No. 21-476

In the Supreme Court of the United States

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

Petitioners,

v.

AUBREY ELENIS, ET AL.,

Respondents.

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

BRIEF OF *AMICI CURIAE* UNITED STATES SENATORS AND REPRESENTATIVES SUPPORTING PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are members of the U.S. Senate and House of Representatives who are committed to protecting the free-speech rights guaranteed by the First Amendment. In the decision below, the Tenth Circuit allowed the state of Colorado to force Petitioner Lorie Smith to create customized wedding websites celebrating and promoting same-sex marriages. *Amici* may hold a variety of views about same-sex marriage. But they all agree that the government has no authority to compel individuals to express opinions that violate their firmly held religious beliefs. Because free speech is essential to preserving personal autonomy, the marketplace of ideas, and a healthy democracy, *Amici* urge this Court to reverse the decision below.

Amici are:

United States Senate

Ted Cruz (TX)	Mike Lee (UT)
Marsha Blackburn (TN)	Steve Daines (MT)
John Boozman (AR)	Chuck Grassley (IA)
Mike Braun (IN)	Josh Hawley (MO)
John Cornyn (TX)	James M. Inhofe (OK)
Tom Cotton (AR)	John Kennedy (LA)

[1] Pursuant to this Court's Rule 37.6, counsel for *Amici* certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *Amici* or their counsel have made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief.

James Lankford (OK)
James E. Risch (ID)
Marco Rubio (FL)
Ben Sasse (NE)
John Thune (SD)
Thom Tillis (NC)
Tommy Tuberville (AL)
Roger F. Wicker (MS)

United States House of Representatives

Doug Lamborn (CO)
Robert B. Aderholt (AL)
Rick W. Allen (GA)
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Jim Banks (IN)
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Markwayne Mullin (OK)
Ralph Norman (SC)
Chip Roy (TX)
Christopher H. Smith (NJ)
William Timmons (SC)
Randy Weber (TX)
Daniel Webster (FL)

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case is yet another example of states "wield[ing]" public accommodation laws "as a sword" to compel individuals to speak or stay silent on controversial issues. Pet. App. 69a (Tymkovich, C.J., dissenting). Petitioner Lorie Smith, who owns a website design company, is "willing to work with all people regardless of sexual orientation." Pet. App. 6a. She sincerely believes, however, that "same-sex marriage conflicts with God's will." Pet. App. 6a. Consistent with her religious beliefs, Ms. Smith "intend[s] to offer wedding websites that celebrate opposite-sex marriages but intend[s] to refuse to create similar websites that celebrate same-sex marriages." Pet. App. 6a. She also intends to publish a statement on her website explaining that she cannot create websites for same-sex marriages because "[my] religious convictions . . . prevent me from creating websites promoting and celebrating ideas or messages that violate my beliefs." Pet. App. 7a.

But Ms. Smith has not offered wedding-related services or published her proposed statement because she is unwilling to violate the Colorado Anti-Discrimination Act (CADA). Under CADA, no Colorado business may "directly or indirectly . . . refuse . . . to an individual or a group, because of . . . sexual orientation . . . the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation." Colo. Rev. Stat. §24-34-601(2)(a). Thus, if Ms. Smith creates wedding websites celebrating opposite-sex marriages, CADA

requires her to create websites celebrating same-sex marriages too.

CADA violates the First Amendment. Because CADA forces Ms. Smith to create a website against her will, the law is subject to the highest form of judicial scrutiny. But the state has no interest (compelling or otherwise) in ensuring access to a particular person's unique artistic product. And the state's interests in preventing discrimination can be achieved through alternative means—the state could simply exempt message-based services from CADA's prohibitions, leaving the vast majority of applications in place. Yet the Tenth Circuit astonishingly found that CADA survived strict scrutiny.

That decision flips the Constitution's promise of free speech on its head. Colorado insists that compelling Ms. Smith to use her artistic and intellectual capabilities to create a message she opposes is no different than compelling a restaurant to "'have flameproof draperies.'" BIO 24. In doing so, the state minimizes the extraordinary choice CADA forces Ms. Smith to make: she may either express a message against her religious beliefs or she may stay silent and forgo the ability to make a living using her artistic talents.

