No. 21-476

In the Supreme Court of the United States

303 CREATIVE LLC, ET AL.,

Petitioners,

v.

AUBREY ELENIS, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE BECKET FUND FOR RELIGIOUS LIBERTY IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Free Speech Clause treats religious speech as core speech entitled to the highest level of protection.

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INTEREST OF THE *AMICUS*[1]

The Becket Fund for Religious Liberty is a nonprofit, nonpartisan law firm that protects the free expression of all religious faiths. Becket has represented agnostics, Buddhists, Christians, Hindus, Jains, Jews, Muslims, Santeros, Sikhs, and Zoroastrians, among others, including in multiple cases at this Court.

Becket has litigated numerous cases under the Free Speech Clause, as both party and amicus counsel. See, *e.g.*, *Greater Baltimore Ctr. for Pregnancy Concerns, Inc.* v. *Mayor & City Council of Baltimore*, 879 F.3d 101 (4th Cir.), *cert. denied*, 138 S. Ct. 2710 (2018); *Americans for Prosperity Found.* v. *Bonta*, 141 S. Ct. 2373 (2021); *Shurtleff* v. *City of Boston*, 142 S. Ct. 1583 (2022).

Becket submits this brief to explain that the history and tradition of freedom of speech demonstrate that religious speech enjoys the highest level of protection available under the Free Speech Clause.

INTRODUCTION

If its latest trip to this Court proves anything, it is that Colorado has learned nothing and forgotten nothing. By now Colorado ought to know that aggressively applying its public accommodation law to force conformity on religious dissenters violates Court-developed rules against compelled speech, content discrimination, and viewpoint discrimination. Yet Colorado

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[1] No counsel for a party authored this brief in whole or in part and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

obstinately continues, despite hornbook law that—as Petitioners explain—ought to make this a simple case.

But there is an even simpler—and narrower—way to resolve this dispute, one that runs through the history and tradition of freedom of speech in Anglo-American law. That history is a history of religious speakers: of Thomas Becket and Thomas More, popish recusants and seditious sectaries, Quakers and abolitionists, and more than a few Jehovah's Witnesses. At every turn, religious dissenters acting on conscience opened the way to speech protections. Freedom of speech first emerged within the Anglo-American tradition as freedom of *religious* speech, and religious speech has retained that special role within speech jurisprudence ever since. Today, that history means that religious speech—like political speech—is core speech that cannot be burdened without proper justification.

History and tradition also show that burdens on religious speech can be justified in only very limited circumstances identified by the Founding generation, such as when the speech threatens "peace and safety" or promotes "licentiousness." Here, Colorado's marketplace access and dignity justifications do not qualify.

Taking this simpler and narrower path to resolving this appeal has two additional virtues to commend it. First, it would provide an additional avenue for resolving a numerically small but recurring class of "wedding vendor" cases—cases that typically involve a provider of wedding-related services who has religious objections to participating in the celebration of a same-sex wedding. Looking to sincere religious belief to determine what category of speech is involved is a judicially manageable task, and one the lower courts routinely undertake.

Second, applying core speech analysis here would firmly re-root at least one subcategory of speech jurisprudence in the history and tradition of the Free Speech Clause. That would provide invaluable guidance to lower courts confronting government attempts to inhibit religious speech by wedding vendors. But it would also have broader helpful effects on the law of religious speech. By explaining that the Free Speech Clause ought to be read in light of historical practices and understandings—like other parts of the Bill of Rights—the Court would move away from a deracinated Free Speech Clause and revive history as a guide in speech cases across the board.

ARGUMENT

I. The history and tradition of freedom of speech teach that religious speech is core speech entitled to the highest level of protection.

The Free Speech Clause stands in a long tradition of protection for religious speech that stretches back from well before the Founding and reaches forward to cases decided by this Court in just the last few years. Indeed, in the Anglo-American tradition, freedom of speech *began* as freedom of religious speech, and it has retained a preferred position in our constitutional order ever since.

A. In the Anglo-American tradition before the Founding, religious speech lay at the origins and core of freedom of speech.

1. In English law, freedom of speech began as freedom of *religious* speech, and specifically as *institutional* religious speech. To be sure, the primary definition of freedom as a general concept in early English

law was stated in individual terms: "Freedom is the natural power of every man to do what he pleases, unless forbidden by law or force." 2 Bracton, *De legibus et consuetudinibus Angliæ* 29 (c.1235) (Samuel Thorne, trans. 1977).[2] But in practice individual freedom was limited to a very small group of rights-bearers, and even they were subject to "force" by those with more power. *Ibid.*

The only entity in post-Conquest England with a kind of nascent freedom of speech as against the government (that is, the King) was the Church. And thus it was between King and Church where the first conflicts over freedom of speech arose. For example, the Constitutions of Clarendon that eventually led to the murder of Archbishop Thomas Becket included not just the well-known provision forcing prosecutions of "criminous clerks" into the King's courts; the Constitutions also forbade church officials from excommunicating vassals of the King without first asking the King to "do justice" with respect to those vassals, or ordaining peasants without consent of the relevant lord. Constitutions of Clarendon ¶¶ 7, 16 (1164), reproduced and translated in Ernest F. Henderson, *Select Historical Documents of the Middle Ages* 13-15 (1892). In fact, it was Becket's excommunication of three bishops—an act that was pure institutional religious speech—that reportedly so enraged the King

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[2] Like many of the principles of English law described in Bracton, this understanding of freedom was ultimately derived from Roman law. See I Digest of Justinian 1.5.4 (Alan Watson, trans. 1985); W.W. Edwards, *Bracton and His Relation to the Civil Roman Law*, in 4 The Green Bag 196 (1892).

that he nudged his knights to act against Becket. See Frank Barlow, *Thomas Becket* 235 (1986).

Becket's murder in 1170 and the societal condemnation of the King that followed shook English society and the English polity to its foundations. But in the end, the incident resulted in a society-wide recognition that the Church had a limited form of freedom of religious institutional speech that the King had no right to impair.[3] It was no accident, then, that the first freedom granted in Magna Carta was King John's promise "that the English Church shall be free, and shall have its rights undiminished, and its liberties unimpaired." Magna Carta (1215).

