

No. 21-476

In the
Supreme Court of the United States

303 CREATIVE LLC, *et al.*,

Petitioners,

v.

AUBREY ELENIS, *et al.*,

Respondents.

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

**BRIEF AMICUS CURIAE OF
CONCERNED WOMEN FOR AMERICA
*in Support of Petitioners***

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INTEREST OF *AMICUS CURIAE*¹

Concerned Women for America (“CWA”) is the largest Christian public policy women’s organization in the United States, with half-a-million participants and supporters from all 50 states, including Colorado. Through our grassroots organization, CWA protects and promotes Biblical values and Constitutional principles through prayer, education, and advocacy.

CWA is made up of people whose voices are often overlooked—average American women whose views are not represented by the powerful or the elite. CWA is profoundly committed to the rights of individual citizens and organizations to exercise the freedoms of speech, organization, and assembly protected by the First Amendment.

SUMMARY OF THE ARGUMENT

Protecting Petitioners’ free speech rights will not have the detrimental effects alleged by Respondents. The overwhelming evidence of the economic, social, and political power wielded by the LGBTQ+ community demonstrates that the slippery-slope arguments are invalid. This Brief will document the development of such power over the course of decades, using information from the beginning of these trends until the present day.

Upholding Petitioners’ First Amendment rights,

¹ All parties have consented to the filing of this brief in writing. No counsel for any party authored this brief in whole or in part. No person or entity other than *Amici*, their members, and their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

on the other hand, would guarantee that the same type of invidious discrimination that the state seeks to prevent is not simply shifted from one group (LGBTQ+ individuals) to another (people of faith) in violation of the First Amendment. It would ensure the balance envisioned by this Court in *Obergefell v. Hodges*, 576 U.S. 644 (2015), between the right to same-sex marriage and religious freedom, including the free speech of religious people.

ARGUMENT

I. **The Overwhelmingly Pro-LGBTQ+ Economic Environment Makes Respondents' Slippery-Slope Argument Untenable.**

Respondents assert that “Colorado’s antidiscrimination law was enacted to achieve its compelling interest in preventing the harm, both dignitary and economic, inflicted by denials of equal access to commercially available goods and services.” Br. in Opp’n at 33. While concern for economic harm, may have been part of what motivated the enactment of the law, that concern was misplaced.

It is well established that “[t]he business community . . . is one of the most important sources of interest group activity.” Wendy L. Hansen & Neil J. Mitchell, *Disaggregating and Explaining Corporate Political Activity: Domestic and Foreign Corporations in National Politics*, 94 Am. Pol. Sci. Rev. 891 (2000) <https://www.cambridge.org/core/journals/american-political-science-review/article/abs/disaggregating-and-explaining-corporate-political-activity-domestic-and-foreign-corporations-in>

-national-politics/467D6407E9C8F64222C3131757314CE6 (last accessed May 17, 2022). Some of the most successful and powerful companies in the world support LGBTQ+ rights. Apple, AT&T, Amazon, Facebook, Google, Home Depot, Twitter, Microsoft, and PayPal, to name a few, have all taken prominent roles, not only in promoting LGBTQ+ rights within their organizations, but in using their significant political capital to support LGBTQ+ rights in legislatures around the country.²

The Human Rights Campaign (HRC) is supported by numerous corporate benefactors: American Airlines, Bank of America, British Petroleum, Chevron, Citibank, Cox Enterprises, Dell, Diago, Coca Cola, Goldman Sachs, Google, IBM, Lexus, MGM Resorts International, Macy's, MetLife, Microsoft, Mitchell Gold & Bob Williams, Morgan Stanley, Nationwide Insurance, Nike, PNC, Northrop Grumman, Pepsico, Pfizer, Raytheon, Shell, Starbucks, and USBank. Human Rights Campaign, *National Corporate Partners*, <https://www.hrc.org/about/corporate-partners>. (Last accessed May 12, 2022.) HRC announced this year, "a record-breaking 842 businesses met all the criteria to earn a 100 percent rating and the designation of being a 2022 'Best Place to Work for LGBTQ+ Equality.'" Human Rights Campaign, *Corporate Equality Index, Executive Summary (2022)* https://reports.hrc.org/corporate-equality-index-2022?_ga=2.129826767.293865500.1652824139-1267407616.1652824139

² See David A. Graham, *The Business Backlash to North Carolina's LGBT Law*, *The Atlantic*, (March 25, 2016), <https://www.theatlantic.com/politics/archive/2016/03/the-backlash-to-north-carolinas-lgbt-non-discrimination-ban/475500/>.

