No. 21-476

In the
Supreme Court of the United States

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

v.

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

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

BRIEF OF *AMICI CURIAE* C12 GROUP, CHRISTIAN EMPLOYERS ALLIANCE, AND PINNACLE FORUM IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

The three *amici curiae* joining in this brief are all organizations advancing the biblical principle that Christians must conduct themselves and their businesses in ways that honor and glorify Jesus. Like the Petitioners, 303 Creative LLC and Lorie Smith, these organizations and their members believe that their Christian calling is not limited to ceremonial rites but includes all of one's life. They do not see their lives as segmented into "secular" and "religious" compartments. Rather, they see their Christian calling as all-encompassing, indivisible, and under the lordship of Jesus. Their businesses or vocations are no exception to the biblical command that they are to do everything "as for the Lord." Colossians 3:23 (ESV). *Amici* have interests in protecting and empowering both individual Christians and Christian-owned businesses and ensuring that they are able to live out their faith in a way that conveys the message of what they believe and the high standards they uphold while also being respectful to those who disagree with them.

The Christian Employers Alliance ("CEA") is an alliance of Christian-owned businesses, both non-profit organizations and for-profit businesses, whose mission is to unite, equip, and represent Christian-owned

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[1] Pursuant to Supreme Court Rule 37.3(a), *amici* certify that Petitioners and Respondents have given consent to the filing of *amicus* briefs. Pursuant to Supreme Court Rule 37.6, counsel for *amici* certifies that no counsel for a party authored this brief in whole or in part and that no person other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

businesses to protect religious freedom and provide the opportunity for employees, businesses, and communities to flourish.

The C 12 Group ("C 12") is the largest network of Christian CEOs, business owners, and executives in the United States. At its roundtables, business leaders from multiple industries convene monthly to incorporate best practices through the foundation of biblical principles by sharing ideas, holding each other accountable, and encouraging one another to uphold the core values of a Christian business leader. In so doing, C12 groups seek to build great businesses for a greater purpose. Its members include 1,420 CEO/Business Owners and 580 Executives representing nearly 1,500 businesses, many of which are closely-held. They span all industry sectors and represent businesses with as few as five and as many as over 15,000 employees.

The Pinnacle Forum America ("Pinnacle") is a non-profit organization devoted to equipping marketplace leaders for personal and cultural transformation in peer forums. Its mission is to encourage and equip influential leaders through forums, supported by a national network, to engage in personal and cultural transformation that honors Jesus. It is comprised of close to 1,000 partners and participants in over 40 states. Its members include owners of companies and C-level executives. The types of businesses and individuals involved include wealth management, manufacturing of all kinds, consulting of all kinds, publishing, construction, real estate development, bakers, realtors, attorneys, health care

providers of all kinds, auto dealers, restaurant owners, CPAs, and product distributors.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners Lorie Smith and her website design company 303 Creative LLC (hereinafter collectively "Lorie") challenged Colorado's Anti-Discrimination Act (CADA) on free-speech and religious grounds. Smith asserts that although she is generally willing to work for lesbian, gay, bisexual, and transgender ("LGBT") clients, she objects to using her artistic talent to communicate a message that promotes same-sex marriage. Accordingly, Lorie proposed to alert potential customers of her religious-based selective criteria on her website. The State of Colorado contends that this course of action violates CADA. This petition for *certiorari* follows lower court rulings in favor of Colorado.

CADA contains two relevant provisions. The "Accommodation Clause" prohibits a broad range of businesses from refusing service because of sexual orientation. The "Communication Clause" bans the publication of any communication that services will be refused or that "an individual's patronage . . . is unwelcome, objectionable, unacceptable, or undesirable because of . . . sexual orientation." *303 Creative LLC v. Elenis*, 6 F.4th 1160, 1168-69 (10th Cir. 2021); Colo. Rev. Stat. § 24-34-601(2)(a).

