No. 21-476

In The Supreme Court of the United States

303 CREATIVE LLC; and LORIE SMITH,

Petitioners,

v.

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

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF *AMICI CURIAE* ETHICS AND PUBLIC POLICY CENTER, AND AFRICAN AMERICAN AND CIVIL RIGHTS ORGANIZATIONS IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

In a pre-enforcement challenge, the Tenth Circuit held that it was congruent with the Free Speech Clause of the First Amendment to apply the Colorado Anti-Discrimination Act ("CADA") to compel a website designer and artist to create custom websites for same-sex weddings. Although the Tenth Circuit agreed that CADA compelled speech, it held that doing so satisfied strict scrutiny.

Citing our nation's history of racial discrimination, and case law addressing it, the Tenth Circuit held that CADA was narrowly tailored to ensure access to publicly available good and services. Such history, however, was particularly problematic because of its overbearing nature, involving *every* business in an industry refusing to serve African Americans. To tie this case to such a situation, the Tenth Circuit defined artists as necessarily a monopoly of one, such that when an artist refuses a commission, *every* business in the industry refuses.

The question presented is:

> Whether applying a public-accommodation law to compel an artist to speak or stay silent violates the Free Speech Clause of the First Amendment.

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INTEREST OF *AMICI CURIAE*[1]

The Ethics and Public Policy Center ("EPPC") is a nonprofit research institution dedicated to applying the Judeo-Christian moral tradition to critical issues of public policy, law, culture, and politics. EPPC's Programs cover a wide range of issues, including specifically Judeo-Christian anthropology and human flourishing, governmental and judicial restraint, and religious liberty. EPPC has a strong interest in promoting the Judeo-Christian vision of the complementarity of the sexes and the conjugal understanding of marriage.

This brief is based on the work of Ryan T. Anderson, Ph.D., the President of EPPC. President Anderson (A.B., Princeton University, M.A., Ph.D. University of Notre Dame) is a researcher who has published extensively on marriage and religious liberty. Citations to many of his works appear throughout this brief.

African American and Civil Rights Organizations, are a diverse group of civil rights leaders, churches, pastors, religious organizations, community groups and individuals that serve constituents largely made up of racial minorities that have directly suffered the indignity of racism and the ongoing consequences of racial bigotry.

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[1] All parties have consented to the filing of this *amicus* brief. Per Rule 37.6, counsel affirms that no counsel for any party authored any portion of this brief and that nobody other than *amici* or counsel made a monetary contribution to fund this brief.

Amici include eight organizations, listed in the appendix, that serve thousands of people who believe in conjugal marriage and the right of citizens to operate their businesses in accordance with this belief. Many of the people *amici* serve own businesses and work in the wedding industry. *Amici* offer this brief to provide the Court with historical contexts on marriage and racism, and how First Amendment protections in the contexts differ. *Amici* believe it is vital for the Court to recognize the views of millions of citizens who have fought racism and reject that support for conjugal marriage is similar to racism.

SUMMARY OF ARGUMENT

In *Obergefell v. Hodges*, this Court correctly noted that "Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here." Three years later, in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, this Court reiterated that "religious and philosophical objections to gay marriage are protected views and in some instances protected forms of expression." Finally, in *Fulton v. City of Philadelphia*, this Court rejected that a "non-discrimination polic[y] can brook no departure[ ]" for a religious objector when the departure does not lead to "gay persons and gay couples . . . be[ing] treated as social outcasts or as inferior in dignity and worth."

Nevertheless, the Tenth Circuit gleaned from this Court's precedents—flowing initially from racial discrimination cases—a compelling government interest in ensuring that sexual minorities have access to all publicly available services, and then defined art and speech as services that are necessarily available from only a single artist or speaker, with no regard for the countervailing interests of people of faith.

The Tenth Circuit's analogy of this case to racial discrimination is inapt.

Anti-discrimination laws as applied to racial discrimination aim to eliminating the public effects of racism and the myth that Blacks are inferior to Whites. This myth contributes to a culture where the badges and incidents of slavery persist, as African Americans continue to be disadvantaged. It also led to opposition to interracial marriage, an outlier from the historic practice of marriage, as simply one aspect of a larger system of white supremacy.

By contrast, support for marriage as the conjugal union of husband and wife is not, and has never been, based on the myth that gays are inferior to straights. Such support has been a human universal until just recently, regardless of views about sexual orientation. This view of marriage is based on the capacity that a man and a woman possess to unite in a conjugal act, create new life, and unite that new life with both a mother and a father. This view of marriage is reasonable, based on decent and honorable premises, and disparages no one.

Exemptions from laws banning discrimination on the basis of race run the risk of undermining the true purposes of those laws, eliminating the myth that Blacks are inferior to Whites. In contrast, First Amendment protections for people who support the conjugal understanding of marriage need not undermine the valid purposes of laws that ban discrimination on the basis of sexual orientation—such as eliminating the myth that gays are inferior to straights—because support for conjugal marriage is not inherently anti-gay.

Recognizing that the dignitary and societal justifications for brooking no exemptions to racial discrimination statutes do not apply here, the Tenth Circuit invented a new justification: the belief that all members of the public should have access to all distinct industries, with a definition of art as a distinct industry of one. But in essence, this ruling is just a reframing of the proposition that this Court rejected in *Obergefell*, *Masterpiece*, and *Fulton*: that support for conjugal marriage is discrimination so invidious—like racial discrimination—that it can *never* be tolerated.

This Court's precedents refusing to hold as much show that a better comparison for this case is to laws that ban discrimination on the basis of sex. If a state were to apply a sex anti-discrimination statute in a way that forced a crisis pregnancy center to advertise abortion, this Court's ruling in favor of a right not to advertise abortion would not undermine the valid purposes of the statute—such as eliminating the public effects of sexism—because pro-life beliefs are not sexist.

Pro-life convictions do not inherently flow from or communicate hostility to women.

If this Court were to rule against Lorie Smith, it would tar citizens who support conjugal marriage with the charge of bigotry. This Court's refusal to grant First Amendment protections to Lorie would teach that her reasonable convictions and associated conduct are so gravely unjust that they cannot be tolerated in a pluralistic society.