(last accessed May 17, 2022)

Other LGBTQ+ groups also benefit from Corporate America's largess. The Gay, Lesbian, and Straight Education Network (GLSEN) is supported by many of America's most recognized corporate names.³ Lambda Legal, "the oldest national organization pursuing high-impact litigation, public education and advocacy on behalf of equality and civil rights for lesbians, gay men, bisexuals, transgender people and people with HIV," boasts donations from the nation's top law firms and corporations.⁴

Funding is not the full extent of support. "There are various dimensions to corporate political activity [Although] 'corporate PAC donations are important in themselves, [] they also should be understood as [just] one quantitative indicator of a range of other corporate political activity.'" Hansen & Mitchell, *supra*, at 891 (citation omitted). Prominent corporations have actively supported non-

³ In addition to many of those mentioned for the Human Rights Campaign, GLSEN corporate partners include Amazon Studios, McDonald's, MGM, New Balance, Pet Smart, State Farm, Walmart, The Walt Disney Company, Warner Media, Wells-Fargo, and YouTube, among others. See GLSEN, *Partners*, <https://www.glsen.org/take-action/corporate-partners> (last accessed May 12, 2022).

⁴ Law firms include Akin Gump, Arnold & Porter, Baker & McKenzie, Cravath, Swain & Moore LLP, Gibson Dunn, Jenner & Block, Jones Day, Kirkland & Ellis LLP, Kramer Levin, Latham & Watkins, Mayer Brown, McDermott Will & Emery, O'Melveny, Perkins Coie LLP, ReedSmith, Sheppard Mullin, Sidley, Vinson & Elkins LLP, and Wachtell, Lipton, Rosen & Katz. Lambda Legal, *National Sponsors*, <https://www.lambdalegal.org/about-us/sponsors> (last accessed May 12, 2022).

discrimination legislation.⁵ The Interim President of the HRC Foundation has written:

Ultimately, the growth of the [Corporate Equality Index] reflects the truth that so many leading businesses have come to embrace: leveling the playing field for LGBTQ+ workers is not simply a society good; it is also good for business.

Corporate Equality, Ex. Sum., supra.

This evidence shows the current business landscape strongly favors LGBTQ+ protections. Moreover, the ascendant practice of “cancel culture” in our society—relating to numerous issues, makes clear that business owners risk both their reputation and financial health if accused (correctly or in error) of speaking or acting in ways that are culturally unpopular. Examples abound, but two recent ones suffice to illustrate the concerns surrounding the contemporary manifestation of public shaming. A local bakery in Oberlin, OH, was falsely accused of racism following an employee’s confrontation with a black student from Oberlin College whom the employee caught shoplifting. There followed student protests of the bakery, elevated by the college’s dean of students, who passed out fliers protesting the bakery, and by the student government’s passage of a resolution that accused the bakery of a history of racial discrimination. Litigation ensued, which is ongoing, although the bakery has

⁵ See, e. g. <https://www.hrc.org/resources/business-coalition-for-equality> (last accessed May 17, 2022), where the HRC lists some of the more than 500 companies that support the proposed federal Equality Act.

been exonerated and awarded damages for the false and malicious accusations <https://www.insidehighered.com/news/2022/04/04/oberlin-college-loses-appeal-suit-filed-local-bakery> (last accessed May 24, 2022). A second example is the attention that getting “cancelled” receives in the business press. An article in Chief Executive, *How CEOs Can Navigate Cancel Culture Risks*, <https://chiefexecutive.net/cancel-culture-work-it-to-your-advantage/> (last visited My 30, 2022), notes “Welcome to 2021, where every marketing move seems to be fraught with the ‘current moment’ of political division and societal unease. In a widely cited Edelman poll, nearly 60 percent of Americans said they would choose, switch, avoid or boycott a brand based on its stand on societal issues. . . .” *Id.*⁶

Given this environment, it is inconceivable that other businesses would rush to avail themselves of the narrow protections Petitioners are asking for here. We have not seen that happened in the aftermath of *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), for example, even though the slippery-slope argument was also presented in that case. This Court noted, “HHS and the principal dissent argue that a ruling in favor of the objecting parties in these cases will lead to a flood of religious objections regarding a wide variety of medical procedures” *Id.* at 732. But this Court was wise to reject the speculation then, as it should here. The flood never came, as “only 52

⁶ See also, Kian Bakhtiara, *Why Brands Need to Pay Attention to Cancel Culture*, <https://www.forbes.com/sites/kianbakhtiari/2020/09/29/why-brands-need-to-pay-attention-to-cancel-culture/?sh=191bc394645e>, (last accessed May 24, 2022) and Marilyn Wilkinson, *Should Brands be Afraid of Cancel Culture?*, <https://latana.com/post/brands-cancel-culture/> (last accessed May 24, 2022).

companies or nonprofit organizations have told the government they plan to opt out of Obamacare’s requirement to cover birth control because it violates their religious beliefs.” (Jennifer Haberkorn, *Two Years Later, Few Hobby Lobby Copycats Emerge*, Politico, (Oct. 11, 2016), <https://www.politico.com/story/2016/10/obamacare-birth-control-mandate-employers-229627>) (last accessed May 21, 2022).