The Tenth Circuit held that the Accommodation Clause must satisfy strict scrutiny because it compels speech. *303 Creative*, 6 F.4th at 1178. Lorie's creation

of wedding websites was found to be "pure speech." *Id.* at 1176. Lorie's own speech is implicated even when her services are requested by a third party. *Id.* at 1177 (citing *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995)). CADA's Accommodation Clause compels Lorie to create speech that celebrates same-sex marriages, thus effectively making her speech the public accommodation. *303 Creative*, 6 F.4th at 1178. The statute is a content-based restriction whose "very purpose" is the "elimination" of disfavored views regarding sexual morality—views that are often driven by religious commands. *Id.*

Nevertheless, the Tenth Circuit held that strict scrutiny was satisfied in this case. The court ruled that Colorado has a compelling interest in protecting "both the dignity interests of members of marginalized groups and their material interests in accessing the commercial marketplace." *303 Creative*, 6 F.4th at 1178. The court held that the Accommodation Clause is not narrowly tailored to preventing dignitary harms because such interests do not outweigh free speech rights. *Id.* at 1179. However, the Accommodation Clause was held to be narrowly tailored to the goal of ensuring equal access to publicly available goods and services. *Id.* at 1179. Lorie's unique services, the court opined, would be unavailable unless her speech is compelled. *Id.* at 1180. The Tenth Circuit held that strict scrutiny was satisfied because ensuring equal access to the commercial market is more important than Lorie's constitutional religious and free-speech rights. *Id.* at 1181-82.

Turning to the Communication Clause, the Tenth Circuit held that Lorie's free speech rights are not violated because speech promoting unlawful activity is not protected. *303 Creative*, 6 F.4th at 1182. As a result, Lorie's proposed notice to potential customers of her selection criteria in exercise of her religion was ruled to violate CADA. *Id.* at 1183.

The Tenth Circuit held that CADA is a neutral law for purposes of the Free Exercise Clause because no evidence of overt religious bias or incendiary statements was presented in this case. *See Employment Div., Dep't of Hum. Resources of Or. v. Smith*, 494 U.S. 872, 880 (1990) (holding that neutral and generally applicable laws do not trigger strict scrutiny under the Free Exercise Clause); *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rights Comm'n*, 138 S. Ct. 1719, 1732 (2018) (holding that certain conduct by state actors betrayed hostility inconsistent with constitutional concerns of governmental neutrality). The court held that exemptions for places of worship and sex-based discrimination having a *bona fide* relationship to the goods or services rendered do not negate CADA's general applicability. *Id*. at 1187-88.

Lorie petitioned for *certiorari* based on the Free Exercise and Free Speech Clauses in the First Amendment. This Court granted *certiorari* on only the limited question "[w]hether applying a public-accommodation law to compel an artist to speak or stay silent violates the Free Speech Clause of the First Amendment." *303 Creative LLC v. Elenis*, 142 S. Ct. 1106 (Mem) (Feb. 22, 2022).

However, the fact that this case involves not just speech, but religious speech, informs the question whether government has a compelling interest. It is widely known that the objections of many people to promoting the LGBT viewpoint are rooted in ancient religious mandates as to marriage and sexual behavior. Colorado residents recognized when sexual orientation protections were added to the public accommodation law that those who disapproved on moral grounds were being branded bigots. *Romer v. Evans*, 517 U.S. 620, 646, 116 S. Ct. 1620, 1634, 134 L. Ed. 2d 855 (1996) (Scalia, J., dissenting). In fact, the conflict between religious commands and LGBT rights has been described as a "zero-sum game." *Fulton v. City of Philadelphia, Pa.*, 141 S. Ct. 1868, 1925 (2021) (Thomas, J., concurring); Chai R. Feldblum, *Moral Conflict and Liberty: Gay Rights and Religion*, 72 Brook. L. Rev. 61, 87 (2006) ("Given this reality, we are in a zero-sum game: a gain for one side necessarily entails a corresponding loss for the other side.").

This Court has recognized that the Constitution protects both the dignity of gay persons and the free-speech rights of those who object to gay marriage on philosophical and religious grounds. *Masterpiece Cakeshop*, 138 S. Ct. at 1727. This Court has sought to avoid a "zero-sum game" by respecting rights on one side without destroying the rights of the other. A law enabling members of one side of a controversy to demand that those on the other side engage in artistic endeavors conveying messages promoting their opponents' views fails to accomplish this goal of governmental neutrality and mutual respect.

It is therefore disconcerting that the Tenth Circuit, after finding that the very purpose of CADA was the elimination of opposing viewpoints and ideas on marriage and sexual orientation, proceeded to hold that CADA is neutral law for purposes of the Free Exercise Clause. *Compare 303 Creative*, 6 F.4th at 1178 *with id.* at 1183-84. The court focused solely on the *Masterpiece Cakeshop* concerns of bias in enforcement. *303 Creative*, 6 F.4th at 1184.