In short, pro-life conscience protections do not undermine women's equality. Neither do conscience protections for conjugal marriage supporters undermine gay equality. By contrast, conscience protections for opponents of interracial marriage could undermine the purposes of *Loving v. Virginia, Brown v. Board of Education*, and the Civil Rights Act of 1964: racial equality.

ARGUMENT

I. The Context of Race-Based Refusals.

Comparisons of this case to one involving a racist go wrong right from the start because social context matters, and the social contexts for these two cases would be profoundly different.[2]

[2] *See* Petition for a Writ of Certiorari ("Pet."), at 27a, 32a (Tenth Circuit citing *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964)).

As the Tenth Circuit acceded, Lorie Smith is "willing to work with all people regardless of sexual orientation." She is "also generally willing to create graphics or websites for lesbian, gay, bisexual, or transgender ('LGBT') customers." However,

> Consistent with Ms. Smith's religious beliefs, Appellants intend to offer wedding websites that celebrate opposite-sex marriages but intend to refuse to create similar websites that celebrate same-sex marriages. Appellants' objection is based on the message of the specific website; Appellants will not create a website celebrating same-sex marriage regardless of whether the customer is the same-sex couple themselves, a heterosexual friend of the couple, or even a disinterested wedding planner requesting a mock-up.[3]

By contrast, those who objected to interracial marriage also refused to treat African Americans equally in a host of circumstances: they would have refused to make them any website at all. Racists did not and do not simply object to interracial marriage; they objected and object to contact with African Americans on an equal footing.

History makes this fact clear. Before the Civil War, a dehumanizing regime of race-based chattel slavery existed in many states. After abolition, Jim Crow laws enforced race-based segregation. Those laws mandated the separation of Blacks from Whites, preventing them from associating or contracting with one another. Even

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[3] Pet. 6a.

after this Court struck down Jim Crow laws, integration did not come easily or willingly in many instances. Public policy, therefore, sought to eliminate racial discrimination even when committed by private actors on private property.

Before the enactment of the Civil Rights Act of 1964, racial segregation was rampant and entrenched, and African Americans were treated as second-class citizens. Individuals, businesses, and associations nationwide excluded Blacks in ways that caused grave material and social harms, without market forces acting as a corrective, and with the government's often explicit backing. As the Lawyer's Committee pointed out in its *amicus* brief filed with the Tenth Circuit in this case:

> In the post-Reconstruction United States, African Americans were systematically relegated to second-class citizenship through a system of laws, ordinances, and customs that separated white and African American people in every conceivable area of life. C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 7 (1955). This code of segregation "lent the sanction of law to a racial ostracism that extended to churches and schools, to housing and jobs, to eating and drinking," and "that ostracism extended to virtually all forms of public transportation, to sports and recreations, to hospitals, orphanages, prisons, and

> asylums, and ultimately to funeral homes, morgues, and cemeteries." *Id*.[4]

African Americans were denied loans, kept out of decent homes, and denied job opportunities—except as servants, janitors, and manual laborers. These material harms both built on and fortified the social harms of a culture corrupted by views of white supremacy. Making it harder for Blacks and Whites to mingle on equal terms was not just incidental: It was the whole point. Discrimination was so pervasive that the risks of lost economic opportunities or sullied reputation were nonexistent to those who engaged in it. Social and market forces, instead of punishing discrimination, rewarded it. Given the irrelevance of race to almost any transaction, and given the widespread and flagrant racial animus of the time, no claims of benign motives are plausible.[5] The context of Lorie's case could not be more different. There is no heterosexual-supremacist movement akin to the movement for white supremacy. There has never been an equivalent of Jim Crow for people who identify as gay. This is not to deny that the LGBT community has experienced bigotry. Homophobia exists. As with other forms of mistreatment, our communities must fight it. But, as explained below, Lorie's desire to run her business in accordance with her

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[4] Corrected Brief for Lawyers' Committee for Civil Rights under Law, et al., as *Amici Curiae* Supporting Affirmance at 8-9, *303 Creative LLC v. Elenis*, 6 F.4th 1160 (10th Cir. 2021) (No. 19-1413), 2020 WL 2617629.

[5] *See* JOHN CORVINO, RYAN T. ANDERSON & SHERIF GIRGIS, DEBATING RELIGIOUS LIBERTY AND DISCRIMINATION 162-184 (2017).

faith is not an instance of bigotry. Even when actual instances of anti-gay bigotry are identified by *amici*,[6] they pale in comparison to the systematic harms wrought by racism. As a result, enforcing Lorie's First Amendment rights would not undermine the social standing of LGBT-identified people, or the valid purposes of a sexual orientation nondiscrimination policy.

II. Opposition to Interracial Marriage Was Part of a Racist System; Support for Conjugal Marriage Is Not Anti-Anything.

Bans on interracial marriage were the exception in world history. They existed *only* in societies with a race-based caste system, in connection with race-based slavery. Opposition to interracial marriage was based on racism and contributed to a dehumanizing system treating African Americans first as property and later as second-class citizens.

The understanding of marriage as the conjugal union of a man and a woman, on the other hand, has been the norm throughout human history, shared by the great thinkers and religions of both East and West, and by cultures with a wide variety of views on homosexuality. Likewise, many religions reasonably teach

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[6] Brief for *Amicus Curiae* Lambda Legal Defense and Education Fund, Inc., in Support of Defendants-Appellees, Affirm at 18, *303 Creative LLC v. Elenis*, 6 F.4th 1160 (10th Cir. 2021) (No. 19-1413), 2020 WL 2111184.

that human beings are created male and female, and are created for each other in marriage.[7]

Interracial marriage bans were unknown to history until colonial America. English common law imposed no barriers to interracial marriage.[8] Anti-miscegenation statutes, first appearing in Maryland in 1661, were the result of African slavery.[9] As Harvard historian Nancy Cott notes:

> It is important to retrieve the singularity of the racial basis for these laws. Ever since ancient Rome, class-stratified and estate-based societies had instituted laws against intermarriage between individuals of unequal social or civil status, with the aim of preserving the integrity of the ruling class. . . . But the English colonies stand out as the first secular authorities to nullify and criminalize intermarriage on the basis of race or color designations.[10]

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[7] *See* SHERIF GIRGIS, RYAN T. ANDERSON & ROBERT P. GEORGE, WHAT IS MARRIAGE? MAN AND WOMAN: A DEFENSE (2012); RYAN T. ANDERSON, TRUTH OVERRULED: THE FUTURE OF MARRIAGE AND RELIGIOUS FREEDOM (2015); RYAN T. ANDERSON, WHEN HARRY BECAME SALLY: RESPONDING TO THE TRANSGENDER MOMENT (2018).

