No. 21-476

IN THE

Supreme Court of the United States

303 CREATIVE LLC, *ET AL.*, *Petitioners*,

v.

AUBREY ELENIS, *ET AL.*, *Respondents*.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

Brief *Amicus Curiae* of Public Advocate of the United States, Conservative Legal Defense and Education Fund, California Constitutional Rights Foundation, One Nation Under God Foundation, Restoring Liberty Action Committee, U.S. Constitutional Rights Legal Defense Fund, and Center for Judeo-Christian Morality in Support of Petitioners

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MISCELLANEOUS

INTEREST OF THE *AMICI CURIAE*[1]

Public Advocate of the United States is a nonprofit social welfare organization, exempt from federal income tax under Internal Revenue Code ("IRC") section 501(c)(4). Conservative Legal Defense and Education Fund, California Constitutional Rights Foundation, One Nation Under God Foundation, U.S. Constitutional Rights Legal Defense Fund, and Center for Judeo-Christian Morality are nonprofit educational and legal organizations, exempt from federal income tax under IRC section 501(c)(3). Restoring Liberty Action Committee is an educational organization. *Amici* organizations were established, *inter alia*, for the purpose of participating in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law. Some of these *amici* also filed *amicus curiae* briefs both in the Colorado Supreme Court and in this Court on the merits, in *Masterpiece Cakeshop v. Colorado Civil Rights Commission,* 138 S. Ct. 1719 (2018):

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[1] It is hereby certified that counsel for Petitioners and for Respondents have consented to the filing of this brief; that counsel of record for all parties received notice of the intention to file this brief at least 10 days prior to its filing; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

- *Masterpiece Cakeshop v. Craig and Mullins*, Brief *Amicus Curiae* of U.S. Justice Foundation, *et al.*, Colorado Supreme Court (October 23, 2015).
- *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, Brief *Amicus Curiae* of Public Advocate of the United States, *et al.*, U.S. Supreme Court (Sept. 7, 2017).

Additionally, some of these *amici* filed *amicus curiae* briefs in several cases involving related issues:

- *Obergefell v. Hodges*, Brief *Amicus Curiae* of Public Advocate of the United States, *et al.*, U.S. Supreme Court, Nos. 14-556, 14-562, 14-571, and 14-574 (April 3, 2015);
- *Stormans v. Wiesman*, Brief *Amicus Curiae* of Public Advocate of the United States, *et al.*, U.S. Supreme Court, No. 15-862 (February 5, 2016);
- *NIFLA v. Becerra*, Brief *Amicus Curiae* of U.S. Justice Foundation, *et al.*, U.S. Supreme Court (Petition Stage), No. 16-1140 (Apr. 20, 2017);
- *NIFLA v. Becerra*, Brief *Amicus Curiae* of Conservative Legal Defense and Education Fund, *et al.*, U.S. Supreme Court (Merits Stage), No. 16-1140 (Jan. 16, 2018);
- *Klein v. Oregon Bureau of Labor and Industries*, Brief *Amicus Curiae* of Public Advocate of the United States, *et al.*, U.S. Supreme Court, No. 18-547 (Nov. 26, 2018); and
- *Coral Ridge Ministries Media v. Amazon & Southern Poverty Law Center*, Brief *Amicus Curiae* of Public Advocate of the United States, *et al.*, Eleventh Circuit, No. 19-14125 (Feb. 6, 2020).

STATEMENT OF THE CASE

Lorie Smith is owner of a small business, 303 Creative LLC, which offers website design services. Ms. Smith wants to expand her business to design custom websites for couples planning weddings. She has written and wants to post a message on her website that says that she will work only for opposite-sex couples having traditional weddings, and not create such websites for same-sex couples. Appellants filed suit to enjoin Colorado from bringing an enforcement action based on its marketing plan violating Colorado's public accommodations statute — the Colorado Anti-Discrimination Act ("CADA"). As the petition explains, CADA both "*requires* her to create websites celebrating same-sex marriage and *bans* her explanatory statement" as to what type of weddings would be served. *See* Petition for Certiorari ("Pet. Cert.") at 2.

