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 OF *AMICUS CURIAE* INSTITUTE FOR FAITH AND FAMILY IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae respectfully urges this Court to reverse the decision of the Tenth Circuit.

The Institute for Faith and Family ("IFF") is a North Carolina nonprofit corporation established to preserve and promote faith, family, and freedom by working in various arenas of public policy to protect constitutional liberties, including the right to live and work according to conscience and faith. IFF exists to advance a culture where human life is valued, religious liberty thrives, and marriage and families flourish. See https://iffnc.com.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Petitioner is a website designer who respectfully serves many people, including the LGBT community, but she does not create messages that conflict with her conscience. *303 Creative LLC v. Elenis*, 6 F.4th 1160, 1170 (2021). The Colorado Anti-Discrimination Act, Colo. Rev. Stat. § 24-34-601(2)(a) (CADA) backs her into a corner. None of the options are constitutionally sound. She must either (1) create a message that offends her conscience; (2) face crippling penalties; or (3) shut down her business. Petitioner believes

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[1] Counsel of record for all parties received notice at least 10 days prior to the due date of *amicus curiae*'s intention to file this brief. The parties have consented to the filing of this brief. *Amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to its preparation or submission.

marriage is the union of one man and one woman, but CADA's anti-discrimination provisions demand that she design websites for same-sex weddings if she offers services for opposite sex weddings. That would "mak[e] [Petitioner's] artistic talents the vehicle for a message anathema to her beliefs." *303 Creative*, 6 F.4th at 1199 (Tymkovich, C.J., dissenting). Although Petitioner's "*unique* services are, by definition, unavailable elsewhere" (*id.* at 1180), those "unique services" will not be available *anywhere* if she is forced out of business and there will be a chilling impact on other creative professionals whose views do not align with the prevailing orthodoxy. "Denying someone his livelihood is a harsh remedy." *Beverly Glen Music v. Warner Communications*, 178 Cal. App. 3d 1142, 1145 (1986). This result not only upends the First Amendment but also defeats a central purpose of public accommodation law by restricting public access to the services of creative professionals who are forced out of the marketplace.

The First Amendment not only protects expressive products, like Petitioner's website designs, but also the personal services required to create them. Creative products do not materialize out of thin air, and creative professionals do not engage in arbitrary, invidious discrimination when they decline to personally create messages that offend their convictions.

The Tenth Circuit ruling allows the use of public accommodation laws as a weapon to coerce unwanted speech. Compelled speech is even more damaging than compelled silence because it coerces "free and independent" individuals "into betraying their

convictions." *Brush & Nib Studio, LC v. City of Phoenix*, 448 P.3d 890, 924 (Ariz. 2019) ("*B&N*"), quoting *Janus v. American Fed. of State, County, and Municipal Employees, Council 31*, 138 S. Ct. 2448, 2464 (2018). In comparable recent cases, the Eighth Circuit, the Arizona Supreme Court, and a United States District Court in Kentucky all supported creative professionals: *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 752-753 (8th Cir. 2018) ("*TMG*") (wedding videos); *B&N*, 448 P.3d at 914 (wedding invitations); *Chelsey Nelson Photography LLC v. Louisville/Jefferson County Metro Gov't,* 479 F. Supp. 3d 543, 558 (W.D. Ky. 2020) ("*CNP*") (photography). The Arizona Supreme Court cited Justice Jackson's warning in *Barnette* about the ultimate futility of "government efforts to compel uniformity of beliefs and ideas." *B&N*, 448 P.3d at 896-897. "Those who begin coercive elimination of dissent soon find themselves exterminating dissenters." *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 641 (1943). "It appears that the path to 'coercive elimination of dissent' is steep—and short." *303 Creative*, 6 F.4th at 1200 (Tymkovich, C.J., dissenting), quoting *Barnette*, 319 U.S. at 641.

ARGUMENT

I. THE CONSTITUTION PROTECTS THE PERSONAL SERVICES REQUIRED TO CREATE PROTECTED EXPRESSION.

Cases involving creative professionals implicate personal services protected by the First Amendment because action is necessary to create expressive products—artwork, videos, photographs, websites. The Arizona Supreme Court rejected the argument that

creating custom wedding invitations "purely involves conduct, without implicating speech." *B&N*, 448 P.3d at 905. On the contrary, "[f]or such products, both the finished product *and the process of creating that product* are protected speech." *Id*. at 907 (emphasis added). Similarly, the Eighth Circuit observed that the creative activities in *TMG* "c[a]me together to produce finished videos that are media for the communication of ideas." 936 F.3d at 752 (internal citations and quotation marks omitted).