The interaction around Becket's murder represents a kind of leitmotif of the expansion of freedom of speech over the centuries. Throughout English and American history, advances in freedom of speech have often followed the same pattern: (1) government officers seek to suppress religious speech, (2) religious dissenters defy the government, (3) the government retaliates, and (4) society reacts to the retaliation by (eventually) recognizing a new principle of freedom of speech.

Of course that does not mean that freedom of speech as we know it today sprang full-grown from the mind of the Church. Medieval lawyers tended to think of these institutional freedoms not in terms of rights, much less individual rights, but in terms of jurisdiction:

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[3] This proto-freedom of speech was not enjoyed by the only other religious community present in England at the time—England's Jews, who were later expelled in 1290.

> There are spiritual causes, in which a lay judge has neither cognisance nor (since he has no power of coercion) execution, * * * and secular causes, jurisdiction over which belongs to kings and princes who defend the realm, with which ecclesiastical judges must not meddle, since their rights or jurisdictions are limited and separate, except when sword ought to aid sword, for there is a great difference between the clerical estate and the realm.

2 Bracton 304. The Church's freedoms were conceived of as more in the nature of what we today call "structural" provisions of the Constitution, rather than the "rights" provisions. But as a practical matter, this meant that the Church had a species of freedom of institutional speech, a freedom it was initially almost alone in enjoying.

In time, this nascent freedom of speech began to spread beyond church bodies to Parliament, where the Lords Temporal sat alongside the Lords Spiritual, both of whom were eventually joined by the Commons. The very name of Parliament reflected that body's focus on speech. See *Parliament*, 2 *Compact Edition of the Oxford English Dictionary* 2080 (1971) (derived from French "parler"). In fact, "[b]y the latter part of the fifteenth century, the Commons of England seems to have enjoyed an undefined right to freedom of speech." Thomas Erskine May, *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament* ¶12.4 & n.1 (David Natzler & Mark Hutton eds., 25th ed. 2019). But even with this development of what later became the freedom of speech and debate, the freedom of speech remained focused on institutions rather than individuals.

2. It was only during the religious conflicts that erupted in the 1500s with the English Reformation that individuals began to invoke freedom of speech, eventually resulting in the extension of freedom of religious speech to individuals. In fact, scholars have concluded that throughout the period from the Reformation to the American Revolution, freedom of speech remained a *religious* concept: "Early debates about free speech were fundamentally debates about the freedom of *religious* speech." Jason Peacey, Robert G. Ingram, and Alex W. Barber, "Freedom of speech in England and the anglophone world, 1500-1850," in *Freedom of Speech, 1500-1850* (Ingram, *et al.*, eds.) (2020) (emphasis in original). See also Douglas Laycock, *High-Value Speech and the Basic Educational Mission of A Public School: Some Preliminary Thoughts*, 12 Lewis & Clark L. Rev. 111, 124 (2008) ("In the early modern era, when the idea of free speech was struggling for acceptance, Europe was embroiled in religious conflict growing out of the Reformation, and the speech that governments most wanted to suppress was very often religious speech.").

King Henry VIII broke from Rome in 1534, and quickly moved to suppress "both Roman Catholicism and extreme Protestantism (of which Puritanism was the most prominent element)." Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1421 (1990) ("*Origins*"). The legal form this suppression took was a series of statutes adopted under Henry and his successors. See Act of Supremacy, 26 Hen.VIII c.1 (1534) (recognizing Henry VIII as "Supreme Head" of the Church of England); An Act Respecting the Oath to the

Succession, 26 Hen.VIII c.2 (1534) (requiring all subjects to swear an oath recognizing Anne Boleyn as Henry VIII's lawful wife and their children as legitimate heirs); Douglas Laycock, *Continuity and Change in the Threat to Religious Liberty: The Reformation Era and the Late Twentieth Century*, 80 Minn. L. Rev. 1047, 1057 (1996).

These statutes immediately resulted in conflicts over freedom of religious speech for individuals, including both the right to speak and the right to remain silent. For example, Sir Thomas More sought to remain true to his Catholic religious beliefs by staying silent about whether he agreed with the King's supremacy over the Church in England. See Peter Ackroyd, *The Life of Thomas More* 353-354 (1998). After he was convicted, More claimed that his duty to comply with his religious conscience ought to excuse him from punishment. *Ibid.* He was nevertheless executed in 1535; More's assertion of both a right to conscientious silence and a right to conscientious speech were not enough to save his own life. Yet More's claim to freedom of *religious* speech for the individual would echo through the following centuries and would eventually be vindicated.

As the Reformation unfolded, Henry's successors, both Protestant and Catholic, continued to deploy the law to punish speech by their religious opponents. Under Edward VI, the Church of England "promulgated the Book of Common Prayer, and the Acts of Uniformity required all persons to worship at services conducted in that form and no other." Laycock, *Continuity and Change*, 80 Minn. L. Rev. at 1058. Dissenters, both Catholics and nonconforming Protestants, were executed for engaging in religious speech acts that

contravened the Acts of Uniformity. During her brief reign, Queen Mary sought to reestablish Catholicism; Parliament accordingly reenacted pre-Reformation religious speech restrictions, resulting in the executions of hundreds of Protestant dissenters, some of whom had themselves been involved in the execution of Catholics during Edward's reign. See John Foxe, 2 *Actes and Monuments* 1355 (1610) (describing burning at the stake of John Rogers). The reign of Queen Elizabeth saw suppression of the religious speech and religious conduct of both Catholics and nonconforming Protestants. In 1592, Parliament enacted a pair of statutes directed at religious dissenters. The Religion Act 1592, 35 Eliz.I, c.1, suppressed Protestant nonconformists ("seditious sectaries") and the Popish Recusants Act 1592, 35 Eliz.I, c.2—one of many recusancy acts enacted during Elizabeth's reign—suppressed Catholics.

