Nos. 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

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AMICUS BRIEF OF CHRISTIAN LEGAL SOCIETY AND FREE SPEECH ADVOCATES IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

Christian Legal Society ("CLS") is a nondenominational association of Christian attorneys, law students, and law professors. CLS's legal advocacy division, the Center for Law & Religious Freedom, works to protect the free exercise and free speech rights of all Americans, both in this Court and in Congress. The decision below directly threatens the freedoms of religious exercise and expression that are essential to a free society. Our Republic will prosper only if the First Amendment rights of all Americans are protected, regardless of the current popularity of their religious exercise and expression. For that reason, CLS was instrumental in passage of the Equal Access Act, 20 U.S.C. §§ 4071-4074 ("EAA"), which for more than thirty years has protected both religious and LGBT student groups' right to meet on public secondary school campuses. *See* 128 Cong. Rec. 11784-85 (1982) (Senator Hatfield statement) (recognizing CLS's role in drafting EAA); *Board of Educ. v. Mergens*, 496 U.S. 226 (1990) (EAA protects religious student group); *Straights and Gays for Equality v. Osseo Area Sch. No. 279*, 540 F.3d 911 (8th Cir. 2008) (EAA protects LGBT student group).

Free Speech Advocates (FSA) is a legal defense project that exists to secure the First Amendment

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[1]The parties have filed blanket letters of consent to the filing of amicus briefs. No counsel for any party authored this brief in whole or in part. No such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity aside from amici, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

rights to engage in religious witness, peaceful sidewalk counseling, and protest of or conscientious objection to the destruction of innocent human life. FSA has appeared as amicus in this Court in previous cases addressing, *inter alia*, freedom of conscience. FSA is deeply concerned about the threat to conscience posed by a state's attempt to coerce a private entity to become complicit in something the entity finds morally and religiously objectionable.

SUMMARY OF ARGUMENT

The sole "state interest" the Tenth Circuit recognized as supporting Colorado's compulsion of a web designer to handle a project it would not otherwise handle is "preventing ongoing discrimination against LGBT people." Pet. App. 25a. But the refusal to provide a service or product because of *what it is*, rather than because of *who requested it*, is not, as a matter of constitutional fact, "discrimination" against a group based on that group's identity. This is precisely the crucial difference between a restaurant not having a kosher or halal menu (not status discrimination) versus not serving Jewish or Muslim customers, respectively (status discrimination). It is the same distinction between a hospital not offering women abortions (not status discrimination) and a hospital providing ER care to men but not women (status discrimination). Recognition of that vital distinction maintains liberty, including religious liberty and free speech. The Tenth Circuit failed to recognize that 303 Creative's refusal to provide a particular service (design of a website celebrating same-sex unions) is not, as a matter of constitutional law, "discrimination."

This Court should therefore reverse the judgment below.

ARGUMENT

The Tenth Circuit's decision rests upon the premise that Colorado's interest in combating invidious discrimination supports forcing a business to offer services it would not otherwise offer. The problem is that this premise affixes the label "discrimination" to something that is not, as a matter of "constitutional facts," invidious discrimination at all. In other words, the state's asserted interest is simply inapplicable here, and hence that interest cannot support the challenged speech compulsion.

I. LABELS CANNOT CONTROL IN PLACE OF CONSTITUTIONAL FACTS.

In First Amendment cases, the facts are often determinative of whether constitutional protection applies. Was there a "true threat"? Is the speech "obscene"? Was the communication an "incitement to imminent lawless activity"? In such cases, as this Court has held, reviewing courts "must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold" on the particular issue. *Bose Corp. v. Consumers Union*, 466 U.S. 485, 511 (1984).

> [T]he reaches of the First Amendment are ultimately defined by the facts it is held to embrace, and we must thus decide for ourselves whether a given course of conduct falls on the near or far side of the line of constitutional protection.

Hurley v. Irish-American GLIB, 515 U.S. 557, 567 (1995). Therefore, neither courts nor parties are permitted to short-circuit the constitutional analysis by slapping on a particular label – such as calling a parade a "public accommodation," as in *Hurley*, or calling a refusal to provide a particular service *at all* "discrimination," as here. The correct characterization of the controlling factors in constitutional analysis must be a matter of constitutional law, not semantics. Were the case otherwise, governments could simply define their way out of constitutional violations. Just as "constitutional limits exist to States' authority to define away facts necessary to constitute a criminal offense," *Apprendi v. New Jersey*, 530 U.S. 466, 486 (2000), so do constitutional limits constrain a state's ability to apply labels like "public accommodation" or "government speech" or, here, "discrimination."