A. The Tenth Circuit admits CADA is a content-based, viewpoint-based regulation of protected expression.

The circuit court admits that Petitioner's "creation of wedding websites is pure speech." *303 Creative,* 6 F.4th at 1176. Marriage itself is "often a particularly expressive event." *Id.*, quoting *Obergefell v. Hodges*, 576 U.S. 644, 657 (2015) (recognizing "untold references to the beauty of marriage in religious and philosophical texts spanning time, cultures, and faiths, as well as in art and literature in all their forms"). Website design is protected expression that conveys a message, like photography and other artwork.[2]

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[2] *Regan v. Time, Inc.*, 468 U.S. 641, 648 (1984) (photographs); *CNP*, 479 F. Supp. at 555 n. 93; *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952) (motion pictures); *Kaplan v. California*, 413 U.S. 115, 119-20 (1973) ("pictures, films, paintings, drawings, engravings"); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65-66 (1981) (motion pictures, music, dramatic works); *Hurley*, 515 U.S. at 569 (art, music, literature); *Brown*, 564 U.S. at 790 (books, plays, films, video games); *ETW Corp. v. Jireh Publishing, Inc.*, 332 F.3d 915, 924 (6th. Cir. 2003) ("music, pictures, films, photographs, paintings, drawings, engravings, prints, sculptures");

"[P]hotography is speech when the photographer's artistic talents are combined to tell a story about the beauty and joy of marriage." *CNP,* 479 F. Supp. 3d at 557. Custom videos are "a form of speech . . . entitled to First Amendment protection." *TMG*, 936 F.3d at 751. Like the creative professionals in *CNP* and *TMG*, Petitioner is engaged in protected expression.

CADA "[m]andat[es] speech that [Petitioner] would not otherwise make" and "exacts a penalty" if she refuses. *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988). This is the essence of content-based regulation. The Tenth Circuit not only acknowledges that creative expression is involved, but also admits "the Accommodation Clause *compels speech*" and "works as a *content-based* restriction." *303 Creative*, 6 F.4th at 1178 (emphasis added). And because CADA's purpose is "to remedy a long and invidious history of discrimination based on sexual orientation" (*id.*), there is a "substantial risk of excising certain ideas or viewpoints from the public dialogue." *Id.*, quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994). The court openly admits that

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Cressman v. Thompson, 798 F.3d 938, 952 (10th Cir. 2015) (paintings, drawings, original artwork); *White v. City of Sparks*, 500 F.3d 953, 955-56 (9th Cir. 2007) (original artwork); *Bery v. City of New York*, 97 F.3d 689, 694-96 (2d Cir. 1996) (same); *Piarowski v. Ill. Cmty. Coll. Dist. 515*, 759 F.2d 625, 628 (7th Cir. 1985) ("art for art's sake"); *Jucha v. City of North Chicago*, 63 F. Supp. 3d 820, 825 (N.D. Ill. 2014) ("There is no doubt that the First Amendment protects artistic expression."); *VIP Prods. LLC v. Jack Daniel's Props.*, 953 F.3d 1170, 1175 (9th Cir. 2020) (dog toy that communicates a humorous message).

"[*e*]*liminating such ideas is CADA's very purpose*." *303 Creative*, 6 F.4th at 1178 (emphasis added).

This is viewpoint discrimination on steroids—an "egregious form of content discrimination." *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995). As the dissent points out, "the *content* of the message determines the applicability of the statute and the *viewpoint* of the speaker determines the legality of the message," so "CADA is both content-and viewpoint-based." *303 Creative*, 6 F.4th at 1202 (Tymkovich, C.J., dissenting). CADA transgresses the "bedrock principle" that "the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). Such censorship is "poison to a free society." *Iancu v. Brunetti*, 139 S. Ct. 2294, 2302 (2019) (Alito, J., concurring). Considering the repeated attacks on free speech, "it is especially important for this Court to remain firm on the principle that the First Amendment does not tolerate viewpoint discrimination." *Id.* at 2302-2303 (Alito, J., concurring).

B. The action required to create expression is entitled to First Amendment protection.

"It goes without saying that artistic expression lies within . . . First Amendment protection." *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 602 (1998) (Souter, J., dissenting). So does the personal labor required to create it. CADA demands that Petitioner engage in personal services, using her creative talents, to design a message that conflicts with her conscience and personal beliefs.