The harms of applying public accommodation laws like CADA to business owners' speech cannot be overstated. To date, 19 states have publicly argued that such laws compelling or silencing speech don't violate the First Amendment. *See* Pet. Reply 1, 12. And business owners across the country have been forced to shut their doors, are risking jail, or are still in

years-long litigation. *See id.* at 13 (noting that "Elaine Photography and Sweet Cakes are out of business, Barronelle Stutzman was forced to retire, Emilee Carpenter is risking jail, Bob Updegrove and Chelsey Nelson are in harm's way, and Jack Phillips is still in court, pursued by a private enforcer who wants to finish the job") (internal cites omitted).

This Court has long recognized that "[a]t the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994). Government compulsion of artistic expression like Ms. Smith's "contravenes this essential right." *Id.* The Court should reverse the decision below.

ARGUMENT

I. CADA violates the First Amendment.

A. Colorado's restrictions on Ms. Smith's speech are subject to the most rigorous judicial scrutiny.

CADA's restrictions implicate the First Amendment because the websites Ms. Smith wants to create are "pure speech." Pet. App. 20a. Her websites will "celebrate and promote the couple's wedding and unique love story by combining custom text, graphics, and other media." Pet. App. 20a (quotations omitted). Just like "books, plays[,] movies," and even "video games," Ms. Smith's websites "communicate ideas

[and] social messages" and thus receive First Amendment protection. *Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 790 (2011).

Strict scrutiny applies to the state's restrictions on Ms. Smith's speech. CADA "force[s] [Ms. Smith] to create websites—and thus, speech—that [she] would otherwise refuse." Pet. App. 22a-23a. Such laws are subject to strict scrutiny. *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988); *see also Nat'l Inst. of Fam. & Life Advocs. (NIFLA) v. Becerra*, 138 S. Ct. 2361, 2371 (2018).

CADA is also a content-based and viewpoint-based regulation of speech. Because of CADA, Ms. Smith "cannot create websites celebrating opposite-sex marriages, unless [she] also agree[s] to serve customers who request websites celebrating same-sex marriages." Pet. App. 23a. A law is content-based (and thus subject to strict scrutiny) if it "applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert,* 576 U.S. 155, 163 (2015). And "[i]t is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995). Nor can it discriminate based on viewpoint. *See id.* at 829-30 (explaining that viewpoint discrimination is an "egregious form of content discrimination" and is "presumptively unconstitutional"). Colorado lost sight of this when it chose to restrict or punish speech because someone may find it offensive. But restrictions because of the "impact that speech has on

its listeners . . . is the essence of content-based regulation." *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 811-12 (2000) (citation and quotations omitted). Simply put, the Constitution abhors restrictions on speech because of the message being conveyed or the way in which the speaker chooses to convey that message. *See Iancu v. Brunetti*, 139 S. Ct. 2294, 2301-02 (2019).

From the outset, then, CADA's chances of surviving judicial scrutiny are exceedingly slim. Indeed, the Court has indicated that laws like these will *never* be constitutional. In *West Virginia Board of Education v. Barnette*, for example, the Court prohibited schools from compelling students to say the pledge of allegiance. 319 U.S. 624, 642 (1943). State interests in "national unity," "patriotism," and "national security" were insufficient—even though the country was in the middle of World War II—to justify compelling the student "to utter what is not in his mind." *Id.* at 634, 640-41. As the Court recognized, "[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, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Id.* at 642. The Court was unaware of "any circumstances which permit an exception." *Id.*

Similarly, this Court has repeatedly stressed that viewpoint-based regulations are *never* allowed. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society

finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). For example, in *Matal v. Tam*, 137 S. Ct. 1744 (2017), the Court's "finding of viewpoint bias ended the matter." *Iancu*, 139 S. Ct. at 2302 (citing *Tam*, 137 S. Ct. at 1761). Indeed, once the Court has "found that a law aims at the suppression of views, why would it matter that Congress could have captured some of the same speech through a viewpoint-neutral statute?" *Id.* Simply put, "if a [law] is viewpoint-based, it is unconstitutional." *Id*. at 2299.

These are not aberrations. Time and again, this Court has refused to sanction laws compelling speech or restricting speech on the basis of content or viewpoint, despite government pleas that such laws were needed to serve important interests. *See, e.g., NIFLA*, 138 S. Ct. at 2368, 2375-78 (interest in informing pregnant women that they are not receiving medical care from licensed professionals insufficient to force crisis pregnancy centers to post medical notices); *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 644, 656-61 (2000) (interest in preventing sexual orientation discrimination insufficient to force Boy Scouts to readmit scoutmaster); *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 244, 248, 258 (1974) (interest in informing the public of all viewpoints insufficient to force newspapers to print opposing views). Regardless of the interest at stake, the First Amendment almost always prevails.