This is understandable. The market works against Christian owners seeking to run their businesses according to their deeply held religious beliefs. Their convictions, not economic incentive, motivate them to close on Sundays or pay higher-than-market wages or refuse good business in order to avoid promoting material that violates their religious convictions.

Respondents do not challenge Petitioners’ deeply held religious convictions,⁷ yet Respondents argue that it should be treated the same as “invidious discrimination.” Br. in Opp’n at 32. This faulty reasoning undercuts the right to freedom of speech and the free exercise of religion. This Court should categorically reject it. As this Court has noted, “Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises.” *Obergefell*, 576 U.S. at 672. Their right to live their lives and conduct their businesses free from government coercion to act contrary to those decent and honorable beliefs should be protected.

⁷ See Question Presented 2, Br. in Opp’n at [i] (addressing “sincerely held religious belief[s].”

II. The LGBTQ+ Community is Well Funded and Engaged, Wielding Significant Political Power.

“Few questions are as important to an understanding of American democracy as the relationship between economic power and political influence.” Lester M. Salamon & John J. Siegfried, *Economic Power and Political Influence: The Impact of Industry Structure on Public Policy*, 71 Am. Pol. Sci. Rev. 1026 (1977). This is certainly true of the LGBTQ+ movement.

The LGBTQ+ community has wielded significant political influence for several decades via its fundraising for political causes. In 2007, National Public Radio reported, “[a] new force is emerging in American politics: wealthy, gay political donors who target state level races.” Austin Jenkins, *Wealthy Gay Donors a New Force in Politics*, NPR, (June 26, 2007), <https://www.npr.org/templates/story/story.php?storyId=11433268> (last accessed May 21, 2022). NPR described an organized effort to finance candidates who support LGBTQ+ causes. *Id.*

Similarly, a 2008 *Time Magazine* article discussed a group of LGBTQ+ donors known as “the Cabinet.” “Among gay activists, the Cabinet is revered as a kind of secret gay Super Friends, a homosexual justice league that can quietly swoop in wherever anti-gay candidates are threatening and finance victories for the good guys.” John Cloud, *The Gay Mafia That’s Redefining Liberal Politics*, *Time* (Oct. 31, 2008), <https://content.time.com/time/subscriber/article/>

0,33009,1855344,00.html (describing the “intriguing development [in the 2008 elections]: anti-gay conservatives had suffered considerably”) (last accessed May 21, 2022).

A more recent profile featured prominent LGBTQ+ activist and donor, Tim Gill, in *Rolling Stone* magazine. *Rolling Stone* reported that Mr. Gill had “methodically, often stealthily, poured \$422 million of his fortune into the cause of equal rights for the LGBTQ+ community—more than any other person in America.” Andi Kroll, *Meet the Megadonor Behind the LGBTQ Rights Movement*, *Rolling Stone*, (June 23, 2017), <https://www.rollingstone.com/politics/politics-features/meet-the-megadonor-behind-the-lgbtq-rights-movement-193996/> (last accessed May 21, 2022). Gill’s well-financed network of LGBTQ+ support is staggering:

Gill’s sprawling network of LGBTQ advocacy groups rivals any big-money operation in the country. The Gill Foundation, which he started in 1994, underwrites academic research, polling, litigation, data analytics and field organizing. Gill Action, a political group launched a decade later, has helped elect hundreds of pro-equality lawmakers at the local, state and federal levels. OutGiving, his donor club, coaches the country’s richest pro-LGBTQ funders on how best to spend their money. Gill’s fingerprints are on nearly every major victory in the march to marriage, from the 2003 *Goodridge v. Dept. of Public Health* case, which made Massachusetts the first state to allow same-sex marriage, to the Supreme Court’s *Obergefell v. Hodges* decision two

decades later that legalized it in all 50. “Without a doubt,” says Mary Bonauto, the attorney who argued the Obergefell case, “we would not be where we are without Tim Gill and the Gill Foundation.”

