NO. 21-476

IN THE

Supreme Court of the United States

303 CREATIVE LLC, A LIMITED LIABILITY COMPANY; LORIE SMITH,

Petitioners,

v.

AUBREY ELENIS; CHARLES GARCIA; AJAY MENON; MIGUEL RENE ELIAS; RICHARD LEWIS; KENDRA ANDERSON; SERGIO CORDOVA; JESSICA POCOCK; PHIL WEISER,

Respondents.

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

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QUESTION PRESENTED

Whether applying a public-accommodation law to compel an artist to speak or stay silent violates the Free Speech Clause of the First Amendment.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE

Petitioner 303 Creative LLC is a single-member Colorado limited-liability company owned by Petitioner Lorie Smith, a Colorado citizen. 303 Creative has no stock, and no parent or publicly held companies have any ownership interest in it.

Respondents are Aubrey Elenis, in her official capacity as Director of the Colorado Civil Rights Division; Sergio Raudel Cordova, Charles Garcia, Richard Lee Lewis, Jr., Ajay Menon, Cherylin Peniston, and Jeremy Ross, in their official capacities as members of the Colorado Civil Rights Commission; and Phil Weiser, in his official capacity as Attorney General for the State of Colorado.

LIST OF ALL PROCEEDINGS

U.S. Court of Appeals for the Tenth Circuit, No. 19-1413, *303 Creative LLC* v. *Elenis*, 6 F.4th 1160, judgment entered July 26, 2021, mandate issued August 17, 2021, reprinted at Pet.App.1a–103a.

U.S. District Court for District of Colorado, No. 16-CV-02372-MSK-CBS, *303 Creative LLC* v. *Elenis*, 404 F. Supp. 3d 907, judgment entered September 26, 2019, reprinted at Pet.App.104a–13a.

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STATEMENT OF JURISDICTION

The Tenth Circuit entered judgment on July 26, 2021. This Court has jurisdiction under 28 U.S.C. 1254(1) and exercised that jurisdiction by granting the petition on February 22, 2022.

PERTINENT CONSTITUTIONAL PROVISIONS AND STATUTES

The First Amendment to the United States Constitution provides, in relevant part: "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." U.S. Const. amend. I.

The Fourteenth Amendment to the United States Constitution provides, in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV.

Relevant portions of the Colorado Anti-Discrimination Act appear at Pet.App.171a–72a.

INTRODUCTION

This case asks whether governments may use public-accommodation laws to compel artists to speak or stay silent when they enter the marketplace. To answer that question "yes" would be unprecedented. No official "can prescribe what shall be orthodox … or force citizens to confess by word or act their faith therein." *W. Va. State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 642 (1943). Rather, the First Amendment gives "the decision as to what views shall be voiced largely into the hands of each of us, 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). Yet these principles are under assault as officials misuse public-accommodation laws, forcing artists who serve everyone to speak government-sanctioned messages or remain silent.

Petitioner Lorie Smith is a graphic artist and website designer who has the right to choose what messages her works convey. In a world with many voices, Smith left a large company to start her design studio, 303 Creative, so she could promote causes close to her heart. Since creating custom designs for her own wedding, Smith has wanted to expand her portfolio to celebrate weddings and express what she believes is the beauty of God's design for marriage.

But Colorado denies her that right. Smith lives in a state where government officials and private parties have relentlessly plied the State's public-accommodation law, CADA (the Colorado Anti-Discrimination Act), to compel speech the government favors and silence speech the government dislikes. These officials insist that if Smith designs and creates

messages celebrating her understanding of God's plan for marriage, then CADA requires Smith to also imagine, design, and create art—including custom wedding websites—that celebrate a message about marriage contradicting her religious convictions.

In a remarkable decision below, the Tenth Circuit acknowledged that Smith's websites and designs are pure speech, and that CADA compels her to speak contrary to conscience. But the Tenth Circuit overrode Smith's right to speak her own message. Using a novel, artists-are-monopolists theory, the lower court found a compelling interest for Colorado to force Smith to speak in content- and viewpoint-based ways because she is the only source of the wedding websites she designs. The more unique the artist's speech, the greater the government's interest to compel it. This Court has never allowed the government to deploy such power, prompting Chief Judge Timothy Tymkovich to label the ruling "staggering" in scope and "unprecedented" in history. Pet.App.51a, 80a.

CADA's application to Smith violates the First Amendment. Forcing artists like painters, photographers, writers, graphic designers, and musicians to speak messages that violate their deeply held beliefs fails to comport with the First Amendment's promise of "individual dignity and choice." *Cohen*, 403 U.S. at 24. As this Court unanimously held over 25 years ago, the government may not use public-accommodation laws to compel speakers to endorse certain messages and eschew others. *Hurley* v. *Irish–Am. Gay, Lesbian and Bisexual Grp. of Bos.*, 515 U.S. 557, 578–81 (1995). *Hurley* demonstrates how governments can prevent discriminatory conduct while guaranteeing that artists like Smith retain the right to speak messages of their choosing.

The First Amendment's free-speech promise advances pluralism, protects other civil liberties, and promotes the civility that allows people with diverse views to live together. A capable and free citizenry depends on this promise and must reject government-backed ideological conformity. The court of appeals should be reversed.

STATEMENT OF THE CASE

A. Lorie Smith and 303 Creative

Lorie Smith is a graphic artist, website designer, and sole owner of 303 Creative, her custom-design studio. Pet.App.181a. Through 303 Creative, Smith offers many creative talents to the public, including website and graphic design in concert with branding, marketing strategy, and social-media management. *Ibid.* Colorado agrees that all Smith's graphic and website designs "are expressive in nature, as they contain images, words, symbols, and other modes of expression" that Smith uses "to communicate a particular message." *Ibid.*

Smith is also Christian, and her religious beliefs—along with those of other Abrahamic faiths—teach that marriage is only between one man and one woman. For Smith, the marital relationship mirrors Christ's relationship to the Church and fulfills the complementary nature of God's first institution. Smith believes that her creative abilities are a gift that must be used in ways that glorify and honor God. Pet.App.180a.

Although Smith developed her design talents at a large company, she wanted more freedom to speak and promote issues she cares about—advancing small businesses, helping people with disabilities, and

assisting veterans and church missions. See Pet.App.180a–81a. She founded 303 Creative to pursue this dream and communicate ideas through original, customized messages. Pet.App.182a–83a. Smith maintains final editorial control over her expression so that each message is consistent with the beliefs that inspire and guide every aspect of her life. Pet.App.183a.

Smith decides which commissions to accept based on what the message is, not who is requesting it. Colorado agrees that Smith will work with clients regardless of race, creed, sexual orientation, or gender and strives to serve them with honesty and transparency. Pet.App.183a–84a. She has designed graphics and created websites for religious and non-religious groups advocating for causes that align with her beliefs, no matter the client's identity. Pet.App.185a. The question is always what message will be expressed. If a client who identifies as gay asked her to design graphics for his animal rescue shelter or to promote an organization serving children with disabilities, Smith would happily do so. See Pet.App.184a.

But Smith will decline any request—no matter who makes it—to create content that contradicts the truths of the Bible, demeans or disparages someone, promotes atheism or gambling, endorses the taking of unborn life, incites violence, or promotes a concept of marriage that is not solely the union of one man and one woman. Pet.App.184a. Accordingly, Smith's standard "Contract for Services" memorializes her right only to create messages or promote events consistent with her beliefs. *Ibid.*

B. Smith's desire to celebrate what her faith teaches about marriage

Smith established 303 Creative to do more than earn a living. She wants to create and convey messages that are consistent with her beliefs. Pet.App.185a. She was particularly excited to expand her portfolio to create content and websites to celebrate the special union of marriage. Pet.App.186a. Creating custom wedding content and websites for clients would provide Smith opportunities to support her faith's view of God's design for marriage. Pet.App.186a–87a. Every one of Smith's wedding websites will not only express messages about the beauty and eternal commitment of the couple, see Pet.App.187a, but will also express approval of the couple's marriage, Pet.App.20a.

Smith has designed wedding websites that illustrate what she desires to create. *E.g.*, J.A.51–72. One uses Bible passages that express God's plan for marriage, such as Jesus' words in the Gospel of Matthew, explaining that a man and woman shall leave their parents "and they shall become one flesh" such that they are no longer two but one. J.A.53. These wedding websites will use text, graphic arts, and videos to celebrate each couple's "unique love story," Pet.App.187a, focusing on how they met, their relationship, their families, and their future, among other things. Anyone viewing these custom websites will know that they are Smith's original artwork because they will say "Designed by 303Creative.com." *Ibid.*

Smith has also designed a 303 Creative website page announcing her wedding portfolio, Pet.App.187a, though she cannot yet share that message. Colorado forbids it on pain of investigation, fines, and re-education, Pet.App.189a. The page describes Smith's belief that God is calling her "to explain His true story about marriage, and to use the talents and business He gave me to publicly proclaim and celebrate His design for marriage as a life-long union between one man and one woman." Pet.App.188a.