As discussed below, the state in this case describes web designer 303 Creative's *content* selectivity as *status* discrimination. That false recharacterization underlies the state's claim of a compelling interest to support its coercion of the web designer.

II. THERE IS A CRUCIAL DISTINCTION BETWEEN DECLINING A PROJECT BECAUSE OF *WHAT* IT IS AND DECLINING A PROJECT BECAUSE OF *WHO* REQUESTED IT.

A. Identifying "status" discrimination

There is a fundamental difference between invidious[2] discrimination on the basis of *who* a person is, on one hand, and legitimate selectivity on the basis of *what* is being requested (i.e., the nature of an event,

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[2]Whether "discrimination" against persons is *invidious* is a separate question. *See generally* Richard Garnett, "Wrongful Discrimination? Religious Freedom, Pluralism, and Equality," in Timothy Shah, Thomas Farr & Jack Friedman, *Religious Freedom and Gay Rights: Emerging Conflicts in North America and Europe* (Oxford Univ. Press 2016) ("Garnett"):

> . . . it is not true that "discrimination" is always or necessarily wrong. . . . "Discrimination," after all, is just another word for decision-making, that is, for choosing and acting in accord with or with reference to particular criteria.
>
> . . . It is not "discrimination" that is wrong; instead, it is *wrongful* discrimination that is wrong.

Id. at 72-73 (emphasis in original). There are obviously situations where legitimate reasons can justify selecting or rejecting people because of their personal characteristics. The Los Angeles Lakers do not have to accept on the team everyone who wishes to play basketball for them. A synagogue does not have to consider non-Jews for a position as rabbi. Yale does not have to admit every applicant for college. A Christian seminary does not have to accept non-Christians, much less anti-Christians, into its ministerial training programs. In the present case, however, the analysis does not even get to the question of invidiousness, as there is no status-based discrimination in the first place.

service, or product). This is the common-sense difference between a restaurant owner who does not serve Muslim customers, versus a restaurateur who welcomes customers regardless of religion but does not carry halal food options. *Cf. Burwell v. Hobby Lobby Stores*, 573 U.S. 682, 703 (2014) ("The businesses refuse to engage in profitable transactions that facilitate or promote alcohol use."). Or an evangelical sculptor who won't handle projects for Catholics, versus one who welcomes Catholic patronage but, as a matter of religious conscience, will not sculpt devotional images of saints. Or a caterer who will not serve Jews, on one hand, versus one who will just not handle a reception for a brit milah (ritual Jewish circumcision) because of strong personal objections to performing circumcisions. Or a toy shop owner who won't serve Japanese patrons, versus one who welcomes all ethnicities but refuses, based upon painful memories from World War II, to carry products manufactured in Japan. In each such case, the one who categorically rejects members of a group, as such, discriminates against the *who* – on the basis of political, racial, or religious *status*, in these examples – while one who declines only to facilitate certain events or provide certain products or services discriminates against the *what*, which is not status-based.[3]

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[3]The Supreme Court of Utah recognized the distinction as follows:

> For example, a Jewish-owned and -operated newspaper which serves a primarily Jewish community might lawfully refuse advertisements propagating anti-Semitic "religious" sentiments. However, that same newspaper could not single

Recognition of this distinction is essential to liberty (and to a sensible reading of nondiscrimination laws). One who discriminates based upon the identity of the patron is more likely to be engaging in arbitrary and invidious bias, withholding business from otherwise perfectly suitable patrons purely because of who they are.[4] Such discrimination (subject to the important caveats flagged in footnotes 2 and 4) is the quintessential target of nondiscrimination laws. But the decision to supply all comers with only certain products or services and not others, or to handle certain events but not others, instead represents a

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> out members of an anti-Semitic religious group and refuse to accept advertisements, regardless of content, from any member of that group *simply because they are a member of that group*. Such discrimination . . . is directed at the individual seeking to place the advertisement rather than at the content of the advertisement,

World Peace Movement of Am. v. Newspaper Agency Corp., 879 P.2d 253, 258 (Utah 1994) (emphasis in original).