Id. This significant pro-LGBTQ+ political influence extends to presidential politics. In the 2012 Presidential campaign, twenty-one prominent LGBTQ+ individuals and couples raised at least \$7.4 million for President Obama’s reelection.⁸ In the 2016 race, President Donald Trump’s candidacy was also aided by significant contributions from the LGBTQ+ community. Famously, Silicon Valley homosexual executive Peter Thiel donated \$1.25 million.⁹ As he campaigned, Trump sought to publicly express his support of the LGBTQ+ community, writing on Twitter, “Thank you to the LGBT community! I will fight for you while Hillary brings in more people that will threaten your freedoms and beliefs.”¹⁰ Candidate Trump was called, “perhaps the most pro-LGBT presidential nominee in the history of the Republican

⁸ See, e.g., Melanie Mason, Matea Gold & Joseph Tanfani, *Gay Political Donors Move from Margins to Mainstream*, L.A. Times (May 13, 2012), <https://articles.latimes.com/2012/may/13/nation/la-na-gay-donors-20120513> (last accessed May 22, 2022) and Jeremy Peters & Shane Goldmacher, *As Buttigieg Builds His Campaign, Gay Donors Provide the Foundation*, N.Y. Times (April 30, 2019), <https://www.nytimes.com/2019/04/30/us/politics/pete-buttigieg-gay-donors.html> (last accessed May 24, 2022).

⁹ David Streitfeld, *Peter Thiel to Donate \$1.25 Million in Support of Donald Trump*, N.Y. Times (Oct. 15, 2016), <https://www.nytimes.com/2016/10/16/technology/peter-thiel-donald-j-trump.html> (last accessed May 22, 2022).

¹⁰ Donald J. Trump (@realDonaldTrump), Twitter (June 14, 2016, 1:31 PM), <https://twitter.com/realDonaldTrump/status/742771576039460864>.

Party,” by the Log Cabin Republicans, the nation’s largest Republican organization representing LGBTQ+ interests.¹¹ Current President Joe Biden was also significantly aided by the endorsement of prominent LGBTQ+ groups like the National LGBTQ Chamber of Commerce¹² and has been called “the most LGBTQ-friendly president in U.S. History.”¹³

Given all the above, it would be hard to characterize the LGBTQ+ community as anything but politically successful. While the community is a minority group, its “political voice” greatly outweighs their numbers.¹⁴ Their unprecedented success has been called, “one of the most successful civil rights movements in history.” Walter Hickey & Dan Avery, *A Timeline of LGBTQ Rights in America, From Stonewall to the Supreme Court*, Business Insider, (June 1, 2020), <https://www.businessinsider.com/gay-rights-marriage-timeline-supreme-court-doma-2013->

¹¹ *Log Cabin Republicans PAC Statement on Presidential Endorsement Decision*, (Oct. 22, 2016), <http://www.log-cabin.org/pressrelease/log-cabin-republicans-pac-statement-on-presidential-endorsement-decision/>.

¹² John Verhovek, *National LGBTQ Chamber of Commerce Endorses Joe Biden*, ABC News (Aug. 31, 2020), <https://abcnews.go.com/Politics/national-lgbtq-chamber-commerce-endorses-joe-biden/story?id=72714924>, noting, “Both the Biden and Trump campaigns are aiming to turn out LGBTQ voters.”

¹³ Michael Collins, *How Joe Biden Became the Most LGBTQ-friendly President in U.S. History*, USA Today (June 22, 2021), <https://www.usatoday.com/in-depth/news/politics/2021/06/18/how-joe-biden-became-most-lgbtq-friendly-president-u-s-history/7495971002/>.

¹⁴ Results from a recent Gallup poll indicate that 7.1% of U.S. adults identify as LGBT or something other than heterosexual. Jeffrey Jones, *LGBT Identification in U.S. Ticks Up to 7.1%*, Feb. 17, 2022, <https://news.gallup.com/poll/389792/lgbt-identification-ticks-up.aspx> (last accessed May 23, 2022).

3 (last accessed May 22, 2022). Their ability “to attract the attention of the lawmakers,” *City of Cleburne v. Cleburne Living*, 473 U.S. 432, 445 (1985), is beyond dispute. Even if LGBTQ+ individuals are underrepresented in decision-making bodies, “[s]upport for homosexuals is, of course, not limited to other homosexuals.” *Ben-Shalom v. Marsh*, 881 F.2d 454, 466 n.9 (7th Cir. 1989). They have attracted attention and substantial support for their interests. Author and lawyer Linda Hirshman traced the historic gains in her book, *Victory: The Triumphant Gay Revolution—How a Despised Minority Pushed Back, Beat Death, Found Love, and Changed America for Everyone* (Harper Collins, 2012).

Over three decades ago, the Seventh and Ninth Circuits recognized the “growing political power” of homosexuals. *Ben-Shalom* at 466 n.9; *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 574 (9th Cir. 1990). The Ninth Circuit noted that “legislatures have addressed and continue to address the discrimination suffered by homosexuals . . . through the passage of anti-discrimination legislation. Thus, homosexuals . . . have the ability to and do ‘attract the attention of the lawmakers,’ as evidenced by such legislation.” *High Tech Gays*, 895 F.2d at 574 (quoting *Cleburne*, 473 U.S. at 445).

