No. 16-111

In the Supreme Court of the United States

MASTERPIECE CAKESHOP, LTD., *et al.*,
Petitioners,

v.

COLORADO CIVIL RIGHTS COMMISSION, *et al.*,
Respondents.

On Writ of Certiorari to the Court of Appeals of Colorado

BRIEF OF *AMICUS CURIAE* SHERIF GIRGIS SUPPORTING PETITIONERS

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QUESTION PRESENTED

The Colorado Civil Rights Commission ruled that Jack Phillips, a cake artist, engaged in sexual orientation discrimination under the Colorado Anti-Discrimination Act when he declined to design and create a custom cake honoring a same-sex marriage because doing so conflicts with his sincerely held religious beliefs. The Colorado Court of Appeals found no violation of the Free Speech or Free Exercise Clauses because it deemed Phillips' speech to be mere conduct compelled by a neutral and generally applicable law.

The question presented is:

> Whether applying Colorado's public accommodations law to compel Phillips to create expression that violates his sincerely held religious beliefs about marriage violates the Free Speech or Free Exercise Clauses of the First Amendment.

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Sherif Girgis, J.D., Yale Law School (Ph.D. candidate, M.A., A.B., *summa cum laude*, Princeton University; B.Phil. (M.Phil.), University of Oxford) is a research scholar at The Witherspoon Institute, Inc., which is an independent research center in Princeton, New Jersey, dedicated to applying the fundamental principles of republican government to contemporary moral and political issues. He has published in law and peer-reviewed journals on marriage, religious liberty, dignitary harm, and related moral and jurisprudential issues. He is author of *Nervous Victors, Illiberal Measures: A Response to Douglas NeJaime and Reva Siegel,* 125 Yale L.J. F. 399 (2016). With Ryan T. Anderson, in counterpoint to John Corvino, he is co-author of *Debating Religious Liberty and Discrimination* (Oxford University Press, 2017), from which portions of this brief are drawn. He is also co-author of "Civil Rights and Liberties," *Cambridge Companion to Philosophy of Law* (Cambridge University Press, forthcoming), a chapter in *What Obergefell v. Hodges Should Have Said* (Jack Balkin, ed., Yale University Press, forthcoming), "What Is Marriage?" (*Harvard Journal of Law and Public Policy*,

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[1] This brief was prepared entirely by amicus and his counsel. The Witherspoon Institute, Inc. is contributing to the costs of this brief. No other person made any financial contribution to its preparation or submission. Counsel of record for petitioners and respondent Colorado Civil Rights Commission have filed consents to the filing of amicus curiae briefs, in support of either party or of neither party. Counsel of record for respondents Charlie Craig and David Mullins received timely notice of the intent to file this brief and have consented to its filing.

2011), and *What Is Marriage? Man and Woman: A Defense* (Encounter Books, 2012).

SUMMARY OF ARGUMENT

According to respondents, conscientious choices like Jack Phillips' are salvos in a culture war. A certain message resounds from them, whatever Jack Phillips might mean or say. Phillips' decision not to design a custom wedding cake conveys the idea that same-sex marriage is wrong. It therefore imposes "dignitary harm"—the harm of being told (even by polite refusals) that decisions central to your identity are wrong. In respondents' telling, this social effect alone explains why Phillips should be coerced even if his claims draw strict scrutiny, and even if he has done no material harm.

But in several cases that speak directly to this one, this Court has held that the state has no legitimate interest—much less a compelling one—in blunting negative reactions to moral or political ideas the state finds offensive or even demeaning to minorities. To allow the government to assert this justification for coercing religion or speech would cut against decades of First Amendment jurisprudence. In a pluralistic society, it would imperil a wide range of civil liberties. It would shrink the fruits of liberalism, of a dynamic society open to reform. And here using coercion to avoid the sending of offensive messages would be self-defeating. After all, a ruling against Phillips would tell him—with all the social authority of the Supreme Court of the United States—that choices central to *his* identity are wrong, indeed bigoted.

That would contradict the Court's observation in *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015), that Phillips' and others' beliefs about the nature of marriage have "decent and honorable religious or philosophical premises." Here that is confirmed by patterns in Phillips' business practices and the historical background of his convictions on marriage.

Such context matters under this Court's precedent. And it reveals a difference in kind between the social meaning of Phillips' conscientious choice, and the dignitary harms rightly disrupted by antidiscrimination laws (against, say, Jim Crow): namely, cultural assumptions that hamper a group's social, political, or economic mobility by disparaging the group's competence, character, interests, or proper place in society. *See infra* Part III.

But even if Phillips' refusal conveyed truly demeaning ideas, that wouldn't establish the constitutionality of compelling his speech in order to contradict the message that his refusal would have sent. In every case where this Court has touted antidiscrimination laws' dignitary benefits, those laws were coercing mere conduct: e.g., a restaurant's "no blacks allowed" policy. States were not applying those laws to interfere with expression, as Colorado has done here.

In fact, in the two cases where antidiscrimination laws *were* being applied to coerce expression, the Court granted the defendants' First Amendment claims—over the objection that their conduct would reinforce demeaning ideas about LGBT people. *See Boy Scouts v. Dale*, 530 U.S. 640, 659–61 (2000); *Hurley v. Irish–American Gay, Lesbian and Bisexual Group of*

Boston, Inc., 515 U.S. 557, 579 (1995). The Court did so precisely on the ground that governments may not interfere with someone's expression simply because they find his message harmful and demeaning. *See Hurley*, 515 U.S. at 579 (government may not "interfere with speech" to eradicate "biases" against LGBT people and "promot[e] an approved message or discourag[e] a favored one, however enlightened"); *see also Boy Scouts*, 530 U.S. at 661.

In strictly scrutinizing burdens on Phillips' First Amendment rights, then, this Court should not countenance as a legitimate public interest the goal of reducing the distress of being confronted with beliefs that Colorado deems offensive, harmful, or demeaning. As this Court has held, coercing otherwise protected expression to serve an "interest in protecting . . . dignity" would violate our law's "longstanding refusal to punish speech" on account of its "adverse emotional impact on the audience." *Boos v. Barry*, 485 U.S. 312, 322 (1988) (quoting *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55 (1988)).