First Amendment protection extends to "creating, distributing, or consuming" speech. *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 792 n. 1 (2011) (video games). "[E]ven the purest of pure speech involves physical movements and activities that could be described as conduct." Richard F. Duncan, *Seeing the No-Compelled-Speech Doctrine Clearly Through the Lens of Telescope Media*, 99 Neb. L. Rev. 58, 70 (2020). Pictures do not paint themselves. Books do not write themselves. Abundant case law confirms this commonsense conclusion. First Amendment protection for creative products does not exist in a vacuum. For such protection to have meaning, the Constitution "must also protect the act of creating that material." *Fields v. City of Phila.*, 862 F.3d 353, 358 (3d Cir. 2017). "The act of taking a photograph, though not necessarily a communicative action in and of itself, is a *necessary prerequisite* to the *existence* of a photograph." *Silberberg v. Bd. of Elections*, 272 F. Supp. 3d 454, 479 (S.D.N.Y. 2017) (emphasis added). *See also ACLU v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012) ("The act of *making* an audio or audiovisual recording" is protected "as a corollary of the right to disseminate the resulting recording."); *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1204 (9th Cir. 2018) (creation of audiovisual recordings is "inextricably intertwined" with the finished recording and therefore "entitled to First Amendment protection as purely expressive activity").

Courts have applied these principles in favor of creative professionals. Producing wedding videos is protected expression. *TMG*, 936 F.3d at 756. The *TMG* plaintiffs did not merely "plant a video camera at the

end of the aisle and press record"—they intended "to shoot, assemble, and edit the videos with the goal of expressing their own views about the sanctity of marriage." *Id*. at 751. Designing wedding invitations (*B&N*, 448 P.3d at 910) is also protected expression. The Phoenix Ordinance in *B&N* would have forced plaintiffs "to *personally* write, paint and create artwork celebrating a same-sex wedding . . . to design and create invitations that enable and facilitate the attendance of guests at a same-sex wedding." 448 P.3d at 922. In *Masterpiece Cakeshop Ltd. v. Colorado Human Rights Commission*, "[f]orcing Phillips to make custom wedding cakes for same-sex marriages requires him to . . . acknowledge that same-sex weddings are 'weddings' and suggest that they should be celebrated—the precise message he believes his faith forbids." 138 S. Ct. 1719, 1744 (2018) (Thomas, J., concurring in part and in the judgment).

Similar editing services are required to design a website. Acts necessary to create expression—writing, painting, editing, or designing—cannot be disconnected from the finished product. As the Ninth Circuit explained, "we have never seriously questioned that the processes of writing words down on paper, painting a picture, and playing an instrument are purely expressive activities entitled to full First Amendment protection." *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1061-62 (9th Cir. 2010). Designing a website is like "[u]sing a camera to create a photograph" or "applying pen to paper to create a writing or applying brush to canvas to create a painting." *Ex parte Thompson*, 442 S.W.3d 325, 337 (Tex. Crim. App. 2014). *"[T]he process of creating the end product cannot*

reasonably be separated from the end product for First Amendment purposes." *Id*. (emphasis added).

The state compulsion required by CADA does a grave disservice to both creative professionals and their customers. Coercion produces a counterfeit. If an artist is repelled by the message he must create and perhaps forbidden to even disclose his viewpoint to potential customers, the finished product will likely be unsatisfactory. That is one reason courts are loathe to order specific performance as a remedy for breach of a contract for personal services, especially where artistic expression is required.[3] The New York Court of Chancery, declining to compel a singer's performance of an Italian opera, expressed concern about "what effect coercion might produce upon the defendant's singing, especially in the livelier airs; although the fear of imprisonment would unquestionably deepen his seriousness in the graver parts of the drama." *De Rivafinoli v. Corsetti*, 4 Paige Ch. 264, 270 (1833). In cases about contracts for personal services, there is already a valid *contract* between parties who *voluntarily* agreed to its terms. Here, the state demands that Petitioner sign onto an unwanted contract for her personal creative services. This is unconscionable not only because it coerces facilitation of an ideological cause, but also because it allows any member of the public to coerce a particular individual

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[3] *See, e.g., Hamblin v. Dinneford*, 2 Edw. Ch. 529, 533-534 (N.Y. 1835) (actor); *Lumley v. Wagner*, 42 Eng. Rep. 687 (1852) (singer); *Duff v. Russell*, 14 N.Y.S. 134 (Super. Ct. 1891) (actress/singer); *Okeh Phonograph v. Armstrong*, 63 F.2d 636 (9th Cir. 1933) (jazz player). *See also* 5A Corbin, Contracts (1964) § 1204.

into providing services—and *that* constitutes involuntary servitude, a practice this nation discarded long ago.

C. Like other speakers, creative professionals have the right to remain silent.

"When the law strikes at free speech it hits human dignity . . . when the law compels a person to say that which he believes to be untrue, the blade cuts deeper because it requires the person to be untrue to himself, perhaps even untrue to God." Duncan, *Seeing the No-Compelled-Speech Doctrine Clearly*, 99 Neb. L. Rev. at 59.