Over time, other courts came to understand the same reality. For example, in 2006, Washington’s Supreme Court noted that sexual orientation had been added to Washington’s nondiscrimination law and that “several state statutes and municipal codes provide protection against discrimination based on sexual orientation and also provide economic benefit for same sex couples.” *Andersen v. King County*, 138

P.3d 963, 974 (Wash. 2006) (*en banc*). Additionally, “a number of openly gay candidates were elected to national, state, and local offices in 2004.” *Id.* In light of these accomplishments, that court concluded that homosexuals were exercising “increasing political power.” *Id.* at 974-75.

In 2007, Maryland’s highest court agreed that homosexuals possess significant political power:

In spite of the unequal treatment suffered . . . by [some], we are not persuaded that gay, lesbian, and bisexual persons are so politically powerless that they are entitled to “extraordinary protection from the majoritarian political process.” To the contrary, it appears that, at least in Maryland, advocacy to eliminate discrimination against [homosexuals] ... based on their sexual orientation has met with growing successes in the legislative and executive branches of government.

Conaway v. Deane, 932 A.2d 571, 611 (Md. 2007) (citations omitted). Since these decisions, the political power of the LGBTQ+ movement has only grown.

Today and for a while now, no resort to court opinions is necessary to make the point the above courts made. Seventy-nine percent of the adult LGBTQ+ population lives in states with hate crime laws covering sexual orientation.¹⁵ Twenty-three states and the District of Columbia, prohibit

¹⁵ Movement Advancement Project, *Hate Crime Laws*, https://www.lgbtmap.org/equality-maps/hate_crime_laws (last accessed May 23, 2022).

employment discrimination based on sexual orientation. Another six prohibit discrimination against public employees based on sexual orientation.¹⁶

Additionally, federal “hate crimes” legislation imposes a minimum sentence on perpetrators of violent crimes “involving actual or perceived ... sexual orientation [or] gender identity.” 18 U.S.C. § 249(2). Finally, in 2010, both houses of Congress supported the successful repeal of “Don’t Ask, Don’t Tell.” Stephanie Condon, *Congress Passes “Don’t Ask, Don’t Tell” Repeal*, CBS News (Dec. 18, 2010), <https://www.cbsnews.com/news/congress-passes-dont-ask-dont-tell-repeal/> (last accessed May 23, 2022).

III. Influential Labor Unions Support LGBTQ+ Rights.

Many of the most influential unions actively support LGBTQ+ rights, giving them broad reach and support in government and the culture.

The National Education Association (NEA) regularly advocates on behalf of LGBTQ+ interests. *Issue Explainer—LGBTQ+ Rights*, <https://www.nea.org/advocating-for-change/action-center/our-issues/lgbtq-rights> (advocating for passage of the “Equality Act”). NEA support of LGBTQ+ causes influences its three million members and lends political muscle to Washington.

¹⁶ Human Rights Campaign, *State Maps of Laws & Policies—Employment* <https://www.hrc.org/resources/state-equality-index> (last accessed May 23, 2022).

The American Federation of State, County and Municipal Employees (AFSCME), with 1.5 million members, resolved to dedicate its resources and time to advancing legislation at both the state and federal level to ensure that same-sex couples received the same treatment as traditional couples. AFSCME, *Marriage Equality*, Res. 13, 40th Int'l Convention (2012), <https://www.afscme.org/about/governance/conventions/resolutions-amendments/2012/resolutions/marriage-equality>. The Service Employees International Union (SEIU), a 1.9-million-member labor union, also supports LGBTQ rights. It joined with AFSCME and the American Federation of Teachers to form the Labor for Equality Council, which is dedicated to, among other goals, securing passage of the Equality Act. Joint column, *LGBTQ Rights and Labor Rights are Intrinsically Linked*, <https://www.afscme.org/blog/lgbtq-rights-and-labor-rights-are-intrinsically-linked> (last accessed, May 23, 2022).

In sum, the LGBTQ+ community is allied with some of the most powerful grassroots and lobbying organizations in the country.

IV. Cultural Support Is Likely to Enhance LGBTQ+ Political Power.

A. Cultural Icons Sway Public Opinion in Favor of LGBTQ+ Rights.

Both news and entertainment media overwhelmingly support LGBTQ causes. The Gay & Lesbian Alliance Against Defamation (GLAAD) lists 138 “celebrity supporters,” including Oprah, Lady Gaga, Tina Fey, Ben Affleck, Jennifer Lopez, Jay-Z, Quincy Jones,

Jake Gyllenhaal, and Taylor Swift.¹⁷

GLAAD declares: “GLAAD rewrites the script for LGBTQ+ acceptance. As a dynamic media force, GLAAD tackles tough issues to shape the narrative and provoke dialogue that leads to cultural change. GLAAD protects all that has been accomplished and creates a world where everyone can live the life they love.” *About GLAAD*, Gay & Lesbian Alliance Against Defamation (“GLAAD”), <https://www.glaad.org/about> (last accessed May 23, 2022). And GLAAD touts its expertise in Entertainment Media, Spanish-language and Latinx media, Transgender Media, and News Media & Rapid Response, among others. <https://www.glaad.org/programs> (last accessed May 23, 2022).