[8] Irving G. Tragen, *Statutory Prohibitions against Interracial Marriage*, 32 CAL. L. REV. 269 (1944); *see also* Francis Beckwith, *Interracial Marriage and Same-Sex Marriage*, PUBLIC DISCOURSE (May 21, 2010), http://www.thepublicdiscourse.com/2010/05/1324/.

[9] Beckwith, *supra* note 8.

[10] NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 483 (2000).

This history shows that anti-miscegenation laws were aimed at holding a race of people in a condition of inferiority and servitude. They were openly premised on the idea that contact with African Americans on an equal plane was wrong. That idea, rooted in the supposed inferiority of African Americans, is the essence of bigotry. Actions based on it contribute to the wider culture of dehumanization and subordination that anti-discrimination law is justly aimed to combat.

The convictions behind Lorie Smith's conscience claims could not form a sharper contrast. Her conviction about marriage has been present throughout human history. "Marriage, as the socially recognized linking of a specific man to a specific woman and her offspring, can be found in all societies. Through marriage, children can be assured of being born to both a man and a woman who will care for them as they mature."[11]

Great thinkers, too, affirm the special value of male-female unions as the foundations of family life. Plato wrote favorably of legislating to have people "couple[], male and female, and lovingly pair together, and live the rest of their lives" together.[12] Plutarch wrote of marriage as "a union of life between man and woman for the delights of love and the begetting of

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[11] G. ROBINA QUALE, A HISTORY OF MARRIAGE SYSTEMS 2 (1988).

[12] 4 PLATO, THE DIALOGUES OF PLATO 407 (Benjamin Jowett trans. & ed., Oxford Univ. 1953) (c. 360 B.C.).

children."[13] He considered marriage a distinct form of friendship embodied in the "physical union" of intercourse.[14] For Musonius Rufus, the first-century Roman Stoic, a "husband and wife" should "come together for the purpose of making a life in common and of procreating children, and furthermore of regarding all things in common between them . . . even their own bodies."[15]

Not one of these thinkers was Jewish or Christian or in contact with Abrahamic religion. Nor were they ignorant of homosexuality, which was common in their societies. They were not motivated by sectarian religious concerns, ignorance, or hostility of any type toward anyone. They and other great thinkers—from Augustine and Aquinas, Maimonides and al-Farabi, and Luther and Calvin, to Locke and Kant, Confucius, Gandhi and Martin Luther King—held the honest and reasoned conviction that male-female sexual bonds had distinctive value.

To note this is not merely to say something about the past but to shed light on the present. Today's beliefs about conjugal marriage grew organically out of millennia-old religious and philosophical traditions that taught the distinct value of male-female union; of

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[13] Plutarch, *Life of Solon*, *in* 20 PLUTARCH'S LIVES 4 (Loeb ed. 1961) (c. 100).

[14] Plutarch, *Erotikas*, *in* 20 PLUTARCH'S LIVES 769 (Loeb ed. 1961) (c. 100).

[15] Musonius Rufus, *Discourses XIIIA*, *in* CORA E. LUTZ, MUSONIUS RUFUS "THE ROMAN SOCRATES" (Yale Univ. Press 1947), *available at* https://sites.google.com/site/thestoiclife/the_teachers/musonius-rufus/lectures/13-0.

joining man and woman as one flesh, and generations as one family.[16] Those traditions continue to provide reasons to affirm conjugal marriage that have nothing to do with bigotry.

Lorie Smith and many other citizens today are shaped by, and find guidance and motivation in, those traditions—whether religious or philosophical. These intellectual streams do not have bigotry as their source and it is unfair to assume that their adherents are bigots. As George Chauncey and other historians of the LGBT experience, who submitted their research to advance gay rights litigation, noted, "widespread discrimination" based on "homosexual status developed only in the twentieth century . . . and peaked from the 1930s to the 1960s."[17]

Thus, a First Amendment ruling in favor of conjugal marriage adherents need not send any negative social message about anyone. The only message sent in protecting citizens who believe in conjugal marriage is that Americans of goodwill can reasonably disagree about marriage.

These traditions also do not turn on empirical assumptions about sexual orientation. Rather, they teach

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[16] *See* GIRGIS, ANDERSON & GEORGE, *supra* note 7; ANDERSON, *supra* note 7.

[17] Brief of Professors of History George Chauncey, Nancy F. Cott, et al., as *Amici Curiae* Supporting Petitioners, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102), 2003 WL 152350; *see also* GEORGE CHAUNCEY, GAY NEW YORK: GENDER, URBAN CULTURE, AND THE MAKING OF THE GAY MALE WORLD, 1890-1940 173, 337 (1994).

that there is distinct value in the one-flesh union that only man and woman can form, and in the kinship ties that such union offers children. Nor does the recent trend toward a more flexible, marriage-as-simple-companionship model make it irrational to continue to affirm these ideals.

No doubt bigotry motivates some individuals. But not Lorie, and it would be unfair to punish her and others who believe in conjugal marriage. And ruling in her favor would not have negative social costs, as the next sections explain.

III. The Social Costs of Protections for Racists.

Exemptions from laws banning racial discrimination run the risk of undermining efforts to eliminate the societal effects of racist bigotry by perpetuating the myth that Blacks are inferior to Whites. As explained by the Vice President of the Confederate States of America:

> With us, all of the white race, however high or low, rich or poor, are equal in the eye of the law. Not so with the negro. Subordination is his place. He, by nature, or by the curse against Canaan, is fitted for that condition which he occupies in our system. . . . It is, indeed, in conformity with the ordinance of the Creator.[18]

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[18] Alexander H. Stephens, "Corner Stone" Speech (Mar. 21, 1861), *available at* http://teachingamericanhistory.org/library/document/cornerstone-speech/.