In the runup to the English Civil War, the Stuart kings intensified attempts to induce conformity. In 1605, Parliament enacted the Popish Recusants Act 1605, 3 & 4 Jac., which effectively prohibited religious speech by Catholics after the failure of the Gunpowder Plot. And under King Charles I, Archbishop of Canterbury William Laud "brought six show cases in the Star Chamber in the 1630s," all against Puritans who had published religious critiques of the Church of England and its officials. Wendell Bird, *The Revolution in Freedoms of Press and Speech* 83-87 (2020). The defendants had their ears cropped, their noses slit, and their faces branded for engaging in religious speech.

Once the Civil War broke out in 1642, "Protestant dissenters took power," freeing Puritans who had been imprisoned for their publication of their religious

views, deposing Charles I, and restricting religious speech according to their own beliefs. They "rewr[ote] the prayer book and confession of faith" to conform to Calvinist and Presbyterian beliefs, while also banning religious freedom for "papists, the adherents of prelacy and the advocates of 'blasphemous, licentious or profane' doctrines." McConnell, *Origins* at 1421. These new rules were all enforced by means of religious speech restrictions enforced by the death penalty and other punishments.

After the monarchy was restored in 1660, the Church of England was reconstituted and new statutes were enacted to restrict religious speech, including the Conventicle Act 1664, 16 Car.II c.4, and the Test Act 1673, 25 Car.II. c.2. The Conventicle Act forbade unofficial church assemblies, prohibiting Protestant nonconformists from "attending a religious meeting or assembling themselves together" with five persons or more not of the same household. John D. Inazu, *Liberty's Refuge: The Forgotten Freedom of Assembly* 24 (2012) (quoting Conventicle Act 1664). The Test Act operated by means of compelled speech, "requir[ing] officeholders to swear an oath in court denying transubstantiation and acknowledging the King's supremacy over the Church and to present proof that they had taken communion within the preceding year in accordance with the rites of the Church of England." McConnell, *Origins* at 1421-1422. "The anti-Catholic elements of the Test Act persisted throughout the eighteenth century." *Ibid.* As Blackstone later put it, these tests were designed to protect the established church "against perils from non-conformists of all denominations, infidels, turks, jews, heretics, papists,

and sectaries[.]" William Blackstone, 4 *Commentaries on the Laws of England* 57 (1769).

The Glorious Revolution of 1688 marked another milestone towards recognition of individual claims to freedom of religious speech. The *Trial of the Seven Bishops* was one of the main precipitating events of the Glorious Revolution. See *The Trial of the Seven Bishops for Publishing a Libel* [1688] 12 How. St. Tr. 183, 415, reprinted in 5 *The Founders' Constitution* 189, 191 (Philip B. Kurland & Ralph Lerner eds., 1987). The trial involved the prosecution of seven Anglican bishops for seditious libel. The bishops had petitioned King James II to be exempted from his command to read a prescribed proclamation from the pulpits, on the grounds that it violated their consciences, and they were prosecuted for making the petition. Bird, *Revolution in Freedoms* at 40. The jury acquitted the bishops. *Ibid.*

The Glorious Revolution itself—which deposed James II and significantly increased parliamentary power—brought further reduction in restrictions on religious speech in its wake. Almost immediately after William and Mary's reign began, Parliament passed the Toleration Act 1688, which lifted restrictions on worship and education for nonconformist Protestants (albeit only Trinitarian ones). See 1 Will. & Mary c.18 (1688). The Act tracked the logic of Locke's *Letter Concerning Toleration*, written in 1685 and published in 1689. See John Locke, *Letter Concerning Toleration* (1689). While still exclusive, limiting freedom of religious speech to only Trinitarian Protestants, the Act was fundamentally an expansion of the concept of freedom of religious speech.

3. The American colonies took root during, and in large part because of, the ongoing religious conflicts in England, and their religious settlements reflected that reality. English colonies were often founded by groups fleeing England after defeats during the religious wars. See David Hackett Fischer, *Albion's Seed* 6-24 (1989) (New England settled by Puritans and Virginia by Cavaliers at times when each group was on the losing side of the English Civil War).

Some colonists brought English censoriousness in matters of religious speech with them. This was especially true in Massachusetts and Virginia—two states with religious establishments. See McConnell, *Origins* at 1420. Massachusetts banished Roger Williams to Rhode Island, whipped and mutilated other dissenters, and hanged four Quaker preachers on Boston Common. Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2162 (2003). The "authorities blocked the Presbyterians' ability to preach at every turn," while "Baptists continued to be horsewhipped and jailed for their preaching until the Revolution." McConnell, *Origins* at 1421. For its part, Virginia had a High Anglican establishment that assiduously suppressed dissenting religious speech. "In the eighteenth century, Virginia was the most intolerant of the colonies." *Ibid.* It expelled "ministers sent to serve the small Puritan community" and "the Catholic Lord Baltimore." *Ibid.*

By contrast, other colonies did something unprecedented in the English-speaking world: from their very beginnings, they embraced across-the-board freedom of religion and freedom of religious speech, for both in-

dividuals and institutions. Maryland was an early example, though it later became more restrictive. "The term 'free exercise' first appeared in an American legal document in 1648, when Lord Baltimore required his new Protestant governor and councilors in Maryland to promise not to disturb Christians ('and in particular no Roman Catholic') in the 'free exercise' of their religion." McConnell, *Origins* at 1425.

Pennsylvania was purposely founded as a haven for religious dissent. In 1670, William Penn had been arrested and tried for violating the Conventicle Act when delivering a sermon to an unlawful gathering of Quakers in London. Inazu, *Liberty's Refuge* 24-25. "[E]very Quaker in America knew of the ordeal suffered by the founder of Pennsylvania and its bearing on the freedom of religion, of speech, and the right of assembly." *Ibid.* (citation omitted). Equally well-known was Penn's refusal, for religious reasons, to remove his hat upon entering the courtroom. See *ibid.* Penn's famous refusal would prove instrumental to the First Amendment's ratification. See McConnell, *Origins* at 1471-1472 & n.320.

Pennsylvania's 1682 Frame of Government guaranteed that everyone who acknowledged God "'shall, in no ways, be molested or prejudiced for their religious persuasion, or practice, in matters of faith and worship.'" David S. Bogen, *The Origins of Freedom of Speech and Press*, 42 Md. L. Rev. 429, 454 (1983) (internal citation omitted). "Pennsylvania's promise of toleration contributed to the highest level of immigration of any of the colonies, and with immigration, prosperity." McConnell, *Origins* at 1430 (noting Pennsylvania's religious toleration informed James Madison's criticism of religious establishment in Virginia). At the

time Pennsylvania was perhaps the English-speaking polity with the most freedom of religious speech.