The page also explains why Smith cannot create custom websites celebrating other marriage views: "Doing that would compromise my Christian witness and tell a story about marriage that contradicts God's true story of marriage – the very story He is calling me to promote." Pet.App.189a. Smith believes this explanation will enable her to be forthright about her beliefs, avoid surprise, and guard clients from uncomfortable moments. Despite Colorado barring Smith from publicizing her wedding services, she has already received at least one request for a same-sex-wedding website. J.A.30–31.

C. Colorado authoritatively interprets CADA to compel and silence certain messages about marriage.

As relevant here, CADA has two key components. Under the Accommodation Clause, 303 Creative is a "public accommodation," Pet.App.171a, that may not "directly or indirectly" refuse "because of disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry the full and equal enjoyment of" 303's "services," Colo. Rev. Stat. 24-34-601(2)(a); Pet.App.171a–72a.

CADA's Publication Clause separately makes it unlawful to publish any communication "that indicates that … services" will be declined "or that an individual's patronage or presence … is unwelcome, objectionable, unacceptable, or undesirable because of" someone's protected status. Colo. Rev. Stat. 24-34-601(2)(a); Pet.App.172a.

The Colorado Civil Rights Commission and its investigative arm, the Civil Rights Division, enforce CADA. Pet.App.175a–76a. Anyone can file complaints with the Division, including each named Respondent. Pet.App.174a–75a. The Division investigates; the Commission adjudicates. Pet.App.175a–76a. Individuals can also file state-court lawsuits. Pet.App.174a. CADA penalizes violators with fines up to $500, cease-and-desist orders, and burdensome reporting and re-education conditions. Pet.App.175a, 177a.

Colorado's Commission actively enforces its law using 30 full-time employees and a $3.5 million budget.[1] And because there is no discretion to decline an investigation, Colorado confirmed in the district court that it *will* investigate Smith if someone files a complaint against her. Pls.' Mot. Summ. J. at 18, No. 1:16-cv-02372 (D. Colo. Jan. 22, 2020).

Colorado uses CADA to regulate those who, like Smith, believe that marriage is a sacred relationship between one man and one woman. Most familiar to this Court, Colorado used CADA against cake artist Jack Phillips, describing his faith as "despicable" rhetoric and comparing his invocation of his religious beliefs "to defenses of slavery and the Holocaust."

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[1] COLO. C.R. DIV., COLO. C.R. COMM'N, *Annual Report Fiscal Year 2019-2020* at 18, https://perma.cc/YQB7-FXC5.

Masterpiece Cakeshop, Ltd. v. *Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1729 (2018). After years of investigation, Colorado required Phillips to undergo re-education training yet allowed three other bakeries to decline requests to design custom cakes with religious messages critical of same-sex marriage. *Id*. at 1730.

Shortly thereafter, Colorado filed new charges against Phillips for not creating a custom cake that celebrated a gender transition, a request made hours after this Court announced it would hear his first case. J.A.315–21. Phillips is still appealing a Colorado state-court verdict in a CADA lawsuit brought by the transition-cake requestor. *Scardina* v. *Masterpiece Cakeshop Inc.*, No. 19CV32214 (Colo Dist. Ct. June 15, 2021). In all, he has spent the last ten years in state and federal courts.

Colorado now accuses Smith of seeking court "permission to discriminate against same-sex couples," Defs.' Resp. to Pls.' Mot. for Prelim. Inj. at 2, No. 16-cv-02372 (D. Colo. Jan. 22, 2020), and "using religion to perpetuate discrimination," J.A.190. And at least 19 states have adopted Colorado's views and are now using the decision below to argue that officials may use public-accommodation laws to compel artists to speak in violation of their conscience. Mass.Amici.Br. 20, 22, *Carpenter* v. *James*, No. 22-75 (2nd Cir. May 16, 2022).

D. Proceedings below

Given Colorado's treatment of similar religious speakers, Smith filed suit and moved for a preliminary injunction. Colorado moved to dismiss while telling the district court that CADA forbids Smith from speaking consistently with her beliefs.

The district court held both motions and instructed Smith to file for summary judgment, which she did based on stipulated facts. Pet.App.173a–93a. The district court dismissed Smith's Accommodation Clause claim on standing grounds. Pet.App.168a–70a. Then, after this Court decided *Masterpiece*, the court granted summary judgment to Colorado on Smith's Publication Clause claim. Pet.App.113a. By the time this Court hears oral argument, it will have been more than *six years* since Smith filed her lawsuit. She will never be able to create for the weddings that occurred during those years.

On appeal, the Tenth Circuit concluded that Smith had standing to challenge both Clauses under *SBA List* v. *Driehaus*, 573 U.S. 149, 159 (2014), since "Colorado's strenuous assertion that it has a compelling interest in enforcing CADA indicates that enforcement is anything but speculative." Pet.App.17a; accord, *e.g.*, CA10 Appellee.Br.3, 50–57 (declaring illegal Smith's proposed statement about how her faith guides her beliefs about marriage and intention to only create messages consistent with those beliefs).

The Tenth Circuit next held that Smith's wedding websites are "pure speech," and "the result of the Accommodation Clause is that [Smith is] forced to create custom websites [she] otherwise would not." Pet.App.20a, 23a. And "[b]ecause the Accommodation Clause compels speech in this case, it also works as a content-based restriction" that creates a "substantial risk of excising certain ideas or viewpoints from the public dialogue;" indeed, "[e]liminating such ideas is CADA's very purpose." Pet.App.23a–24a (cleaned up). As CADA compels and restricts speech based on content and viewpoint, the court rightly applied strict scrutiny. *Ibid.*

The panel majority then astonishingly held that CADA met this arduous test because Colorado had a compelling interest in ensuring access to Smith's "*unique* services [which] are, by definition, unavailable elsewhere"—while admitting that "LGBT consumers may be able to obtain wedding-website design services from other businesses." Pet.App.28a. The majority held that "for the same reason" Smith's custom websites are speech, they are "inherently not fungible," so the government may compel her to create them, *ibid.*, even though hundreds of other website-design companies operate in Denver alone, Pet.App.190a. The court also rejected Smith's Publication Clause challenge, holding that her statement of beliefs expressed an intent to do what "the Accommodation Clause forbids" and what "the First Amendment does not protect." Pet.App.28a, 34a.

Chief Judge Tymkovich's dissent recognized the majority's strict-scrutiny analysis was "remarkable," "novel," "staggering" in scope, and "unprecedented." Pet.App.51a, 80a. "No case has ever gone so far." Pet.App.51a. He agreed with the majority that CADA compelled speech, regulated speech based on content and viewpoint, and triggered strict scrutiny. He concluded that CADA flunked this test because "ensuring access to a *particular* person's unique, artistic product … is *not* a compelling state interest." Pet.App.77a. Further, he reasoned, "there are reasonable, practicable alternatives Colorado could implement to ensure market access while better protecting speech." Pet.App.78a. "Taken to its logical end," he concluded, "the government could regulate the messages communicated by *all* artists." Pet.App.80a.

SUMMARY OF THE ARGUMENT

It is bedrock law that the First Amendment protects an artist's right to choose what to say and when to remain silent. This Court has steadfastly refused to sanction government "[c]ompulsory unification of opinion." *W. Va. State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 641 (1943). Yet Colorado has turned those principles upside down, such that artists must now speak government-sanctioned messages, stop speaking their own preferred message, or leave the market in which they hope to participate.

This Court has already dealt with the intersection of public-accommodation laws and free speech in *Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995). There, a unanimous Court held that when a public-accommodation law makes "speech itself … the public accommodation," and forces someone to "alter" their "expressive content," the government must satisfy strict scrutiny. *Id.* at 572–73. That's this case: CADA makes an artist's speech the accommodation, and Colorado's application of the law to an artist like Smith forces her to alter her expressive content in untenable ways. This Colorado cannot do.

Colorado invites this Court to compel speech without limit and upend settled First Amendment law. But artists do not lose their free-speech rights when creating speech on commission. And the speech CADA compels is hardly "incidental" to any conduct when CADA applies to pure speech like Smith's custom websites. Here, CADA directly regulates Smith's speech with *no* predicate regulation of conduct. Smith is also not a passive conduit for her client's messages; she designs, creates, and publishes

her wedding websites, retains final editorial control over them, and stamps each of them with 303 Creative's logo and website address. This is Smith's speech and her message.

But CADA's Accommodation Clause does more than just compel an artist's speech; it does so based on content and viewpoint. The regulation's "very purpose" is to "[e]liminat[e]" certain ideas in favor of others. Pet.App.24a. No matter the message required or viewpoint suppressed, such a scheme pursues a "decidedly fatal objective." *Hurley*, 515 U.S. at 579.

CADA's Publication Clause is just as problematic. A designer can say she creates websites for those wanting to celebrate Islam and every other religion. But a designer cannot post a statement explaining her constitutional right to celebrate only Islam. Everything turns on content and viewpoint. This, too, is unconstitutional.