ARGUMENT

I. This Court should not recognize a new public interest in shielding citizens from the distress of being confronted with moral or political ideas deemed offensive or demeaning.

a. This Court has repeatedly held that the state has no legitimate interest in reducing negative reactions to ideas it finds demeaning.

Respondents would have this Court conclude under strict scrutiny that Colorado has a legitimate—no, a *compelling*—interest in reducing citizens' distress at being confronted with moral or political ideas they find offensive. That holding would require drilling through decades of cases to shatter the "bedrock principle underlying the First Amendment, [which] is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989); *see also Snyder v. Phelps*, 562 U.S. 443, 458 (2011) (speech "cannot be restricted simply because it is upsetting or arouses contempt."). Indeed, in a case quite like this one—involving public accommodations protections for LGBT people—this Court went so far as to say that "the point of all speech protection . . . is to shield just those choices of content that in someone's eyes are misguided, or even hurtful." *Hurley*, 515 U.S. 557, 574 (1995).

Nor can states try to separate the offending idea from the reaction it evokes so as to isolate the latter for attack. As this Court held last Term eight-to-zero,

"[g]iving offense *is* a viewpoint." *Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017) (plurality) (emphasis added); *accord id.* at 1766 (Kennedy, J., concurring) (targeting offensive messages "is the essence of viewpoint discrimination"). In other words, "[t]he emotive impact of speech on its audience is not a 'secondary effect' unrelated to the content of the expression itself" but of a piece with it. *Johnson*, 491 U.S. at 412 (citing *Boos*, 485 U.S. at 321 (plurality opinion) and *Boos*, 485 U.S. at 334 (Brennan, J., concurring in part and concurring in judgment)). For this reason, as Justice Kennedy has warned, states "may not insulate a law from charges of viewpoint discrimination by tying censorship to the reaction of the speaker's audience." *Matal*, 137 S. Ct. at 1766 (Kennedy, J., concurring). And so our law protects expression of the vilest slurs, even when their delivery at a funeral is calculated to be so "hurtful" that the term "emotional distress" "fails to capture" the "anguish" of a bereaved father subjected to those slurs. *Snyder*, 562 U.S. at 456. It is hard to imagine a more direct repudiation of the idea that government can use coercion to reduce the anguish of encountering offensive or demeaning ideas.

Finally, it is no answer to say that some ideas do not merely cause anguish but impugn the dignity of others. This Court has dispatched that reply directly: allowing government to coercively pursue an "interest in protecting the dignity" of those on the receiving end of otherwise protected expression would violate our "longstanding refusal to punish speech" on account of its "adverse emotional impact on the audience." *Boos*, 485 U.S. at 322 (quoting *Hustler Magazine*, 485 U.S. at 55). That is why it "strikes at the heart of the First Amendment" to use regulations even to "encourag[e]

racial tolerance" or prevent any group—including long burdened minorities—from being "bombarded with demeaning messages." *Matal*, 137 S. Ct. at 1764. Such goals cannot count as "substantial" interests, let alone compelling. *Id.*

So Colorado may not, in defending punishment of "nonverbal expressive activity," cite audience reactions to ideas it deems offensive or demeaning to minorities. *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 385 (1992) (such conduct cannot be banned "because of the ideas it expresses"). Thus, pressed to justify its coercion of Phillips under First Amendment scrutiny, the Commission may not appeal to distress caused by ideas his conduct might convey, even if the Commission thinks those ideas insulting to LGBT people's dignity: "[D]isplaying the [Commission's] special hostility towards the particular biases thus singled out . . . . is precisely what the First Amendment forbids." *R.A.V.*, 505 U.S. at 396.

It is essential that society defend the equal dignity of all, sexual minorities included. Colorado remains free to teach that this duty requires recognizing same-sex relationships as marriages. That "officials may foster [this view] by persuasion and example is not in question. The problem is whether under our Constitution compulsion as here employed is a permissible means for its achievement." *Johnson*, 491 U.S. at 418 (citing *West Virginia v. Barnette*, 319 U.S. 624, 640 (1943)). "The way to [promote Colorado's view] is not to punish those who feel differently about these matters. It is to persuade them that they are wrong." *Id.* at 419.

b. Allowing states to curtail First Amendment rights in order to reduce distressed reactions to ideas that the majority finds offensive would impair civil liberties while making no meaningful difference to whether people might experience such distress.

In a pluralistic society, most religious activity and even a great deal of verbal expression will convey ideas offensive to some. Curtailing our liberties when they confront others with distressing ideas would require trimming the whole field of religious liberty and pure speech, not just that small corner of conscience claims centered on custom wedding services. On the other hand, trying to reduce offensive ideas by coercing custom wedding services but no *other* First Amendment conduct would make almost no net difference to the amount of ideological strife in society, ensuring that burdens on people like Phillips were entirely in vain.

Verbal speech can inflict the kind of distress the Commission would coerce Phillips to prevent. Yet even when verbal speech does so, our nation has a "profound . . . commitment" to protecting it. *Snyder*, 562 U.S. at 452 (quoting *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964)). How can the state have a profound interest in allowing distress when it flows from verbal speech, and a *compelling* interest in *quashing* distress when it flows from other and far milder forms of expression?

For example, we know someone in Phillips' shoes would have been free under the Constitution to tell a same-sex couple that God hated them and had sent the 9/11 attacks and IED explosions in Iraq to punish the

Nation on their account. *See id.* at 448. We know she would have been free to "issue[] a press release" ahead of the couple's wedding to make of it a "tumultuous media event" and "then appear[] at the church, approach[] as closely as [she] could without trespassing, and launch[] a malevolent verbal attack" on the very idea of same-sex weddings "at a time of acute emotional vulnerability." *Id.* at 463 (Alito, J., dissenting). We know a wedding-cake artist could have done all of this shielded by our Constitution's "profound . . . commitment" to open debate on public affairs. *Id.* at 452 (citation omitted).