These different legislative approaches were mirrored in the 18th century by opposed understandings of the freedom of speech within the world of legal practice and the academy. As recent scholarship has shown, there were "two clusters of views" surrounding freedom of speech. Bird, *Revolution in Freedoms* 4. The "broad understanding"—associated with James Madison—sought to establish that there was a "right which every free subject has to speak and write of public affairs[.]" *Ibid.* The "narrow understanding"—associated with William Blackstone and Lord Chief Justice Mansfield—would restrict the right of free speech to freedom from prior restraints. *Ibid.*[4]

This mixed experience of establishment and disestablishment, orthodoxy and dissent, restriction and expansion, was to be of great consequence at the Founding. By the time of the Founding, almost every religious group present in the colonies had suffered at some point in their history from government restrictions on religious speech. Yet the Founders were also in a position to look back over the six centuries prior and discern a clear arc towards more protection for religious speech, both institutional and individual.

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[4] One need not accept Professor Bird's further argument that the Blackstone/Mansfield view was a minority view to conclude that the historical evidence shows the existence of two contending views of free speech at the time.

B. At the Founding, the Framers chose, and the American people adopted, broad protections for religious speech.

At the Founding, the Framers elected to follow a broad view of freedom of speech, rooted in the experience of over 600 years of conflict over (and growing protection of) religious speech, as well as in expanding theories of natural rights rooted in religious tradition.

1. First in importance was the fact that many Americans fought the Revolution *for the purpose of* establishing freedom of religion and freedom of religious speech for their communities. Observers at the time recognized that nonconforming Protestants were the driving force of the Revolution. Edmund Burke stated that the "free spirit" in America is due to "one main cause," that "[t]he people are Protestants; and of that kind which is the most adverse to all implicit submission of mind and opinion. * * * it is the dissidence of dissent, and the Protestantism of the Protestant religion." Edmund Burke, Speech on Conciliation with the Colonies (Mar. 22, 1775). Others said the Revolution was a "Presbyterian Rebellion," or led by "Congregationalists, Presbyterians, and Smugglers." Mark A. Noll, *A History of Christianity in the United States and Canada* 122 (1992).

Prominent colonial Protestant clerics would often advocate for American independence through religious parallels. For example, prominent minister and President of Yale College Ezra Stiles drew an analogy between "the *equality* and *independence* of every congregational apostolic church" and the freedom that "the thirteen provinces on this continent" should possess. Ezra Stiles, *A Discourse on the Christian Union* (1760),

quoted in Robert A. Ferguson, *Reading the Early Republic* 60 (2004). It was this reality that prompted John Adams to reject Rousseau's later claim that Americans had invented "the science of the rights of man," stating instead that they "found it in their religion." John Adams, Letter to Thomas Boylston Adams (Mar. 18, 1794), quoted in James H. Hutson, "The Emergence of the Modern Concept of a Right in America," in *The Nature of Rights at the American Founding and Beyond* 48 (Barry Alan Shain, ed. 2007).

2. Second, this practical interest in obtaining freedom of religious speech was paralleled by then-current theories of liberty that invoked the natural rights/natural law tradition to justify full protection for natural rights, including freedom of religious speech. In the view of the Founders, freedom of speech and freedom of religion were "natural rights" as opposed to "civil rights" or "acquired rights" like the right to trial by jury. See Philip Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 Yale L.J. 907, 920-921 (1993).

It was the task of lawgivers to translate natural rights into positive civil law: "Americans said that they should adopt constitutions and, more generally, civil laws that reflected natural law reasoning." Hamburger, 102 Yale L.J. at 937. The "civil law was expected to reflect natural law" by "adopt[ing] and enforc[ing] rules that approximated the constraints implied by natural law." *Id.* at 909. Thus for many Framers, one of their main tasks would have been to ensure that the Constitution and the Bill of Rights protected the natural rights of freedom of speech and freedom of religion.

And the content of those rights would have been readily apparent: "Indeed, reason confirmed what custom established: that the rights and immunities enjoyed by Englishmen under the common law and the British constitution were the very embodiment of natural rights." Michael W. McConnell, *Tradition and Constitutionalism Before the Constitution*, 1998 U. Ill. L. Rev. 173, 193 (1998). Contemporary natural rights theory thus dovetailed with the practical interest many Americans had in protecting freedom of religious speech.

3. The Founders acted to protect the freedom of religious speech in three phases. First, state constitutional provisions adopted immediately after the Declaration of Independence assiduously protected religious exercise, including religious speech. By 1789, every state except Connecticut (which still operated under its royal charter) had adopted protections for freedom of religion. See McConnell, *Origins* at 1455. By contrast, freedom of speech as a more general principle (as opposed to legislative speech and debate) was mentioned in only Pennsylvania's constitution.

In each of the religious freedom provisions, religious "[o]pinion, expression of opinion, and practice were all expressly protected." McConnell, *Origins* at 1459. Indeed, the current scholarly debate over the scope of these provisions centers on whether these provisions covered practice; but pure religious speech—that is, opinion and expression of opinion—is taken as a given. These provisions thus demonstrate that the Founders chose robust protection for religious speech at the very beginning of the Republic.