Appellants brought claims based on the Free Speech, Free Press, and Free Exercise clauses of the First Amendment, and the Equal Protection and Due Process clauses of the Fourteenth Amendment. In 2017, the district court quickly dismissed claims against CADA's "Accommodation Clause" which prevents businesses from refusing service, for lack of standing. Colo. Rev. Stat. § 24-34-601(2)(a). It allowed challenges to the "Communications Clause" which prevents businesses from announcing they "discriminate" to proceed. *See id.* Then, in 2019, the district court ruled against the challenges to that Communication Clause. *See 303 Creative v. Elenis*, 405 F. Supp. 3d 907 (D. Colo. 2019).

On July 26, 2021, a split panel of the Tenth Circuit affirmed the ruling of the lower court. *303 Creative v. Elenis*, 6 F.4th 1160 (10th Cir. 2021) (hereinafter *"303 Creative*"), with Chief Judge Tymkovich dissenting. On September 24, 2021, Petitioners filed this petition for certiorari.

SUMMARY OF ARGUMENT

The issues presented by Petitioners were limited to protecting the First Amendment rights of "artists" and the proper application of *Employment Division v. Smith* to this case. These *amici* agree that *Smith* was improperly applied — because the circuit court never considered, as required by *Smith*, whether the Colorado Anti-Discrimination Act ("CADA") "prohibit[ed] conduct that the State is free to regulate." Properly understood, Free Speech and Free Exercise protections protect not just artists, but rather all Americans, and Colorado has no authority to regulate such conduct.

The circuit court's handling of the Free Speech claims was remarkable. The court concluded that enforcement of the Colorado law could present a substantial risk of "excising certain ideas or viewpoints from the public dialogue," but that was permissible because "eliminating such ideas is CADA's very purpose." General assertions of prior discrimination against homosexuals authorizes Colorado to currently discriminate against Christians in business. The handling of the Free Exercise claims was no better — limited to a misreading of *Smith*, and expressing confidence that CADA enforcement was no longer

biased, as had been found by this Court in *Masterpiece Cakeshop*. *See* Section I, *infra*.

Historically, the doctrine of Public Accommodation was limited to narrow class of businesses in public callings — not all businesses open to the public. The regulation of the operation of private businesses by the state is a characteristic of Fascism. *See* Section II, *infra*. By text, history, and tradition, the Free Exercise Clause does not assert a principle of toleration, but imposes an outer limit on the jurisdiction and the power of government to intercede on the sphere of "religion" — a rule which was violated by CADA. *See* Section III, *infra*. This Court has not yet considered the threshold question presented by public accommodation cases — whether any government has any power to enact laws such as CADA. *See* Section IV, *infra*. These *amici* urge the Court to grant *certiorari* and do so here.

ARGUMENT

I. THE TENTH CIRCUIT SANCTIONED THE DESTRUCTION OF THE FREE SPEECH AND FREE EXERCISE CONSTITUTIONAL PROTECTIONS OF CHRISTIAN BUSINESSES, IN SERVICE TO A POWERFUL LGBTQ POLITICAL LOBBY.

A. Free Speech

After resolving standing concerns favorably to Appellants, the circuit court opinion made a series of

interim rulings which seemed to require a decision in favor Appellants:

- "creation of wedding websites is **pure speech**." *303 Creative* at 1176 (emphasis added).
- a marriage "is itself often a particularly **expressive event**." *Id*. (emphasis added).
- "Appellants' **own speech** is implicated even where their services are requested by a third-party." *Id*. at 1177 (emphasis added).
- "Nor does a profit motive transform Appellants' speech into 'commercial conduct.'" *Id*.
- "Because the Accommodation Clause **compels speech** in this case, it also works as a **content-based** restriction.... CADA's purpose and history also demonstrate how the statute is a content-based restriction." *Id*. at 1178 (emphasis added).
- "[T]here is more than a '**substantial risk of excising certain ideas** or viewpoints from the public dialogue.'" *Id*. (emphasis added) (citation omitted). This end is appropriate because "**[e]liminating such ideas is CADA's very purpose**." *Id*. (emphasis added).