This belief system was geared precisely to racial subordination. When lived out fully, it led to regular killings of African Americans and a history of lynching that haunts their memories even today.[19]

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[19] *See*, *e.g.*, TY SEIDULE, ROBERT E. LEE AND ME: A SOUTHERNER'S RECKONING WITH THE MYTH OF THE LOST CAUSE (2020); TERENCE FINEGAN, A DEED SO ACCURSED: LYNCHING IN MISSISSIPPI AND SOUTH CAROLINA, 1881-1940 (2013); MICHAEL J. PFEIFER, LYNCHING BEYOND DIXIE: AMERICAN MOB VIOLENCE OUTSIDE THE SOUTH (2013); Karlos K. Hill, *Black Vigilantism: The Rise and Decline of African American Lynch Mob Activity in the Mississippi and Arkansas Deltas, 1883-1923*, 95 J. AFR. AM. HIST. 26 (2010); STEVEN BUDIANSKY, THE BLOODY SHIRT: TERROR AFTER THE CIVIL WAR (2008); TOM SMITH, THE CRESCENT CITY LYNCHINGS (2007); WALTER RUCKER & JAMES NATHANIEL UPTON, ENCYCLOPEDIA OF AMERICAN RACE RIOTS (2007); NICHOLAS LEMANN, REDEMPTION: THE LAST BATTLE OF THE CIVIL WAR (2006); JONATHAN MARKOVITZ, LEGACIES OF LYNCHING: RACIAL VIOLENCE AND MEMORY (2004); MICHAEL J. PFEIFER, ROUGH JUSTICE: LYNCHING AND AMERICAN SOCIETY, 1874-1947 (2004); MARK CURRIDEN & LEROY PHILLIPS, CONTEMPT OF COURT: THE TURN-OF-THE-CENTURY LYNCHING THAT LAUNCHED A HUNDRED YEARS OF FEDERALISM (2001); JAMES ALLEN, WITHOUT SANCTUARY: LYNCHING PHOTOGRAPHY IN AMERICA (2000); WILLIAM FITZHUGH BRUNDAGE, LYNCHING IN THE NEW SOUTH: GEORGIA AND VIRGINIA, 1880-1930 (1993); STEWART E. TOLNAY & E.M. BECK, A FESTIVAL OF VIOLENCE: AN ANALYSIS OF SOUTHERN LYNCHINGS, 1882-1930 (1992); MICHAEL NEWTON & JUDY ANN NEWTON, RACIAL AND RELIGIOUS VIOLENCE IN AMERICA: A CHRONOLOGY (1991); GEORGE C. WRIGHT, RACIAL VIOLENCE IN KENTUCKY 1865-1940 (1990); E.M. Beck & Stewart E. Tolnay, *The Killing Fields of the Deep South: The Market for Cotton and the Lynching of Blacks, 1882-1930*, 55 AM. SOC. R. 526 (1990); JAMES CAMERON, A TIME OF TERROR: A SURVIVOR'S STORY (1982); BERTRAM WYATT-BROWN, SOUTHERN HONOR: ETHICS & BEHAVIOR IN THE OLD SOUTH (1982); NAACP, THIRTY YEARS OF LYNCHING IN THE UNITED STATES, 1889-1918 (1969); RALPH GINZBURG, 100 YEARS

We should not minimize how pervasive and destructive white supremacy was. Dr. Martin Luther King, Jr., in his "Letter from a Birmingham Jail," aptly highlighted the overarching purpose and effects of racial discrimination:

> when you suddenly find your tongue twisted and your speech stammering as you seek to explain to your six year old daughter why she can't go to the public amusement park that has just been advertised on television, and see tears welling up in her eyes when she is told that Funtown is closed to colored children, and see ominous clouds of inferiority beginning to form in her little mental sky, and see her beginning to distort her personality by developing an unconscious bitterness toward white people; when you have to concoct an answer for a five year old son who is asking: "Daddy, why do white people treat colored people so mean?"; when you take a cross country drive and find it necessary to sleep night after night in the uncomfortable corners of your automobile because no motel will accept you; when you are humiliated day in and day out by nagging signs reading "white" and "colored"; when your first name becomes "nigger," your middle name becomes "boy" (however old you are) and your last name becomes "John," and your wife and mother are never given the respected title "Mrs."; when you are harried by day and haunted by night by the fact that

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OF LYNCHING (1962); Walter Lynwood Fleming, *Lynch Law*, *in* 17 ENCYCLOPEDIA BRITANNICA (11th ed. 1911).

> you are a Negro, living constantly at tiptoe stance, never quite knowing what to expect next, and are plagued with inner fears and outer resentments.[20]

This was the reality that laws banning racial discrimination were meant to combat. And combatting racial discrimination in all instances is a compelling government interest pursued in a narrowly tailored way. As this Court noted in *Burwell v. Hobby Lobby Stores, Inc.*: "The Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal." 573 U.S. 682, 733 (2014). This applies equally to a public accommodation: any exemption to a law prohibiting racial discrimination in public accommodations would undermine the law by sending the message that intentional racism is protected conduct, and amplifying historical and persisting messages that say African Americans count for less, are subhuman, and may be treated as such. In doing so, it increases the likelihood that people engage in deplorable acts based on notions of white supremacy.

Therefore, comparing First Amendment protections for Lorie to protections for a racist ignores the differing social context and how that context shapes the relevant legal analysis. For not only are the acts of the racist and of Lorie different, so too are the

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[20] Martin Luther King, Jr., *Letter From A Birmingham Jail* (Apr. 16, 1963), *available at* https://www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html.

messages that rulings in favor of each would send—and the harms that those messages could contribute to.

Combatting racism is a compelling state interest given not just our Nation's history but also the current effects of racism. Despite the progress made in combatting racism, African Americans continue to face both outright discrimination and systemic disadvantages.