But the Commission would claim a compelling interest in preventing the particular margin of distress caused by a cake-artist's demure refusal to serve a wedding out of fidelity to, say, her Muslim convictions about marriage being opposite-sex. *See, e.g.,* Who Oppose or Strongly Oppose Gay Marriage Who Are Muslim, PEW RESEARCH CENTER, http://www.pewforum.org/religious-landscape-study/religious-tradition/muslim/views-about-same-sex-marriage/opposestrongly-oppose/.

It isn't only extremist protesters and the occasional cake-artist that might see their rights eroded if governments can use coercion to reduce the anguish of encountering offensive ideas. In a diverse society, religious liberty will *always* subject others to ideas they might find offensive. Religious freedom includes nothing if not the rights to worship, proselytize, and convert—forms of conduct (and speech) that can express the conviction that outsiders are wrong. Perhaps not just wrong, but deluded about matters of cosmic importance around which they have ordered

their lives—even *damnably* wrong. This is true of mainstream denominations as well as minorities like the Westboro Baptists.

On the Catholic view, for instance, worship of the Eucharist ought to be the organizing principle of one's life. Catholic Church, *Catechism of the Catholic Church: Revised in Accordance with the Official Latin Text Promulgated by Pope John Paul II,* 2nd ed. (Vatican City: Libreria Editrice Vaticana, 1997), §§ 1324–25. For evangelical Protestants, making it so might entail idolatry, a violation of literally the first commandment. *See, e.g.*, Dan Corner, John 6:53 and the Catholic *Holy Eucharist*, EVANGELICAL OUTREACH, http://perma.cc/9UNW-4DG9 (calling worship of the Eucharist "faulty worship in the form of idolatry"). In a world full of conflicting faiths and denominations, religious freedom is the *ultimate* source of distressing contact with offensive ideas. Indeed, freedoms of speech and religion grew from the same vine:

> Long before James Madison argued that democracy logically entailed the freedom to criticize incumbent officeholders, the principal focus of arguments against censorship was the prohibition of heresy and blasphemy. Free speech and freedom of religion were not always in separate analytical silos.

Andrew Koppelman, "A Free Speech Response to the Gay Rights/Religious Liberty Conflict." 110 Nw. U. L. Rev. 1125, 1150 (2016). For these reasons, given that we never treat offensiveness or emotional distress as reasons to override core religious activity or verbal speech, allowing these very same factors to override Phillips' freedom would be both arbitrary and pointless.

Some advocates would reply that the real divide is between action and speech: actions do more harm than speech, the argument goes, so we override only freedoms of action. *See* John Corvino, "Reply to Anderson and Girgis," in CORVINO, ET AL., DEBATING RELIGIOUS LIBERTY AND DISCRIMINATION 226 (2017). But that is false. Some speech, too, is unprotected (e.g., incitement to violence). So everyone agrees the state should sometimes limit religion and verbal speech to curb *tangible* harms. The question is why our law should *further* limit religious liberty or artistic expression to quell emotional distress—given that our law refuses to limit other forms of speech on that basis *at all*. Why the double standard of counting offensiveness or distress even just a little against religion and artistic discretion but never against verbal speech?

Of course, Colorado would never ask this Court to whittle away at rights to worship or seek converts, or picket or protest, wherever their exercise would imply that others are sinning (or even damned). Since this Court certainly *won't* suppress these far more pervasive exercises of liberty, how much good would it do to stamp out only the negative reactions created by what legal scholar and passionate gay-rights advocate Andrew Koppelman calls the "handful" of cases like Phillips' "in a country of 300 million people"? *Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law*, 88 S. Cal. L. Rev. 619, 643 (2015). The reduction in public rancor would be slight, while the cost for each person coerced against conscience would be grave. So would damage to the integrity of the "bedrock principle" of First Amendment jurisprudence that "the government may not prohibit

the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Johnson,* 491 U.S. at 414.

There is little public good, and some incoherence or harm, in legally counting distress at contact with ideas the majority deems offensive or even demeaning.

c. Letting majorities ban conduct precisely for conveying ideas they find offensive would dampen pluralism, ossify political orthodoxies, and slow social reform.

It isn't blind tradition that sustains our "profound national commitment" to forbidding the government from taking direct aim at distressing ideas. *Snyder*, 562 U.S. at 452 (citation omitted). That commitment is essential for an open and dynamic society; distress at offensive ideas can lead to moral and social reform.

i. Our law has prized and guarded the ability of deeply upsetting exercises of religion and speech to enable moral and social reform.

It is the "proudest boast of our free speech jurisprudence . . . that we protect the freedom to express 'the thought that we hate.'" *Matal*, 137 S. Ct. at 1764 (quoting *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting)). Being confronted with the thought that we hate disturbs our dogmatism about the deepest questions. It prevents victories or defeats from ossifying into orthodoxies. That is why we give even offensive speech a wide berth "in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity . . . ." *Cohen v. California*, 403 U.S. 15, 24 (1971).

If ideological currents are allowed to run freely, we all enjoy a steadier flow of fresh ideas about morality, religion, and politics. Mainstream assumptions are challenged by countercurrents; no cultural tide becomes too strong to turn. This is why some of our greatest reforms first sprouted in the soil of civil society, long irrigated by religion. The greatest examples are the movements for abolition and civil rights. *See, e.g.,* Douglas Laycock, *Freedom of Speech That Is Both Religious and Political*, 29 U.C. Davis L. Rev. 793, 801–03 (1996).

To be sure, some offensive speech is socially worthless, but the socially valuable kind—the kind that spurs true reform—will always debut in social life as an offense to a majority. We protect it because a policy of silencing today's dissent will always mute the voice for tomorrow's reform. As Justice Kennedy has observed, regulation of expression is especially perilous where the "ideas or perspectives are ones a particular audience might think offensive, at least at first hearing. An initial reaction may prompt further reflection, leading to a more reasoned, more tolerant position." *Matal*, 137 S. Ct. at 1767 (concurrence).