Surely these findings could have been expected to lay the foundation for a win for the Appellants. However, the court observed that: "CADA is intended to remedy a long and invidious history of discrimination based on sexual orientation." *Id*. The only benefit Appellants obtained from this early

analysis was that the court applied "strict scrutiny," but found that the government met that burden rather easily. First, Colorado "has a compelling interest in protecting both the dignity interests of members of marginalized groups and their material interests in accessing the commercial marketplace." *Id.* The court concluded that while the Accommodation Clause "is not narrowly tailored to preventing dignitary harms ... [it] is, however, narrowly tailored to Colorado's interest in ensuring 'equal access to publicly available goods and services.'" *Id.* at 1179. "Excepting Appellants from the Accommodation Clause would necessarily relegate LGBT consumers to an inferior market because Appellants' *unique* services are, by definition, unavailable elsewhere." *Id.* at 1180. The court explained: "[t]he product at issue is not merely 'custom-made wedding websites,' but rather 'custom-made wedding websites of the same quality and nature as those made by Appellants.'" *Id.*

This is a truly remarkable analysis for any court to make. Because there allegedly exists a "marginalized group" of homosexuals which at some point had been subject to "invidious discrimination" by others, as a result, — almost as if a form of sex-based affirmative action — the speech rights of all Christian business owners must be sacrificed. If the same-sex complainants are unable to compel the Christian Appellants to serve their same-sex "wedding," they would be deprived of services of that one Christian vendor — which, by definition, only that Christian Appellant could provide. Perhaps the court believed that two marginalized groups are better than one.

Every known free speech principle is thereby thrown out the window: pure speech can be compelled; content and viewpoint discrimination is permissible; and the risk of excising ideas from how Americans think, act, and speak is a mere casualty of war against purported hate. Of course, the panel made clear that its real purpose was not to give options to same-sex couples — for, as it states, "**[e]liminating such ideas is CADA's very purpose**." Finding Colorado's purpose of "eliminating" ideas to be legitimate is quite consistent with the world George Orwell described, as used by Chief Judge Tymkovich to open his dissent:

> If liberty means anything at all, it means the right to tell people what they do not want to hear. [*Id.* at 1190 (Tymkovich, C.J., dissenting).]

B. Free Exercise Clause.

Having demonstrated no respect for the First Amendment's guarantee of "free speech," the court then went on to disregard Appellants' Free Exercise claim as well. Finding that CADA is a "neutral law of general applicability," the court invoked *Employment Division v. Smith*, 494 U.S. 872 (1990), to conclude CADA is constitutional. The court never asked the threshold question in *Smith*: whether the "otherwise valid law prohibit[ed] conduct that the State is free to regulate." *Smith* at 879. The use of mind-altering drugs has traditionally been in the sphere of behavior that the state "is free to regulate." However, the historic, common law rule has supported the right of all businesses — except for a narrow category such as

innkeepers required to rent rooms — to refuse service based on their own standards. *See* discussion of Public Accommodations antecedents in section II, *infra*. The 1964 Civil Rights Act slightly expanded those said to be in the "innkeeper" category to include restaurants and theaters, but the desire to grant special rights to homosexuals has now transformed certain states of the union into what can reasonably be called near "fascist states" where the private means of production are brought under full government management and control. The Colorado law goes well beyond the 1964 law. Rather than a law of "public accommodation," it is better understood to be a law of "public (*i.e.,* government) control."

The circuit court was willing to undermine the free speech and the free exercise rights of Christians in order to serve a powerful interest group at odds with Biblical morality. As a result, what may once have been a marginalized group has become empowered to marginalize Christians by driving them out of the businesses world, and perhaps soon the professions. Many will not be content until Christians assume the status of anti-communists in Eastern Europe during the Cold War, who were viewed as fit only to serve in common laborer positions.