Numerous people have speculated that it was no coincidence that the Academy Award-winning film “Milk” was released in the critical week before the November 2008 election, providing invaluable publicity for the homosexual and lesbian community that could not be purchased with campaign funds. See, e.g., John Patterson, *Why Gus van Sant’s Milk Is an Important Film*, *The Guardian*, Dec. 5, 2008, <https://www.guardian.co.uk/film/2008/dec/05/john-paterson-milk-gus-van-sant>.

Recent reports recount how arguably the world’s most successful family entertainment company, Disney, employs strategic personnel in charge of “adding

¹⁷ *GLAAD Celebrity Supporters & Events*, *Look to the Stars: The World of Celebrity Giving*, <https://www.looktothestars.org/charity/glaad> (last accessed, May 4, 2022).

queerness” to all its entertainment productions.¹⁸ Following some controversy over the matter, Disney CEO Bob Chapek promised to produce even more LGBT content from the influential studio.¹⁹

And America’s news media also renders direct and concrete support for the LGBTQ+ community. Two examples follow: First, the 2005 Human Rights Campaign Annual Report stated that its organization alone has at least one quote in a newspaper each and every day. Human Rights Campaign, *2005 Annual Report / 25 Years of Progress*, https://assets2.hrc.org/files/assets/resources/AnnualReport_2005.pdf?_ga=2.262900172.1529413984.1653419797-1752540482.1653310759 (last accessed May 24, 2022). Second, in the November 2008 election, every major newspaper in California that took a position on Proposition 8, along with the influential *New York Times*, expressed a “vote No on 8” editorial opinion. Trial Tr. at 2456:25-2457:17, 2442:21-24 (testimony of Miller), *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. 09-CV-2292) (“I looked at the editorial endorsements of the 23 largest newspapers in California by circulation. And of those 23, 21 of the 23 endorsed a No On 8 position. Two of the—the remaining two out of the 23 did not take a position one way or the other [N]ational newspapers like the *New York Times* have been important allies of gays

¹⁸ Caroline Downey, *Disney Executive Producer Admits to ‘Gay Agenda,’ ‘Adding Queerness’ Wherever She Could*, National Review (March 29, 2022), <https://www.nationalreview.com/news/disney-executive-producer-admits-to-gay-agenda-adding-queerness-wherever-she-could/>.

¹⁹ Kay Smythe, *Disney to Create More Gay Content for Children*, Daily Caller (March 22, 2022), <https://dailycaller.com/2022/03/22/disney-lgbt-content-children/>.

and lesbians in the LGBTQ rights movement.”).

B. Various Religious Groups Support LGBTQ+ Rights.

Homosexuals are not without support in the religious arena either. A compilation of religious groups’ official positions regarding same-sex marriage shows great diversity, with many religious organizations officially embracing homosexuality and same-sex partnership. Pew Research Religion & Public Life Project, *Religious Groups’ Official Positions on Same-Sex Marriage*, (Dec. 7, 2012), <https://www.pewforum.org/2012/12/07/religious-groups-official-positions-on-same-sex-marriage/> (last accessed May 24, 2022). See, also, Pew Research Center, *Most U.S. Christian Groups Grow More Accepting of Homosexuality*, (December 18, 2015), <https://www.pewresearch.org/fact-tank/2015/12/18/most-u-s-christian-groups-grow-more-accepting-of-homosexuality/> (last accessed May 24, 2022).

For example, many religious organizations supported the “No on 8” campaign in California. Philanthropy News summarizes a report by Rebecca Voelkel, *A Time to Build Up: Analysis of the No on Proposition 8 Campaign & Its Implications for Future Pro-LGBTQIA Religious Organizing*, of the National Gay & Lesbian Task Force (2009), which encourage alliances between LGBTQ+ advocates and sympathetic religious leaders. <https://philanthropynewsdigest.org/features/research-briefs/a-time-to-build-up-an-analysis-of-the-no-on-proposition-8-campaign-and-its-implications-for-future-pro-lgbtqia-religious-organizing> (last accessed May 24, 2022). In its Novem-

ber 2008 newsletter, the Unitarian Universalist Association urged congregants to support the campaign. Roger Jones, *Thanks to Friends of Fairness*, The Uni-gram 4 (Nov. 2008).