Second, the original version of the federal Constitution protected against religious tests like those required by the Test Acts in England and the religious tests imposed by certain states. See U.S. Const., Art. VI (1789). The No Religious Test Clause protected a religious speech right to remain silent, or, put another way, banned a certain form of compelled religious speech. During the ratification debates, this Clause was conceived of as an individual right: "By the injurious consequences to individuals, I mean, that some, who, in every other respect, are qualified to fill some important post in government, will be excluded by their not being able to stand the religious test; which I take to be a privation of part of their civil rights." Jonathan Elliot, 2 The Debates in the Several State Conventions on the Adoption of the Federal Constitution (2d ed. 1941) at 118-119 (Jan. 31, 1788) (statement of Rev. Daniel Shute during Massachusetts ratification debate). With the No Religious Test Clause, then, the Founders had adopted a provision that rejected compelled speech in violation of religious conscience.[5]

Third, religious speech was protected in the Bill of Rights, as adopted in 1791, by the Free Exercise Clause and Free Speech Clause of the First Amendment. The two provisions overlap. Professor McConnell has concluded that the protections of the Free Exercise Clause covered "opinions," "profession of religious opinions," and "conduct." McConnell, *Origins* at 1512. Of those three, only conduct is the subject of

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[5] The Constitution's separate oath-or-affirmation provisions were meant as a religious accommodation for Quakers and others, but were couched in non-religious terms.

scholarly dispute over whether it was protected. See *Ibid.* That view conforms to near-contemporaneous documents such as the Virginia Statute for Religious Freedom, which specifically protected religious speech: "all men shall be free to profess, and by argument to maintain, their opinions in matters of religion." Virginia Statute for Religious Freedom (1786).

But what of the Free Speech Clause? Neither the debates in Congress nor the ratification debates within the several states shed great light on the exact scope of the rights protected, much less to what extent religious speech was covered. In Congress, "[n]o one defined freedom of speech with any precision." Bogen, 42 Md. L. Rev. at 458. However, the general principle was distilled by Madison: "the censorial power is in the people over the Government, and not in the Government over the people." Akhil Reed Amar, *How America's Constitution Affirmed Freedom of Speech Even Before the First Amendment*, 38 Cap. U. L. Rev. 503, 506 (2010) (quoting 4 Annals of Cong. 934 (1794)). And since the "censorial power" wielded in England and the colonies had focused on the topics of politics and religion, both were covered by the Free Speech Clause designed by the Founders. See *id.* at 506 ("Historical arguments * * * offer additional support for a robust constitutional right of free political expression.").

C. Since the Founding, religious speech has consistently been treated as core speech under the Free Speech Clause that enjoys the highest level of constitutional protection.

1. For many decades after the First Amendment was ratified in 1791, this Court had little occasion to interpret the Free Speech Clause, in religious speech

cases or otherwise. It was therefore in the state courts where the first decisions concerning freedom of religious speech were made—and were made in favor of a preferred position for religious speech.

In the first case, *People* v. *Philips*, the Court of General Sessions, in an opinion authored by Mayor DeWitt Clinton, held that New York could not subpoena a Catholic priest for testimony about information that he had received during confession. 1 W.L.J. 109, 112–113 (Gen. Sess., N.Y. 1813). The court recognized that compelling religiously-forbidden speech would effectively "declare that there shall be no penance; and this important branch of the Roman Catholic religion would thus be annihilated." *Id.* at 112. Mayor Clinton recognized that the decision rested on constitutional grounds: "[a]lthough we differ from the witness and his brethren[] in our religious creed," "[t]hey are protected by the laws and constitution of this country[.]" *Id.* at 113.

Philips was influential, and "knowledge of the decision appears to have spread widely." *Fulton* v. *City of Philadelphia*, 141 S. Ct. 1868, 1908 (2021) (Alito, J., concurring). In *Commonwealth* v. *Cronin*, 2 Va. Cir. 488 (1855), the court, following *Philips*, held that it could not compel a Catholic priest to testify in a criminal trial as to information he received during confession. *Ibid.* Thus, in the decades following the Founding, American courts recognized that the Constitution protected religious speech and that government could

not compel religiously-forbidden speech.[6] In the same vein, early scholarly commentary noted religious speech's preferred position and compared it to core political speech. For example, St. George Tucker's 1803 constitutional law commentaries summed up "'the right of personal opinion'" in America as containing two categories: "'liberty of conscience in all matters relative to religion' and 'liberty of speech and of discussion in all speculative matters, whether religious, philosophical, or political.'" McConnell, *Origins* at 1493-1494 (internal citation omitted).

2. Freedom of religious speech also informed disputes about slavery and, later, the Fourteenth Amendment. In the years before the Civil War, Southern governments were worried that abolitionist religious speech would convince white Southerners to oppose slavery and lead to slave insurrections. As the issue of slavery roiled the nation, abolitionists in the North, including many clergy members, sent hundreds of anti-slavery religious tracts to Southern clergy and postmasters with instructions to distribute them in Southern communities. Kurt Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 Nw. U. L. Rev. 1106, 1132 (1994). Pro-slavery Southerners responded with a wave of repression. For example, in Charleston, South Carolina, pro-slavery vigilantes broke into the post office and stole anti-slavery tracts, and thousands

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[6] Professor McConnell notes that Pennsylvania and South Carolina had decisions rejecting religious exemptions, but that there is also evidence that trial judges in both states had broad discretion to issue de facto exemptions. See McConnell, *Origins* at 1511.

of people then gathered to publicly destroy them and burn effigies of leading Northern abolitionists. See Susan Wyly-Jones, *The 1835 Anti-Abolition Meetings in the South: A New Look at the Controversy over the Abolition Postal Campaign*, 47 Civil War History 289 (2001).

After Reverend Nat Turner led a rebellion in 1831, Southern states began aggressively regulating religious speech. For example, Southern states not only made it a crime, punishable by death, to "write, print, publish or distribute" abolitionist literature; many states specifically targeted religious speech that advocated for emancipation. Lash, 88 Nw. U. L. Rev. at 1134. "Those who attacked slavery through sermons, speeches, or written documents risked death by law or at the hands of proslavery mobs." *Ibid.* (citing Louisiana Constitutional and Anti-Fanatical Society, *Digest of the Laws Relative to Slaves and People of Free Colour in the State of Louisiana* 68 (1835)).