Like many recent courts addressing collisions between LGBT and religious rights, the Tenth Court's opinion contains the boilerplate disclaimer that Lorie's "sincere religious beliefs" are unquestioned. *Id*. at 1181. The court promptly dismissed her religion as irrelevant. *Id*. The unspoken inference is that because courts are prohibited from questioning subjective religious beliefs, they are entitled to infer that religious beliefs are *merely* subjective.

The First Amendment limits the state, not vice versa. *See id.* at 893 ("The Free Exercise Clause of the First Amendment commands that 'Congress shall make no law . . . prohibiting the free exercise [of religion].'") (O'Connor, J., concurring). The scope of the acts considered "religious exercise" must be defined by religion, not by the state. *Masterpiece Cakeshop*, 138 S. Ct. at 1731 (holding that state officials may not prescribe what is orthodox or offensive). After all, religion often involves a belief in a supernatural deity who prescribes rules of morality for mankind. If the Free Exercise Clause is more than a dead letter, it lies beyond the power of civil authority to proscribe obedience to religious commands. Government must

protect those who believe with the same vigor it protects those who do not.

The *Smith* majority recognized that it "would doubtless be unconstitutional" to ban "the casting of statues that are to be used for worship purposes or bowing down before a golden calf." 494 U.S. at 877-78. From whence come the prohibitions against idolatry? The existence of religious commands concerning conduct is a matter of public record. The First Amendment prevents government from considering the *weight* of this evidence. But constitutional religious concerns are raised when government seeks to require people to ignore the *existence* of those commands.

Lorie's religious exercise is based on the Bible, which is well known to prescribe the sacrament of marriage between one man and one woman and to include commands against sexual immorality. It is understandable that Lorie would seek to avoid communicating a message that promotes a view of marriage the Bible forbids. There is no evidence that Lorie seeks to mistreat anyone, only to avoid communicating a message inconsistent with her religion.

The text of the Constitution forbids laws prohibiting the free exercise of religion, and CADA does precisely that. Furthermore, the very object of CADA is the elimination of dissenting views on religion and religious observance. CADA thus strikes at the very heart of the liberties the First Amendment was designed to protect. *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) ("holding that "the Constitution . . . affirmatively mandates accommodation, not merely

tolerance, of all religions, and forbids hostility toward any"); *Marsh v. State of Ala.*, 326 U.S. 501, 509 (1946) (holding that the exercise of First Amendment rights has a preferred position in balancing tests because these rights lie at the foundation of free government); *Murdock v. Com. of Pennsylvania*, 319 U.S. 105, 115-16 (1943) (holding that ostensibly "nondiscriminatory" laws may not be employed in a manner so as to crush dissenting religious views). Colorado can hardly have a compelling governmental interest in targeting a universally-known religious teaching for eradication—that would violate the Constitution. The religious concerns lend additional weight to Lorie's constitutional free speech rights in this case.

As the Tenth Circuit recognized, strict scrutiny applies. CADA's Accommodation Clause (and with it, the Communication Clause) are unconstitutional as applied because the statute is not narrowly tailored to a compelling governmental interest. This is evidenced by the fact that other similar statutes are not nearly as burdensome on free speech (and religious) rights.

ARGUMENT

I. Public accommodation laws are too blunt an instrument to support a governmental interest in compelling artistic speech.

Public accommodation laws seek to ensure market access by rendering legally irrelevant certain personal characteristics of those seeking goods and services. *303 Creative*, 6 F.4th at 1181 n.5 (citing *Hurley*, 515 U.S. at 572; *Masterpiece Cakeshop*, 138 S. Ct. at 1728). A landscaper, for example, generally has little reason to

concern himself or herself with the personal life or characteristics of the owner.

The purpose of public accommodation laws is less relevant when goods or services are sought for a specified purpose. Consider, for example, a firearms vendor who is informed that a weapon being purchased is intended to be used for the commission of a crime. The dealer is then confronted with issues that go far beyond the mere personal characteristics of the prospective purchaser. Once a goal or purpose for services is known, the question arises whether the service provider wishes to involve herself in that cause.

