No. 21-476

In The Supreme Court of the United States

303 CREATIVE LLC AND 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 *AMICUS CURIAE*
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IN SUPPORT OF PETITIONERS

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Robert P. George (B.A., Swarthmore College; J.D., M.T.S., Harvard University; D.Phil., B.C.L., D.C.L., and D.Litt. University of Oxford) is a legal philosopher and constitutional scholar who serves as the McCormick Professor of Jurisprudence at Princeton University. He has studied, written, and taught about religious liberty, human dignity, and First and Fourteenth Amendment jurisprudence for decades. His academic writings include Making Men Moral: Civil Liberties and Public Morality; The Clash of Orthodoxies; and Conscience and Its Enemies. Professor George routinely contributes to litigation in which questions concerning individual liberty and freedom of expression arise. He offers the following to help guide the Court's analysis in this crucial case.

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[1] Pursuant to Rule 37.3(a), both the Petitioners and the Respondents have provided blanket consents to the filing of amicus briefs. In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part. The Witherspoon Institute, Inc., is contributing to the costs of printing this brief. No other person or entity other than Amicus Curiae and the counsel below contributed the costs associated with the preparation and submission of this brief.

INTRODUCTION & SUMMARY OF THE ARGUMENT

The State of Colorado, under the banner of the Colorado Anti-Discrimination Act (CADA), seeks to compel a religiously orthodox website designer to offer her creative services to customers that wish to promote events that are inconsistent with her religious beliefs. Colorado asserts that its law does not violate the First Amendment because its law regulates commercial *conduct* only—not expression—and that any speech discernible in her governmentally compelled conduct flows not from her but instead from her customers. If the law does compel speech, the State maintains that this commandeering of her voice is justified by its compelling need to protect persons who identify as homosexual from exclusion from the marketplace.

The State's argument is triply flawed. First, States have no legitimate—much less compelling—interest in shielding citizens from offensive ideas conveyed by protected speech. Second, the activity that CADA compels is indeed speech protected by the First Amendment and attributable to the website designer. And third, even if Colorado is correct in categorizing Petitioners' speech as commercial conduct subject to a more forgiving standard, Ms. Smith's conduct is nevertheless expressive and differs, both meaningfully and contextually, from the kinds of commercial conduct that have historically been the target of public-accommodation laws—namely the exclusion of an entire class of persons from participation in a particular market.

The arguments below find ample support in Supreme Court precedent, and they are also rooted in the distinct pluralistic tradition exemplified by the broad protections of the First Amendment. The fundamental question at stake here is one of governmental power and trust: Do we trust the government to appropriately identify and excise undesirable ideas from the public square, or do we trust individuals to work out their conflicting values and beliefs through the free exchange of ideas—that is, in a manner characteristic of a society premised upon a system of ordered liberty? The latter option is the only permissible course under our Constitution.

ARGUMENT

I. There is no legitimate or compelling state interest in protecting citizens from exposure to allegedly stigmatizing ideas or concepts.

A. "If 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." *West Virginia State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 642 (1943). This foundational principle protects citizens against attempts to compel the expression of government-approved speech. Although public officials might prefer that citizens fly American flags rather than deface them, see *Spence* v. *Washington*, 418 U.S. 405 (1974), or burn them, see *Texas* v. *Johnson*, 491 U.S. 397, 399 (1989), or march in a patriotic July 4th parade rather than a pro-Nazi parade, *National Socialist*

Party of Am. v. *Skokie*, 432 U.S. 43 (1977) (per curiam), the government cannot prescribe that all citizens adhere to only state-approved forms of speech and expressive conduct.

The First Amendment's prohibition on governmental speech restrictions applies even when the speech at issue offends other members of the community. This Court has affirmed in a long line of precedent that "the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable"; indeed, it has deemed this concept the "bedrock principle underlying the First Amendment." *Johnson*, 491 U.S., at 413. After all, the First Amendment is rarely invoked to defend the legality of speech that a majority finds palatable; rather, "the point of all speech protection . . . is to shield just those choices of content that in someone's eyes are misguided, or even hurtful." *Hurley* v. *Irish-American Gay, Lesbian, and Bisexual Grp. of Boston, Inc.*, 515 U.S. 557, 574 (1995); see also *Snyder* v. *Phelps*, 562 U.S. 443, 458 (2011) ("Such speech cannot be restricted simply because it is upsetting or arouses contempt.").