II. THE COLORADO PUBLIC ACCOMMODATIONS STATUTE ASSERTS CONTROL OVER PRIVATE BEHAVIOR, GIVING SPECIAL RIGHTS TO POLITICALLY POWERFUL CLASSES.

Petitioners challenged Colorado's so-called "public accommodations" statute, which states in pertinent part:

> It is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of ... sexual orientation ..., the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a **place of public accommodation** or, directly or indirectly, to publish, circulate, issue, display, post, or mail any written, electronic, or printed communication, notice, or advertisement that indicates that the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation will be refused, withheld from, or denied an individual or that an individual's patronage or presence at a place of public accommodation is unwelcome, objectionable, unacceptable, or undesirable because of ... sexual orientation.... [Colo. Rev. Stat. § 24-34-601(2)(a) (emphasis added).]

Radical activists have a history of using Colorado's laws and the Colorado Civil Rights Commission to

target and punish Christian businesses who do not support homosexuality. After Appellants filed to enjoin enforcement, but well before Lorie Smith's company even began offering wedding websites, she received a request for a website to promote a same-sex wedding. This effort by some to provoke a controversy is reminiscent of how Masterpiece Cakeshop, a bakery which makes wedding cakes, and its owner, Jack Phillips, were targeted. There, a customer made a request to participate in a same-sex wedding which forced Phillips to decline. This anti-Christian bias has not been limited to those demanding services, but this court found that it extends to those in powerful governmental roles in enforcing state law. *See Masterpiece Cakeshop v. Colo. Civ. Rts. Comm'n*, 138 S. Ct. 1719, 1729 (2018) ("The Civil Rights Commission's treatment of his case has some elements of a clear and impermissible hostility toward the sincere religious beliefs that motivated his objection."). Even after this Court's *Masterpiece* decision, Phillips is still being targeted for declining to make a custom gender-transition-celebration cake because of his beliefs. *See Scardina v. Masterpiece Cakeshop*, No. 19CV32214 (Colo. Dist. Ct. June 15, 2021).

In truth, the notion of declaring all businesses (and all individuals) to be places of public accommodation has become in vogue in certain states, enacted, *inter alia*, to cater to the politically powerful or politically favored, yet such actions are not within the power of government. Despite repeated claims, such laws have neither common law nor federal antecedent. Such laws place government bureaucrats and courts in operational charge of businesses, imposing the state's

morality on every business owner, while still (nominally) allowing private ownership of the "means of production." Thus, it is best understood as extreme interventionism — a step on the road to Fascism. Consider how the Colorado Public Accommodation law accords with the description of Fascism offered by scholar Sheldon Richman, former editor of *The Freeman*:

> As an economic system, fascism is SOCIALISM with a capitalist veneer.... Where socialism sought totalitarian control of a society's economic processes through direct state operation of the means of production, fascism sought that **control indirectly, through domination of nominally private owners**. Where socialism nationalized property explicitly, fascism did so implicitly, by **requiring owners to use their property in the "national interest"** — that is, as the autocratic authority conceived it.... [Sheldon Richman, "Fascism," Library of Economics and Liberty (emphasis added).]

In its essence, the Colorado law confiscates from individuals and businesses the right to determine with whom they will do business and on what terms. They smack of the type of control that Benito Mussolini described in his 1928 autobiography:

> The citizen in the Fascist State is no longer a selfish individual who has the anti-social right of rebelling against any law of the Collectivity. **The Fascist State** with its corporative

> conception puts men and their possibilities into productive work and **interprets for them the duties they have to fulfill**. [B. Mussolini, My Autobiography (1928) cited in Sheldon Richman, *supra* (emphasis added).]