In fact, the Tenth Circuit agreed that: (1) Lorie does not discriminate against anyone, including those who identify as LGBT, and makes referrals based solely on content; (2) the publication and creation of a wedding website is "pure speech"; and (3) Colorado both compels and silences speech based on its content and viewpoint. That should have doomed CADA's application against Smith.

Rather than have officials pick ideological winners and losers, the Constitution commits the government "to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail." *McCullen* v. *Coakley*, 573 U.S. 464, 476 (2014) (cleaned up). The Constitution leaves to "the individual" the power to decide what to say and what to leave unsaid, rather than empower "the Gover-

nment to decree" such things. *Brown* v. *Ent. Merchs. Ass'n*, 564 U.S. 786, 790 (2011) (cleaned up). Accordingly, this Court need not engage in any kind of scrutiny. CADA's speech compulsion and censorship of artists violate the First Amendment.

At a minimum, Colorado must satisfy strict scrutiny and has failed miserably. Colorado lacks a compelling government interest to coerce or silence Smith's expression. Nor has this Court ever found such an interest in compelling an artist to speak. And Colorado has numerous, less burdensome alternatives to achieve any legitimate interests it might articulate. Many other states manage to enforce their public-accommodation laws without violating the First Amendment.

At bottom, this "case is made difficult not because the principles of its decision are obscure" but because of the context. *Barnette*, 319 U.S. at 641. After all, officials have frequently sought to "coerce uniformity of sentiment in support of some end thought essential to their time and country." *Id.* at 640. But this Court has never let the government violate artists' freedom of conscience or compel them to "mouth support for views they find objectionable." *Janus* v. *Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2463 (2018).

Neither the public-accommodation context nor the topic of marriage justifies an exception to this cardinal rule. In seeking this exception, Colorado asks this Court to allow officials to compel innumerable artists to speak countless messages—from forcing pro-abortion calligraphers to write pro-life flyers to compelling atheist musicians to perform at religious ceremonies. If this Court blesses a public-accommo-

dation exception to ordinary First Amendment principles, the path to the "coercive elimination of dissent" is indeed short and steep. Pet.App.70a (Tymkovich, C.J., dissenting) (quoting *Barnette*, 319 U.S. at 641.).

Accordingly, this Court should reverse the Tenth Circuit's opinion and hold that the First Amendment protects artists' right to speak messages consistent with their beliefs.

ARGUMENT

I. CADA violates the First Amendment by compelling artists to speak against their convictions.

Colorado compels speech, forcing Smith to speak contrary to her conscience by designing, creating, and publishing websites she would not otherwise create and must therefore (at a minimum) satisfy strict scrutiny. This case really is that simple. Colorado has misused its public-accommodation laws to coerce and censor speech. This Court's decisions chart the way forward: while public-accommodation laws may legitimately regulate conduct, they may not declare speech itself to be the accommodation. There is no public-accommodation exception to the First Amendment.

A. The First Amendment protects artists' speech, while still allowing public-accommodation laws to stop status discrimination.

The First Amendment prohibits governments from making any law "abridging the freedom of speech," U.S. Const. amend. I, which includes laws

compelling speech. The Framers were well acquainted with "coerced" speech. *Barnette*, 319 U.S. at 633 & n.13. It was "largely to escape" religious persecution, including compelled speech like religious test oaths and declarations, "that a great many of the early colonists left Europe and came [to America] hoping to worship in their own way." *Torcaso* v. *Watkins*, 367 U.S. 488, 490 (1961). Ratifying states insisted on a Bill of Rights that protects free speech and forbids government from "compel[ling] [someone] to utter what is not in his mind." *Barnette*, 319 U.S. at 634.

Thus, this Court has repeatedly condemned compelled speech, holding that the First Amendment "prohibits the government from telling people what they must say." *Rumsfeld* v. *Forum for Acad. & Institutional Rts.*, 547 U.S. 47, 61 (2006) (*FAIR*). In fact, compelled speech is the worst kind of speech regulation because compelling speech "coerce[s] [individuals] into betraying their convictions." *Janus*, 138 S. Ct. at 2464. In so doing, it "violates the fundamental rule" that "a speaker has the autonomy to choose the content of h[er] own message," *Hurley*, 515 U.S. at 573, and erodes speakers' "editorial control" over their message, *Miami Herald Publ'g Co.* v. *Tornillo*, 418 U.S. 241, 258 (1974).

Freedom from government-mandated orthodoxy is crucial to preserving our most fundamental liberties. This Court has described the sphere protected by the compelled-speech doctrine as "speaker's autonomy," *Hurley*, 515 U.S. at 575, "individual freedom of mind," *Barnette*, 319 U.S. at 637, "individual dignity," *Cohen*, 403 U.S. at 24, freedom of "conscience," *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209, 235 (1977), "freedom of thought," *Wooley*

v. *Maynard*, 430 U.S. 705, 714 (1977), and the "right to think," *Ashcroft* v. *Free Speech Coal.*, 535 U.S. 234, 253 (2002). These interests all protect the "freedom to differ"—a freedom that "is not limited to things that do not matter much." *Barnette*, 319 U.S. at 642. For "[t]hat would be a mere shadow of freedom." *Ibid.*

Hurley is illustrative. There, this Court held that the government could not use a public-accommodation law to force parade organizers "to include among the marchers a group imparting a message the organizers do not wish to convey." *Hurley*, 515 U.S. at 559. To do so would require "petitioners to alter the expressive content of their parade" and violate the right of speakers "to choose the content of [their] own message." *Id.* at 572–73. Anything less would render the First Amendment's promises "empty," for the government would be "freely able to compel … speakers to propound … messages with which they disagree." *Id.* at 576.

This approach strikes the right constitutional balance. It can handle the easy cases (like Smith's) and the harder ones too. It protects speech while allowing officials to stop discrimination. It also provides a workable standard based on two well-established inquiries.

First, a court asks whether the forced accommodation involves "a form of expression." *Hurley*, 515 U.S. at 568; accord *FAIR*, 547 U.S. at 64 (compelled-speech precedent turns on "the expressive quality of a parade, a newsletter, or the editorial page of a newspaper"). This Court and the lower courts have "long drawn" the "line between speech and conduct." *Nat'l Inst. of Fam. & Life Advocs.* v. *Becerra*, 138 S. Ct. 2361, 2373 (2018) (*NIFLA*). And in the

marketplace, there are "innumerable goods and services that no one could argue implicate the First Amendment." *Masterpiece*, 138 S. Ct. at 1728. The courts are well equipped to distinguish protected speech from unprotected conduct, as they must do in every free-speech case. See, *e.g.*, *Mastrovincenzo* v. *City of N.Y.*, 435 F.3d 78 (2d Cir. 2006).

Second, a court asks whether "the complaining speaker's own message was affected by the speech it was forced to accommodate." *FAIR*, 547 U.S. at 49 (citing *Hurley*, 515 U.S. at 566). This too is a workable test this Court has deployed for at least 40 years, both in its expressive-association and compelled-speech cases. *Runyon* v. *McCrary*, 427 U.S. 160 (1976); *Boy Scouts of Am.* v. *Dale*, 530 U.S. 640, 653 (2000); *Hurley*, 515 U.S. at 573.

Against that backdrop, this case boils down to a few undisputed facts. Everyone agrees that Smith's websites are speech. Pet.App.181a. Everyone agrees that CADA forces her to personally and actively design, create, and publish websites that express views with which she disagrees. And everyone agrees that Smith serves her clients regardless of status, including sexual orientation. Pet.App.184a. Yet Colorado asks this Court to do something it has never done before—bless government-mandated orthodoxy and require an artist to speak or stay silent contrary to her beliefs. This the Constitution does not permit.

B. The Accommodation Clause unlawfully alters an artist's speech when she makes a message-based decision.

The First Amendment forbids what CADA requires in this case because CADA, as applied to

artists, declares their "speech itself to be the public accommodation." *Hurley*, 515 U.S. at 573. Smith prevails here because she is engaged in pure speech and because the Accommodation Clause affects that speech by compelling her to speak against her conscience.

1. Smith's websites and her work creating them are pure speech.

Smith's wedding websites are "pure speech." Pet.App.20a. As the Tenth Circuit held, the creation of a wedding website "(whether through words, pictures, or other media) implicates [Smith's] unique creative talents, and is thus inherently expressive." Pet.App.21a. Just as the individual components of Smith's custom websites are pure speech—including "the printed word," "pictures," "drawings," and "films"—so too is the final product. *Kaplan* v. *California*, 413 U.S. 115, 119–20 (1973). And of course, the First Amendment applies full force to websites. *Reno* v. *ACLU*, 521 U.S. 844, 870 (1997). Further, Smith's bespoke webpages "express approval and celebration of the couple's marriage, which is itself often a particularly expressive event." Pet.App.20a.

Colorado agrees that Smith's websites "are expressive in nature" and "communicate a particular message" that "celebrate[s] and promote[s]" God's design for marriage. Pet.App.181a, 187a. It is not hard to see why. Each of Smith's websites is created custom. Pet.App.181a, 183a. And her sample websites express the special moments of a couple's love story and the couple's hopes for their future together. Smith's websites also celebrate a biblical view of

marriage—the joining together of a "Bride" and "Groom" by God. Pet.App.187a; J.A.51–72.