Creative professionals have the "right to remain silent" by declining to create expression that is disagreeable to them. The First Circuit considered the case of well-known actress Vanessa Redgrave, who sued the Boston Symphony Orchestra for cancelling her scheduled appearance in the wake of protests about her political views. *Redgrave v. Boston Symphony Orchestra, Inc.*, 855 F.2d 888 (1st Cir. 1988). Redgrave argued that cancelling her performance violated the Massachusetts Civil Rights Act (MCRA), which created a private cause of action for violations. *Redgrave*, 855 F.2d at 901. The Orchestra responded by asserting its own "right to be free from compelled expression," and the court agreed. "A distinguished line of cases has underscored a private party's right to refuse compelled expression." *Id.* at 905. The "typical reluctance" of courts "to force private citizens to act . . . augments its constitutionally based concern for the integrity of the artist." *Id.*, citing *Lumley v. Wagner*, 42 Eng. Rep. 687,

693 (1852). Since private expression is encouraged and protected, the court saw "no reason why *less* protection should be provided where the artist [the Orchestra] refuses to perform; indeed, silence traditionally has been more sacrosanct than affirmative expression." *Id.* at 906. The Civil Rights Act could not lawfully foreclose the Orchestra's decision not to perform, because that decision was itself a constitutionally protected exercise of the right to be free of compelled speech. The same rational applies here. The statutory rights of same-sex couples must be "measured against the [Petitioner's] constitutional right against the state" (*id.* at 904) to be free of compelled expression.

II. PETITIONER'S OPERATION OF HER WEBSITE DESIGN BUSINESS IN ACCORDANCE WITH HER PERSONAL BELIEFS AND CONSCIENCE IS NOT IRRATIONAL, INVIDIOUS, OR ARBITRARY.

Public accommodation laws are designed to provide a shield but increasingly morph into a sword to cut off or compel expression. Anti-discrimination laws are "weaponized by supporters of same-sex marriage to drive religious conscientious objectors out of business and deprive them of their livelihoods." Richard F. Duncan, *A Piece of Cake or Religious Expression:* Masterpiece Cakeshop *and the First Amendment*, 10 Neb. L. Rev. Bull. 1, 22 (January 2019). Petitioner refuses to use her personal services to create a message she does not believe. Her refusal is not irrational, invidious, or arbitrary.

The First Amendment demands a clear, consistent definition for "discrimination" in this context. Declining to create or endorse a message does not constitute discrimination. "[C]ourts must more clearly evaluate when public accommodation laws have actually been violated, as opposed to when the individual or business is simply refusing to endorse a particular message." James M. Gottry, Note, *Just Shoot Me: Public Accommodation Anti-Discrimination Laws Take Aim at First Amendment Freedom of Speech*, 64 Vand. L. Rev. 961, 999 (2011). Like the wedding invitation designers in *B&N*, Petitioner does not seek "to employ the coercive apparatus of government to impose disabilities on others," but rather the "right not to engage in speech that offends [her] deeply held religious beliefs . . . one of our nation's most cherished civil liberties." *B&N*, 448 P.3d at 929.

A. Early anti-discrimination laws were carefully crafted with narrow definitions of protected categories and the places regulated.

Anti-discrimination policies have ancient roots. The Massachusetts law at issue in *Hurley* was derived from the common law principle that innkeepers and others in public service could not refuse service without good reason. *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 571 (1995). Anti-discrimination principles have expanded over the years to encompass more protected categories and places classified as "public accommodations." The potential encroachment on speech and religious liberty has vastly expanded. Early anti-discrimination laws

focused almost exclusively on eliminating the racial discrimination that plagued the nation for decades. *Just Shoot Me*, 64 Vand. L. Rev. at 965. Primary responsibility shifted to the states after this Court invalidated the Civil Rights Act of 1875. *The Civil Rights Cases*, 109 U.S. 3 (1883); *see Just Shoot Me,* 64 Vand. L. Rev. at 965 n. 7. Later federal attempts succeeded but again highlighted racial equality. The Civil Rights Act of 1964 "was enacted with a spirit of justice and equality in order to remove racial discrimination from certain facilities which are open to the general public." *Miller v. Amusement Enters., Inc.*, 394 F.2d 342, 352 (5th Cir. 1968); *see* Civil Rights Act of 1964, 42 U.S.C. § 2000a.

The vast expansion of categories and places has occurred with little analysis of the difference between race and newly protected classes—or as to how and when criteria may be legitimately related to a business decision. The Thirteenth, Fourteenth, and Fifteenth Amendments were added to the U.S. Constitution to remedy the nation's extraordinary problem of racial discrimination. These provisions cannot readily be transported into every other species of "discrimination," particularly when imposed on private citizens whose own rights may be trampled. It is one thing to impose nondiscrimination principles on the *state*—it is quite another to impose those same standards on private parties whose own liberties are at stake.

Early anti-discrimination laws narrowly defined "places of public accommodation" in terms of transient lodging, theaters, restaurants, and public entertainment venues. *Just Shoot Me*, 64 Vand. L. Rev.