Although relied on by the Tenth Circuit (*303 Creative* at 1176-78), *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995), provides no support for CADA. In *Hurley*, Justice Souter asserted that modern public accommodation laws have a "venerable history" (*id.* at 571), stretching back to the common law rule requiring an innkeeper to serve all travelers that come his way unless he had "good reason" not to. *See* III W. Blackstone, Commentaries on the Laws of England, Ch. 9, Sec. 6 (1768). But that venerable history applied only in what was termed "a public calling, such as an innkeeper or public carrier." John E.H. Sherry, The Laws of Innkeepers at 45 (Cornell Univ. Press: 1993) (citation omitted). Indeed, only those few professions were "obliged to serve without discrimination all who sought service, whereas proprietors or purely private enterprises were under no such obligation, the latter enjoying an absolute power to serve whom they pleased." *Id.*

Once public accommodation laws seek to control businesses outside those few "public callings," and once they expand to force complicity with Biblically banned practices, they cease to be part of that "venerable history."

Even Title II of the 1964 Civil Rights Act is narrowly limited in its application generally to hotels, restaurants, movie theaters, and stadiums (42 U.S.C. § 2000a(b)) and its grounds for discrimination were strictly limited to "race, color, religion, or national origin" (42 U.S.C. § 2000a(a)). Every effort in Congress to broaden the "protected classes" to include "sexual orientation" has thus far failed.

George Mason Law Professor David Bernstein has captured the essence of the threat to our liberties:

> **Intolerant activists are determined to impose their moralistic views on all Americans**, regardless of the consequences for civil liberties. These zealots are politically well organized and are a dominant force in one of the two major political parties. They have already achieved many legislative victories, especially at the local level, where they often wield disproportionate power**. Courts have often acquiesced to their agenda, even when it conflicts directly with constitutional provisions protecting civil liberties**. Until the power of these militants is checked, the First Amendment's protection of freedom of speech and freedom of religion will be in constant danger. [David E. Bernstein, You Can't Say That: The Growing Threat to Civil Liberties from Antidiscrimination Laws (Cato Institute: 2003) at 1 (emphasis added).]

III. THE FREE EXERCISE CLAUSE IS A LIMIT ON THE POWER OF GOVERNMENT, NOT JUST ANOTHER FACTOR TO BE CONSIDERED.

The court of appeals appeared to believed that the application of the First Amendment's Free Exercise Clause to this case was limited to considering whether the rule of *Employment Division v. Smith* was followed and whether the religious bias found by this Court in *Masterpiece Cakeshop* again had contaminated the enforcement process. *See 303 Creative* at 1183-88. Even in applying *Smith*, the court made no effort to determine, as Justice Scalia's opinion required, whether CADA "prohibit[ed] conduct that the State is free to regulate." *Smith* at 879. The court certainly made no effort to consider and apply the Free Exercise text, history, and tradition. Had it done so, the court should have recognized that Colorado had no authority whatsoever to enact CADA's challenged provisions. It should have recognized that the Free Exercise Clause is not discretionary or waivable. It was rooted not in the Enlightenment and notions of tolerance of religion, but rather in the recognition of the existence of two separate and distinct jurisdictions — one civil and one ecclesiastical — a principle recognized as early as the late Middle Ages and widely understood by the time of the Protestant Reformation. *See generally* Robert Louis Wilken, Liberty in the Things of God (Yale Univ. Press: 2019). In seeking to compel behavior belonging to the realm of religion, Colorado exceeded its authority.

In ancient Israel, the jurisdictional division between the authority of the state and the authority of the church was well established in Holy Writ. *See, e.g.,* I Samuel 13 (King Saul was admonished by the Prophet Samuel for offering a religious sacrifice); II Chronicles 19:11 (Jehu counseled King Jehoshaphat: "And, behold, Amariah the chief priest is over you in all matters of the Lord; and Zebadiah the son of Ishmael, the ruler of the house of Judah, for all the king's matters: also the Levites shall be officers before you. Deal courageously, and the Lord shall be with the good."); II Chronicles 26 (King Uzziah was admonished by Azariah the priest for trespassing in the temple to burn incense, and judged with leprosy). Violations of the jurisdictional division between the authority of the state and the authority of the church were punished in other ancient kingdoms. *See, e.g.*, Daniel 3:10-18 (King Nebuchadnezzar exceeded his authority by ordering that his image be worshiped, and then tried to punish Daniel, Shadrach, Meshach, and Abednego); Daniel 6 (King Darius exceeded his authority to order Daniel not to pray for 30 days).