Not only are Smith's wedding websites protected speech, her creation of them is also protected. After all, the government cannot separate Picasso from his brush or Faulkner from his pen. *Brown*, 564 U.S. at 792 n.1 ("Whether government regulation applies to creating, distributing, or consuming speech makes no difference."); *Simon & Schuster, Inc.* v. *Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116–18 (1991) (First Amendment protects both writing and publishing). In sum, both Smith's work and her works are indisputably speech.

2. The Accommodation Clause affects Smith's speech by compelling her to speak against her conscience.

CADA's Accommodation Clause forbids places of "public accommodation" from refusing "the full and equal enjoyment of" their services because of someone's protected class. Colo. Rev. Stat. 24-34-601(2)(a). In the Tenth Circuit's words, "the result of the Accommodation Clause is that [Smith is] forced to create custom websites"—that is, speech—"[she] otherwise would not." Pet.App.22a–23a. This is paradigmatic compelled speech since Smith's "message [i]s affected by the speech [she] [i]s forced to accommodate." *FAIR*, 547 U.S. at 63.

When evaluating public-accommodation laws, this Court has consistently asked whether they "affect[ ] the message conveyed by" a particular speaker. *Hurley*, 515 U.S. at 572. In *Dale*, for example, this Court determined that a public-accommodation law "interfere[d] with the Boy Scouts'

choice not to propound a point of view contrary to its beliefs." 530 U.S. at 654. And in *Roberts* v. *U.S. Jaycees*, this Court asked whether Minnesota's public-accommodation law would "change the message communicated by the [Jaycees'] speech." 468 U.S. 609, 627 (1984) (considering whether compulsion "will change the content or impact of the organization's speech"); accord *FAIR*, 547 U.S. at 64 (no First Amendment violation "because the accommodation does not sufficiently interfere with any message of the school"). In most situations, forced creation and distribution of speech necessarily affects a speaker's message.

But this principle would not cover the rare circumstance where an artist declines to speak based on the status of the requester rather than the artist's objection to the message, or to the artist who refuses to sell an off-the-shelf product to a protected class. *E.g.*, *Hurley*, 515 U.S. at 572–73 (distinguishing parade organizers' sincere message-based objection from "any intent to exclude homosexuals as such"); *Associated Press* v. *United States*, 326 U.S. 1, 20 n.18 (1945) (distinguishing refusal to sell completed product from refusal to create and publish). A speaker's freedom of conscience is not implicated when they do not object to the message.

In concluding that the parade organizers' message was affected in *Hurley*, this Court focused on the fact that the organizers' decision to exclude the LGBT group turned on their objection to the message requested, not the requester's protected class. *Hurley*, 515 U.S. at 572, 574. That message-based "disagreement" was clear because the organizers served the protected class generally and did not exclude "homosexuals as such" from the parade, and

because the requester's banner changed the organizers' desired message. *Id.* at 572, 574. The Court also highlighted that the "very purpose" of the requester's speech was "to celebrate its members' identity," *id.* at 570, a message the organizers did not want to convey.

Here, Smith serves all people regardless of their status, does not discriminate against those who identify as gay or lesbian, and declines requests for message-based reasons. Pet.App.184a. For Smith, it is "the kind of [speech], not the kind of customer" that matters. *Masterpiece*, 138 S. Ct. at 1736 (Gorsuch, J., concurring). She gladly creates websites for anyone and objects to expressing only certain messages that violate her beliefs. That a speaker otherwise creates messages for a protected class strongly indicates a message-based, not status-based, decision.

Further, CADA undeniably forces Smith to change her message. Her wedding websites use text and graphic design "to celebrate and promote the couple's wedding and unique love story." Pet.App.187a. People request wedding websites for the purpose of celebrating weddings. If forced to create same-sex wedding websites, Smith "would be expressing a message celebrating and promoting a conception of marriage that [she] believe[s] is contrary to God's design for marriage," thus violating her "sincerely held religious beliefs." Pet.App.189a. A website celebrating same-sex marriage expresses a

different message from one celebrating opposite-sex marriage.[2]

In short, CADA affects the content of Smith's speech by forcing her to create and promote a message she disagrees with, violating the fundamental rule "that a speaker has the autonomy to choose the content of [her] own message." *Hurley*, 515 U.S. at 573.

In fact, CADA violates this fundamental rule more so than even the law in *Hurley*. While the government there argued that the parade organizers had to include someone else's expression in their parade, CADA forces Smith to personally design and "actively create each website," then publish it on the internet. Pet.App.21a. This "affirmative act" of personal imagination and content creation is "a more serious infringement upon personal liberties than [even] the passive act of carrying the state motto on a license plate." *Wooley*, 430 U.S. at 715. Not even the Barnette children had to compose the words or knit the flag that violated their conscience. This Court should not countenance a violation of conscience so severe that it eclipses not just *Hurley* but all other compelled-speech precedents too.

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[2] Smith's opposite-sex wedding websites are not "suitable for use" to celebrate a same-sex wedding for two reasons. *Masterpiece*, 138 S. Ct. at 1733 (Kagan, J., concurring). First, the literal text differs as Smith tailors each wedding website to a particular bride and groom. Because context matters, this Court considers more than just a message's text. So second, and even more important, these websites convey very different messages, as context makes clear. See *Spence* v. *Washington*, 418 U.S. 405, 410 (1974) (per curiam) ("context … is important" because "context may give meaning to the symbol").

C. The Court should reject Colorado's invitation to overturn settled First Amendment law protecting speaker autonomy.

1. CADA compels speech, not commercial conduct.

Unable to deny that Smith's websites speak messages, Colorado nonetheless argues that CADA "is an 'unexceptional' regulation of commercial conduct." Opp.Br.24.[3] Hardly. CADA makes speech itself the accommodation and compels Smith to speak against her convictions.

Colorado insists on labeling Smith's speech "commercial conduct." But calling speech conduct does not make it so. The creation and publication of Smith's wedding websites and other designs are pure speech. When applied to her designs, CADA is simply not directed at conduct. Pet.App.86a.

To be sure, laws "directed at commerce or conduct" do not ordinarily trigger First Amendment scrutiny. *Sorrell* v. *IMS Health Inc.*, 564 U.S. 552, 567 (2011). Antitrust laws can regulate newspapers. Anti-discrimination laws can regulate a printer's employment decisions.

But when the government applies a conduct-focused law to compel *speech*—when the application "alter[s] [an artist's] expressive content," *Hurley,* 515 U.S. at 572, or is "trigger[ed]" by "communicating a message," *Holder* v. *Humanitarian L. Project*, 561

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[3] CADA regulates much more than "commercial conduct" but also non-profits, as do the public-accommodation laws of many jurisdictions. E.g., *Roberts* v. *U.S. Jaycees*, 468 U.S. 609 (1984), *N.Y. State Club Ass'n* v. *City of New York*, 487 U.S. 1 (1988).

U.S. 1, 28 (2010)—the First Amendment applies. See also *Cantwell* v. *Connecticut*, 310 U.S. 296, 310 (1940) (applying First Amendment to breach of peace law); Elena Kagan, *Regulation of Hate Speech and Pornography after* R.A.V., 60 U. CHI. L. REV. 873, 887–88 (1993) ("[E]ven the neutral application of a law that is not itself about speech might in some circumstances violate the First Amendment."). Indeed, this Court has regularly applied the First Amendment to conduct-focused laws in the commercial and public-accommodation contexts. *Hurley*, 515 U.S. at 572 (public-accommodation law did not, "on its face, target speech"); *Hustler Mag., Inc.* v. *Falwell*, 485 U.S. 46, 48 (1988) (tort law applied to magazine article sold and published by for-profit business).

This explains the difference between *Hurley* and *FAIR*. While the equal-access policies in both cases facially regulated conduct, the law in *Hurley* compelled access to "speech itself," altering the parade's expressive content. *Hurley*, 515 U.S. at 573. In contrast, the policy in *FAIR* compelled access to the law schools' empty rooms. And empty rooms do "not speak[ ]." *FAIR*, 547 U.S. at 64; accord *PruneYard Shopping Ctr.* v. *Robins*, 447 U.S. 74, 87 (1980) (upholding access to shopping mall courtyard).

FAIR's analysis would have been different if the equal-access policy had applied to curriculum, forcing schools to teach classes defending the don't-ask-don't-tell policy. *Wash. State Grange* v. *Wash. State Republican Party*, 552 U.S. 442, 457 n.10 (2008) (distinguishing *FAIR* from forced speech).

Similarly, Colorado is wrong that a profit motive transforms Smith's speech into "commercial conduct" beyond the scope of the First Amendment. "First Amendment protection is *not* diminished merely because … speech is sold rather than given away." *City of Lakewood* v. *Plain Dealer Publ'g Co.*, 486 U.S. 750, 756 n.5 (1988) (emphasis added). A "speaker's rights are not lost merely because compensation is received." *Riley* v. *Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795–801 (1988); accord *Pac. Gas & Elec. Co.* v. *Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 9–21 (1986) (PG&E) (plurality) (utility company); *Tornillo*, 418 U.S. at 254–58 (for-profit newspaper).