But it isn't only free speech that promotes a "marketplace" of ideas, *R.A.V.*, 505 U.S. at 387 (citation omitted), for the "discovery and spread of political truth," *Boy Scouts*, 530 U.S. at 661 (internal quotation marks omitted) (citation omitted). Freedoms of conscience and religion also serve that market. They help furnish ideas traded on the intellectual market, and empower those hawking them. But to do so, these rights must be protected with an ideologically even hand. The state cannot play the crony capitalist with

ideas, giving stronger protections to those it finds congenial. As Justice Robert Jackson famously wrote—in a case that fittingly combined religion and free speech—it is a "fixed star in our constitutional constellation . . . that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . . ." *Barnette*, 319 U.S. at 642. So we threaten a long celebrated benefit of the First Amendment—political and social reform—by allowing government to act with the aim of relieving the sometimes deeply personal distress of unmuted moral disagreement.

ii. This Court has recognized that the distress associated with offensive ideas is a feature, not a defect, of a society open to reform.

This Court has recognized that the distress caused by the free exchange of rival moral and political ideas *magnifies* the benefits of that freedom. Free speech "may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Johnson*, 491 U.S. at 408–09 (citing *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949) (internal quotation marks omitted)). Justice Frankfurter celebrated the social value of "the freedom to speak foolishly and without moderation." *Baumgartner v. United States*, 322 U.S. 665, 674 (1944). It's also why this Court has expressed confidence that "verbal tumult, discord, and even offensive utterance" and "verbal cacophony" are signs not "of weakness but of strength." *Cohen*, 403 U.S. at 24–25.

The reason for this embrace of the intellectual fray is simple: societies are roused from dogmatism not simply by the detached observation that someone somewhere might disagree with them. More important is what Professor Andrew Koppelman, a longstanding advocate of progressive causes, calls "the open collision of moral views," which liberalism has long seen as a benefit:

> When John Stuart Mill's classic defense of free speech balances liberty against harm, Jeremy Waldron has observed, that balancing cannot count as harm the moral distress of having your most cherished views denounced, or of contemplating ways of life antithetical to your own. A core value of free speech is that it will and must induce such distress. Mill, and liberalism more generally, place great value on "*ethical confrontation*—the open clash between earnestly held ideals and opinions about the nature and basis of the good life." Moral distress, "far from being a legitimate ground for interference . . . is a positive and healthy sign that the processes of ethical confrontation that Mill called for are actually taking place."

"A Free Speech Response," at 1152 (quoting Jeremy Waldron, Mill and the Value of Moral Distress, in LIBERAL RIGHTS: COLLECTED PAPERS 1981–1991, at 115 (1993)).

In short, the distress of having your ideals challenged is a boon, even when it's also a bane. What the Commission sees as a legally cognizable harm of enforcing Phillips' First Amendment rights—the spread of distress—promotes reform. Counting that

distress against First Amendment claims would shelter majorities from the very confrontation that might force them to rethink and reform. Of course, distressing expression doesn't advance that goal every time. But in any given case, almost by definition, the majority is in no position to tell. *Cf. Matal,* 137 S. Ct. 1744 (Kennedy, J., concurring) ("A law that can be directed against speech found offensive to some portion of the public can be turned against minority and dissenting views to the detriment of all."). That is why this Court has refrained from allowing majorities to target the distress of hearing ideas they find even deeply offensive. It should do so still.

d. The goal of avoiding distressing ideas for the sake of dignity cuts both ways in this case.

Here as elsewhere, both sides could claim with equal force that a decision against them would stigmatize them. Indeed, this Court has expressly affirmed that dignity is at stake in religious belief and self-expression as well as sexual privacy, such that guarantees of free expression honor the "individual dignity . . . upon which our political system rests." *Cohen*, 403 U.S. at 24. In Justice Kennedy's words, religious believers' freedom to live by their convictions is "essential in preserving their own dignity and in striving for a self-definition shaped by their religious precepts." *Burwell v. Hobby Lobby*, 134 S. Ct. 2751, 2785 (2014) (Kennedy, J., concurring). That is no less true when believers step into the marketplace or the public square. *See id.* (discussing the right "to establish one's religious (or nonreligious) self-definition *in the*

political, civic, and economic life of our larger community") (emphasis added).

Grant, then, that declining to design a custom-wedding cake conveys to same-sex partners that intimacies they regard as central to their identity are wrong. What about denying Phillips' claims? Won't that tell him—and *all* traditional Muslims, Orthodox Jews, and Christians—that acting on beliefs central to his identity is wrong, benighted, even bigoted? But that is a message this Court has *expressly rejected*. *See Obergefell,* 135 S. Ct. at 2602 ("Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises . . . ."). In most cases, any side might feel stigmatized by rival decisions or policies, which also favors freedom over coercion on such matters.[2]

[2] Indeed, if a government is forced to choose between avoiding one offensive message by coercing the parties conveying it, and avoiding another offensive message without any coercion at all, the case law suggests it would have to take the non-coercive route—which here would require a ruling for Phillips. *See Johnson*, 491 U.S. at 418–19 (that "officials may foster [valuable messages] by persuasion and example is not in question. . . . The way to [do so] is not to punish those who feel differently [but . . . .] to persuade . . . ." *Id.* at 419 (citation omitted).

II. This Court has noted the intangible or dignitary benefits of coercing discriminatory *conduct*. But it has never approved of coercing *expression* so as to silence or contradict a speaker's allegedly bigoted message; twice it has done just the opposite.

In the absence of material harms, the Commission tries to justify coercing Phillips by appeal to what it considers the harmful social meaning of his conscientious decision. The Commission sees in Phillips' decision the kind of dignitary harm fought by the Civil Rights Act of 1964, which sought to "vindicate 'the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.'" *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250 (1964) (citation omitted).

But in every case where this Court has noted antidiscrimination laws' dignitary benefits, those laws were coercing mere *conduct*: for example, restaurants' "no blacks allowed" policy, *id.*; or a civic organization's "no women allowed" policy, *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625 (1984). *See also J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 141–42 (1994) (lamenting the dignitary harms of excluding women as such from juries). After all, as the Court noted in *Hurley*, antidiscrimination laws generally have not "target[ed] speech or discriminate[d] on the basis of its content." 515 U.S. at 572.