Additionally, the jurisdictional division between the authority of the state and the authority of the church was well established in the New Testament. Matthew 28:19-20 (Great Commission); Mark 12:17 ("And Jesus answering said unto them, Render to Caesar the things that are Caesar's, and to God the things that are God's. And they marvelled at him."). In an 1877 speech entitled, "The History of Freedom in Antiquity," Lord Acton cited the words of Jesus in Mark 12:17 as both: (i) imposing the first limits on the

powers of the state, and (ii) birthing of the freedom of individuals:

> ... when Christ said: "Render unto Caesar the things that are Caesar's, and unto God the things that are God's" ... **gave to the civil power**, under the protection of **conscience,** a sacredness it had never enjoyed, and **bounds it had never acknowledged**; and they were the repudiation of absolutism and the **inauguration of freedom**. For our Lord not only delivered the precept, but created the force to execute it.... [Lord Acton, The History of Freedom in Antiquity: An Address Delivered to the Members of the Bridgnorth Institute, Acton Institute (Feb. 26, 1877) (emphasis added).]

The history of the early church in the New Testament also confirms the authority of individuals to resist orders of the state that exceed the state's jurisdiction. *See generally* Acts 4:19 ("Whether it be right in the sight of God to hearken unto you more than unto God, judge ye."); Acts 5:29 ("Then Peter and the other apostles answered and said, We ought to obey God rather than men.").

Based on these Biblical principles, no government has any authority of the sort Colorado presumed to have in enacting CADA, demanding that Coloradans sacrifice their religious liberties in service to an unbiblical religious ceremony such as same-sex marriage. These jurisdictional principles were recognized, embodied, and protected in the First

Amendment's Free Exercise Clause. The issue is not whether Colorado would or should allow Christians to have an exception to a general rule demanding they act in service to a cause they disdain based on religious liberty on some theory of toleration. Rather, under First Principles as recognized in and protected by the First Amendment, Colorado simply has no authority whatsoever to enact such law. Thus, such a law is a nullity. *See Marbury v. Madison*, 5 U.S. 137, 174, 176 (1803) ("all laws which are repugnant to the Constitution, are null and void."). This Court has a duty to grant certiorari and rule consistent with that bedrock principle.

The forerunner of the Free Exercise Clause, the 1776 Virginia Statute of Religious Liberties, clearly separated the civil from the religious jurisdictions. Those duties "which we owe to our creator, and the manner of discharging [them] can be directed only by reason and conviction," were expressly defined to constitute "religion." Those duties owed to the state are enforceable by "Force" or "Violence." Professor A.E. Dick Howard explained the development of the Virginia Declaration of Rights in his Commentaries on the Constitution of Virginia:

> George Mason's **original draft** stated ... "that all Men should enjoy the fullest **Toleration** in the Exercise of Religion according to the Dictates of Conscience...." [citation omitted.] The emphasis on toleration ... could be taken to mean only a **limited form of religious liberty**: toleration of dissenters in a state where there was an established church.

> James Madison thought that stronger language was needed and drafted a substitute declaring that "all men are equally entitled to the full and free exercise" of religion... Madison's draft, **substituting the language of entitlement for toleration** sounded more of a **natural right** than did Mason's version. [A.E. Dick Howard, Commentaries on the Constitution of Virginia (Univ. Press of Virginia: 1974) at 290 (emphasis added).]

The final text of section 16 of the Virginia Declaration of Rights, as adopted by Virginia Constitutional Convention (June 12, 1776), as modified by James Madison, clearly recognized this jurisdictional division:

> That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by **reason and conviction**, not by **force or violence**; and therefore all men are equally **entitled** to the **free exercise of religion**, according to the dictates of **conscience**.... [Emphasis added.]

Professor Robert Louis Wilken also explains that religious freedom is more robust than mere religious toleration:

> Toleration is forbearance of that which is not approved, a political policy of restraint toward those whose beliefs and practices are objectionable.... [R]eligious freedom, or **liberty of conscience**, [is] a **natural right** that

> belongs to all human beings, **not an accommodation** granted by ruling authorities. [R. L. Wilken, *supra*, at 5 (emphasis added).]