961 at 966. But eventually these traditional "places" expanded beyond inns and trains to commercial entities and even membership associations—escalating the potential collision with First Amendment rights. *Boy Scouts v. Dale*, 530 U.S. 640, 657 (2000). Even today, federal law tracks common law rather than broadly sweeping in *any* establishment that offers *any* goods or services to the public. 42 U.S.C. § 2000a(b).

B. Action motivated by conscience or religious faith is not arbitrary, irrational, or unreasonable.

Discrimination is arbitrary where an entire class of persons is excluded because of irrelevant factors, e.g., "a practice of refusing to rent rooms to Negroes." *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 244 (1964). Protective measures are reasonable where widespread refusals deny an entire group access to basic public goods and services such as lodging, food, transportation. This Court rightly upheld federal legislation passed to eradicate America's long history of racial discrimination by enforcing the provisions of the Fourteenth and Fifteenth Amendments. *Id.* at 245, citing H. R. Doc. No. 124, 88th Cong., 1st Sess., at 14. The application of anti-discrimination law to private parties was a significant departure from the normal principles of constitutional law, specifically the *state* action requirement, but it was necessary under these extraordinary circumstances. Legal activists have now hijacked the language and legal principles surrounding racial discrimination to engineer controversial social changes that threaten First Amendment protection for speech and religious faith.

Conscience-based actions "are best understood as not constituting discrimination based on a protected trait" and therefore outside the scope of public accommodations laws like CADA. Timothy Bradley, *NOTE: Religious Liberty, Discrimination, and Same-Sex Marriage: Escaping the* Obergefell *Catch-22*, 95 Notre Dame L. Rev. 1339, 1342 (January 2020). It is hardly arbitrary or irrational to avoid promoting a cause for reasons of conscience. As protection against discrimination expands to more places and people, so does the potential to employ anti-discrimination principles to suppress traditional viewpoints and impose social change on unwilling participants.

C. The state must guard the rights of *all* citizens, including those who do not share the values of current legislative majorities.

The Constitution is an inclusive document protecting the life, liberty, religion, and viewpoint of all within its realm. Inclusion is a key rationale for anti-discrimination provisions. "The Constitution does not require a choice between gay rights and freedom of speech. It demands both." *CNP*, 479 F. Supp. at 549. But the liberty of all Americans will suffer irreparable harm if the government is granted power to coerce creative services that communicate its preferred message. "There is a reciprocity and universality to these rights of speech and conscience that give us all a direct stake in protecting them . . . ." *B&N*, 448 P.3d at 929. Non-discrimination principles should never be applied in a discriminatory, unequal manner that squelches First Amendment rights. Ironically, CADA

creates an intolerable danger of *exclusion* for free speech and artistic expression. The state can easily use the law to punish persons who hold traditional marriage beliefs by *excluding* them from full participation in public life. If applied to Petitioner, CADA would compel her to choose between her convictions and her livelihood, all because she refuses to sacrifice her beliefs and conscience on the altar of an agenda she cannot support.

The First Amendment protects a broad spectrum of expression, popular or not. Indeed, the increasing popularity of an idea makes it even more essential to protect dissenting voices. *Dale*, 530 U.S. at 660. Censorship spells death for a free society. "Once used to stifle the thoughts that we hate . . . it can stifle the ideas we love." *Gay Alliance of Students v. Matthews*, 544 F.2d 162, 167-168 (4th Cir. 1976). First Amendment freedoms "must be accorded to the ideas we hate or sooner or later they will be denied to the ideas we cherish." *Communist Party v. SACB,* 367 U.S. 1, 137 (1961) (Black, J., dissenting).

Proponents of LGBT rights have accomplished dramatic social and political transformation in just a few years by exercising their rights to free speech, press, association, and the political process generally. Their "progress depended on the First Amendment's protection of expressive conduct that was once far less popular than it is today, from marching in pride parades to flying rainbow flags." *CNP*, 479 F. Supp. at 564. These changes were possible because the Constitution guards free expression and facilitates the advocacy of new ideas. But advocates are not entitled

to demand for themselves what they would deny to others—otherwise, the constitutional foundation crumbles and all Americans suffer. One group's aggressive assertion of rights can erode protection for others.

Although LGBT citizens "cannot be treated as social outcasts or as inferior in dignity and worth" (*Masterpiece Cakeshop*, 138 S. Ct. at 1727), people of faith "are members of the community too." *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246, 2277 (2020) (Gorsuch, J. concurring). "[U]nder our Constitution, the government can't force them to . . . create an artistic expression that celebrates a marriage that their conscience doesn't condone." *CNP*, 479 F. Supp. at 548-549 (citations omitted).