[4]*But see supra* note 2. Cases where the identity of the individual is a bona fide, germane qualification (e.g., being old enough to purchase alcohol or cigarettes, or being a resident of a district eligible to vote there, or being tall enough safely to ride certain roller coasters, etc.) are a different matter. Moreover, religiously-based entities have their own constitutional right to preserve mission integrity and organizational identity when, for example, choosing their leaders and representatives. *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012). The First Amendment likewise shields the freedom of association, i.e., the right to set criteria to ensure pursuit of common goals. *See, e.g., Americans for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2382 (2021) ("the freedom of association may be violated where a group is required to take in members it does not want").

business decision necessary for all commercial enterprises: how will this business operate? Importantly, that business decision can reflect a variety of motives: profit judgments, personal taste, ethical norms, religious, political, or moral principles, concern about brand and image, etc.

Whether or not the business owner in fact deeply disagrees with some belief or practice of the pertinent class of customers is irrelevant. "It is a mistake to move too quickly from the observation that a person or group negatively evaluates an action to the conclusion that the group has demeaned or attacked the dignity of those who engage in that action." Garnett, *supra* note 2, at 82. A refusal to serve black customers is impermissible discrimination even if the bar owner has no animosity toward black people (maybe even is black himself), agrees they are entitled to equal rights, but nevertheless excludes them to please other, bigoted customers. On the other hand, a bar owner who serves all customers regardless of race does not discriminate even if he has the heart of Archie Bunker or Bull Connor.

Similarly, it is legally irrelevant whether a business decision reflects personal beliefs that an opponent might characterize as biased. In the examples above, the restaurateur who does not carry halal options may (or may not) harbor resentment against Muslims; the evangelical sculptor who won't carve a statue of St. Francis may find certain Catholic devotional practices theologically repugnant, perhaps even idolatrous; the toy shop owner who doesn't carry Japanese goods may hold a grudge against all Japanese for their nation's hostilities in World War II. Anti-discrimination laws, however, target discriminatory acts, not bad attitudes or thoughts.

Indeed, the latter are sacrosanct under the First Amendment, even when repugnant to some. *Schneiderman v. United States*, 320 U.S. 118, 144 (1943) ("If any provisions of the Constitution can be singled out as requiring unqualified attachment, they are the guaranties of the Bill of Rights and especially that of freedom of thought contained in the First Amendment.").

Thus, nondiscrimination does not mean a customer can demand whatever service he or she might want. That would be a right to commandeer a business, not a right to equal treatment. A Frenchman cannot insist, on pain of a charge of nationality discrimination, that a private language school teach French in addition to Arabic and Mandarin. Instead, a customer is entitled not to be denied goods or services because of who the patron is. Thus, a bookstore does not discriminate on the basis of the identity of its patrons if it fails to carry Christian publications that a Christian clientele might desire, even if the owner does this because he is a fervently anti-Christian atheist. Conversely, the Christian bookseller does not discriminate on the basis of religion by declining to carry books promoting Hinduism, regardless of motive. In such cases, customers of all stripes are welcome to patronize the store, but the seller is not obliged to add other products to satisfy a particular group, even if that group is legally protected from discrimination based upon its identity. *Compare Bray v. Alexandria Women's Health Ctr.*, 506 U.S. 263, 271-73 (1993) (disparate treatment of abortion is not sex-based even though only women have abortions), *with id.* at 270 (irrational disfavoring of activities associated with a particular class of people can indicate intent to disfavor that class).

In the present case, the web designer "gladly" would work with any customer regardless of identity. Pet. App. 184a ¶¶64-65. However, the web designer rejects certain projects because *those projects* are objectionable, not because of the identity of the customer. Pet. App. 184a, ¶66 (listing examples of items that would be objectionable). The web designer is by no means an uncritical "hired gun" for any and all projects. Rather, the web designer offers certain products and services, and not others. That such selectivity reflects moral and religious norms is no more relevant for purposes of a state interest in nondiscrimination than if the selectivity reflected aesthetics, profitability projections, or personal quirks. In neither case does the identity of the would-be patron matter. Hence, there is no discrimination on the basis of identity.

B. Maintaining the distinction when the "what" is associated with the "who"

That same-sex marriage is closely identified with homosexual or lesbian status does not change the constitutional calculus.