B. CADA cannot withstand strict scrutiny.

Despite recognizing that CADA must withstand the strictest form of judicial scrutiny, the Tenth Circuit nevertheless upheld the state law. This decision flatly contradicts this Court's precedent.

To begin, the state has no compelling interest in forcing Ms. Smith to create same-sex wedding websites. The Tenth Circuit found that the state had a compelling interest in "protecting both the dignity interests of members of marginalized groups and their material interests in accessing the commercial marketplace." Pet. App. 24a. But this is nonresponsive. No one disputes that states can enact public-accommodations laws to protect "a given group [that] is the target of discrimination." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 572 (1995); *see Roberts v. U.S. Jaycees*, 468 U.S. 609, 628 (1984) ("[A]cts of invidious discrimination in the distribution of publicly available goods, services, and other advantages cause unique evils that government has a compelling interest to prevent[.]"). Such laws are generally compatible with the First Amendment because they don't "target speech" but instead prohibit "the *act* of discriminating against individuals in the provision of publicly available goods, privileges, and services." *Hurley*, 515 U.S. at 572 (emphasis added).

The relevant question instead is whether the state has a compelling interest in "ensuring access to a *particular* person's unique, artistic product." Pet. App. 77a (Tymkovich, C.J., dissenting). Stunningly, the

Tenth Circuit found this interest to be compelling. According to the Tenth Circuit, the state had a compelling interest in ensuring access to Ms. Smith's "*unique* services [which] are, by definition, unavailable elsewhere." Pet. App. 28a. Although "LGBT consumers may be able to obtain wedding-website design services from other businesses," they could never "obtain wedding-related services of the same quality and nature as those that [Ms. Smith] offer[s]." Pet. App. 28. In other words, the Tenth Circuit believed the state had a compelling interest in forcing Ms. Smith to speak views she opposes because she—by definition—is the only one like her. Pet. App. 28a.

At least one lower court has already employed this backward reasoning to silence another artist. In *Emilee Carpenter, LLC v. James*, a federal district court expressly relied on the Tenth Circuit's reasoning to conclude that a New York photographer must violate her conscience and create photographs and blogs celebrating same-sex weddings because her "unique artistic style and vision" would be unavailable elsewhere. 2021 WL 5879090, at *16 (W.D.N.Y. Dec. 13, 2021). And at least 19 states have relied on the Tenth Circuit's decision to argue that state officials may silence or compel their citizens to speak. *See* Pet. Reply 1, 12; Mass. Amici. Br. 19, 21, *Updegrove v. Herring*, No. 21-1506 (4th Cir. Aug. 27, 2021).

The Tenth Circuit's reasoning makes clear the true purpose of CADA's speech compulsions—to compel dissenters to mouth views with which they disagree and to silence opposing viewpoints. After all, as the Tenth Circuit recognized, same-sex couples have

no shortage of alternative options for wedding website designs. Pet. App. 28a. The state insists that the availability of these myriad alternatives is just like the "guidebook identifying safe lodging for African-Americans at a time when some hotels denied them service" in *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 253 (1964). *See* BIO 33. But the exclusionary practices in *Heart of Atlanta* were "nationwide" and "so acute as to require" a "special guidebook" which listed the few hotels that would rent to African Americans. *Heart of Atlanta Motel, Inc.,* 379 U.S. at 253 There is no similar record here. Indeed, "practically all wedding [website] publications now publish LGBTQ+ weddings," and "it's more notable if a publication *won't* publish LGBTQ+ weddings." *LGBTQ+ Inclusive Wedding Websites Worth Knowing*, Equally Wed, bit.ly/3iUNqRQ.