In other words, none of this Court's antidiscrimination cases has involved the coercion or compulsion of otherwise protected *speech or expression*. None has involved government efforts to prohibit or

compel expression in order to muffle or displace the speaker's messages, simply on the ground that they're offensive or even bigoted.

To be sure, the Jaycees in *Roberts v. U.S. Jaycees* did claim that forcing them to accept women would curtail their freedom of expressive association. However, this Court did *not* concede that point and then just find the burden on expressive association justified anyway (as such burdens can be, 468 U.S. at 623) by a compelling interest (e.g., fighting misogyny). Rather, the Court held that the Jaycees hadn't shown that the law imposed "any serious burden[] on [their] freedom of expressive association" in the first place. *Id.* at 626. For that reason, *Jaycees* offers no precedent for thinking that in this case, a genuine burden on Phillips' free speech rights could be justified in terms of a compelling interest in stopping the dignitary harm that Colorado sees simply in the message conveyed by Phillips' choice.

Indeed, in the two cases that *did* involve burdens on expression that were designed to achieve the dignitary benefits of fighting sexual-orientation discrimination, the Court rejected this rationale as illegitimate, and found First Amendment violations. In both cases, the Court noted that ruling otherwise would contradict its case law against punishing offensive messages *because of their offensiveness*. *See Boy Scouts*, 530 U.S. at 657–59 (forbidding New Jersey to coerce expressive activity that conveys "oppos[ition]" to "homosexual conduct"); *Hurley*, 515 U.S. at 578–79 (holding that expression may not be coerced under antidiscrimination laws, even if the goal is to reduce "biases" against LGBT people).

In short, this Court has never endorsed the use of antidiscrimination law to *coerce or compel expression so as to silence or contradict a speaker's message, simply on the ground that it's bigoted*. The Court has done just the opposite in the two cases where laws interfered with speech or expression. In both of those cases, in fact, the government sought to stymie what it saw as the dignitary harms of opposition to gay relationships. *See Boy Scouts*, 530 U.S. at 657-59 (barring New Jersey from burdening expressive activity that conveyed "oppos[ition]" to "homosexual conduct"); *Hurley*, 515 U.S. at 578–79 (barring Massachusetts from using antidiscrimination law to compel expression to reduce anti-LGBT "biases").

That is no surprise. In both cases, the Court was trying to square its approval of laws fighting dignitary harm with its rejection of laws meant to punish expressive conduct just because that conduct sends offensive messages. The apparent incongruity disappears when one sees that the cases touting the dignitary benefits of antidiscrimination law have all focused on the coercion of conduct, not expression.

III. Even if states may sometimes compel speech to fight intangible dignitary harms, there is a *difference in kind* between the social meaning of Phillips' conscientious decision in this case, and the social harms fought by laws whose dignitary benefits this Court has touted.

Suppose that despite the cases reviewed in Parts I and II, governments may indeed fight dignitary harm by compelling expression. Suppose they may fight Jim Crow-style "deprivation[s] of personal dignity" by

compelling expressive activities like custom cake design, and not only ordinary conduct (like restaurant-admission). *Heart of Atlanta Motel*, 379 U.S. at 250 (citation omitted). Even then, this Court's cases on dignitary harm—read in light of its cases against punishing offensive speech—would show that Colorado may not compel Phillips' speech. For doing so could not offer the *kind* of social effects at issue in cases like *Heart of Atlanta Motel*.

That case was about Jim Crow, which was about avoiding contact on socially equal terms with African Americans, by refusing them any service. This case is about denying requests for certain custom services—whoever comes in to place them—while avoiding contact with no one. It is not about refusals to serve sexual minorities, but about refusals to celebrate weddings or other activities or themes at odds with Phillips' faith. His choices may convey ideas that Colorado finds offensive, but they do not perpetuate the kind of humiliating assumptions that might impede social, economic, or political mobility. Affirming Phillips' expressive freedom here would not inflict the dignitary harm rightly targeted by the Civil Rights Act and decried in a number of this Court's opinions.

The point is not simply that Phillips' decision turned on conduct rather than status. The divide between his decision and Jim Crow-era policies is different and far deeper.

What sets Jim Crow-style discrimination apart is that it reflects and solidifies cultural assumptions that lock a group out of markets, income brackets, social tiers, and political power. In particular, this discrimination always rests on unfair assumptions

about a group's basic abilities, interests, character, or proper place in society. That is why bans on such discrimination naturally disrupt these humiliating assumptions—which then reduces the impulse to discriminate, and so on.

Put simply, antidiscrimination laws promote dignity by eroding those humiliating assumptions that also debilitate a group socially, politically, and economically. The dignitary harms at stake do *not* span the full range of demeaning ideas, *see supra* I.a., but only *cultural assumptions that* "reflect and reinforce" *barriers to a group's social, economic, and political mobility*. *J.E.B. v. Alabama* ex rel. *T.B.*, 511 U.S. at 141.

Those harms were surely at stake in Jim Crow-era actions and policies, which assumed that African Americans had baser interests and were variously incompetent, unreliable, and vicious. *See generally* 3 BRUCE ACKERMAN, WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION (2014). But above all, Jim Crow was openly premised on the cultural assumption that it was improper for African Americans to mingle with whites on equal terms. That assumption didn't simply lead to other barriers to social mobility; it *was* such a barrier.

No such dignitary harms are in the offing here because Phillips' convictions need not reinforce or rest on *any* assumptions about LGBT people's basic abilities, interests, character, or proper place in society. That is confirmed by the context and history that precedent makes relevant, and by this Court's own words in *Obergefell*. Context proves that what motivates Phillips is his Christian conviction on the nature of marriage. History proves that this conviction

could not possibly have stemmed from assumptions, good or bad, about LGBT people's basic competence or character—not least because it arose long before anyone had our modern concept of gay people as a class.