The need to protect a speaker's audience either from offense or from what the audience might regard as insult cannot be a legitimate justification for restricting speech. Otherwise, the state would have vast censorship authority that would inevitably be wielded most frequently against the types of political and religious speech that warrant the greatest constitutional protection. As Justice Thomas explained in a concurring opinion joined by Justice Gorsuch in *Masterpiece Cakeshop, Ltd.* v. *Colorado Civil Rights Commission*, "[s]tates cannot punish

protected speech because some group finds it offensive, hurtful, stigmatic, unreasonable, or undignified. . . . A contrary rule would allow the government to stamp out virtually any speech at will." 138 S. Ct. 1719, 1746 (2018) (Thomas, J., concurring). As a unanimous Court recently recognized, "[g]iving offense *is* a viewpoint." *Matal* v. *Tam*, 137 S. Ct. 1744, 1763 (2017) (emphasis added). A state "may not insulate a law from charges of viewpoint discrimination by tying censorship to the reaction of the speaker's audience." *Id.,* at 1766 (Kennedy, J., concurring). The Constitution remains a safer guarantor of speech rights than the whims of public opinion (or of policymakers).

Moreover, there is no degree of offense so severe as to constitute a legally cognizable "dignitary harm" against the group of people offended. Speech is protected even when it is so "particularly hurtful" to a distinct group that "emotional distress" "fails to capture fully" the strength of the emotions it stokes among listeners. *Snyder*, 562 U.S., at 456. This is so because it is the "proudest boast of our free speech jurisprudence . . . that we protect the freedom to express 'the thought that we hate.'" *Matal*, 137 S. Ct., at 1764 (quoting *United States* v. *Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting)). Accordingly, even when the government acts pursuant to such unobjectionable motivations as "encouraging racial tolerance," it must act through constitutionally permissible means. *Id.* A State may lawfully promote its favored message "by persuasion and example," but the argument that "[t]he Government has an interest in *preventing* speech

expressing ideas that offend . . . strikes at the heart of the First Amendment." *Id.* (emphasis added).

In other words, "[w]hile the law is free to promote all sorts of conduct in place of harmful behavior, it 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. The freestanding right to avoid offense or what one regards as insult is not and never has been legally cognizable. The First Amendment protects even the most offensive speech "in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity." *Cohen* v. *California*, 403 U.S. 15, 24 (1971).

Fundamentally, the way to promote the State's preferred values "is not to punish those who feel differently about these matters. It is to persuade them that they are wrong." *Johnson*, 491 U.S., at 419. Rather than first attempt persuasion, Colorado has opted for compulsion.

B. Although the rights to free speech and the free exercise of religion are distinct and thus receive separate protection under the First Amendment, they are often intertwined. "[M]uch . . . religious speech might be perceived as offensive to some," because faithful adherence to a religious tradition implies the acceptance of certain claims about objective truth and the concomitant rejection of certain conduct as morally inconsistent with that truth. *Morse* v. *Frederick*, 551 U.S. 393, 409 (2007). In a pluralistic society in which the theologically traditional mix freely with citizens who belong to

different religious traditions or no religion at all, friction inevitably arises. The expression of traditional religious beliefs—through speech or conduct—is not, however, punishable by law.

As demonstrated, the Supreme Court has consistently affirmed that the First Amendment protects even profoundly offensive forms of expressive conduct. See, *e. g.*, *Snyder*, 562 U.S., at 447 (First Amendment protects group that picketed a soldier's funeral bearing signs indicating their belief "that God kills American soldiers as punishment" for national sins); *Virginia* v. *Black*, 583 U.S. 343, 347–348 (2003) (affirming the right of the Ku Klux Klan to burn crosses at rallies); *Johnson*, 491 U.S., at 420 (holding a "State's interest in preserving the [American] flag as a symbol of nationhood and national unity" did not justify a man's criminal conviction for engaging in protected political expression by burning it). Hence, when a speaker's message is explicit—as unmistakable in expressive intent as a twenty-five-foot-tall burning cross, for instance, *Black*, 583 U.S., at 349—it is clearly protected by the First Amendment. But Colorado's argument would deny protection to far milder forms of speech, such as an artist's refusal to design a product that promotes a message to which she objects.

The Supreme Court has ruled that "the First Amendment protects flag burning, funeral protests, and Nazi parades." *McCutcheon* v. *FEC*, 572 U.S. 185, 191 (2014). It would be an absurd jurisprudential result to rule that Ms. Smith could not, however, politely tell a couple that satisfying their request would conflict with her deeply held

religious beliefs about marriage, and then direct them to a different service provider, without bringing the full force of Colorado law down upon herself.

The State's logic admits to no limiting principle. Colorado argues that CADA prohibits only messages that "propose[] illegal activity" and is therefore constitutionally permissible. Brief in Opposition 33–34. But it simultaneously claims for itself the freestanding authority to regulate expressive conduct that, in its view, inflicts "dignitary harm." See *id.* (comparing Petitioners' refusal to design products to promote same-sex ceremonies with Jim Crow-era denials of service to African Americans in the South). The Tenth Circuit's opinion in the case below showed where reasoning like this inexorably leads. See 6 F.4th 1160, 1179 (10th Cir. 2021) ("As compelling as Colorado's interest in protecting the dignitary rights of LGBT people may be, Colorado may not enforce that interest by limiting offensive speech. Indeed, the First Amendment protects a wide range of arguably greater offenses to the dignitary interests of LGBT people.") (citing *Snyder*, 562 U.S., 443).