When same-sex marriage became legal in Massachusetts, several religious organizations encouraged their clergy to perform such weddings, and some churches chose to do so. George Chauncey, *Why Marriage? The History Shaping Today's Debate over Gay Equality* 77-78 (2004).

Moving closer to the present, the Mormon Church announced its support of legislation to protect homosexuals in housing and employment. Michelle Boorstein & Abby Ohlheiser, *Mormon Church Announces Support for Legal Protections for Gay People*, Wash. Post (Jan. 27, 2015), <https://www.washingtonpost.com/news/local/wp/2015/01/27/mormon-church-to-announce-support-for-legal-protections-for-gay-people/> (last accessed May 24, 2022). Similarly, the nation's largest Presbyterian denomination, the Presbyterian Church (U.S.A.), gave final approval to authorizing same-sex marriages. Laurie Goldstein, *Largest Presbyterian Denomination Gives Final Approval for Same-Sex Marriage*, N.Y. Times (Mar. 17, 2015), https://www.nytimes.com/2015/03/18/us/presbyterians-give-final-approval-for-same-sex-marriage.html?_r=1 (last accessed May 24, 2022). In so doing, it joined the ranks of other religious bodies that already allow same-sex marriages: the Episcopal Church, the United Church of Christ, the Quakers, the Evangelical Lutheran Church, Reform Judaism, Conservative Judaism, and the Unitarian Universalist Association of Churches. *Id.*

A 2017 statement in support of the traditional, Biblical view of marriage signed by 150 faith leaders was met with a counter-statement by pro-LGBTQ+ faith leaders with double the number of signatures (300). Joshua Gill, *Pro-Gay Church Leaders Condemn Nashville Statement, Say Homosexuality Is 'Fully Blessed by God,'* The Daily Caller, (Aug. 31, 2017) <https://dailycaller.com/2017/08/31/pro-gay-church-leaders-condemn-nashville-statement/> (last accessed May 24, 2022). And even within organizations that *officially* support only traditional marriage, many individual *members* support same-sex marriage. For example, Gallup found that from 2016-2020, an average of 69% of U.S. Catholics supported same-sex marriage (<https://news.gallup.com/poll/322805/catholics-backed-sex-marriage-2011.aspx>) (last accessed May 24, 2022).

V. **Public Opinion Favors LGBTQ+ Rights, And First Amendment Protections.**

Considering the above, it should be no surprise that public opinion continues to grow in favor of LGBTQ rights. According to Gallup, in 1996, only 27% of Americans supported same-sex marriage. Today, the number is 70%. Gallup, *Marriage*, <https://www.gallup.com/poll/117328/marriage.aspx> (last accessed May 24, 2022). In 1977, “only 56 percent of Americans supported gay rights legislation.” Chauncey, *Why Marriage?*, *supra*, at 54-55. By 1996, 84% of Americans supported gay rights legislation. *Id.* at 55. By 2002, a Gallup poll found that “even though forty-four percent of the people said homosexuality was an unacceptable ‘alternative lifestyle,’ eighty-six percent thought homosexuals should have ‘equal rights in terms of job opportunities.’” *Id.* See, also, *id.* at 150-51

(describing the growing number of Americans who believe that homosexuals should be allowed to adopt).

This change is especially prevalent among the younger generations, where many have grown up knowing homosexuals and seeing them treated with respect. *Id.* at 166; see also, Gregory M. Herek, *Legal Recognition of Same-Sex Relationships in the United States: A Social Science Perspective*, *Am. Psychologist*, Sept. 2006 at 618 (describing changing attitudes among heterosexuals toward sexual minorities over the last two decades).

Yet, even as the LGBTQ+ movement continues to garner support, most Americans want the religious liberties protections guaranteed by the Constitution to be upheld. A June 28, 2017, Rasmussen national survey, in light of the granting of writ in this case, found that 57% believe a baker should be free to refuse to make a wedding cake based on religious beliefs. Only 29% thought the baker should be prosecuted for discrimination. Fourteen percent were undecided.²⁰ The poll reflects the preoccupation of the nation as it adjusts to the demands of living in a pluralistic society. This Court can help that process by upholding Petitioners' constitutional rights in this case.

VI. Reversing the Decision Below Prevents Discrimination.

Reversing the decision below does not allow 303

²⁰ Rasmussen Report, *Most Uphold Baker's Right to Refuse Gay Wedding Cake*, (June 28, 2017), https://www.rasmussenreports.com/public_content/politics/current_events/social_issues/most_uphold_baker_s_right_to_refuse_gay_wedding_cake. (Last accessed May 24, 2023.)