Following the Civil War, the framers of the Fourteenth Amendment sought to overturn Southern practices that suppressed religious speech. Rep. John Bingham, the author of Section One of the Fourteenth Amendment, "believed slavery violated basic principles of the Constitution, including the right 'to utter, according to conscience.'" Lash, 88 Nw. U. L. Rev. at 1146 (quoting *Cong. Globe*, 35th Cong., 2d Sess. 985 (1859)). Bingham also explained that "by the force of the fourteenth amendment, no State hereafter can * * * ever repeat the example of Georgia and send men to the penitentiary * * * for teaching the Indian to read the lessons of the New Testament." *Cong. Globe*, 42d Cong., 1st Sess. 84 (1871). Sen. Lyman Trumbull,

a co-sponsor of the Civil Rights Act, similarly reminded other members of Congress that States had made it "a highly penal offense for any person * * * to teach slaves." *Cong. Globe*, 39th Cong., 1st Sess. 474 (1865). And Rep. James Ashley remarked that under slavery, Southern governments had "silenced every free pulpit within [their] control." *Cong. Globe*, 38th Cong., 2d Sess. 138 (1864).

The Congress that adopted the Fourteenth Amendment therefore did so against a historical background where religious speech was both suppressed and yet instrumental in leading to slavery's demise. With this in mind, the framers of the Fourteenth Amendment established that religious speech was entitled to special solicitude and would be protected thenceforth from any similar attempts at suppression.

3. The preferred position of religious speech has continued in the decisions of this Court. In the almost-century since the Free Speech Clause was incorporated against the states in *Gitlow* v. *New York*, 45 S. Ct. 625 (1925), this Court has repeatedly confirmed that religious speech enjoys the highest level of constitutional protection.

Many of the early cases involved the religious speech practices of the Jehovah's Witnesses, who "played a remarkable role in developing First Amendment law[.]" Jeffrey S. Sutton, Barnette*, Frankfurter, and Judicial Review*, 96 Marquette L. Rev. 133, 140-141 (2012). Their "objection to the flag salute, their zeal in spreading their faith, their willingness to proceed in the most hostile environments, and their omnipresent distribution of pamphlets laid the groundwork for much of what we now take for granted as first premises of First Amendment law." *Ibid.*

In a series of decisions, this Court "emphasize[d] the value of the speech involved" while striking down ordinances restricting the speech rights of Jehovah's Witnesses. *Watchtower Bible & Tract Soc'y of N.Y., Inc.* v. *Village of Stratton*, 536 U.S. 150, 161 (2002). For example, in *Cantwell* v. *Connecticut*, this Court held that an ordinance requiring Jehovah's Witnesses to obtain a license before engaging in door-to-door solicitations and evangelism was invalid. 310 U.S. 296 (1940). This Court concluded that the case involved "only an effort to persuade a willing listener to buy a book or to contribute money in the interest of what [the plaintiff] * * * conceived to be true religion." *Id.* at 310. The Court drew a parallel between Cantwell's religious speech and political speech, explaining that "[i]n the realm of religious faith, and in that of political belief, sharp differences arise," but that "these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy." *Ibid.* Later the Court recognized that *Cantwell*'s rule sounded in both the Free Exercise Clause and the Free Speech Clause. See *Village of Schaumburg* v. *Citizens for a Better Env't*, 444 U.S. 620, 629 (1980).

In *Murdock* v. *Pennsylvania*, the Court again invalidated a municipal ordinance that required speakers to pay for a permit to distribute or sell literature door-to-door. 319 U.S. 105 (1943). And again, the Court highlighted the special value of religious speech, explaining that the "hand distribution of religious tracts is an age-old form of missionary evangelism—as old as the history of printing presses" and "has been a potent force in various religious movements" throughout history. *Id.* at 108. The Court continued and noted that

Murdock's religious speech was "more than preaching" and "more than distribution of religious literature"—"[i]t [was] a combination of both," and its "purpose [was] as evangelical as the revival meeting." *Id.* at 109. "This form of religious activity occupies the same high estate under the First Amendment as do worship in churches and preaching from the pulpits," and "has the same claim as the others to the guarantees of freedom of speech." *Ibid.* Moreover, "[f]reedom of press, freedom of speech, freedom of religion are in a preferred position" within the constitutional hierarchy. *Id.* at 115.

Similarly, in *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 (1943), this Court held that Jehovah's Witness children could not be compelled to recite the Pledge of Allegiance, overruling the Court's decision just three years earlier in *Minersville Sch. Dist.* v. *Gobitis*, 310 U.S. 586 (1940). As this Court framed it, the question was whether government officials could require a "conscientious child to stultify himself in public" by "making a prescribed sign and profession"—"a form of utterance"—that went against his religious beliefs. *Barnette*, 319 U.S. at 630, 632, 635 n.15.

In holding that school officials could not compel students to speak a message contrary to their religious beliefs, the Court noted that "[o]bjection to this form of communication when coerced is an old one, well known to the framers of the Bill of Rights." *Barnette*, 319 U.S. at 633. Indeed, the Court linked the Jehovah's Witnesses' religious speech to that of the Quakers (and the famous case of Penn's hat) who "suffered punishment rather than uncover their heads in deference to any civil authority." *Id.* n.13. And the Court concluded its

opinion by noting that religious speech "touch[es] the heart of the existing order," and that "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, [or] religion." *Id*. at 642.[7]

4. Later cases have consistently recognized that religious speech holds high station under the First Amendment. In fact, the Court has recognized that "in Anglo-American history, at least, 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 Rev. & Advisory Bd.* v. *Pinette*, 515 U.S. 753, 760 (1995) (emphasis in original). Put another way, religious speech, given its status as "speech on public issues," "occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection." *Connick* v. *Myers*, 461 U.S. 138, 145 (1983) (citations omitted) (collecting cases). See also *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 839 (1995) (rejecting "refusal to extend free speech rights to religious speakers"); *Good News Club* v. *Milford Cent. Sch.*, 533 U.S. 98, 107 n.2 (2001)

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[7] Other cases where the Court grappled with religious speech claims by Jehovah's Witnesses included *Lovell* v. *City of Griffin*, 303 U.S. 444 (1938); *Schneider* v. *New Jersey*, 308 U.S. 147 (1939); *Jones* v. *City of Opelika*, 316 U.S. 584 (1942), *vacated*, 319 U.S. 103 (1943); *Martin* v. *City of Struthers*, 319 U.S. 141 (1943); *Douglas* v. *City of Jeannette*, 319 U.S. 157 (1943); and *Saia* v. *New York*, 334 U.S. 558 (1948). The Jehovah's Witnesses have good claim to be the "recusants" or "sectaries" of the 20th century.