"African Americans are incarcerated at more than 5 times the rate of whites."[21] Police officers are more likely to employ force against African Americans.[22] 19.5% of African Americans live in poverty compared to 8.2% of Whites.[23] African American students have persistently lower graduation rates than White Americans.[24] The unemployment rate for African American recent college graduates is twice that of White graduates.[25] African Americans earn less than White

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[21] *Criminal Justice Fact Sheet*, NAACP, https://naacp.org/resources/criminal-justice-fact-sheet (last visited May 16, 2022).

[22] Phillip A. Goff, et al., *The Science of Justice: Race, Arrests, and Police Use of Force*, CTR. FOR POLICING EQ., July 2016, *available at* https://policingequity.org/images/pdfs-doc/CPE_SoJ_Race-Arrests-UoF_2016-07-08-1130.pdf.

[23] Emily A. Shrider, et al., *Income and Poverty in the United States: 2020*, U.S. CENSUS BUREAU, Sept. 2021, at 13, *available at* https://www.census.gov/content/dam/Census/library/publications/2021/demo/p60-273.pdf.

[24] Cristobal de Brey, et al., *Status and Trends in the Education of Racial and Ethnic Groups 2018*, NAT'L CTR. FOR EDUC. STAT., Feb. 2019, *available at* https://nces.ed.gov/pubs2019/2019038.pdf.

[25] Nick Morrison, *Black Graduates Twice As Likely To Be Unemployed*, FORBES (Jun. 18, 2020), https://www.forbes.com/sites/

Americans and that wage gap is widening.[26] Studies show that White men with criminal records are more likely to be hired than Black men with the same resumes without criminal records.[27]

These patterns have consequences: "patterns of racial and ethnic exclusion coincide with economic exclusion; almost all economically exclusive neighborhoods also exclude African Americans, and most neighborhoods in which non-whites predominate are economically isolated as well." This "distances minority jobseekers from areas of employment growth and opportunity" and "also contributes to minorities' unequal educational attainment, and hence to their disadvantaged position in the evolving labor market. Black high school graduation rates, employment rates, and wages are all negatively associated with the level of black-white segregation in a city."[28]

These important social and historical differences help explain why this Court could rule in favor of Lorie

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nickmorrison/2020/06/18/black-graduates-twice-as-likely-to-be-unemployed/.

[26] Elise Gould, *Black-white wage gaps are worse today than in 2000*, ECON. POL'Y INST. (Feb. 27, 2020), https://www.epi.org/blog/black-white-wage-gaps-are-worse-today-than-in-2000/.

[27] Janell Ross, *African Americans With College Degrees Are Twice As Likely to Be Unemployed as Other Graduates*, THE ATLANTIC (May 27, 2014), https://www.theatlantic.com/politics/archive/2014/05/african-americans-with-college-degrees-are-twice-as-likely-to-be-unemployed-as-other-graduates/430971/.

[28] Margery Austin Turner, *Limits on Housing and Neighborhood Choice: Discrimination and Segregation in U.S. Housing Markets*, 41 IND. L. REV. 797, 800, 808-11 (2008).

but not in favor of a racist. Brooking no exemptions to a race nondiscrimination statute is narrowly tailored; but, as explained below, the same is not true with respect to brooking an exemption for a sincere and good faith belief in the importance of conjugal marriage.

IV. The Social Costs of Protections for Conjugal Marriage Supporters.

First Amendment protections for people who affirm the conjugal understanding of marriage need not undermine any of the valid purposes of laws that ban discrimination on the basis of sexual orientation—eliminating the public effects of anti-gay bigotry—because support for conjugal marriage is not anti-gay.[29] A ruling in favor of Lorie sends no message about the supposed inferiority of people who identify as gay, for it sends no message about them or their sexual orientation at all. Rather, it says that citizens who support the historic understanding of marriage are not bigots and that the state may not exclude them from civic life. It reflects the reality that, as this Court noted, citizens of goodwill reasonably disagree about marriage.

Lorie and other citizens like her who believe marriage is the conjugal union of husband and wife are not even taking sexual orientation into account, but rather

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[29] *See* CORVINO, ANDERSON & GIRGIS, *supra* note 5; *see also* Ryan T. Anderson, *How to Think About Sexual Orientation and Gender Identity (SOGI) Policies and Religious Freedom*, THE HERITAGE FOUND., Feb. 13, 2017, *available at* http://www.heritage.org/sites/default/files/2017-03/BG3194.pdf.

are acting (and distinguishing) based on their reasonable view of marriage. As a result, recognizing a First Amendment protection of Lorie sends no anti-gay message and thus does not have similar social costs as an exemption for a racist. Conjugal marriage conscience protections do not undermine gay equality.

Discrimination in the broad sense is simply the making of distinctions. It is a necessity of life. Discrimination in the familiar moralized sense, however, involves mistreatment based on irrelevant factors. For clarity, this brief uses "distinguish" to refer to conduct neutrally, and "discriminate" to refer to wrongful distinctions.[30] Of course, there might be some traits on which we both distinguish and discriminate, and disentangling the two can take work.

Discrimination is rooted in unfair, socially debilitating attitudes or ideas about individuals' worth, proper social status, abilities, or actions. Bans on interracial marriage were paradigms of discrimination. They were based on beliefs about African Americans, especially their supposed incompetence and threat to Whites (especially women). A designer refusing to make a wedding website for an interracial marriage would discriminate on the basis of race. She would take race into consideration where it is irrelevant and mistreat people on that basis, and thus her behavior would serve to perpetuate myths about African Americans that are unfair and socially debilitating.

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[30] *See* CORVINO, ANDERSON & GIRGIS, *supra* note 5, at 163-68.

Lorie, by contrast, does not discriminate—nor even distinguish—on the basis of sexual orientation. She desires to not participate in creating a website to celebrate a same-sex wedding because she objects to lending her voice to celebrate same-sex marriage, based on the common Christian belief that it is not marital (along with many other relationships, including polyamorous unions).[31] Nowhere need her reasoning even refer to the partners' sexual orientation—or any ideas or attitudes about gay people, good or bad. Though her views might have disparate impact, they need not discriminate *or even distinguish* on the basis of sexual orientation.