Less than a month later, on July 4, 1776, the Declaration of Independence reaffirmed these Biblical truths (July 4, 1776):

> We hold these Truths to be self-evident, that all Men are created equal, that they are **endowed by their Creator** with certain unalienable Rights, that among these are Life, **Liberty, and the Pursuit of Happiness** — That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed.... [Emphasis added.]

James Madison's "Memorial and Remonstrance Against Religious Assessments" (June 20, 1785) reiterated the jurisdictional limitation on the state, explaining that the realm of religion is "wholly exempt" from the authority of the state:

> Because we hold it for a fundamental and undeniable truth, "that **Religion** or **the duty which we owe to our Creator and the manner of discharging it**, can be directed only by **reason and conviction**, not by **force or violence**." **The Religion then of every man must be left to the conviction and conscience of every man**; and it is the right of every man to exercise it as these may

> dictate. This right is in its nature an **unalienable right**. It is unalienable, because **the opinions of men**, depending only on the evidence contemplated by their own minds **cannot follow the dictates of other men**: It is unalienable also, because what is here a right towards men, is a **duty towards the Creator**. It is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him. This duty is **precedent**, both in order of time and in degree of obligation, **to the claims of Civil Society**.... **We maintain therefore that in matters of Religion, no mans right is abridged by the institution of Civil Society and that Religion is wholly exempt from its cognizance**. True it is, that no other rule exists, by which any question which may divide a Society, can be ultimately determined, but the will of the majority; but it is also true that the majority may trespass on the rights of the minority. [Emphasis added.]

Thomas Jefferson's "Virginia Statute for Establishing Religious Freedom" (Jan. 16, 1786) embraced the same distinction:

> Whereas, **Almighty God hath created the mind free**; that all attempts to influence it by **temporal punishments or burthens**, or by **civil incapacitations** tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the holy author of our religion, who being Lord, both of body and

> mind yet chose not to propagate it by coercions on either, as was in his Almighty power to do, that the **impious presumption of legislators and rulers, civil as well as ecclesiastical,** who, being themselves but **fallible and uninspired men** have assumed dominion over the faith of others, **setting up their own opinions and modes of thinking as the only true and infallible, and as such endeavouring to impose them on others,** hath established and maintained false religions over the greatest part of the world and through all time...; that **... to suffer the civil magistrate to intrude his powers into the field of opinion and to restrain the profession or propagation of principles on supposition of their ill tendency is a dangerous fallacy** which at once destroys all religious liberty because he being of course judge of that tendency will make his opinions the rule of judgment and approve or condemn the sentiments of others only as they shall square with or differ from his own...; and finally, that Truth is great, and will prevail if left to herself, that she is the proper and sufficient antagonist to error, and has nothing to fear from the conflict, unless by human interposition disarmed of her natural weapons free argument and debate, errors ceasing to be dangerous when it is permitted freely to contradict them.... [Emphasis added.]

Embodying these principles, the First Amendment to the U.S. Constitution, ratified in 1791, provides:

> 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. [Emphasis added.]

In his opinion for the Court in *Heller*, Justice Scalia set out the rule by which constitutional provisions are to be understood:

> The very enumeration of the right takes out of the hands of government — even the Third Branch of Government — the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all. **Constitutional rights are enshrined with the scope they were understood to have when the people adopted them**, whether or not future legislatures or (yes) even future judges think that scope too broad. [*District of Columbia v. Heller*, 554 U.S. 570, 634-35 (2008) (bold added).]

The circuit court found it unremarkable that the CADA was enacted for the purpose of "excising" and "eliminating" Biblical "ideas or viewpoints from the public dialogue..." *303 Creative* at 1178 (citation omitted). Such a remarkable finding should demonstrate to this Court that the Madisonian and

Jeffersonian principles that provide the foundation of Free Exercise rights were savaged by CADA and the Tenth Circuit. Although the Colorado legislature may believe that its so-called "public accommodation" law is good policy, that preference cannot override the constitutionally recognized religious liberties of Coloradans who refuse to bow down to the government to serve and facilitate a perversion of the marriage union.