The irony and implications have been recognized in prior cases. In *Masterpiece Cakeshop*, Colorado law "afforded storekeepers some latitude to decline to create specific messages the storekeeper considered offensive," e.g., a Denver bakery that refused a Christian customer's request to create two bible-shaped cakes inscribed with messages about the sinfulness of homosexuality. *Jack v. Azucar Bakery*, Charge No. P20140069X, at 2 (Colo. Civil Rights Div. Mar. 25, 2015), *available at* http://perma.cc/5K6D-VV8U. *Masterpiece Cakeshop*, 138 S. Ct. at 1728. Properly applied, anti-discrimination law could not force a gay calligrapher to "create a program for a church that preached against same-sex marriage" or compel Michelangelo, if he were alive today, "to paint a chapel ceiling in a way he deemed blasphemous"—although he could be required to sell completed sculptures free of

discrimination. *B&N*, 448 P.3d at 929. As the Tenth Circuit dissent observed, Colorado could "wield CADA as a sword" and require "an unwilling Muslim movie director to make a film with a Zionist message" or force "an atheist muralist to accept a commission celebrating Evangelical zeal." *303 Creative LLC*, 6 F.4th at 1199 (Tymkovich, C.J., dissenting).

The implications of anti-discrimination law are particularly striking where political affiliation is (or is not) a protected category.[4] In Michigan, a conservative consulting firm sued the City of Ann Arbor for outlawing discrimination based on political beliefs, forcing them to advocate views that contradicted their principles.[5] In New York, bars may throw out Trump supporters because the law does not protect against political discrimination[6] and renters seeking

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[4] *See, e.g.*, a current District of Columbia statute that prohibits discrimination based not only on race or color, but also "religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, familial status, family responsibilities, genetic information, disability, matriculation, political affiliation, source of income, or place of residence or business of any individual." D.C. Code § 2-1402.31(a). The D.C. Office of Human Rights lists 21 protected traits applicable to housing, employment, public accommodations, and educational institutions. https://ohr.dc.gov/protectedtraits.

[5] *ThinkRight Strategies v. City of Ann Arbor*, Case 2:19-cv-12233-DML-RSW (E.D. Mich. 2019). There was a stipulated dismissal in 2019 because the firm did not come within the definition of "public accommodation."

[6] https://nypost.com/2018/04/25/judge-bars-are-allowed-to-throw-out-trump-supporters/

roommates can advertise they do not want Trump supporters.[7] But in Seattle, where political beliefs are protected, a gym may lawfully ban a white supremacist.[8] The Eighth Circuit observed that if Minnesota's application of its law were correct, it could "require a Muslim tattoo artist to inscribe 'My religion is the only true religion' on the body of a Christian" if the artist "would do the same for a fellow Muslim" or "force a Democratic speechwriter to provide the same services to a Republican." *TMG*, 936 F.3d at 756.

III. THE GOVERNMENT HAS A COMPELLING INTEREST IN SAFEGUARDING THE RIGHTS GUARANTEED BY THE CONSTITUTION.

It is ironic that an opinion framed in terms of personal dignity (*Obergefell*) is now used to demolish the dignity of persons who respectfully disagree. There is a high price to pay for making Petitioner's unique services available to all. It comes at the cost of Petitioner's own dignity. Even if eliminating discrimination in places of public accommodation is a compelling state interest, "ensuring access to a *particular* person's unique, artistic product . . . is *not* a compelling state interest." *303 Creative*, 6 F.4th at 1203 (Tymkovich, C.J., dissenting). The government's most compelling interest is to preserve the constitutional rights of all citizens—perhaps *especially*

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[7] https://www.nytimes.com/2017/02/10/us/politics/roommates-trump-supporters.html

[8] https://crosscut.com/2018/02/a-gym-banned-a-white-nationalist-but-seattle-law-is-on-his-side

those who reject the prevailing state orthodoxy. "[T]he same Constitution held by *Obergefell* to guarantee the right of same-sex couples to marry also protects religious and philosophical objections to same-sex marriage." *CNP*, 479 F. Supp. at 563, citing *Obergefell*, 135 S. Ct. at 2605; *United States v. Windsor*, 570 U.S. 774, 775 (2013); *Masterpiece Cakeshop*, 138 S. Ct. at 1727. A law like CADA that commands "involuntary affirmation" demands "even more immediate and urgent grounds than a law demanding silence." *Janus*, 138 S. Ct. at 2464, citing *Barnette*, 319 U.S. at 633 (internal quotation marks omitted).