Creative to discriminate against individuals *because of* their sexual orientation. Instead, the state will simply be foreclosed from forcing people of faith to violate their conscience in order to pursue their creative passions. Reversing the decision below simply implements the language of this Court in *Obergefell*, when it said:

Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered. The same is true of those who oppose same-sex marriage for other reasons.

Obergefell, 576 U.S. at 679-80. To permit the state to punish free expression and dismiss sincerely held religious beliefs as animus would in turn promote the proliferation of discrimination against a new target.

The trend towards the targeting of Christians who hold a traditional view of marriage will increase exponentially. As this Court is aware, the cases are numerous and continue to grow.²¹ Such blatant,

²¹ See, e.g., *Elane Photography v. Willock*, 572 U.S. 1046 (2014); *State v. Arlene's Flowers, Inc.*, 389 P.3d 543, 548–49 (Wash. 2017), *vacated and remanded for recon.*, 138 S. Ct. 2671 (2018), *aff'd*, *State v. Arlene's Flowers, Inc.*, 441 P.3d 1203 (Wash. 2019), *cert. denied*, *Arlene's Flowers, Inc. v. Wash.*, 141 S. Ct. 2884

intentional and unconstitutional targeting of people of faith cannot be the answer to the states' efforts to protect discrimination based on sexual orientation. But that is exactly what is occurring, and this targeting is likely to intensify if Respondents' arguments were to prevail. "We're going to punish the wicked," said Coloradan pro-LGBTQ+ rights megadonor Tim Gill, as he commented on his efforts to expand protections based on sexual orientation. Kroll, *Meet the Megadonor*, *supra*.

In August 2016, a Catholic farmer in Michigan was barred from selling his product at a local farmers' market because he shared his beliefs on same-sex marriage on a Facebook post. Madeleine Buckley, *A Farmer Sues After he was Ousted from City's Farmer's Market Over his Views on Same-sex Marriage*, The Washington Post, (June 2, 2017), <https://www.washingtonpost.com/news/acts-of-faith/wp/2017/06/02/a-farmer-sues-after-he-was-ousted-from-citys-farmers-market-over-his-views-on-same-sex-marriage/> (last accessed May 24, 2022). In Ohio, a pro-LGBTQ+ rights group said it could target churches if they refused to allow their property to be used for same-sex weddings. Tyler O'Neil, *Ohio LGBTQ Group Announces Plans to Target Churches for Homosexual Weddings*, The Aquila Report (Mar. 12, 2017) <https://theaquilareport.com/ohio-lgbt-group-announces-plans-target-churches-homosexual-weddings/> (last

(2021), *Klein v. Ore. Bur. of Labor and Indus.*, 410 Pac. 3d 1051 (Ore. Ct. App. 2017), *vacated and remanded for recon.*, 139 S. Ct. 2713 (2019), *rev'd as to violation of ORS659A.409 and related grant of injunction, rev'd and remanded as to damages, otherwise aff'd*, *Klein v. Or. Bureau of Labor & Indus.*, 317 Or. App. 138 (Or. Ct. App. 2022), *petition for review denied*, *Klein v. Or. Bureau of Labor & Indus.*, 369 Or. 705 (Or. 2022), among others.

accessed May 24, 2022). As Chief Justice Roberts pointed out in his *Obergefell* opinion,

[h]ard questions arise when people of faith exercise religion in ways that may be seen to conflict with the new right to same-sex marriage—when, for example, a religious college provides married student housing only to opposite-sex married couples, or a religious adoption agency declines to place children with same-sex married couples. Indeed, the Solicitor General candidly acknowledged that the tax exemptions of some religious institutions would be in question if they opposed same-sex marriage. See Tr. of Oral Arg. on Question 1, at 36–38. There is little doubt that these and similar questions will soon be before this Court.

576 U.S. at 711-12 (Roberts, C.J. dissenting). This Court should make sure that efforts to protect against discrimination based on sexual orientation do not trample on the rights specifically spelled out in the First Amendment.

And it is a widely recognized that animus against people of faith who hold a traditional Biblical view of marriage continues to grow under the current political and cultural pressures we have discussed. It can also be seen in the public comments against Christian businesses that, like 303 Creative, find themselves unfortunately having to defend their beliefs against the cultural trend. Such comments come and go too quickly to reliably cite examples in this brief, but their existence is beyond dispute. Colorado’s view that sincerely held religious beliefs should be treated identi-

cally to invidious discrimination fuels the fire of discrimination against people of faith.

CONCLUSION

For the foregoing reasons, this Court should reject Respondents' sincerely-held-religious-beliefs-equals invidious-discrimination argument. Instead, this Court should stand against all forms of discrimination by upholding Petitioners' constitutional rights to freedom of speech by reversing the decision below.

Respectfully submitted,
this 31st day of May, 2022,

s/ Steven W. Fitschen

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