Government may have an interest in preventing vendors from refusing goods or services merely because they may ultimately be used for something to which they object. *See Masterpiece Cakeshop*, 138 S. Ct. at 1728-29 (opining that providers should not "in effect be allowed to put up signs saying 'no goods or services will be sold if they will be used for gay marriages.'"). But services sought for a specified goal involve the service provider, to some extent, in enabling or becoming complicit in the aim for which the services are sought.

This case involves concerns beyond merely being legally compelled to assist in a cause a service provider finds objectionable. Here we have a conflict with the heightened First Amendment protection of artists against compelled speech. Requests for artistic efforts conveying a particular message raise issues of personal choice, freedom of association, freedom of speech, and freedom of religion that are fundamental to our country's commitment to personal liberty. Use of public accommodation laws to compel artistic speech that is

profoundly at odds with the artist's convictions oversteps the promise of "life, liberty, and the pursuit of happiness" contemplated in the Declaration of Independence.

Furthermore, an unconstitutional law cannot be rendered valid merely because it is enforced in a manner free of overt bias. The First Amendment prohibits even facially neutral laws if they are positioned to eliminate dissent. *Murdock*, 319 U.S. at 115 (noting that "[t]he way of the religious dissenter has long been hard" and holding that taxation of religious speech could effectively approve "a new device for suppression of religious minorities"). Although *Masterpiece Cakeshop* provides an additional layer of protection guaranteeing evenhanded enforcement, the question of constitutionality must focus on the law itself.

Laws that compel speech or goal-directed activities toward aims that violate one's personal or religious convictions, especially creative artistic endeavors conveying a potentially controversial message, are suspect and should be presumptively unconstitutional. At a minimum, government should have the heavy burden of satisfying strict scrutiny.

II. Strict scrutiny requires the government demonstrate not only a compelling governmental interest, but also that less restrictive measures are ineffective, and that burden has not been met.

To satisfy strict scrutiny, Colorado must demonstrate that CADA's particular application is

narrowly tailored to further a compelling governmental interest. *303 Creative*, 6 F.4th at 1178. As discussed above, it is questionable whether a compelling governmental interest exists in requiring speech that violates a service provider's personal and/or religious convictions. A compelling governmental interest in guaranteeing market access does not necessitate such drastic measures.

The Tenth Circuit recognized that "compelled speech is deeply suspect in our jurisprudence." As a general rule, a speaker has a right to express values, opinions, and endorsements, and to refrain from subjects the speaker wishes to avoid. *Hurley*, 515 U.S. at 573. When dissemination of views contrary to one's own are forced upon a speaker, the right to autonomy over the message is compromised. *Id.* at 576. Compelling people to speak a particular message alters the content of their speech. *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2371 (2018). Protection from compelled speech is a constitutionally-mandated governmental interest.

The Tenth Circuit erred in holding that government has a compelling interest in ensuring protected groups have access to creative works of a particular artist. The fact that each person's talents and abilities are unique does not equate to a monopoly. But even if it did, the Tenth Circuit failed to explain how compelled creative speech toward a cause against which an artist is fundamentally opposed would support equal access to the market. Common sense dictates that artists will be more likely to pour their creative endeavors into projects that are important to them. Laws can compel

conduct, but not the passion and energy that proceeds from one's beliefs. Thus, compelled speech fails to accomplish the stated goal of ensuring equal market access.

But even if Colorado has a compelling governmental interest in requiring Lorie to convey a message she is opposed to on religious grounds, Colorado's position cannot survive strict scrutiny. The presence of numerous other federal and state laws that are less restrictive demonstrates that CADA is not the least restrictive alternative.

III. Numerous examples of less restrictive public accommodation laws illustrate that Colorado's statute is not narrowly tailored.

The tailoring requirement prevents the government from "too readily sacrificing speech for efficiency." *McCullen v. Coakley*, 573 U.S. 464, 486 (2014). Narrow tailoring means that the curtailment of free speech must be actually necessary to the solution of an actual problem the state has demonstrated is in need of solving. *Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 799 (2011). This is such a demanding standard that "[i]t is rare that a regulation restricting speech because of its content will ever be permissible." *Id.* The government may not satisfy the narrow tailoring requirement by mere allegations or inference that less restrictive means would not work. *Ramirez v. Collier*, 142 S. Ct. 1264, 1279 (2022); *Holt v. Hobbs*, 574 U.S. 352, 368-69 (2015).