In *TMG*, Minnesota alleged an "important governmental interest—preventing discrimination" by ensuring that all its citizens were "entitled to full and equal enjoyment of public accommodations and services." 936 P.3d at 749, 754. "[M]ost applications of antidiscrimination laws . . . are constitutional," and a ruling in favor of a creative professional "is not a license to discriminate." *CNP*, 479 F. Supp. at 564. But legislators and courts must beware of "peculiar" applications that require speakers "to alter the[ir] expressive content." *TMG*, 936 P.3d at 755, citing *Hurley*, 515 U.S. at 572-573. Where the government's apparent interest is "simply to require speakers to modify the content of their expression" to align with a preferred message, that interest is "not compelling." *CNP*, 479 F. Supp. at 559.

The state's interest in preventing discrimination does not trump the Constitution. The Arizona Supreme Court found that the state's interest in ensuring equal access to publicly available goods and services did not

"justify compelling Plaintiffs' speech by commandeering their creation of custom wedding invitations, each of which expresses a celebratory message, as the means of eradicating society of biases." *B&N*, 448 P.3d at 914-915. "While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." *Hurley*, 515 U.S. at 579; *see B&N*, 448 P.3d at 915; *TMG*, 936 F.3d at 755. Even if the state could craft a narrowly tailored law to accomplish its legitimate interest, "it might still lose" in cases "where it is attempting to compel religious speech at the core of the First Amendment." *CNP*, 479 F. Supp. at 559.

IV. CADA WEAPONIZES PUBLIC ACCOMMODATIONS LAW TO PUNISH EXPRESSION OF TRADITIONAL VIEWS ABOUT MARRIAGE.

This case implicates two core liberties – speech and religion. This Court granted certiorari on the question respecting the Free Speech Clause, but the religious nature of the speech should not be overlooked. Anti-discrimination laws that cover sexual orientation are increasingly weaponized to target the expression of traditional views about marriage, and these views are often grounded in religion. Religious speech is not only "as fully protected . . . as secular private expression," but historically, "government suppression of speech has so commonly been directed *precisely* at religious speech that a free-speech clause without religion would be

Hamlet without the prince." *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995) (internal citations omitted). Like the wedding invitation designers in *B&N*, Petitioner uses her creative skills to express a message about marriage consistent with her beliefs. 448 P.3d at 917. The video producers in *TMG* wanted to "affect the cultural narrative regarding marriage" through films that portrayed "their view of marriage as a 'sacrificial covenant between one man and one woman.'" 936 F.3d at 748. Minnesota's anti-discrimination law "burden[ed] their *religiously* motivated *speech*" about marriage and reinforced their free speech claims. *Id*. at 759 (emphasis added). CADA imposes similar burdens on Petitioner.

The Sixth Circuit warned about the dangers of failing to apply an anti-discrimination policy "in an even-handed, much less a faith-neutral, manner." *Ward v. Polite*, 667 F.3d 727, 739 (6th Cir. 2012). Where the law protects a category defined by conduct that many religious traditions consider sinful, faith-neutral application is virtually impossible. People of faith will inevitably challenge laws forcing them to abandon their core religious convictions about marriage. Dissenting Justices in *Obergefell* sent a clarion call about the coming collision. Because marriage is not strictly a governmental institution but also a religious institution, it is "all but inevitable that the two will come into conflict." *Obergefell*, 135 S. Ct. at 2638 (Thomas, J., dissenting). And yet the viewpoint of "good and decent people [who] oppose same-sex marriage as a tenet of faith" is protected and "actually spelled out"

in the First Amendment—"unlike the right imagined by the majority." *Id.* at 2625 (Roberts, C.J., dissenting).

Marriage is a deeply personal matter that intersects speech, religious beliefs, and action. *See Turner v. Safley*, 482 U.S. 78, 96 (1987) ("[M]any religions recognize marriage as having spiritual significance. . . ."). The First Amendment embraces not only the freedom to believe but also "the right to express those beliefs and to establish one's religious (or nonreligious) self-definition in the political, civic, and economic life of our larger community." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 736-737 (2014) (Kennedy, J., concurring). One of the reasons this nation is "so open, so tolerant, and so free is that no person may be restricted or demeaned by government" for exercising religious liberty. *Id.* at 739 (2014) (Kennedy, J., concurring). In America, "tolerance is a two-way street." *Ward v. Polite*, 667 F.3d at 735. This Court's redefinition of marriage does not grant same-sex couples a corollary right to coerce an unwilling business owner to create expression that celebrates their viewpoint. CADA operates to "vilify" creative professionals "unwilling to assent to the new orthodoxy." *Obergefell*, 576 U.S. at 741 (Alito, J., dissenting). Colorado discards this Court's concern about stigma and "put[s] the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied." *Id*. at 672.