Lorie's reason for desiring not to make same-sex wedding websites is manifestly *not* to avoid contact with gay people on equal terms. The Tenth Circuit explicitly noted the sincerity of her religious beliefs and her good faith.[32] And the Supreme Courts of both Arizona and the United Kingdom recognize this distinction.[33] Some people's refusals to create wedding websites for same-sex weddings might be ill motivated. However, as noted above, it is unfair to assume that

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[31] *See* 3 JOHN FINNIS, HUMAN RIGHTS AND COMMON GOOD: COLLECTED ESSAYS 315-388 (2011); JOHN WITTE JR., FROM SACRAMENT TO CONTRACT: MARRIAGE, RELIGION, AND LAW IN THE WESTERN TRADITION (2nd ed., 2012); SCOTT YENOR, FAMILY POLITICS: THE IDEA OF MARRIAGE IN MODERN POLITICAL THOUGHT (2011).

[32] Pet. 30a-32a.

[33] *Brush & Nib Studio, LLC v. City of Phoenix*, 247 Ariz. 269, 304 (2019); *Lee v. Ashers Baking Co. Ltd.*, UKSC 49, ¶ 62 [2018] [appeal taken from N. Ir.].

affirming conjugal marriage is premised on hostility to the LGBT community.

This is seen most clearly in the case of Catholic Charities adoption agencies. They decline to place children entrusted to them with same-sex couples not because of their sexual orientation, but because of the conviction that children deserve both a mother and a father. These agencies believe that men and women are not interchangeable, that mothers and fathers are not replaceable, that the two best dads in the world cannot make up for a missing mom. These beliefs have nothing to do with sexual orientation.[34]

Catholic Charities does not say that people who identify as gay cannot love or care for children; its preference for placing children with mothers and fathers is not an instance of sexual orientation discrimination because it does not consider sexual orientation *at all*.[35] In *Fulton v. City of Philadelphia*, this Court agreed, finding that although the government's interest in "the equal treatment of prospective foster parents and foster children" "is a weighty one," the distinguishing at issue was not discrimination of such an invidious nature as to brook no exceptions. 141 S. Ct. 1868, 1882 (2021).

Therefore, affirming Lorie's First Amendment rights here would not undermine Colorado's sexual orientation nondiscrimination law. By contrast, as this

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[34] *See* GIRGIS, ANDERSON & GEORGE, *supra* note 7; ANDERSON, *supra* note 7.

[35] *See* CORVINO, ANDERSON & GIRGIS, *supra* note 5.

Court explained in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, an exemption for a hospital that refused to perform chemotherapy because the patient was gay would undermine the law. As would an exemption for Lorie should she desire to not design other websites for LGBT-identifying customers. *See* 138 S. Ct. 1719, 1727 (2018). Because the underlying act would discriminate on the basis of sexual orientation *per se*, and has no root in "decent and honorable" beliefs, exemptions in these cases could, like exemptions in the cases of racism, send the signal that citizens who identify as gay count as less than other citizens.

But affirming conjugal marriage sends no such message. Indeed, within a two-year time span Colorado citizens voted to define marriage as the union of husband and wife and to ban discrimination on the basis of sexual orientation. Many states simultaneously enacted sexual orientation nondiscrimination policies while insisting that conjugal marriage is not discriminatory.

That affirming a First Amendment protection for Lorie would not undermine antidiscrimination law is more clearly seen when one considers the larger social context. An astonishingly small number of business-owners cannot in good conscience support same-sex wedding celebrations. Among this small group, Lorie is not an outlier in treating people who identify as gay with respect but declining to lend her talents to the celebrations of same-sex weddings. Professor Andrew

Koppelman, a longtime LGBT advocate, acknowledges as much:

> Hardly any of these cases have occurred: a handful in a country of 300 million people. In all of them, the people who objected to the law were asked directly to facilitate same-sex relationships, by providing wedding, adoption, or artificial insemination services, counseling, or rental of bedrooms. There have been no claims of a right to simply refuse to deal with gay people.[36]

Those three sentences shatter the strongest argument for denying a First Amendment protection in cases like these. There is no incipient movement ready to deny people who identify as gay access to markets and goods and services. Indeed, there is a reason why there have been "no claims of a right to simply refuse to deal with gay people." As law professor and religious liberty expert Douglas Laycock—a same-sex marriage supporter—noted, no faith teaches it.[37]

The refusals of individuals like Lorie have nothing like the sweep or shape of racist practices. They do not span every domain but focus on marriage and sex. Within that domain, they are about refusing to

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[36] Andrew Koppelman, *A Zombie in the Supreme Court: The Elane Photography Cert Denial*, 7 ALA. C.R. & C.L. L. REV. 77, 91-92 (2016).

[37] Doug Laycock, *What Arizona SB1062 Actually Said*, THE WASH. POST (Feb. 27, 2014), http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/02/27/guest-post-from-prof-doug-laycock-what-arizona-sb1062-actually-said/.

communicate certain messages about marriage, not avoiding contact with certain people.

Thus, Cathy Miller, who declined to make a wedding cake for a lesbian couple, had respectfully designed birthday and other holiday cakes for gay clients for years. She did not think they mattered less or deserved shunning. She employed them and served them faithfully. Only with respect to wedding cakes, did she demur.[38] As Professor Koppelman wrote, "These people are not homophobic bigots who want to hurt gay people."[39] And as Robin Fretwell Wilson, another law professor who supports same-sex marriage, noted, "The religious and moral convictions that motivate objectors to refuse to facilitate same-sex marriage simply cannot be marshaled to justify racial discrimination."[40] But Cathy's and other cases are still making their way up to this Court.[41]

These considerations in favor of affirming First Amendment protections for conjugal marriage supporters are buttressed by the socioeconomic standing of people who identify as gay, in contrast to that of

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[38] *Dep't of Fair Emp. & Hous. v. Miller*, No. BCV-17-102855, 2018 WL 747835 (Cal. Super. Feb. 05, 2018).

[39] Koppelman, *supra* note 36, at 92.

[40] Robin Fretwell Wilson, *Matters of Conscience: Lessons for Same-Sex Marriage from the Healthcare Context*, *in* SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 101 (Douglas Laycock, et al., eds., 2008).