This is true in the public-accommodation context too. *Hurley* explained that the right to speaker autonomy covers "business corporations generally" and those collaborating with others on the "item[s] featured in the[ir] communication[s]"—such as "professional publishers." 515 U.S. at 570, 574. Indeed, *Hurley* protected the parade organizers even though they charged a participation fee. *Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.* v. *City of Bos.*, 636 N.E.2d 1293, 1298 & 1298 n.13 (Mass. 1994). What matters is not whether CADA regulates commercial activity but whether it compels speech.

That makes sense. Colorado's speech-is-conduct logic would upend vast swaths of First Amendment jurisprudence. If a statute on its face purports to regulate "commercial conduct," officials could use it to force Muslim filmmakers to promote Scientology or force lesbian artists to design church websites criticizing same-sex marriage.

Consider just how far this might reach in the public-accommodation context. Many of those laws, for example, make political ideology a protected class. *Telescope Media Grp.* v. *Lucero*, 936 F .3d 740, 756 (8th Cir. 2019); see also Eugene Volokh, *Bans on Political Discrimination in Places of Public Accommodation and Housing*, 15 N.Y.U. J. L. & LIBERTY 490 (2022) (identifying some of these laws). Others include traits such as personal appearance, familial responsibilities, and matriculation. D.C. Office of Human Rights, *Protected Traits in DC*, https://perma.cc/DN7B-SWBE.

Under Colorado's theory, officials may compel commissioned speakers to speak any message—from forcing Democrat artists to design posters promoting Republican events, to compelling environmentalist designers to create billboards denying climate change, to requiring Hindu calligraphers to write flyers proclaiming "Jesus is Lord," or to enlisting ad designers who celebrate body positivity to create a campaign for a weight-loss program. Such results are anathema to the First Amendment.

2. CADA compels speech, not speech incidental to conduct.

Colorado's speech-incidental-to-conduct argument fares no better than its speech-is-conduct argument. In limited circumstances, officials may force individuals required to engage in non-expressive conduct to provide facts necessary to facilitate that conduct. So the government can force law schools to send logistical emails containing statements of fact about military recruiters when the government requires access to law-school property. *FAIR*, 547 U.S. at 63. Or the government can force waiters to tell

patrons the price for sandwiches when the government sets that price. See *Expressions Hair Design* v. *Schneiderman*, 137 S. Ct. 1144, 1151 (2017).

In those narrow circumstances, forcing someone to make a factual statement may be constitutional because it is "plainly incidental" to the "regulation of [their] conduct," *e.g.*, room access or setting prices. *FAIR*, 547 U.S. at 62; see also Eugene Volokh, *The Law of Compelled Speech*, 97 TEX. L. REV. 355, 389 (2018) (government may sometimes compel factual speech incidental to the regulation of other conduct).

CADA's effect on Smith's speech is far from incidental. CADA forces Smith to speak when she otherwise would not and without any predicate regulation of conduct. As in *Hurley*, the speech-incidental-to-conduct exception is inapposite because CADA has "the effect of declaring [Smith's] speech itself to be the public accommodation." *Hurley*, 515 U.S. at 573. And CADA compels her to speak far more than factual information—it requires her to speak a view of marriage that violates her convictions.

If Smith's speech is incidental to conduct here, that doctrine has no limits. Officials would be able to rebrand all regulated speech as incidental to something. And that would allow the government to regulate "most everything"—either banning or compelling large swaths of speech. Kagan, *Regulation of Hate Speech*, 60 U. CHI. L. REV. at 884.

3. CADA regulates Smith's speech, not her clients' speech.

Colorado says that CADA does not affect Smith's "own" expression, but merely requires her to convey a couple's love story. Opp.Br.30–31. Not so. Smith's designs and websites are her speech. She personally and actively designs, creates, and publishes them. She retains final editorial control. Pet.App.183a. And the websites contain her name and logo, declaring they are "designed by 303 Creative.com." Pet.App.187a. Smith is not a passive conduit for someone else's message. She is "intimately connected with the communication advanced." *Hurley*, 515 U.S. at 576.

According to Colorado though, observers would not believe that Smith is speaking or endorsing the messages in her websites. Opp.Br.30–31. That speculation is baseless. Colorado concedes that viewers (1) "will know that the websites are [her] original artwork"; and (2) understand Smith's "intended message of celebration." Pet.App.187a; J.A. 262. Like other artists with limited resources, Smith must actively choose her projects. People understand this. As in *Hurley*, Smith's "determination" to include a message would signify that she believes the message to be "worthy of presentation and quite possibly of support as well." 515 U.S. at 575.

In any event, whether CADA invades Smith's "freedom of conscience" does not depend on what others may think. No one thinks a driver endorses the motto on his government-issued license plate or a utility company writes the billing-envelope newsletters attributed to third parties. *Wooley*, 430 U.S. at 722 (Rehnquist, J., dissenting); *PG&E*, 475 U.S. at 6–

7, 15 n.11. Nor does anyone think that newspapers write or endorse the op-eds published under someone else's name. *Tornillo*, 418 U.S. at 256. But this Court still found compelled speech in those situations anyway.

If third-party (mis)perceptions were all that mattered, there would be few limits to government-compelled speech. Every commissioned publisher, writer, printer, painter, calligrapher, website designer, tattoo artist, photographer, and videographer could be forced to speak any message. Indeed, Colorado has repeatedly argued that the government can compel speech writers to write speeches that violate their most deeply held convictions. *E.g.*, Opp.Br.29. Nothing supports such a cramped understanding of the First Amendment.

II. The Accommodation Clause compels speech based on content and viewpoint.

Colorado applies CADA in a content- and viewpoint-based manner. The statute's "very purpose," as the Tenth Circuit said, is to "[e]liminat[e] [certain] ideas" about marriage in favor of others, Pet.App.24a, and it authorizes the government to take sides in an important cultural, political, and religious discussion—all in the name of "produc[ing] a society free of … biases," *Hurley*, 515 U.S. at 578.

It is "a bedrock" First Amendment principle "that the government may not prohibit the expression of an idea simply because" the government disagrees with them. *Texas* v. *Johnson*, 491 U.S. 397, 414 (1989). "At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression,

consideration, and adherence." *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 641 (1994). In fact, this Court has held that the government's disagreement with a speaker's opinion "is a *reason* for according it constitutional protection.'" *Hustler Mag.*, 485 U.S. at 55 (emphasis added).

As a result, content-based speech laws "are presumptively unconstitutional…." *Reed* v. *Town of Gilbert*, 576 U.S. 155, 163 (2015). A law that discriminates based on viewpoint is an even more "blatant" First Amendment violation. *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). The government may not regulate "speech based on 'the specific motivating ideology or the opinion or perspective of the speaker.'" *Reed*, 576 U.S. at 168 (quoting *Rosenberger*, 515 U.S. at 829).

A law is content based if it "applies to particular speech because of the topic discussed or … message expressed." *Reed*, 576 U.S. at 163. A viewpoint-based law regulates speech because of the "particular views taken by speakers on a subject," *Rosenberger*, 515 U.S. at 829, or "reflects the Government's disapproval of a subset of messages it finds offensive," *Iancu* v. *Brunetti*, 139 S. Ct. 2294, 2299 (2019).

CADA compels speech based not only on content but also viewpoint. The *content* of a message determines whether CADA applies, and the *viewpoint* of the speaker determines the legality of the message. See Pet.App.74a. (Tymkovich, C.J., dissenting). Consider three ways that CADA discriminates based on content and viewpoint.

First, the Accommodation Clause compels Smith to create and publish websites celebrating same-sex weddings, which "necessarily alters the content of

[her] speech" and makes this application "a content-based regulation of speech." *Riley*, 487 U.S. at 795; see also *NIFLA*, 138 S. Ct. at 2371 (same).

Second, the Clause treats Smith's "choice to talk about one topic—opposite[-]sex marriages—as a trigger for compelling" her to celebrate same-sex marriage. *Telescope Media*, 936 F.3d at 753; *Tornillo*, 418 U.S. at 256 (invalidating statute that triggered requirement to print candidate's op-ed based on printing criticism of candidate). For example, Smith is not compelled to create same-sex wedding content if she designs websites promoting environmentalism, but *only* when she creates content celebrating her view of marriage. This "exacts a penalty on the basis of the content." *Tornillo*, 418 U.S. at 256.

So CADA is a "[g]overnment-enforced right of access [that] *inescapably* 'dampens the vigor and limits the variety of public debate.'" *Tornillo*, 418 U.S. at 257 (quoting *N.Y. Times Co.* v. *Sullivan,* 376 U.S. 254, 279 (1964)) (emphasis added). Because Smith must "opt to change [her] message" or "refrain from speaking altogether," the State has silenced her voice. See *Ariz. Free Enter. Club's Freedom Club PAC* v. *Bennett*, 564 U.S. 721, 739–40 (2011).