(rejecting "exclusion of the Club on the basis of its religious perspective"); *Lamb's Chapel* v. *Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993) (rejecting exclusion of film series because it "dealt with the subject from a religious standpoint"); *Widmar* v. *Vincent*, 454 U.S. 263, 277 (1981) (rejecting university's "content-based exclusion of religious speech"); cf. *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 565 U.S. 171, 199 (2012) (Alito, J., concurring) ("Throughout our Nation's history, religious bodies have been the preeminent example of private associations that have acted as critical buffers between the individual and the power of the State." (cleaned up)).

That high level of free speech protection extends to the right *not* to foster ideological concepts that run contrary to one's conscience: "A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts." *Wooley* v. *Maynard*, 430 U.S. 705, 714 (1977) (Jehovah's Witness could refuse to convey the government's slogan). And where government "burdens core * * * speech without proper justification," whether by compelling speech or forbidding it, the First Amendment is violated. *FEC* v. *Cruz*, 142 S. Ct. 1638, 1656 (2022).

Even in cases where the Court has not found political or religious speech to be at issue, it has been careful to distinguish those forms of speech. For instance, in *Bethel Sch. Dist. No. 403* v. *Fraser*, "fundamental values of 'habits and manners of civility' essential to a democratic society must, of course, include tolerance of divergent *political and religious* views, even when the views expressed may be unpopular." 478 U.S. 675,

681 (1986) (emphasis added). In that case, the Court concluded that the challenged speech was "vulgar and lewd" rather than political or religious and thus did not qualify as core speech. *Id.* at 685. Similarly, in *Morse* v. *Frederick*, the Court distinguished the banner in question from the messages in cases like *Tinker* by pointing out that it did not "convey[] any sort of political or religious message." 551 U.S. 393, 403 (2007). The same has been true of commercial speech, as the Court has "always been careful to distinguish commercial speech from speech at the First Amendment's core." *Florida Bar* v. *Went For It, Inc.*, 515 U.S. 618, 623 (1995).

And just last year, the Court again emphasized the equal station of political and religious speech and their preferred position within the realm of protected speech: "When it comes to *political or religious speech* that occurs outside school or a school program or activity, the school will have a heavy burden to justify intervention." *Mahanoy Area Sch. Dist.* v. *B.L.*, 141 S. Ct. 2038, 2046 (2021) (emphasis added).

* * *

As the foregoing history shows, religious speech has been consistently privileged across eight centuries of Anglo-American jurisprudence. Indeed, the freedom of speech for both institutions and individuals grew out of conflicts over religious speech. The Free Speech Clause is the hard-won fruit of centuries of religious dissent.

And whatever might be said about peripheral speech that "falls only within the outer ambit of the First Amendment's protection," *City of Erie* v. *Pap's A.M.*, 529 U.S. 277, 289 (2000) (plurality), the same

cannot be said of religious speech. Rather, our country's history, traditions, and practices have placed religious speech at the apex of First Amendment values, where it occupies a position of "high estate," *Murdock*, 319 U.S. at 109, "and is entitled to special protection," *Connick*, 461 U.S. at 145.

Here, both Smith's religious speech and her religious silence deserve the highest level of protection available under the Free Speech Clause.

II. The text, history, and tradition of the Free Speech Clause show that religious speech receives the highest level of protection available.

In her brief, Smith has explained in detail why this Court's compelled speech, content discrimination, and viewpoint discrimination decisions exclude any justification Colorado might offer for burdening Smith's speech. Pet.Br.35-50. Importantly, Smith explains that because Colorado is "restricting speech contrary to conscience" "there is no need to engage in any kind of scrutiny." Pet.Br.35. But should the Court nevertheless reach Colorado's strict scrutiny affirmative defense, there are ample grounds to reject it. *Ibid.*

However, if the Court decides the case on the narrower ground that core religious speech has been burdened, the justification analysis will be even simpler, since the Court would not necessarily have to apply strict scrutiny.

In recent years, a number of jurists and scholars have called for a reconsideration of application of tiers-of-scrutiny balancing tests in constitutional cases generally, and free speech cases in particular. See, *e.g.*, *Whole Woman's Health* v. *Hellerstedt*, 136 S. Ct. 2292,

2327 (2016) (Thomas, J., dissenting) ("The Constitution does not prescribe tiers of scrutiny."); *Ramirez* v. *Collier*, 142 S. Ct. 1264, 1287 n.1 (2022) (Kavanaugh, J., concurring) (strict scrutiny test "can be difficult to apply"); *United States* v. *Jimenez-Shilon*, --- F.4th ----, 2022 WL 1613203 at *10-11 (11th Cir. 2022) (Newsom, J., concurring) (calling for reconsideration of use of balancing tests in First Amendment cases); Brett M. Kavanaugh, *Keynote Address: Two Challenges for the Judge as Umpire: Statutory Ambiguity and Constitutional Exceptions*, 92 Notre Dame L. Rev. 1907, 1914 (2017) ("I want to underscore that the compelling interest/important interest/strict scrutiny/intermediate scrutiny formulations are rather indeterminate."); Joel Alicea & John D. Ohlendorf, *Against the Tiers of Constitutional Scrutiny*, National Affairs (Fall 2019) ("[T]he tiers of scrutiny lack the essential characteristic of any jurisprudential test whose aim is the faithful application of the law: serving as a meaningful guide to legal analysis. Instead, each step of the scrutiny process is marked by indeterminacy and manipulability."). See also Jud Campbell, *The Emergence of Neutrality*, 131 Yale L.J. 861, 930 (2022) ("The balancing approach that prevailed in the 1950s carried the usual benefits of flexible standards. * * * But as is so often true, the benefits of balancing also turned out to be liabilities.").

The Court recently stated the general rule: government may not "burden[] core * * * speech without proper justification." *Cruz*, 142 S. Ct. at 1656. And history and tradition provide a helpful guide to determining what constitutes "proper justification." See *Houston Cmty. Coll. Sys.* v. *Wilson*, 142 S. Ct. 1253, 1259

(2022) ("When faced with a dispute about the Constitution's meaning or application, long settled and established practice is a consideration of great weight. * * * Often, a regular course of practice can illuminate or liquidate our founding document's terms and phrases." (cleaned up)); *Ramirez*, 142 S. Ct. at 1288 (Kavanaugh, J., concurring) ("history and state practice can at least help structure the inquiry and focus the Court's assessment" of a government's justifications).