[41] *Dep't of Fair Emp. & Hous. v. Superior Ct. of Kern Cnty.*, 54 Cal. App. 5th 356 (2020); *Klein v. Oregon Bureau of Lab. & Indus.*, 317 Or. App. 138 (2022).

African Americans. For example, there is no evidence that a single hotel chain, a single major restaurant, or a single major employer has turned away individuals who identify as gay. In fact:

- The Human Rights Campaign (HRC)—the nation's premier LGBT advocacy group—reports that 91 percent of Fortune 500 companies have policies against considering sexual orientation in employment decisions.[42]

- According to the U.S. Census Bureau, in 2019, "Overall, same-sex married couples had a higher median household income than opposite-sex married couples: $107,200 and $96,930, respectively."[43]

- An August 2016 report from the U.S. Treasury—based on tax returns, not surveys—shows opposite-sex couples earning on average $113,115, compared to $123,995 for lesbian couples and $175,590 for gay male couples. For couples with children, the gap is even more dramatic: $104,475 for opposite-sex couples

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[42] *LGBTQ Equality at the Fortune 500*, HUMAN R. CAMPAIGN, http://www.hrc.org/resources/entry/lgbt-equality-at-the-fortune-500 (last visited May 16, 2022).

[43] Brian Glassman, *Census Bureau Implements Improved Measurement of Same-Sex Couples*, U.S. CENSUS BUREAU (Sept. 17, 2020), https://www.census.gov/library/stories/2020/09/same-sex-married-couples-have-higher-income-than-opposite-sex-married-couples.html.

but $130,865 for lesbian couples and $274,855 for gay couples.[44]

Social acceptance of gays and lesbians has seen remarkable growth in recent years. LGBT-identifying Americans overwhelmingly believe that their social standing has improved in the last decade and will continue to improve in the coming one.[45] Three-quarters of LGBT-identified youth report that their peers are accepting of their identities.[46] A growing percentage of Americans support legal protection and recognition of same-sex relationships.[47]

The improvement in the perception and treatment of people who identify as gay in the United States is also visible in the cultural changes that have taken place. GLAAD's 2021-2022 annual report on LGBT

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[44] Robin Fisher, et al., *Joint Filing by Same-Sex Couples After Windsor: Characteristics of Married Tax Filers in 2013 and 2014*, U.S. DEPT. OF THE TREASURY, OFFICE OF TAX ANALYSIS, Aug. 2016, https://www.treasury.gov/resource-center/tax-policy/tax-analysis/Documents/WP-108.pdf.

[45] *A Survey of LGBT Americans*, PEW RESEARCH CTR., June 13, 2013, http://www.pewsocialtrends.org/2013/06/13/a-survey-of-lgbt-americans/.

[46] *Growing Up LGBT in America: HRC Youth Survey Report Key Findings*, HUMAN R. CAMPAIGN, https://assets2.hrc.org/files/assets/resources/Growing-Up-LGBT-in-America_Report.pdf.

[47] *Changing Attitudes on Gay Marriage*, PEW RESEARCH CTR., June 26, 2017, http://www.pewforum.org/fact-sheet/changing-attitudes-on-gay-marriage; Hannah Fingerhut, *Support steady for same-sex marriage and acceptance of homosexuality*, PEW RESEARCH CTR. (May 12, 2016), http://www.pewresearch.org/fact-tank/2016/05/12/support-steady-for-same-sex-marriage-and-acceptance-of-homosexuality/.

issues in media found a record-high number of LGBT characters were featured on television.[48] In addition to being profitable, being pro-gay is also politically advantageous. On June 1, 2021, President Biden "proclaim[ed] June 2021 as Lesbian, Gay, Bisexual, Transgender, and Queer Pride Month."[49] The LGBT community's political influence is profound and still growing.

Furthermore, the few cases of refusals that have garnered media attention hardly diminish a single person or couple's range of opportunities. If businesses started to refuse service specifically to individuals who identify as gay, it is hard to imagine a sector of commerce or a region of the U.S. where media coverage would not provide a remedy swift and decisive enough to restore access in days—or shutter the business.

Such was the case for Cathy Miller. Within hours of declining a custom wedding cake commission, after the couple posted about Cathy on social media, all of the local media stations had set up shop in her bakery's parking lot. She and her employees were then inundated with hate mail, threats of violence, actual

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[48] *Where We Are on TV Report—2021-2022*, GLAAD, https://www.glaad.org/sites/default/files/GLAAD%20202122%20WWATV.pdf.

[49] *A Proclamation on Lesbian, Gay, Bisexual, Transgender, and Queer Pride Month, 2021*, THE WHITE HOUSE (June 1, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/06/01/a-proclamation-on-lesbian-gay-bisexual-transgender-and-queer-pride-month-2021/.

violence, and pornography.[50] In contrast, the lesbian couple was quickly offered a free wedding cake, free photography services, and free wedding-day makeup.[51]

Finally, given the small numbers of such refusals, the enormous and growing social and market pressures to decrease their number over time, the wide availability of professionals willing to help celebrate same-sex weddings, and the consistent failure of very motivated and focused media outlets and advocacy groups to prove otherwise, there's no reason to think that allowing these conscience claims would deny access to basic goods or markets—unless the market is defined as an industry of one.

Progressives like Professor Koppelman have noted the cultural pressures fast at work and how they weaken the case for legal coercion against people like Lorie Smith: "With respect to the religious condemnation of homosexuality, this marginalization is already taking place. But that does not mean that the conservatives need to be punished or driven out of the marketplace. There remains room for the kind of cold respect that toleration among exclusivist religions

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[50] Declaration of Catharine Miller in Support of Defendants' Motion for Summary Judgment or, in the Alternative, Summary Adjudication ¶¶ 45-50, *Dep't of Fair Emp. & Hous. v. Miller*, No. BCV-18-102633 (Cal. Super. Sept. 8, 2021), *available at* https://thomasmoresociety.org/case/department-of-fair-employment-and-housing-v-tastries-bakery/.