Smith is not alone. Like others across the country, she has refrained from expressing her views of marriage to avoid speaking a contrary one. That stigmatizes her viewpoint as unwelcome, drives it from the public square, and removes it from public consciousness. CADA "restrict[s] the speech of some elements of our society in order to enhance the relative voice of others," something "wholly foreign to the First Amendment." *Buckley* v. *Valeo*, 424 U.S. 1, 48–49 (1976) (per curiam).

Third, the Clause awards access to Smith's websites "only to those who disagree[ ] with [her] views" on marriage. *PG&E*, 475 U.S. at 13. When Smith creates a traditional wedding website, CADA awards access only to those who celebrate same-sex marriage.

CADA "is a paradigmatic example of the serious threat presented when government seeks to impose its own message in the place of individual speech, thought, and expression." *NIFLA*, 138 S. Ct. at 2379 (Kennedy, J., concurring). As the Tenth Circuit concluded, "CADA's purpose and history also demonstrate how the statute is a content-based restriction." Pet.App.23a. CADA's "very purpose" is to "excis[e] certain ideas or viewpoints [regarding marriage] from the public dialogue." Pet.App.24a. This "decidedly fatal objective" is content- and viewpoint-discrimination. *Hurley*, 515 U.S. at 579.

III. The Publication Clause restricts artists' speech based on content and viewpoint.

CADA's Publication Clause fares no better than its Accommodation Clause. The former prohibits a public accommodation from "directly or indirectly" publishing anything "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…." Colo. Rev. Stat. 24–34–601(2)(a). Because Smith values and respects all her potential clients, she wants to describe her beliefs transparently on 303 Creative's website and explain that she can only create messages consistent with her faith. Pet.App.189a.

The Publication Clause bans this speech based on content and viewpoint. It "applies to particular speech because of the topic discussed or … message expressed." *Reed*, 576 U.S. at 163. A statement saying, "I create wedding websites" is permissible; one saying "I create only opposite-sex wedding websites" is not. This "is about as content-based as it gets." *Barr* v. *Am. Ass'n of Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2346 (2020).

Colorado insists it can ban Smith's statement for the sole reason that it is speech incidental to illegal conduct. Opp.Br.31–33. But this doctrine covers speech "intended to induce or commence illegal activities." *United States* v. *Williams*, 553 U.S. 285, 298 (2008). It prohibits employers from posting signs saying "white applicants only" and restaurants from stating "gay couples not served here." Those signs are "incidental to a valid limitation" on the "illegal," non-expressive activity of discriminatory conduct. *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Hum. Rels.*, 413 U.S. 376, 389 (1973).

In contrast, Smith's statement is not incidental to a valid limit on non-expressive, illegal conduct. It is incidental to an *invalid* restriction on *constitutionally protected* speech. Colorado can no more ban Smith's statement than it could ban a parade organizer's statement declining to accept floats that criticize same-sex marriage. Accordingly, Colorado tacitly acknowledges that the constitutionality of the Publication Clause's application to Smith depends on

the constitutionality of applying the Accommodation Clause to her websites. See CA10 Appelle.Br.51.[4]

IV. As applied to artists like Smith, CADA violates the First Amendment and cannot satisfy strict scrutiny.

No state interest—including a dignitary interest—justifies compelling or restricting speech contrary to conscience. *Hurley*, 515 U.S. at 574, 578–79; accord *Matal* v. *Tam*, 137 S. Ct. 1744, 1763–64 (2017); *Snyder* v. *Phelps*, 562 U.S. 443, 458 (2011); *Hustler Mag.,* 485 U.S. at 50–57; *Masterpiece,* 138 S. Ct. at 1746 (Thomas, J., concurring) ("These [dignity] justifications are completely foreign to our free-speech jurisprudence.").

The "central tenet of the First Amendment" is "that the government must remain neutral in the marketplace of ideas." *F.C.C.* v. *Pacifica Found.*, 438 U.S. 726, 745–46 (1978). That neutrality disappears when Colorado silences "ideas that it disfavors" or "compel[s] the endorsement of ideas that it approves." *Knox* v. *Serv. Emps. Int'l Union, Loc. 1000*, 567 U.S. 298, 309 (2012). The First Amendment is "plainly offended" when the state picks ideological winners and losers. *First Nat'l Bank of Bos.* v. *Bellotti*, 435 U.S. 765, 785–86 (1978). Accordingly, there is no need to engage in any kind of scrutiny. CADA's speech

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[4] For the same reasons, the publication restrictions in Title VII and the Fair Housing Act do not raise First Amendment concerns because they only limit statements that indicate an intent to engage in illegal and constitutionally unprotected conduct.

compulsion and censorship of artists violate the First Amendment.

Because CADA compels and regulates speech based on content and viewpoint, the law's application to artists like Smith must at least satisfy strict scrutiny. *PG&E*, 475 U.S. at 19; *Riley*, 487 U.S. at 795; *Reed*, 576 U.S. at 164. For good reason too. Laws like these impose severe harms on the individual, the marketplace of ideas, and democratic self-government.

Under this arduous standard, Colorado must prove that applying CADA to Smith's speech "furthers a compelling interest and is narrowly tailored to achieve that interest." *Reed*, 576 U.S. at 171 (cleaned up). This Court has *never* allowed compelled speech under strict scrutiny and has only allowed speech restrictions under this standard about three times, in inapposite contexts. See *Burson* v. *Freeman*, 504 U.S. 191 (1992) (political solicitation near polling places); *Holder*, 561 U.S. at 1 (material support to foreign terrorist organizations); *Williams-Yulee* v. *Fla. Bar*, 575 U.S. 433 (2015) (campaign solicitations by judicial candidates).

Colorado fails this test "at the outset." *Brown*, 564 U.S. at 799. To satisfy strict scrutiny, Colorado must show an "actual problem" that requires "the curtailment of free speech" to solve. *Ibid*. And it must do so with actual evidence, not "ambiguous proof," *id.* at 800, or "anecdote and supposition," *United States* v. *Playboy Ent. Grp., Inc.*, 529 U.S. 803, 822 (2000). Yet the record here is "barren" of any evidence demonstrating a problem that can be solved only by compelling Smith's speech. *Ibid.* That is fatal.

Colorado's legal arguments face additional insurmountable obstacles. In the past, other states have marshaled the same arguments as Colorado to justify applying their public-accommodation laws to infringe First Amendment liberties. Those attempts failed then. *Hurley*, 515 U.S. at 578–79; *Dale*, 530 U.S. at 657–59. They fare no better now.

A. Colorado lacks a compelling interest in how it applies CADA.

1. Marketplace access

Colorado contends that it must compel Smith's speech to "eradicat[e] discrimination" and maintain access to goods and services. Pet.App.111a. But that sets Colorado's interest at too "high [a] level of generality, [and] the First Amendment demands a more precise analysis." *Fulton* v. *City of Philadelphia*, 141 S. Ct. 1868, 1881 (2021) (cleaned up). "Rather than rely on broadly formulated interests … in enforcing its non-discrimination policies generally," Colorado must show that letting Smith speak consistent with her conscience will undermine its interest in preventing discriminatory denials of access to goods and services. *Ibid.* (cleaned up).

Colorado cannot make this showing. For Smith does not discriminate against anyone and will happily serve everyone, regardless of status. Pet.App.183a–84a. Coercing speech that violates Smith's conscience, or silencing her if she is unwilling to speak objectionable messages does nothing to combat discriminatory conduct.

Nor does coercing and suppressing Smith's speech affect general market access. Coloradoans have no "actual problem" accessing the website-design

market. *Playboy*, 529 U.S. at 822. Many designers in Colorado (and elsewhere) will convey the messages Smith cannot. J.A.17–23; Pet.App.28a ("To be sure, LGBT consumers may be able to obtain wedding-website design services from other businesses."). And if Colorado prevails, that does not mean that same-sex couples will then have access to Smith's creative skills; her convictions will force her not to imagine, design, and create wedding websites for anyone.

Colorado speculates that protecting Smith's speech would sanction widespread discrimination and hinder others' ability to access other goods and services. Yet "[b]ecause the Government is defending a restriction on speech as necessary to prevent an anticipated harm, it must do more than 'simply posit the existence of the disease sought to be cured.'" *FEC* v. *Cruz*, __ S. Ct. __, 2022 WL 1528348, at *9 (U.S. May 16, 2022) (quoting *Colo. Republican Fed. Campaign Comm.* v. *FEC*, 518 U.S. 604, 618 (1996)). Speculation "is insufficient to satisfy strict scrutiny." *Fulton*, 141 S. Ct. at 1882 (citing *Brown*, 564 U.S. at 799–800); accord *Consol. Edison Co. of N.Y., Inc.* v. *Pub. Ser*v. *Comm'n of N.Y.*, 447 U.S. 530, 543 (1980) (same).