The point of applying CADA to Ms. Smith, then, isn't to provide a public accommodation; it's to force her to conform her speech to the prevailing view. Yet it is well settled that the state "is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." *Hurley*, 515 U.S. at 579. "Even antidiscrimination laws, as critically important as they are, must yield to the Constitution." *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 755 (8th Cir. 2019). And as "compelling as the interest in preventing discriminatory conduct may be, speech is treated differently under the First Amendment." *Id.*

Hurley is directly on point. There, the Court held that Massachusetts could not force the organizer of a St. Patrick's Day parade to include a group celebrating gay, lesbian, and bisexual Irish-Americans. 515 U.S. at 559, 561. Enforcing the state's public accommodation law (which prohibited discrimination on account of sexual orientation) would force the parade organizer to "bear witness to the fact that some Irish are gay, lesbian, or bisexual," would "suggest . . . that people of their sexual orientations have as much claim to unqualified social acceptance as heterosexuals," and would imply that the practice of homosexuality or bisexuality "merits celebration." *Id.* at 574. Even if excluding a group with a pro-LGBT message was "misguided, or even hurtful," the parade organizer could not be forced into expressing "thoughts and statements acceptable to some groups or, indeed, all people." *Id.* at 574, 579; *see also Dale*, 530 U.S. at 661 (a state may not "compel [a private] organization to accept members where such acceptance would derogate from the organization's expressive message").

In fact, the damage to free expression inflicted by CADA is far worse than in *Hurley* and similar cases. This Court has struck down state laws that required only "passive act[s]," *Wooley v. Maynard*, 430 U.S. 705, 715 (1977), like carrying a state motto on a license plate, *id.*, allowing others to march in a parade, *Hurley*, 515 U.S. at 559, and providing newspaper space for opposing viewpoints, *Tornillo*, 418 U.S. at 243.

CADA, by contrast, forces Ms. Smith to *create* speech that she opposes. Ms. Smith's websites are not

"fungible products, like a hamburger or a pair of shoes." *Brush & Nib v. City of Phoenix*, 448 P.3d 890, 910 (Ariz. 2019). They are custom-created, artistic expressions. Despite her religious objections, CADA compels Ms. Smith to use her intellectual and artistic abilities to create websites that "express approval and celebration of [same-sex] marriage[s]." Pet. App. 20a.

Even the Tenth Circuit realized the special burdens CADA imposed. *See* Pet. App. 21a ("The speech element is even clearer here than in *Hurley* because Appellants actively create each website, rather than merely hosting customer-generated content on Appellant's online platform."); *see also Telescope Media Grp.*, 936 F.3d at 754 n.4 ("The allegations here may well be more troubling from a First Amendment perspective than the facts of *Tornillo*. In that case, all the newspaper had to do was reproduce verbatim an opinion piece written by someone else. The [law here], in contrast, would require the [plaintiffs] to use their own creative skills to speak in a way they find morally objectionable."). The state simply has no interest—compelling or otherwise—in forcing individuals to create artistic content that they oppose or that violates their religious beliefs.

Even if the state has a compelling interest (which it doesn't), CADA is not narrowly tailored to further that interest. A law is not narrowly tailored unless it is "the least restrictive means among available, effective alternatives." *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004). Accordingly, the law must "avoid unnecessarily abridging speech," *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 444 (2015); it cannot be overinclusive,

Brown, 564 U.S. at 804, or underinclusive, *Reed*, 576 U.S. at 171-72; and there must be no administrable, reasonable alternatives, *Ashcroft*, 542 U.S at 666.

CADA is not narrowly tailored because the state has "reasonable, practicable alternatives [it] could implement to ensure market access while better protecting speech." Pet. App. 78a (Tymkovich, C.J., dissenting). Most obvious, the state could exempt message-based services from its prohibitions or, at a minimum, exempt individuals like Ms. Smith who create artistic content about or for weddings. This practicable alternative "protects artists' speech interests while not harming the state's interest in ensuring market access." *Id.* And it would "leave intact" the vast majority of "applications of [CADA] that do not regulate speech based on its content or otherwise compel an individual to speak." *Telescope Media Grp.*, 936 F.3d at 758. Other alternatives exist too. *See* Pet. App. 78a-79a (Tymkovich, C.J., dissenting).

CADA's blunderbuss approach can't satisfy this Court's standard. "Because First Amendment freedoms need breathing space to survive, . . . [b]road prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP v. Button*, 371 U.S. 415, 433, 438 (1963). Given the important First Amendment issues at stake, the state needed to draft its anti-discrimination laws so as not to infringe on the rights of individuals like Ms. Smith. It failed to do so.