[51] *See*, *e.g.*, *Tastries Bakery under fire after reportedly refusing to serve gay couple*, ABC 23 (Aug. 26, 2017), https://www.turnto23.com/news/local-news/tastries-bakery-under-fire-after-reportedly-refusing-to-serve-homosexual-couples.

entails."[52] In another article, Koppelman expands: "The reshaping of culture to marginalize anti-gay discrimination is inevitable. To say it again: The gay rights movement has won. It will not be stopped by a few exemptions. It should be magnanimous in victory."[53]

V. A Better Comparison: Pro-Life Medicine and Sex Discrimination.

Sometimes First Amendment rights have to be limited, but when they can be protected, they contribute to the rich associational life we call civil society, and they protect the dignity of the human person as people try to live life in conformity with what they believe to be the truth, particularly the truth about morality and the divine.[54] A ruling against Lorie would therefore threaten her dignity—and the dignity of millions of Americans who share her same beliefs.

Instead of comparing Lorie's case to an opponent of interracial marriage, a more instructive comparison involves the application of a sex antidiscrimination statute to pro-life citizens. *See Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993); *Geduldig v. Aiello*, 417 U.S. 484, 497 n.20 (1974). If a state were to apply a sex anti-discrimination statute in a way that

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[52] Koppelman, *supra* note 36, at 93.

[53] Andrew Koppelman, *Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law*, 88 S. CAL. L. REV. 619, 628 (2015).

[54] *See* CORVINO, ANDERSON & GIRGIS, *supra* note 5.

forced a crisis pregnancy center to advertise abortion, this Court's ruling in favor of a right not to advertise abortion would not undermine the statute because pro-life beliefs are not sexist. *See Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2376 (2018). Pro-life citizens who object to abortion do not do so out of hostility to women. A ruling in their favor sends no message about patriarchy or female subordination. It simply says that pro-life citizens are not bigots and that the state may not exclude them from public life.

Pro-life objection to abortion is built on no premises about women, let alone discriminatory premises. Pro-life objection to abortion is based on a belief about the equal dignity of all human beings, including unborn babies. Even those who argue that abortion access gives women equal opportunities in the marketplace and public life will recognize that pro-life beliefs are not inspired by, nor do they contribute to, a culture of sexism or patriarchy.

The same is true in the case of Lorie. Her beliefs about marriage are built on no premises about sexual orientation or people who identify as gay—let alone discriminatory premises. She distinguishes based on whether the relationship is (in her religious understanding) marital, which turns on whether it involves a man and woman. That does, of course, turn on the *sex* of the partners, *see Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), but even that sex-based distinction is not invidious.

That is, the conjugal view of marriage that Lorie affirms makes no reference to sexual orientation. It does make reference to biological sex, but its sex-based distinction is not rooted in animus or unfair generalizations about either sex. It simply says that marriage requires *both* sexes. It cannot be invidious discrimination to recognize biological sex precisely in how the concepts of male and female are inter-defined. The distinguishing on the basis of sex that takes place in support of conjugal marriage is more akin to the distinguishing that takes place in providing separate intimate facilities for men and women. It does nothing to perpetuate unjust stereotypes or a sex-based caste to say that both sexes matter and deserve privacy.

Therefore, while First Amendment protections for Lorie would not undermine any of the legitimate purposes of sex *or* sexual orientation nondiscrimination statutes, a ruling against her would undermine her equal status in civil society just as a ruling against pro-life citizens would. Feminists for Life certainly do not think their convictions are sexist, and pro-choice people might agree for now. But the more that academic, media, and governmental officials declare—and operate on the assumption—that opposing abortion is sexist, the more it will take on that meaning by the general public.

So, too, if this Court were to not forcefully reiterate its holdings in *Masterpiece Cakeshop* and *Fulton* in reversing the Tenth Circuit and ruling for Lorie, it would tar citizens who support conjugal marriage with the charge of bigotry. Such a ruling would lead

America down a path that views people of faith as "less than fully welcome," *Kennedy v. Bremerton Sch. Dist.*, 4 F.4th 910, 953 n.10 (9th Cir. 2021) (Nelson, J., dissenting from denial of rehearing en banc), *cert. granted*, 142 S. Ct. 857 (2022)—indeed never welcome—which this Court has frequently had to correct. *See Shurtleff v. City of Boston*, 142 S. Ct. 1583 (2022).

The Tenth Circuit made clear that Lorie's religious beliefs were asserted "sincere[ly]" and in "good faith," but still held that they could not be tolerated at all.[55] By not vigorously rejecting this, the Court would do what it said in *Obergefell v. Hodges* it was not doing, disparaging Americans who have decent and honorable religious and philosophical beliefs about conjugal marriage.

Some LGBT activists express concern that granting First Amendment protections teaches people that they have a "license to discriminate." However, their criticism proves a different point: This Court's refusal to grant First Amendment protections to Lorie would teach that her reasonable convictions and associated conduct cannot be tolerated in a pluralistic society. If *Obergefell* was about respecting the freedom of people who identify as gay to live as they wish, then *Masterpiece* was about the same for Americans who believe in the conjugal understanding of marriage. But the lower courts have refused to follow *Masterpiece*—in almost all instances limiting it to its factual setting.

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[55] Pet. 30a-32a.

No doubt many people are opposed to what Lorie believes. But, as this Court noted in *Obergefell*, when that "personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied." 576 U.S. at 672. This Court should not allow Colorado to so demean and stigmatize conjugal marriage supporters. It should not allow the state to "punish the wicked."[56]

CONCLUSION

Lorie Smith's conflict of conscience is motivated by her reasonable beliefs about the nature of marriage. To say that her refusal to design a wedding website for a same-sex wedding is the same as discriminating against people who identify as gay is to misstate the facts of the case. To compare her refusal to race discrimination ignores the history of racism in this country and flies in the face of the history and purpose of marriage itself. A better comparison can be found in this Court's application of Equal Protection jurisprudence in the abortion context. Just as pro-life conscience protections do not undermine women's equality, so too conjugal marriage conscience

[56] Quote from Tim Gill, Andy Kroll, *Meet the Megadonor Behind the LGBTQ Rights Movement*, ROLLING STONE (June 23, 2017), http://www.rollingstone.com/politics/features/meet-tim-gill-megadonor-behind-lgbtq-rights-movement-wins-w489213.

protections do not undermine *Obergefell v. Hodges* or gay equality.

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