CADA is not narrowly tailored to furthering the goal of ensuring market access to goods and services.

As one of the most aggressive public accommodation laws in the country, CADA can hardly claim it meets the narrow tailoring requirement.

In the first place, protection of sexual orientation in public accommodation statutes is not universal. The federal government does not make sexual orientation a protected class in its public accommodation law. 42 U.S.C. § 2000a. Only 22 states currently include sexual orientation as a protected class in public accommodation statutes. Br. of Mass., *et al.* as *amici curiae* filed Apr. 29, 2020 in the Fourth Circuit, Appellate Case No. 19-1413 (citing Cal. Civ. Code § 51 (2018); Colo. Rev. Stat. § 24-34-601 (2014); Conn. Gen. Stat. § 46a-64 (2019); Del. Code Ann. tit. 6, § 4504 (2013); D.C. Code § 2-1402.31 (2001); Haw. Rev. Stat. § 489-3 (2006); 775 Ill. Comp. Stat. 5/1-102, 5/5-102 (2015); Iowa Code § 216.7 (2007); Me. Rev. Stat. tit. 5, § 4592 (2019); Md. Code Ann., State Gov't § 20-304 (West 2018); Mass. Gen. Laws. ch. 272, § 98 (2018); Minn. Stat. § 363A.11 (2019); Nev. Rev. Stat. § 651.070 (2011); N.H. Rev. Stat. § 354-A:17 (2009); N.J. Stat. § 10:5-4 (2007); N.M. Stat. § 28-1-7 (2008); N.Y. Exec. Law § 291 (McKinney 2010); Or. Rev. Stat. § 659A.403 (2019); R.I. Gen. Laws § 11-24-2 (2019); Vt. Stat. tit. 9, § 4502 (2019); Wash. Rev. Code § 49.60.010 (2019); Wis. Stat. § 106.52 (2018)). The fact that less than half the states have opted to make sexual orientation a protected class weighs against a finding that states have a compelling governmental interest in doing so.

Many public accommodation laws exclude expressive entities like newspapers from their definition of public accommodation to avoid

constitutional concerns. *Treanor v. Washington Post Co.*, 826 F. Supp. 568, 569 (D.D.C. 1993); *World Peace Movement of America v. Newspaper Agency Corp., Inc.*, 879 P.2d 253, 257-58 (Utah 1994); *Hatheway v. Gannett Satellite Info. Network, Inc.*, 459 N.W.2d 873, 157 Wis.2d 395 (1990). Governmental intrusion into the editorial process "is clearly a violation of the First Amendment freedom of the press." *Treanor*, 826 F. Supp. at 569. Courts have observed that "[t]here is a fundamental difference between having access to the neighborhood grocery store and asserting a so-called right to have a book reviewed by a newspaper." *Id.* Moreover, courts have recognized that, for expressive businesses, it is often the message that is rejected, not the characteristics of the proponents. *World Peace*, 879 P.2d at 258.

This same logic carries over into expressive activities. An artist's objection to supporting a message may be completely unrelated to the protected characteristics of the messenger. Narrow tailoring requires government to ferret out discriminatory animus without resorting to the heavy-handed tactic of compelling speech.

This Court has held that even the fact that newspapers tend to have monopoly control over public debate does not justify compelled speech. *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974). "Government-enforced right of access inescapably dampens the vigor and limits the variety of public debate." *Id.* at 257. Compelled speech is inconsistent with our "profound national commitment to the principle that debate on public issues should be

uninhibited, robust, and wide-open." *Id.* (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). This undermines the Tenth Circuit's holding that mere individual differences justify compelled speech.

Compelled speech is often avoided by limiting the applicability of public accommodation laws to physical places. Title II of the Civil Rights Act is limited to discrimination occurring in facilities or establishments serving the public. *Welsh v. Boy Scouts of Am.*, 993 F.2d 1267, 1275 (7th Cir. 1993); *Clegg v. Cult Awareness Network*, 18 F.3d 752, 755 (9th Cir. 1994). The federal statute does not apply to computer giants such as Google. *Lewis v. Google, LLC*, 461 F. Supp. 3d 938, 956-57 (N.D. Cal. 2020). Some states apply public accommodation laws more narrowly to apply only to places of public accommodation. *See Hatheway*, 459 N.W.2d 873, 875, 157 Wis.2d 395, 399 (1990). This helps avoid conflicts with expressive rights of newspapers and artists.