CADA attacks liberty of thought and conscience. The victory for freedom of thought recorded in the Bill of Rights recognizes that in the domain of conscience there is a moral power higher than the State. *Girouard*

v. United States, 328 U.S. 61, 68 (1946). Liberty of conscience undergirds the Establishment Clause and the unique taxpayer standing rules developed in *Flast v. Cohen*, 392 U.S. 83 (1968): "[T]he Framers' generation worried that conscience would be violated if citizens were required to pay taxes to support religious institutions with whose beliefs they disagreed." *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 141 (2011), quoting Feldman, *Intellectual Origins of the Establishment Clause*, 77 N. Y. U. L. Rev. 346, 351 (2002). An equivalent principle applies here. Colorado requires Petitioner to violate her conscience by creating messages she believes are false and celebrating events she believes are immoral. This assault on conscience is comparable to the Establishment Clause evil of compelling citizens to financially support beliefs they do not hold.

Petitioner wishes to conduct her business with integrity, setting company policies consistent with her conscience, moral values, and faith. Not everyone shares those values but cutting conscience out of commerce is a frightening prospect for business owners, employees, and customers. Customers expect businesses to operate with honesty and integrity. CADA compels Petitioner to hide her convictions. No American should ever have to choose between allegiance to the state and conscience just to remain in business. The government may not "exclude[] a person from a profession or punish[] him solely . . . because he holds certain beliefs." *Baird v. State Bar of Arizona*, 401 U.S. 1, 6 (1971); *see also Keyishian v. Bd. of Regents*, 385 U.S. 589, 607 (1967) (professor).

This Court has a "duty to guard and respect that sphere of inviolable conscience and belief which is the mark of a free people." *Lee v. Weisman*, 505 U.S. 577, 592 (1992). Rights of free speech and religion "are not limited to soft murmurings behind the doors of a person's home or church, or private conversations with like-minded friends and family." *B&N*, 448 P.3d at 895. On the contrary, the Constitution guarantees the right to free expression in the public square, including "the right to create and sell words, paintings, and art that express a person's sincere religious beliefs." *Id*.

V. CADA CRUSHES DISSENT, CREATING INTOLERANCE, UNIFORMITY, EXCLUSION, AND INEQUALITY.

Many believe that anti-discrimination laws like CADA are necessary to achieve *tolerance, diversity, inclusion,* and *equality* for the LGBT community. Properly understood and applied, these values facilitate life in a free society and protect the rights of all Americans. But instead of eradicating invidious discrimination, CADA creates it—crushing dissent and promoting *intolerance, uniformity, exclusion,* and *inequality*. CADA destroys diversity by demanding uniformity of thought, belief, speech, and action concerning the nature of marriage, silencing one side of this hotly contested issue. Colorado cements intolerance into state law. The result is an unconscionable inequality where people who hold traditional marriage beliefs are excluded from offering creative services to the public. CADA imposes a burden even more onerous than the compelled speech in *Wooley v. Maynard*, 430 U.S. 705 (1977). In *Wooley*, the

state designed and created the license plate its citizens had to display. Here, *Petitioner* must design and create expression that communicates a celebratory message she believes is false. This is anathema to the First Amendment. "Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning." *Janus*, 138 S. Ct. at 2464. The Tenth Circuit's decision is the "worst of all" possible speech violations—"a viewpoint-based compulsion to speak on politics or religion." *CNP*, 479 F. Supp. at 555.

Obergefell has led to brazen efforts to coerce uniformity of thought and punish dissenting views. Colorado contravenes "[t]he very purpose of the First Amendment," which is "to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion." *Thomas v. Collins,* 323 U.S. 516, 545 (1945) (Jackson, J., concurring). This is dangerous to a free society where the government must respect a wide range of diverse viewpoints "Struggles to coerce uniformity" of thought are ultimately futile, "achiev[ing] only the unanimity of the graveyard." *Barnette*, 319 U.S. at 640, 641.

The freedom of thought that undergirds the First Amendment merits "unqualified attachment." *Schneiderman v. United States*, 320 U.S. 118, 144 (1943). In this context, the distinction between compelled speech and compelled silence is "without constitutional significance." *Riley*, 487 U.S. at 796. These complementary rights are components of "individual freedom of mind." *Barnette*, 319 U.S. at 637. Freedom of thought "is the matrix, the indispensable

condition, of nearly every other form of freedom." *Palko v. Connecticut*, 302 U.S. 319, 326-27 (1937)), *overruled on other grounds by Benton v. Maryland*, 395 U.S. 784 (1969). Like many past cases, this case implicates a state law that "forces an individual . . . to be an instrument for fostering public adherence to an ideological point of view [s]he finds unacceptable." *Wooley*, 430 U.S. at 715; *B&N*, 448 P.3d at 904-905. The ideological coercion of public opinion "is not forward thinking." *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2379 (2018) (Kennedy, J., concurring).

CONCLUSION

This Court should reverse the Tenth Circuit ruling.

Respectfully submitted,

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