In the particular case of core *religious* speech, history and tradition provide more of a guide than they do with respect to other Free Speech Clause claims. That is because the Free Speech Clause and the Free Exercise Clause overlap when it comes to "expression," McConnell, *Origins* at 1459, and there is a rich history regarding freedom of religion.

That history discloses that religious speech rights were subject to only a very limited set of governmental interests that might justify interfering with religious speech. Early state constitutional protections contained provisos to religious speech protections; the protections were subject to maintaining "peace" or "safety" in the relevant state and preventing "licentiousness or immorality." McConnell, *Origins* at 1461-1462. New York's Constitution, for example, protected "the free exercise and enjoyment of religious profession and worship" so long as those actions did not "excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State." N.Y. Const. of 1777, Art. XXXVIII.

This is not the same as a "compelling governmental interest" under the tiers-of-scrutiny approach. The historically defined public interests are a far smaller

set and more determinate than the list of governmental interests lower courts have deemed compelling, a list which continues to grow. Thus, with respect to what sorts of interests a government can invoke as justifications, "the First Amendment has struck the balance" and courts do not need to innovate. *Hosanna-Tabor*, 565 U.S. at 196.

In the end, to decide this appeal the Court need not decide the exact form of justification required. The outcome will be the same whether the Court looks to peace, security, and licentiousness, or to strict scrutiny, or decides Colorado has no justification at all available to it. Here, Colorado's claimed interests in marketplace access and preventing dignitary harm do not come close to qualifying, either with respect to the compelling interest test, or the historic test. Colorado therefore cannot justify burdening Smith's religious speech.

III. Employing core speech analysis to resolve this appeal will have additional salutary effects on free speech jurisprudence.

Core speech analysis rooted in the history and tradition of the Free Speech Clause is not only the simplest way to resolve this case; it will also have at least two therapeutic effects on the body of free speech jurisprudence.

First, many or most of the wedding vendor cases sound in both the Free Exercise Clause and the Free Speech Clause. Recognizing the special role of core speech analysis in these cases will give lower courts more flexibility in deciding these sometimes factually complex cases. Lower courts can choose among options

for deciding these cases, enabling them to avoid deciding novel constitutional issues in particular cases. It would also allow lower courts deciding wedding vendor cases to rely on precedents within the other major subset of core speech—political speech. Tying speech on matters of public concern to speech on matters of religious concern will thus serve the stability and usefulness of both areas of jurisprudence.

Second, reconnecting one subset of free speech jurisprudence—core religious speech—to the text, history, and tradition of the Free Speech Clause would have a salutary effect on free speech jurisprudence as a whole. The Court has in the past few decades returned to history in deciding important constitutional questions, and specifically questions arising under the Bill of Rights. See, *e.g.*, Eric Rassbach, Town of Greece v. Galloway: *The Establishment Clause and the Rediscovery of History*, Cato Sup. Ct. Review (2013-2014) (describing historical turn in Establishment Clause jurisprudence). The Court's embrace of historical practices and understandings as a touchstone of constitutional interpretation extends across the Sixth Amendment's Confrontation Clause, the Fourth Amendment, the Second Amendment, and parts of the First Amendment, as well as other parts of the Constitution.

But thus far free speech jurisprudence has not made the same historical turn. In fact, free speech caselaw has been detached from the text, history, and tradition of the Free Speech Clause since at least 1971, when *Cohen* v. *California* was decided. 403 U.S. 15 (1971). The key passage of analysis in that case started with a concession of difficulty: "Admittedly, it is not so obvious that the First and Fourteenth Amendments

must be taken to disable the States." *Id.* at 23. But *Cohen* went on to rely on "examination and reflection" to conclude that "no readily ascertainable general principle exists" to limit the use of vulgarity, and that "governmental officials cannot make principled distinctions in this area." *Id.* at 24, 25. What *Cohen*—like many other Free Speech decisions of the 1970s—did *not* do is examine the history and tradition of the First Amendment, relying instead on the Court's own free speech decisions from the preceding four decades and a variety of unsupported musings about the nature of human communication.[8]

Perhaps treating the history and tradition of the First Amendment as unknowable or ineffable and thus irrelevant was a plausible approach in 1971. Cf. *Lemon* v. *Kurtzman*, 403 U.S. 602, 612 (1971) ("we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law"; "[t]he language of the Religion Clauses of the First Amendment is at best opaque."). But today, scholars decry the Court's choice not to look at the "wealth of historical materials that could have guided the Court through * * * difficult shoals." Michael W. McConnell, *Time, Institutions, and Interpretation*, 95 B.U. L. Rev. 1745, 1757 (2015) (free speech cases "[c]onspicuous for their lack of originalist analysis"). Intentionally ignoring history and tradition is a particularly poor foundation for judicial analysis in light of the massive growth

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[8] In this, Free Speech jurisprudence is similar to Establishment Clause jurisprudence, where "the Supreme Court has based its interpretation of the First Amendment on abstractions." McConnell, *Establishment and Disestablishment*, 44 Wm. & Mary L. Rev. at 2205.

in scholarly historical research, the digitization of historical documents, and the increases in accessibility that have come with the advent of the internet. Courts and litigants simply have more access to more knowledge of historical fact than ever before. Given this increased access to history and tradition, the Court should grasp the opportunity this case presents and graft one small part of the law of free speech back into the centuries of historical tradition from which it grew.

* * *

Colorado's stubborn insistence on forcing religious wedding vendors to conform to its moral vision is a shameful chapter in that State's history, and one that is a dark echo of past outrages on religious speech in the Anglo-American tradition. Yet one principle that tradition produced—after much suffering—was that no government should be in the unseemly business of suppressing or demanding the speech of religious institutions or individuals. Here, Colorado's intransigent attempts at forcing uniformity of opinion on religious dissenters must be rejected.

CONCLUSION

The decision below should be reversed.

Respectfully submitted.

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