In each of these ways, Jim Crow could not be in sharper contrast—and not simply because Phillips' convictions are rooted in sincere faith. It doesn't matter if some had sincere religious grounds for thinking that, say, African Americans shouldn't marry whites. The point is that this idea itself—whatever its roots—*just is* one of the social norms that impedes mobility: it impedes a group's progress in every dimension, by holding that the group ought not to mix with others on equal terms. But whatever the status of Phillips' views on marriage, they clearly don't give effect to—or rest on—the idea that it's improper for LGBT people to mingle on the same plane with others. *See infra* III.b.

Thus we come to a difference in kind between the humiliation of being denied a seat at the table of public life and the distress of sitting near people who oppose conduct you prize. The first, rooted in harmful assumptions and ramifying into wider exclusions, must be avoided. The second, stemming from conflicting consciences, is unavoidable and even necessary to tolerate in any society open to reform. Somewhere behind the first, one will find unfair ideas about a group's basic competence, character or place in society. Behind the second are—at worst—false and offensive moral convictions that needn't themselves rest on unfair ideas about competence or character. The second our law forbids states to punish. *See supra* I.a. Whatever material harms we fight, the law brooks no

freestanding right not to be offended. We should not change course now.

a. In toppling barriers to social, political, and economic mobility, antidiscrimination law naturally disrupts related cultural norms—unfair assumptions about a group's basic abilities, character, interests, or place in society.

Recall that respondents, pressed to name an interest that might justify burdens on Phillips under strict scrutiny, point to the Civil Rights Act's goal of "vindicat[ing] 'the deprivation of personal dignity *that surely accompanies denials of equal access to public establishments*.'" *Heart of Atlanta Motel*, 379 U.S. at 250 (citation omitted) (emphasis added). Of course, those denials of equal access to public spaces merely gave effect to a quite general and explicit social norm about African Americans' proper place in society: that they should not mingle on the same plane with whites. That social norm *was* the "deprivation of personal dignity" fought by the Civil Rights Act. *Id.*

This reflects the pattern in other cases where this Court has recognized a law's dignitary benefits. Together with *Heart of Atlanta Motel*, these cases show that the dignitary harms rightly fought by legal coercion are those cultural norms that naturally ("surely," *id.*) flow from—and then fortify—*barriers to social, economic, and political mobility*. This specific reading of "dignitary" harm is needed for coherence. It helps reconcile this Court's approval of laws fighting dignitary harm with the Court's rejection of laws

meant to fight the pain of being confronted with offensive or demeaning ideas.

To be precise, the case law shows that when embracing the intangible, dignitary benefits of antidiscrimination laws, this Court has meant the disruption of cultural assumptions that (i) deprive a group of social, economic, or political mobility, by (ii) perpetuating unfair ideas about the group's abilities, interests, character, or proper place in society.

Thus, in *Jaycees*, 468 U.S. at 625, this Court spoke of harms to women's "individual dignity." It referred specifically to discrimination (i) that hampered "wide participation in political, economic, and cultural life" by perpetuating (ii) "archaic and overbroad assumptions" about women's "needs and capacities." *Id.* Indeed, the Court noted with approval the state's action to remove "*barriers to economic advancement and political and social integration* that have historically plagued certain disadvantaged groups . . . ." *Id.* at 626 (emphasis added). *Cf. United States v. Virginia*, 518 U.S. 515, 533 (1996) (renouncing "overbroad generalizations about the different talents, capacities, or preferences of" females).

Still another case focused on harms to "dignity" that centered on "discriminatory and *stereotypical presumptions* that *reflect and reinforce* patterns of historical discrimination" by "presum[ing] [a group] *unqualified*" for certain tasks. *J.E.B.*, 511 U.S. at 141–42 (emphases added). More to the point, the Court there distinguished a range of everyday "stereotypes" and "biases" from those that "reinforce the same stereotypes about a group's competence or predispositions that have been used to prevent them

from voting, participating on juries, pursuing their chosen professions, or otherwise contributing to civic life." *Id.* at 142 n.14; *see also Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring) (allegations of mismanagement and dishonesty implicate "the essential dignity and worth of every human being").

It's easy to see why attacks on a group's basic competence, character, interests, or proper place in society are the cultural assumptions naturally disrupted by antidiscrimination law. These assumptions don't simply offend or provoke; they keep people from climbing socially, economically, and politically. If people think ill of your abilities, character, or worth—if they assume you're incompetent, vicious, criminal, or beneath them socially—they'll be less likely to hire you, trust you, vote for you, or include you. They'll think it unwise, dangerous, or wrong to mingle with you on equal terms at all. You'll have a hard time exchanging freely, rising professionally, participating politically, or doing anything else that hangs on the cooperation of others. That's why antidiscrimination laws—which seek to remove the "barriers to economic advancement and political and social integration," *Jaycees*, 468 U.S. at 626—will in the process naturally disrupt harmful cultural assumptions about people's abilities, interests, character, and proper social role.

Whether otherwise protected First Amendment conduct contributes to such debilitating cultural assumptions turns on the message it conveys in its *particular* context and in light of history. That much is clear from this Court's precedent. Applying that precedent here will expose a difference in kind between

Phillips' conscientious decisions and the kinds of dignitary harm that coercive laws may cure.

b. Here context and history prove that Phillips' convictions don't rest on assumptions about any group's basic competence, character, or social role.

Unable to point to material harms, respondents argued below that applying Colorado's public accommodations law to Phillips would clear strict scrutiny because "uniform enforcement of antidiscrimination laws is the 'least restrictive means' of achieving the state's interest in preventing the social harms of discrimination," which "must be prohibited in all forms." App. Br. at 38.

That can't *possibly* suffice. If it did, every application of antidiscrimination laws would always clear the highest form of scrutiny. No such application could ever violate the First Amendment. And yet this Court has reached the opposite conclusion *twice*. *See Hurley*, 515 U.S. at 572–73 (while public accommodations laws don't "as a general matter" violate the First Amendment, they do when "applied in a peculiar way" that burdens speech); *see also Boy Scouts*, 530 U.S. at 657–58. In both cases, the government had found discrimination based on sexual orientation. Both cases involved public accommodations. The government in both cases aimed to reduce social harms. And yet its justifications failed, leading this Court to extend First Amendment protection to conduct sending a message of "oppos[ing] or disfavor[ing] homosexual conduct," *Boy Scouts*, 530 U.S. at 659, to say nothing of less pointed views about which bonds can be marital.