Colorado cannot establish an actual market-access problem for good reason—its fears are divorced from reality. Many states' public-accommodation laws do not apply to speech like Smith's, yet those states do not report the discriminatory problems that Colorado fears. Neb.Amici.Br.4, *Carpenter* v. *James*, No. 22-75 (2d Cir. Mar. 14, 2022) (19 states "refrain from compelling speech, and that has not sacrificed their ability to enforce their public-accommodation laws").

Meanwhile, those who share and voice Smith's beliefs—like Jack Phillips—face increasing criticism and government hostility. In an environment where only those with the strongest convictions will dare to speak up, it is hard to fathom the general access concerns that Colorado conjures.

2. Dignitary interests

Colorado contends it must compel Smith's speech to protect dignitary interests, even though she serves every client regardless of status. But this Court has never held that a state may further such an interest by compelling or silencing speech. Just the opposite: "the *point* of all speech protection … is to shield just those choices of content that in someone's eyes are … hurtful." *Hurley*, 515 U.S. at 574 (emphasis added); accord *Boos* v. *Barry*, 485 U.S. 312, 322 (1988). This is "the proudest boast of our free speech jurisprudence…." *Matal*, 137 S. Ct. at 1764.

Colorado ignores that speakers have dignitary interests, too. "When speech is compelled, … individuals are coerced into betraying their convictions." *Janus*, 138 S. Ct. at 2464. Since the First Amendment's guarantee of free speech is "premise[d]" on a speaker's "individual dignity," *Cohen*, 403 U.S. at 24, "[f]orcing free and independent individuals to endorse ideas they find objectionable is always demeaning…." *Janus*, 138 S. Ct. at 2464. So rather than vindicate a state's interest in avoiding dignitary harm, state-compelled speech exacerbates it.

Further, since Smith has a dignitary interest as a speaker, Colorado cannot compel speech in an "ideologically neutral" way that avoids the State favoring one dignitary interest over another. *Wooley*,

430 U.S. at 717. When the government "restrict[s] the speech of some elements … to enhance the relative voice of others," *Buckley*, 424 U.S. at 48–49, it cannot avoid picking ideological winners and losers. A "dignity standard … is so inherently subjective" that the government must decide whose dignity is worth protecting and whose is worth violating. *Boos*, 485 U.S. at 322 (cleaned up).

Consider the dignitary harm here. By "prescrib[ing]" Smith's speech as "offensive," Colorado is telling her that her views "cannot legitimately be carried into the public sphere or commercial domain, implying that [her] beliefs and person[ ] are less than fully welcome in Colorado's business community." *Masterpiece*, 138 S. Ct. at 1729, 1731. And all so the State can "produce a society free of … biases" by "produc[ing] thoughts and statements acceptable to some groups." *Hurley*, 515 U.S. at 578–79. That "amounts to nothing less than a proposal to limit speech in the service of orthodox expression," an objective to which the "Speech Clause has no more certain antithesis." *Id.* at 579.

Dignitary interests never justify state-compelled or suppressed speech, and Colorado has a particularly weak basis to invoke that interest here for at least three reasons. First, Smith does not discriminate against anyone. She simply claims the constitutional right to exercise autonomy over her own messages. In that context, declining to speak contrary to conscience "would be well understood in our constitutional order" as an exercise of First Amendment liberty "that gay persons could recognize and accept without serious diminishment to their own dignity and worth." *Masterpiece*, 138 S. Ct. at 1727. After all, the artist and designer who celebrates same-sex marriage

wants the same freedom to affirm what she believes as Smith does.[5] The First Amendment protects them both.

In fact, people and businesses in the marketplace routinely decline to convey messages with which they disagree. Newspapers, for instance, regularly decline to print op-eds that the editors think would contradict the newspaper's values. See *Tornillo*, 418 U.S. at 258; Oliver Darcy, *Tom Cotton op-ed will not run in print, New York Times editor announces during employee town hall*, CNN BUSINESS (June 5, 2020), https://perma.cc/D4PM-7LB4. Yet no one would equate these refusals with "hotels" denying "safe lodging for African-Americans," as Colorado has suggested. Opp.Br.33. That's because newspapers, artists, and businesses often decline to convey messages they disagree with while continuing to serve clients regardless of who they are. That is a distinction with a constitutional difference.

Second, those offended by Smith's message have a better option than coercion: counter-expression. This Court has repeatedly said the answer to speech that one sees as undignified is *more* speech, not censorship. In *Hurley*, for instance, this Court observed that GLIB "presumably would have had a fair shot … at obtaining a parade permit of its own," a superior alternative to coercing the parade organizers' speech. 515 U.S. at 578.

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[5] *E.g.*, Billy Hallowell, *T-Shirt Maker Who Refused to Print Gay Pride Shirts Is Being Punished — but These Lesbian Business Owners Reveal Why They're Supporting Him*, BLAZE MEDIA (Nov. 7, 2014), https://perma.cc/4DZ8-GM5E.

Finally, Colorado allows other speech that "put its [dignitary] goal at" far greater "risk" than allowing Smith to choose her website content and post her desired statement. That makes Colorado's dignitary interest massively underinclusive. *Fulton*, 141 S. Ct. at 1881–82. For example, Colorado must and does allow its citizens to do everything from politely saying why "same-sex marriage should not be condoned," *Obergefell* v. *Hodges*, 576 U.S. 644, 679 (2015), to proclaiming "hurtful speech" like the virulent epitaphs noted in *Snyder*, 562 U.S. at 460–61.

CADA's text meanwhile allows public accommodations to restrict admission "to individuals of one sex if such restriction has a bona fide relationship to" the accommodation's services. Colo. Rev. Stat. 24-34-601(3). And though Colorado requires Smith to create messages that conflict with her conscience, Colorado allows other public accommodations to refuse to convey messages with which they disagree. *Masterpiece*, 138 S. Ct. at 1730.[6] That CADA "is wildly underinclusive when judged against" the State's "asserted [dignitary-based] justification" shows that Colorado has not demonstrated that the "curtailment of [Smith's] free speech" is "actually necessary." *Brown*, 564 U.S. at 799, 802. These exemptions underscore that Colorado can allow Smith to engage in protected expression without undermining its goals.

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[6] Likewise, although Colorado says it must ban Smith's desired editorial statement to avoid dignitary harm, Colorado allows businesses to publish blatantly discriminatory employment statements if they are "based upon a bona fide occupational qualification or required by and given to an agency of government for security reasons." Colo. Rev. Stat. 24-34-402.

B. The uniqueness of an artist's speech does not lessen First Amendment protection.

The Tenth Circuit invented a new interest for Colorado: protecting "material interests in accessing the commercial marketplace." Pet.App.24a. Colorado never asserted this interest, and it was improper for the Tenth Circuit to invent it post-hoc. *NIFLA*, 138 S. Ct. at 2377 (rejecting "purely hypothetical" justifications under heightened scrutiny). Yet even this judicially created interest does not justify speech compulsion or suppression.

Though this Court has recognized that states have an interest in ensuring equal access to the marketplace generally, *Roberts*, 468 U.S. at 624, there is no compelling interest in "ensuring [general] access to a *particular* person's unique, artistic product," Pet.App.77a (Tymkovich, C.J., dissenting in part), nor a legitimate interest in ensuring market *outcomes*. Yet in an "unprecedented" move, *id.* at 80a, the Tenth Circuit allowed Colorado to coerce Smith's speech to ensure that anyone—or at least anyone with whom Colorado agrees—could "access" her unique speech. This monopoly-of-one holding threatens every artist's control over her own speech, replacing speaker autonomy with the government's message

To reach this erroneous result, the Tenth Circuit first took "the *effect* of the statute and posited that effect as the State's interest." *Simon & Schuster,* 502 U.S. at 120. Public-accommodation laws focus on the *reason* that people cannot access goods or services, i.e., discrimination, not the mere existence of access. *C.R. Cases*, 109 U.S. 3, 26–27 (1883) (Harlan, J., dissenting). Here, access is but an effect of Colorado's true interest: "eradicating discrimination."

Pet.App.111a. And when that interest is not served—when no invidious discrimination in the marketplace exists—a state cannot resurrect a compelling interest by asserting its desired effects. Because Smith treats all her clients equally, Colorado has no interest in coopting her message.

To hold otherwise would allow states to "sidestep judicial review of almost any statute." *Simon & Schuster*, 502 U.S. at 120. If a state could claim a compelling interest in a statute's effects, then "all statutes look narrowly tailored." *Ibid.* Massachusetts might have claimed a compelling interest in "ensuring equal access" to the Boston St. Patrick's Day Parade. Or the state in *Dale* could have advanced "equal access" to the Boy Scouts as an interest. This Court has never accepted this approach. It should not start now.

Nor has this Court ever suggested that unique speech is some sort of monopoly. There are at least four reasons why.

First, this Court has always focused on "the relevant medium," not a speaker's message. *Turner*, 512 U.S. at 656. In *Turner*, for instance, this Court examined the "important technological difference[s] between newspapers and cable television"—the *media*—and not the unique messages that either conveyed. There, the cable operators enjoyed "bottleneck monopoly power" over their medium. *Id.* at 656, 661. And this power threatened to "silence the voice of competing speakers." *Id.* at 656.