To be sure, the distinction between project selectivity and status discrimination can be less obvious when the service or product is closely linked to a particular group. While anyone can buy and wear a yarmulke, the practice is characteristic of Judaism, which is why "[a] tax on wearing yarmulkes is a tax on Jews." *Bray*, 506 U.S. at 270. But a tax on "wearing yarmulkes" is quite different from a decision not to *sell* yarmulkes. A tax on "wearing" yarmulkes is an imposition on "those persons who wear yarmulkes" – the "who," not the "what." By contrast, a decision of a

haberdasher not to offer yarmulkes (or mitres, Amish Kapps, or Muslim niqabs, for that matter) is not discrimination against those who wear yarmulkes (or mitres, Kapps, or niqabs). While avoiding a tax on wearing yarmulkes would require individuals to forswear that practice, a particular merchant's inventory decisions have no such consequence. Individuals retain their freedom to wear their preferred headgear; the merchant retains the freedom not to be dragooned into selling those items. And as noted above, it is not relevant whether the haberdasher declines to offer such products because of a principled (or even unprincipled) antipathy to the religion such head coverings reflect. After all, no one is required to profess or even act as if any particular religion, creed, or ideology is correct, desirable, or beneficial. The curmudgeon and the idealist are alike entitled to their confessional autonomy.

This Court applied this very approach in the abortion context. The Court, viewing some twenty years of struggle in the wake of *Roe v. Wade*, 410 U.S. 113 (1973), acknowledged that "men and women of good conscience can disagree" over the issue of abortion, *Planned Parenthood v. Casey*, 505 U.S. 833, 850 (1992), and that there were "common and respectable reasons for opposing" abortion, *Bray*, 506 U.S. at 270. Opposition to abortion – even direct, physical obstruction, as in *Bray* – therefore did not qualify as "animus" against a class (namely, women, the only biological sex capable of obtaining abortions). 506 U.S. at 269-74. As the *Bray* Court explained, discrimination requires that the act in question be taken "by reason of" the protected characteristic. *Id.* at 270 (emphasis in original). Members of the group must be targeted "because they are" members, *id.* (emphasis

in original), i.e., on the basis of the who, not the what, *id.* at 272 n.4 ("the characteristic that formed the basis of the targeting here was not womanhood, but the seeking of abortion"). Thus, the very different purpose or motive of "stopping" a "practice" (there, abortion) would not qualify as discrimination unless such opposition was, in essence, inherently class-based. *Id.* at 270. But that proposition was not "supportable." *Id.* As the *Bray* Court explained, even though as a matter of biology only women could get abortions,[5] "it cannot be denied that there are common and respectable reasons for opposing it, other than hatred of, or condescension toward (or indeed any view at all concerning), women as a class." *Id.* As the *Bray* Court concluded:

> Whether one agrees or disagrees with the goal of preventing abortion, that goal in itself (apart from the use of unlawful means to achieve it, which is not relevant to our discussion of animus) does not remotely qualify for such harsh description, and for such derogatory association with racism.

Id. at 274.

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[5]As the Court explained:

> While it is true . . . that only women can become pregnant, it does not follow that every . . . classification concerning pregnancy is a sex-based classification. . . . Discriminatory purpose . . . implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group.

Id. at 271-72 (internal quotation marks and citations omitted).

The same logic holds for same-sex marriage. This Court has expressly recognized that men and women of good conscience can disagree over same-sex marriage. "Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here." *Obergefell v. Hodges*, 576 U.S. 644, 672 (2015). It follows that opposition to *the what* – same-sex unions – cannot be equated with opposition to *the who* – homosexual or lesbian persons. There are common and respectable reasons for opposing same-sex unions, whether as a matter of adherence to "divine precepts," *id.* at 679, or "for other reasons" grounded in secular principles, *id.* at 680. That same-sex sexual acts are typically engaged in by persons of homosexual orientation no more refutes that proposition than does the fact that women, and only women, can be pregnant and thus have abortions. Likewise, in *Hurley v. Irish-American GLIB*, 515 U.S. 557 (1995), the parade organizers did not "exclude homosexuals as such," *id.* at 572, but simply invoked their constitutional right not to let their parade become a platform for celebrating homosexuality, *id.* at 570, a constitutional right this Court unanimously endorsed. That a particular group felt the decision most keenly did not convert legitimate subject matter control into invidious status-based discrimination.

The web designer here objects to having its business conscripted to celebrate same-sex unions. Like objections to abortion, objections to same-sex unions do not, as such, constitute status-based discrimination.

* * *

The state's attempt to justify compelled speech in this context on the basis of an interest in combating status-based discrimination fails at the threshold. There is no such discrimination here. It follows that the speech compulsion challenged here flunks constitutional review.

CONCLUSION

This Court should reverse the judgment below.

Respectfully submitted,

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