Colorado is one of only a few states that currently apply their public accommodation laws to online entities. In several of these states, this occurred through judicial interpretation. *See 303 Creative v. Elenis*, 385 F. Supp. 3d 1147, 1153 (D. Colo. 2019) (applying CADA in this case); *White v. Square*, 7 Cal. 5th 1019, 446 P.3d 276 (Cal. 2019) (applying California's Unruh Civil Rights Act to online entities); *Elane Photography, LLC v. Willock*, 284 P.3d 428, 436 (N.M. App. 2012), *aff'd*, 309 P.3d 53 (N.M. 2013) (applying New Mexico's Human Rights Act to an online photography business); *Andrews v. Blick Art Materials, LLC*, 268 F. Supp. 3d 381, 398-401 (E.D.N.Y. 2017)

(holding that a website is a place of public accommodation under New York law); *Harrington v. Airbnb, Inc.*, 348 F. Supp. 3d 1085, 1092-93 (D. Or. 2018). Several of these cases involved religious objections to providing creative or artistic support for same-sex marriages.

Some states apply public accommodation laws to only an exclusive list of businesses. *See* Md. Code Ann. State Gov't § 20-301; Me. Rev. Stat. tit. 5, § 4553.8. If other states can avoid free speech conflicts in this manner, so can Colorado.

Public accommodation laws are usually not applicable to organizations that use selective criteria to assess potential candidates. *Fulton*, 141 S.Ct. at 1880 (holding that "the one-size-fits-all public accommodation model is a poor match for the foster care system"); *Hetz v. Aurora Med. Ctr. Of Manitowoc County*, No. 06-C-636, 2007 WL 2753428 at *17 (E.D. Wisc. June 18, 2007) (refusing to apply Title III of the Americans with Disabilities Act to the denial of an application for medical staff privileges). Although Lorie serves everyone but seeks to avoid expressing messages inconsistent with her religious beliefs, her artistic services are also incompatible with the "one-size-fits-all public accommodation model." Her use of selective criteria to select projects that are within her scope of interest should be permissible under *Fulton* and *Hetz.* Requests for goal-directed services, especially expressive artistic works, do not fit well within the public accommodation requirement that providers must take all comers.

Public accommodation statutes often do not apply to private clubs. For example, Title II of the Civil Rights Act exempts private clubs that are not open to the public. 42 U.S.C. § 2000a(e). Many states follow this pattern. Iowa Code § 216.2(13)(a); N.H. Rev. Stat. Ann. § 354-A:2 (XIV); N.J. Stat. Ann § 10:5-5(l); N.M. Stat. Ann. § 28-1-2(H); N.Y. Civ. Rights Law § 40; 43 Pa. Cons. Stat. § 954(l); R.I. Gen. Laws § 11-24-3; Wash. Rev. Code § 49.60.040(2); D.C. Code § 2-1401.02(24).

Limitations on public accommodation laws often concern privacy. Many states exempt bathrooms, locker rooms, and changing areas from prohibitions against sex segregation. Conn. Gen. Stat. § 46a-64(b)(1)(B); 775 Ill. Comp. Stat. § 5/5-103(B); Md. Code Ann., State Gov't § 20-303; N.M. Stat. Ann. § 28-1-9(E); R.I. Gen. Laws § 11-24-3.1; Wis. Stat. § 106.52(3)(b) & (d). The same sometimes applies to sleeping accommodations in inn, dormitories, rooming houses. Conn. Gen. Stat. § 46a-64(b)(1)(A); 775 Ill. Comp. Stat. § 5/5-103(C); Mass. Gen. Laws ch.272, § 92(A); Wis. Stat. § 106.52(3)(b) & (d). Health clubs and sports teams are also sometimes allowed to limit membership by sex. Mass. Gen. Laws ch.272, § 92(A); Wis. Stat. § 106.52(3)(e).

Finally, some public accommodation laws have exceptions for religious organizations and members of the clergy. CADA's exception is narrowly drafted to include only "a church, synagogue, mosque, or other place that is principally used for religious purposes." Colo. Rev. Stat. § 24-34-601(1). Other states have exemptions for religious organizations. Iowa Code § 216.7(2)(a).; Minn. Stat. § 363A.11; N.H. Rev. Stat.