But here, Smith is one of many graphic designers. When she "asserts exclusive control" over her own message, she "does not thereby prevent other" *media*—similar in kind though different in content—

"from being distributed to willing participants in the same locale." *Ibid*. Her unique message does not come close to equaling a monopoly over the relevant medium. For First Amendment purposes, the message cannot be the medium.

Second, a "monopoly does not exist merely because" someone's speech "differs from others." *United States* v. *E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 394 (1956). In fact, most speakers create products that are, by their nature, unique and different from other content. As "NBC is just another television network," Smith is one of many graphic designers. *Glob. Disc. Travel Servs., LLC* v. *Trans World Airlines, Inc.*, 960 F. Supp. 701, 705–06 (S.D.N.Y. 1997) (Sotomayor, J.). So long as "there are market alternatives"—which cannot logically be limited to "*identical* products"—a market remains free and competitive. *E.I. du Pont*, 351 U.S. at 394. As even the Tenth Circuit admitted, same-sex couples can "obtain wedding-website design services from other businesses." Pet.App.28a.

Hurley is emblematic. There, this Court forbade Massachusetts from coopting the parade organizers' speech—even though there was only one St. Patrick's Day Parade. "In that market, only the [parade] exist[ed]." Cf. Pet.App.29a. But while the unique "success of [the organizers'] parade" might have made it "an enviable vehicle for the dissemination of" opposing views, "that fact" fell "far short of supporting a claim that" the parade organizers somehow "enjoy[ed] an abiding monopoly of access to spectators." *Hurley*, 515 U.S. at 577–78.

Third, the Tenth Circuit failed to consider that this Court affords unique speech *more* constitutional protection, not less. Not once has this Court equated speech's unique qualities with a monopoly. In fact, many of this Court's compelled-speech cases have involved unique expression. *Tornillo*, 418 U.S. at 241 (unique op-ed); *Riley*, 487 U.S. at 781 (unique fundraiser pitches); *PG&E*, 475 U.S. at 1 (unique newsletter). Yet the Tenth Circuit "use[d] the very quality that gives the art value—its expressive and singular nature—to cheapen it." Pet.App.79a (Tymkovich, C.J., dissenting in part).

Fourth, this Court has condemned speech regulations even where *actual* monopolies existed. *E.g.*, *Consol. Edison Co.*, 447 U.S. at 534 n.1 ("regulated monopoly" status did not "preclude … First Amendment rights"); *PG&E*, 475 U.S. at 17 n.14. The newspaper at issue in *Tornillo* enjoyed extensive market power akin to a "local monopoly." 418 U.S. at 250 & n.15; accord *U.S. Telecom Ass'n* v. *FCC*, 855 F.3d 381, 435 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of reh'g en banc). But that did not permit "governmental coercion" of its speech. *Tornillo*, 418 U.S. at 254; accord *Denver Area Educ. Telecomms. Consortium, Inc.* v. *FCC*, 518 U.S. 727, 813 (1996) (Thomas, J., concurring in the judgment and dissenting in part) ("We also flatly rejected the argument that the newspaper's alleged media monopoly could justify forcing the paper to speak in contravention of its own editorial discretion."). If the First Amendment protects actual monopolies from compelled speech in these cases, then it surely protects a singular artist like Smith who custom creates all her websites.

C. Colorado has many, less intrusive alternatives to achieving its asserted goals.

Colorado bears the "especially heavy" burden to prove that coercing or silencing Smith's speech is the least restrictive means to further its interests. *Reno*, 521 U.S. at 879. To satisfy this burden, Colorado must at least show it considered other alternatives—including those used by other jurisdictions—but found them "ineffective to achieve its goals." *Playboy*, 529 U.S. at 816; accord *McCullen*, 573 U.S. at 494, 496 ("In short, the Commonwealth has not shown that it seriously undertook to address the problem with less intrusive tools readily available to it."); *Ramirez* v. *Collier*, 142 S. Ct. 1264, 1288 (2022) (Kavanaugh, J., concurring) ("[E]xperience matters in assessing whether less restrictive alternatives could still satisfy the State's compelling interest.").

But no matter what interests Colorado cites, it has many ways to achieve them without coercing or suppressing speech. Throughout this litigation, Smith has pointed out several.

For example, Colorado could interpret CADA to allow speakers who serve all people to decline specific projects based on their message. If Colorado adopted this interpretation, CADA would still stop status discrimination, while simultaneously freeing speakers like Smith from state-sponsored coercion. Numerous lower courts, at least 19 states, and the federal government have already done this. United States.Amicus.Br.22, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (2018) (No. 16-111); Neb.Amici.Br.4, *Carpenter* v. *James*, No. 22-75 (2d Cir. Mar. 14, 2022); *Telescope Media*, 936 F.3d at 752–53; *Brush & Nib*

Studio, LC v. *City of Phx.*, 448 P.3d 890, 910–11 (Ariz. 2019); *World Peace Movement* v. *Newspaper Agency Corp., Inc.*, 879 P.2d 253, 258 (Utah 1994). Colorado cannot explain its refusal to give Smith the same protection. CA10 Appellee.Br.62.

Alternatively, Colorado could accomplish the same thing statutorily, enacting textual exemptions for artists who decline projects based on messages. See 29 C.F.R. 1604.2 (interpreting Title VII to allow production studios to make classifications when "necessary for the purpose of authenticity or genuineness"). Colorado already has something similar. See Colo. Rev. Stat. Ann. 24-34-601(3) (exempting admission restrictions based on sex if restriction "has a bona fide relationship" to services offered).

Other states have already adopted limited exemptions for the wedding industry. As this Court recognized, "reasonable and sincere people" disagree on marriage "here and throughout the world." *Obergefell*, 576 U.S. at 657. Mississippi, for instance, has exempted artists who create expression for or about weddings from public-accommodation laws. *E.g.*, Miss. Code Ann. 11-62-5(5). Colorado could do the same.

Finally, Colorado could narrow what it considers a public accommodation. To start, Colorado could limit a public accommodation to physical spaces, as courts have traditionally done with Title II. See *Coral Ridge Ministries Media, Inc.* v. *Amazon.com, Inc.*, 6 F.4th 1247, 1256 n.12 (11th Cir. 2021). Or Colorado could, like other states, define public accommodations to cover entities that provide essential goods and

services like food, lodging, and medical treatment. Fla. Stat. 760.02(11); S.C. Code Ann. 45-9-10(B).

Just last year, this Court expressed skepticism about defining a public accommodation to include something that "involve[d] a customized and selective assessment that bears little resemblance to staying in a hotel, eating at a restaurant, or riding a bus." *Fulton*, 141 S. Ct. at 1880; accord *Vejo* v. *Portland Pub. Schs.*, 204 F. Supp. 3d 1149, 1168 (D. Or. 2016) (interpreting Oregon law to conclude that a university program was too selective to qualify as a public accommodation).

Colorado has done nothing to show why these "available, effective alternatives" would fail where only speech coercion can succeed. *Ashcroft* v. *ACLU*, 542 U.S. 656, 666 (2004). "When a plausible, less restrictive alternative is offered to a content-based speech restriction, it is the Government's *obligation* to prove that the alternative will be ineffective to achieve its goals." *Playboy*, 529 U.S. at 816. The silence in the record shows that Colorado never seriously "considered"—much less disproved—"different methods that other jurisdictions have found effective." *McCullen*, 573 U.S. at 494. Colorado has failed to meet its burden. And its failure has highlighted the true nature of how Colorado applies CADA: to censor and punish those who express a view on marriage contrary to the State's own.

* * *

Government officials are using their power to coerce those who hold views those officials disfavor. The consequences are often severe. Barronelle Stutzman was forced to retire and hand over her company after Washington prohibited her from creating floral art for weddings. Pet.17, 31. Elane Photography and Sweet Cakes went out of business entirely. Pet.17, 31–32 & nn.8–9. Emilee Carpenter is facing six-figure fines and jail. Pet.33 n.11. Chelsey Nelson and Bob Updegrove are in litigation. Pet.16; Pet.App.65a. And Jack Phillips has been in court for 10 years—despite prevailing in this Court. Pet.31.

Such coercion will continue to increase unless this Court issues a definitive ruling protecting the First Amendment rights of these creative professionals. As noted above, Colorado and 19 others states now rely on the decision below to argue that officials may use public-accommodation laws to compel citizens to speak in violation of their conscience. More will surely follow unless this Court vindicates Smith's freedom.

This case and the First Amendment principles at issue transcend current cultural, political, and religious debates. No artist should face coercion of conscience or expression at the hands of the government. For decades, this Court's First Amendment jurisprudence has struck a sound constitutional balance, ensuring public-accommodation laws forbid businesses from discriminating against people because of protected classifications, while affirming artists' freedom to choose the ideas deserving of expression. The First Amendment promises us all this liberty. This Court should disavow the Tenth Circuit's unprecedented holding and issue a clear ruling that protects all artists' right to decide when to speak and what to say.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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