Put simply, *Hurley* and *Boy Scouts* stand for the proposition that when a government must justify burdens on core First Amendment conduct, it can't simply point to the generic benefits of fighting social harms through bans on sexual-orientation discrimination in public accommodations. But pointing to such generic benefits is all the respondents did below, and all they could do. That alone is fatal to their case.

Nonetheless, it is worth spelling out why this Court was right to reject such generic justifications the first two times around. The short answer is this: Under First Amendment strict scrutiny, courts must consider the *marginal* harms and benefits of granting or denying a *particular kind* of claim. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006). In doing so, courts must look to the context and history of the underlying beliefs. *Id.*; *J.E.B.*, 511 U.S. at 142. And sometimes that particularized, contextual inquiry proves that the only effect of imposing a burden on First Amendment rights is not some material benefit—or even disruption of the sorts of humiliating assumptions about minorities that impede mobility—but only an allaying of people's distress at being confronted with offensive ideas. And that is not a permissible public goal, much less a compelling one.

Such is the case here.

i. Under strict scrutiny, courts must look to context to measure the *marginal* costs of granting Phillips' *particular* kind of claim.

"'[C]ontext matters' in applying the compelling interest test." *Gonzales*, 546 U.S. at 431 (quoting *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003)). The test requires "this Court [to] look[] beyond broadly formulated interests justifying the general applicability of government mandates and scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants." *Id.* Thus, when this Court in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), "permitted an exemption for Amish children from a compulsory school attendance law," it did not allow Wisconsin to gesture vaguely toward an interest in "education, but held that . . . [the Court] must searchingly examine" the asserted interests. *Gonzales*, 546 U.S. at 431. And the *Yoder* Court did not fret the costs of later exempting a hypothetical believer who might object to all public education. Rather, it focused on the actual costs "that would flow from recognizing *the claimed Amish exemption*." *Id.* (citing *Yoder*) (internal quotation marks omitted). Finally, in an earlier case brought by an employee who objected to working on Saturdays, the Court set aside merely hypothetical cases where "an employee's religious convictions [might] serve to make him a nonproductive member of society." *Id.* (citation omitted).

Here, then, strict scrutiny cannot turn on whether it's possible to imagine a set of religious convictions that might conflict with the most generic antidiscrimination goals. The question is what the

marginal benefits and costs might be of requiring Phillips and others similarly motivated to design custom artistic products for same-sex weddings.

Consider first the kind of convictions Phillips seeks to exercise. If *Gonzales* emphasized that the *Yoder* Court looked to the effects of honoring Amish and not more sweeping convictions, this Court should consider how Phillips' actual convictions inform his decisions. On the one hand, he sells any off-the-shelf product for any occasion; and he creates custom cakes for all, including LGBT patrons. JA164. On the other hand, he declines custom orders—regardless of the identity of those placing them—if they would conflict with his Christian faith. So he won't design cakes that carry Halloween themes, celebrate divorce, or contain vulgar or hateful messages. JA158–59, 164–66.

In short, context tells us that Phillips is acting simply on his Christian convictions, among them that marriage is permanent and opposite-sex. So his beliefs don't bar serving LGBT people, only celebrating same-sex weddings. And even with respect to marriage, his convictions don't single out LGBT-related issues but exclude any deviation from the idea of marriage as a permanent union of man and woman.

As for the actual (and not merely hypothetical) costs of protecting convictions of this kind, namely, traditional-religious convictions on marriage: Professor Andrew Koppelman bluntly remarks that "there have been no claims of a right to simply refuse to deal with gay people." *Gay Rights*, 88 S. Cal. L. Rev. at 643. Indeed, even denials of services for same-sex weddings like Phillips' have only occurred a "handful" of times in a "country of 300 million." *Id.* (citations omitted). More

sweeping still is the observation of legal scholar Douglas Laycock, who has long advocated same-sex marriage and closely studied and written on religious liberty throughout his career:

> I know of no American religious group that teaches discrimination against gays as such, and few judges would be persuaded of the sincerity of such a claim. The religious liberty issue with respect to gays and lesbians is about directly facilitating the marriage, as with wedding services and marital counseling.

Doug Laycock, *What Arizona SB1062 Actually Said*, THE WASH. POST (Feb. 27, 2014), http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/02/27/guest-post-from-prof-doug-laycock-what-arizona-sb1062-actually-said/. Elsewhere Professor Laycock provides still more context:

> The religion that generates most of these claims in the U.S. proclaims its obligation to hate the sin but love the sinner. . . . They have no desire to deprive same-sex couples of food, or plumbers, or most other goods and services in the economy. But some of them are scrupulous about their own conduct in facilitating what they believe to be the sexual immorality in that relationship.

Douglas Laycock, Civil Unions: Making Religious Exemptions Work, UNIV. OF CHI. LAW SCH. FACULTY BLOG (May 10, 2009, 2:41 PM), http://uchicagolaw.typepad.com/faculty/2009/05/civil-unions-making-religious-exemptions-work.html. Thus, precedent requires the Court in *this* case to set aside purely hypothetical scenarios in which a claimant

objects to serving LGBT people—of which gay rights scholars have found no real-life instances. The only claims at issue here involve religious objections to helping celebrate same-sex relationships as marriages.

ii. The only marginal "benefit" of rejecting Phillips' argument is constitutionally illegitimate: to suppress the distress of being confronted with offensive ideas.

Thus, the compelling-interest inquiry here comes to this: What are the *non-material costs* of allowing a *handful* of providers of custom services—in a country of 300 million—to decline *custom* requests for *weddings* to which they have objections rooted in their *convictions about the nature of marriage*?