§ 354A:18; N.J. Stat. § 10:5-12.a.; N.M. Stat. § 28-1-9.B.; N.Y. Exec. Law § 296.11.; Or. Rev. Stat. § 659A.006(3); Vt. Stat. tit. 9, § 4502(l). Some states have exceptions for free speech or religious expression. 775 Ill. Comp. Stat. 5/1-102.1(b); Nev. Rev. Stat. § 651.060.2.(a). Co-religionist exemptions exist in some states. Mich. Comp. Laws § 37.2301(a)(iv); Iowa Code § 216(2)(a).; Minn. Stat. § 363A.26(1); N.H. Rev. Stat. § 354A:18; N.M. Stat. § 28-1-9(B). Several states allow religious institutions to decline hosting same-sex weddings. Me. Rev. Stat. tit. 19-A, § 655(3); 750 Ill. Comp. Stat. 5/209(a-10); Minn. Stat. § 517-09; N.Y. Dom. Rel. Law § 10-b.

A religious exemption from sexual orientation discrimination exists in a few states. Conn. Gen. Stat. § 46a-81(p); Iowa Code § 216.7(2)(a).; Minn. Stat. § 363A.26(2); N.M. Stat. § 28-1-9(B); Or. Rev. Stat. § 659A.006(3). A problem arises, however, in that these exemptions are underinclusive. They are restricted to religious organizations, and do not extend their protections to religious practices by laity. *See Elane*, 309 P.3d 53 (holding that compelled creative expression was not protected by either the Free Speech or the Free Exercise provisions of the First Amendment); *Klein v. Or. Bureau of Labor and Indus.*, 317 Or. App. 138, 506 P.3d 1108 (2022) (refusing to extend a religious exemption to a bakery that declined a request for a cake for a same-sex wedding). Nothing in the Constitution justifies limiting the freedom of speech and free exercise of religion to religious organizations or the clergy.

Other states protect religious beliefs through Religious Freedom Restoration Acts (RFRA). *See* N.M. Stat.§ 28-22-2(A) and (3); 775 Ill. Comp. Stat. 35/5 and /15. These statutes impose strict scrutiny on religious free exercise. Had Colorado employed this technique, Lorie's religious rights would not have been decided solely by the *Smith* test.

Public accommodation laws originally served the narrow purpose of preventing vendors and innkeepers from refusing customers without good reason. *Hurley*, 515 U.S. at 571. The common law treated innkeepers as "a sort of public servants." *Id.* In that limited context, few exceptions seem necessary. But as the scope of public accommodation laws has increased, other important rights are drawn into conflict with them. When they expanded into the realm of expression on controversial issues, particularly those involving religion, First Amendment rights are implicated. *Id.*, 515 U.S. at 581; *Treanor*, 826 F. Supp. at 569; *World Peace*, 879 P.2d at 258. Artists conveying a message are not "public servants" like vendors and innkeepers. Exceptions to public accommodation laws are constitutionally necessary to avoid these conflicts.

The above examples show that exceptions to public accommodation laws are not only possible, they are common. Other states have sought to achieve their non-discrimination interests while upholding rights of free speech. Moreover, Colorado's position that the goal of protecting dignity interests of LGBT persons is so compelling that no exceptions can be allowed for free speech or religious dissent is undermined by the

number and variety of exceptions to similar laws in other states.

CADA fails to balance Colorado's non-discrimination goal against the rights of artists such as Lorie to retain control over the message she conveys in her work. The controversy raised in this case is not a mere coincidence—CADA's stated purpose is to eliminate dissent on a controversial issue. *303 Creative*, 6 F.4th at 1178. The narrower drafting of similar laws in other states underscores the fact that CADA is not narrowly tailored to accomplish a compelling governmental interest.

CONCLUSION

This case is different from a typical application of public accommodation statutes in that it involves a request for a goal-directed artistic project expressing a message that contradicts Lorie's deepest religious beliefs. First Amendment protections of both Free Speech and Free Exercise of religion attach because this type of request invokes choices not merely about characteristics of the persons making the request, but also whether to associate with the cause for which the request was made. Compelled speech is rightly considered suspect in our jurisprudence. Applying strict scrutiny, CADA is not narrowly tailored to Colorado's goal of ensuring market access to protected classes. Accordingly, *Amici* respectfully request that this Court grant the petition and reverse the Tenth Circuit.

Respectfully submitted,

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