II. Overreaching anti-discrimination laws like CADA impose enormous harms to free expression.

This case is unquestionably important—to Ms. Smith and to the countless others like her facing similar dilemmas. In recent years, the scope and applicability of general public accommodations laws have undoubtedly "expanded to cover more places." *Dale*, 530 U.S. at 656. But as the definition of "public accommodation" has expanded, "the potential for conflict between state public accommodations laws and the First Amendment rights of organizations has increased." *Id.* at 657. As Petitioners explain, "Colorado has shown an unnerving enthusiasm for prosecuting people of faith with its public accommodation law. And that enthusiasm is going national, evidenced by the 19 states that now rely on the decision below to argue that officials may use public-accommodation laws to compel citizens to speak in violation of their conscience." Pet. Supp. Br. 1.

Compelling an individual to use her artistic and intellectual capabilities to create a message she opposes is the most odious form of compelled expression. Such laws coerce writers and artists into "betraying their convictions." *Janus v. Am. Fed'n of State, Cnty., & Mun. Emp., Council 31*, 138 S. Ct. 2448, 2464 (2018). They are the tool of totalitarian regimes, not the United States. As Milos Forman, the famous Czech-American film director, once noted:

> The censorship itself, that's not the worst evil. . . . The worst evil [of communism] is the

> self-censorship because that twists spines, that destroys my character[.] I have to think something else and say something else. . . . I am stopping to [be] honest. I am becoming [a] hypocrite.

Interview with Milos Forman, Nat'l Security Archive (Jan. 18, 1997), bit.ly/3DXpy8z.

Yet Colorado insists that compelling Ms. Smith to use her artistic and intellectual capabilities to create a message she opposes is no different than requiring a restaurant to "'have flameproof draperies.'" BIO 24. In doing so, the state minimizes the extraordinary choice CADA forces Ms. Smith to make: she may either express speech against her religious beliefs or she may stay silent and forgo the ability to make a living using her artistic talents.

That CADA compels individuals to violate their *religious* convictions is even more intolerable. Religious beliefs "define a person's very being—his sense of who he is, why he exists, and how he should relate to the world around him." Daniel O. Conkle, *Toward a General Theory of the Establishment Clause*, 82 Nw. U. L. Rev. 1113, 1164 (1988). Religious beliefs are often "based upon a faith[] to which all else is subordinate or upon which all else is ultimately dependent." *United States v. Seeger*, 380 U.S. 163, 176 (1965). When the state seeks to override these beliefs, it strikes at an individual's "basic autonomy of identity and self-creation," one that is essential to "the human condition." Alan E. Brownstein, *Harmonizing the Heavenly and Earthly Spheres: The Fragmentation*

and Synthesis of Religion, Equality and Speech in the Constitution, 51 Ohio St. L.J. 89, 95 (1990).

Yet CADA is worse still. Not only does CADA force individuals to speak views that conflict with their religious beliefs, it forces them to *create* speech that betrays their religious convictions. But religious art and creative expressions (often more than other artistic works) reflect the heart of an individual's soul and character. As one theologian has put it, "Christian art is the expression of the whole life of the whole person as a Christian. What a Christian portrays in his art is the totality of life." Francis A. Schaeffer, *Art & the Bible* 90 (1973). Indeed, Ms. Smith is no different. She believes that she must "use the creative talents God has given to her in a manner that honors God and that she must not use them in a way that displeases God." Pet. App. 180a.

Religious speech has long received the strongest possible First Amendment protection. "Religious expression holds a place at the core of the type of speech that the First Amendment was designed to protect." *DeBoer v. Vill. of Oak Park*, 267 F.3d 558, 570 (7th Cir. 2001). Indeed, "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). The First Amendment ensures that individuals of all faiths "are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and

faiths." *Obergefell v. Hodges*, 576 U.S. 644, 679-80 (2015).

Yet the Tenth Circuit's decision allows the state to "wield CADA as a sword" to compel speech conflicting with an individual's deeply held beliefs. Pet. App. 69a (Tymkovich, C.J., dissenting). For example, an atheist musician could be forced to perform at an evangelical church service. Or a Muslim tattoo artist could be forced to write "My religion is the only true religion" on the body of a Christian. *See also* Pet. App. 69a-70a (Tymkovich, C.J., dissenting).

These outcomes do not reflect—and profoundly undermine—our longstanding First Amendment traditions. Religious speech holds a uniquely important and protected place in American history and jurisprudence. Ms. Smith and others like her deserve the strongest possible First Amendment protection.

CONCLUSION

Amici curiae respectfully request that this Court reverse the decision below.

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