As respondents' emphasis on "dignitary harm" makes clear, the non-material costs they allege come down to the message sent by Phillips' convictions. For the purpose of discerning the effects of that message, history matters. *See J.E.B.*, 511 U.S. at 142 (striking jurors "simply because of their gender" sends a "message" that "denigrates the dignity" of a woman because it "*reinvokes a history of exclusion from political participation*") (emphasis added); *id.* &n.14 (distinguishing everyday "stereotypes" from those that "reinforce the same stereotypes about a group's competence . . . *that have been used*" historically to exclude them in other ways) (emphasis added).

And on that historical question, this Court has already offered an answer: The history of traditional views of marriage reveals "decent and honorable religious or philosophical premises" about the nature of

marriage itself, not about the worth or abilities or proper place in society of LGBT people. *Obergefell*, 135 S. Ct. at 2602.

Indeed, history demonstrates that religious traditions didn't base their vision of marriage on hostility toward the LGBT community. To be sure, the Christian tradition—like the Muslim, Jewish and, for that matter, Stoic and Platonic and Aristotelian traditions—has taught the distinct value of the "one-flesh" union that only a man and woman can form. Genesis 2:24. *See generally, e.g.*, John Finnis, *Law, Morality, and Sexual Orientation*, 69 Notre Dame L. Rev. 1049 (1994); *see also* SHERIF GIRGIS, ET AL., WHAT IS MARRIAGE? MAN AND WOMAN: A DEFENSE 49 (2012). But these traditions all did so centuries before anyone had our concept of gay identity. They could not have been motivated by animus toward a class of people of which no one even had a concept. One might as well suppose that Moses had contempt for soccer moms.

But under this Court's precedent, again, history matters for discerning social meaning. *J.E.B.*, 511 U.S. at 142. Here it shows that the social meaning of—the message conjured by—conduct like Phillips' is simply this: My religion teaches that marriage is inherently conjugal—a one-flesh union that only a man and woman can form. And again, history also proves that this message couldn't in turn have been driven by assumptions about gay people—fair or not, debilitating or neutral.

That lesson of history is confirmed by the present-day context of Phillips' First Amendment claims and those of other conservative wedding-service professionals. In every case, *see supra* III.b.i., they

focus only on *marriage*, and thus have nothing like the sweep or shape of Jim Crow practices, which really were motivated by demeaning assumptions about the abilities, interests, competence, character, and proper social role of African Americans. *See generally* ACKERMAN, WE THE PEOPLE.

Respondents might answer that while it was possible for earlier generations to hold views like Phillips' without animus, it isn't possible for us in the 21st-century, now that the social norm has shifted toward a more flexible, marriage-as-simple-companionship model. But this Court has held that the growing marginalization of traditional religious views on homosexuality only *strengthens* their claim to constitutional protection. *See Boy Scouts,* 530 U.S. at 660 ("Indeed, it appears that homosexuality has gained greater societal acceptance . . . . But this is scarcely an argument for denying First Amendment protection to those who refuse to accept these views . . . . [T]he fact that an idea may be embraced and advocated by increasing numbers of people is all the more reason to protect the First Amendment rights of those who wish to voice a different view.").

Thus, precedent requires a contextual and historically informed look at the *particular* class of claims at issue, and that careful inquiry favors Phillips: the First Amendment conduct this decision would protect does not "reflect and reinforce" the kinds of dignitary harms rightly fought by antidiscrimination laws. *J.E.B.* 511 U.S. at 141.

This leaves only one basis for allowing the state to coerce Phillips: that a majority finds his convictions offensive or hurtful or biased. And again, our law could

not be clearer: expression "cannot be restricted simply because it is upsetting or arouses contempt . . . . Indeed, 'the point of all speech protection . . . is to shield just those choices of content that in someone's eyes are misguided, or even hurtful.'" *Snyder*, 562 U.S. at 458 (citations omitted). To justify coercion on the ground that the messages conveyed by Phillips' decision are "too harmful to be tolerated" would be a "startling and dangerous" proposition. *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 791–92 (2011) (citations omitted).

It is equally "fatal" if Colorado's goal is to regulate the expression of ideas *not* as "an end in itself, but [as] a means to produce speakers free of the biases, whose expressive conduct would be at least neutral toward the particular classes . . . ." *Hurley*, 515 U.S. at 578–79. *See also Boos*, 485 U.S. at 322 (looking askance at the goal of protecting listeners' "dignity" against hateful messages); *R.A.V.*, 505 U.S. at 396 (coercively pursuing the goal of suppressing "particular biases" in society "is precisely what the First Amendment forbids").

CONCLUSION

Once this Court applies strict scrutiny to Colorado's burden on Jack Phillips' First Amendment rights, the rest of its analysis is dictated by decades of precedent. States may use antidiscrimination law to fight unfair assumptions about a group's abilities, interests, or proper place in society, *Jaycees*, 468 U.S. at 625, insofar as these impede social, economic, or political mobility, *id.* at 626, but the Court has never sanctioned their doing so by coercing or compelling expression so as to silence or contradict a speaker's message, simply on the ground that it's bigoted.

And even if states *could* coerce expression to erode those particular demeaning assumptions that deprive groups of social mobility, this case involves no such assumptions. That is confirmed by the particularized historical and contextual inquiry required under strict scrutiny, *see Gonzales*, 546 U.S. at 431: History shows that religious convictions of the kind at issue are not rooted in assumptions about gay people. Context proves that protecting them would shield just a handful of decisions on custom wedding services in a nation of some 300 million.

All that remains is the Commission's conclusion that Phillips' convictions are offensive or even demeaning. But the case law is clear: States have no legitimate interest in fighting offensive ideas. *Johnson,* 491 U.S. at 414. They have no legitimate interest in fighting the distress *caused* by those ideas. *Id.* at 412. They even lack the authority to fight ideas the majority finds demeaning or biased toward minority groups. *See Matal*, 137 S. Ct. at 1764. They lack that authority even in the context of public accommodations laws, and even when those laws are designed to protect sexual minorities. *See Boy Scouts*, 530 U.S. at 657–58; *Hurley*, 515 U.S. at 572–73.

Respondents' dignitary-harm argument asks this Court to hold that majorities may punish expressive conduct whose message they abhor, just because they abhor it. Against this plea, our First Amendment jurisprudence speaks with one confident voice.

Respectfully submitted,

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