE COURT
Oscar Hammerstein II
Oscar Hammerstein II, Clerk of Court