Although some may believe that anything short of demonstrating hostility to Christianity constitutes an establishment of religion, that was not the way that it was intended. As Joseph Story explained:

> it is the especial duty of government to foster, and encourage [Christianity] among all the citizens and subjects. This is a point wholly distinct from that of the right of private judgment in matters of religion, and of the freedom of public worship according to the dictates of one's conscience. [J. Story, Commentaries on the Constitution of the U.S. at sec. 1865 (1833).]

This Court should grant certiorari to reassure Americans currently subject to coercive "public accommodations" laws that Rousseau's vision, embodied in the Declaration of the Rights of Man and Citizen, that natural rights may be limited by law according to the "general will" — those principles which undergirded the violent French Revolution — does not govern here. Rather, as John Locke explained, the American system was designed to

preserve man's freedoms to "which he was entitled, not by the state, but by nature" and ultimately by our Creator God. *See* Herbert W. Titus, "Christian Roots in American Constitutional Law" (1978).

IV. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE IMPORTANT QUESTIONS NOT PREVIOUSLY DECIDED.

The threat to the Christian businesswoman in this case is part of a nationwide political, LGBTQ-led, relentless and well-funded campaign to use government power to coerce individuals and businesses to facilitate, participate in, and celebrate same-sex marriage. And it is part of an effort to destroy the livelihood of those individuals and businesses who stand against the secular tide. Although the *Hurley* case mentioned a State's power to protect a group that "is the target of discrimination" (*Hurley* at 572), another question entirely arises when the group that had been discriminated against becomes the aggressor.

There are many indications that the LGBTQ forces are not oppressed, but rather politically and economically powerful, and in the ascendancy, even in the judiciary:

- They have defeated state constitutional provisions of a large number of states defining marriage as between a woman and a man, not by persuading voters in those states, but by convincing a majority of this Court that the

Constitution speaks to the matter. *See Obergefell v. Hodges*, 576 U.S. 644 (2015).

- They changed the Civil Rights Act passed by Congress in 1964, not by amending the law in Congress, but by convincing this Court that the law should be reimagined to conform to modern "values." *See Bostock v. Clayton Co.*, 140 S. Ct. 1731 (2020).
- Several countries have had openly "LGBT politicians" serve as their prime ministers. *See* A. Merelli, "The LGBT political glass ceiling is cracking wide open," Quartz (June 20, 2018).

And, thus far, LGBTQ forces often have prevailed in their campaign to manipulate various state "public accommodation" and "human rights" laws like CADA to force all individuals and businesses that oppose same-sex marriage — not just "artists" — to participate by providing goods and services for those ceremonies.

On June 29, 2016, in a similar type of case involving abortifacients, this Court (then with eight Justices) denied a petition for certiorari to review the case of a Christian pharmacist who was ordered by Washington State officials to carry abortifacients. A dissent filed by Justice Alito, joined by Chief Justice Roberts and Justice Thomas, began with these words: "This case is an ominous sign." It continued:

> There are strong reasons to doubt whether the regulations were adopted for — or that they actually serve — any legitimate purpose. And

> there is much evidence that **the impetus for the adoption of the regulations was hostility to** pharmacists whose **religious beliefs** regarding abortion and contraception are out of step with prevailing opinion in the State. Yet the Ninth Circuit held that the regulations do not violate the First Amendment.... If this is a sign of how religious liberty claims will be treated in the years ahead, **those who value religious freedom have cause for great concern**. [*Stormans v. Weisman*, 136 S. Ct. 2433 (2016) (Alito, J., dissenting from denial of certiorari) (emphasis added).]

The circumstances presented in this case undermine the same principles, and the Court should grant the petition in this case in order to check this use of state powers to purge Bible-believing Christians from the business world.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be granted — not just to address the rights of artists — but to address the threshold question of whether any government has the authority to enact such coercive laws in the first place.

Respectfully submitted,

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