Yet even as it rides roughshod over civil liberties, the State's theory would do little to actually protect people from the "dignitary harm" of hearing traditional beliefs about marriage publicly expressed. Religion is not a private matter. "Religious freedom," instead, "includes nothing if not the rights to worship, proselytize, and convert," all of which imply the right to "express the conviction that outsiders are . . . not just wrong, but deluded about matters of cosmic importance around which they

have ordered their lives--even *damnably* wrong." Girgis, Nervous Victors, Illiberal Measures: A Response to Douglas NeJaime and Reva Siegel, 125 Yale L.J. F. 399, 406 (2016) (emphasis in original). The freedom to make such weighty and potentially upsetting claims cannot be separated from the religious and expressional freedoms protected by the First Amendment. Barring believers from the market for wedding services will not prevent their beliefs from being voiced, to the inevitable consternation of outsiders.

C. Even if Ms. Smith's refusal to provide website design services for same-sex ceremonies is deeply upsetting, her customers' distress would still not justify coercion, because the dignity of both parties would be at stake. Ms. Smith could just as easily claim that Colorado's attempt to commandeer her voice inflicts a "dignitary harm" upon her. By using its power to take from Ms. Smith the right to speak and disseminate her ideas in the public square, Colorado's actions deprive Ms. Smith of "the right to use speech to strive to establish worth, standing, and respect" for her voice. See *Citizens United* v. *FEC,* 558 U.S. 310, 340–341 (2010); *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682, 736 (2014) (Kennedy, J., concurring) ("[F]ree exercise is essential in preserving their own dignity and in striving for a self-definition shaped by their religious precepts."). Accordingly, Colorado's actions impose "dignitary harms" on Ms. Smith.

What is a State to do in such a situation? This Court has already supplied the answer: Nothing. In doing nothing, the State fulfills its constitutional duty to respect the *freedom* of all concerned. Because

the First Amendment is "premised on mistrust of governmental power," the government is prohibited from depriving "the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration." *Citizens United*, 558 U.S., at 340–341.

Disputes between American citizens—or between States and citizens—are not assessed in a vacuum, but instead must be evaluated in light of "the constitutional backdrop against which [a] decision must be made." *Cohen*, 402 U.S., at 24. Similarly, the First Amendment itself is not a device of unknown origin or murky motivation; rather:

> [The First Amendment was] designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that *no other approach would comport with the premise of individual dignity and choice upon which our political system rests*.

Id. (emphasis added). The First Amendment is a default setting *against* governmental restraints on speech that the State can overcome only with a compelling rationale. Allegations of "dignitary harm," on their own, do not suffice, particularly when state action to remedy that "harm" only transfers the injury to a different party.

II. The activity at issue here is pure speech, which is subject to a different legal standard than mere commercial conduct.

A. Colorado argues there is nothing to fear from CADA because the law is no different in form or function from similar federal and state anti-discrimination laws that seek only to "prevent[] the harm, both dignitary and economic, inflicted by denials of equal access to commercially available goods and services." Brief in Opposition 33. For the reasons explained in Section I *supra*, the State's interest in preventing "dignitary harm" is unavailing. But what of its desire to ensure equal access to the market? This argument might succeed if this case presented an example of discrimination against certain people (*e. g.*, people who experience and affirm same-sex attraction or who form same-sex relationships) as a class. Ms. Smith, however, has never claimed such an open-ended right.

Instead, the Court's inquiry, like Ms. Smith's claim, should focus on the *content* of the compelled speech rather than the *client* for whom it is performed. Ms. Smith would refuse to design a website promoting a same-sex ceremony for *any* customer who requested one, whether that potential customer experienced same- or opposite-sex attraction, because she objects to the content of the message itself. And her objection to same-sex partnerships is rooted in "decent and honorable religious or philosophical premises," beliefs which this Court only recently claimed it would not "disparage[]." *Obergefell* v. *Hodges*, 576 U.S. 644, 672 (2015). As the Tenth Circuit recognized, the conduct

implicated here is not just the exchange of services for payment; it is First-Amendment-protected speech. 6 F.4th, at 1176 ("Appellants' creation of wedding websites is pure speech.").

Understandably, Colorado wants to recategorize Ms. Smith's pure speech as commercial conduct. Brief in Opposition 24. But even under this categorization, Colorado fails. Although the government has "a freer hand in restricting expressive conduct" than written or spoken forms of speech, it cannot target particular expressive conduct *because* of its "expressive elements." *Johnson*, 491 U.S., at 406. For the purposes of constitutional analysis, governmental intent is relevant; it matters whether the government aims only to regulate the "nonspeech element" of a given activity or whether it is really attempting to squelch the expressive message conveyed thereby. *United States* v. *O'Brien*, 391 U.S. 367, 376 (1968).

Colorado argues that here, the "nonspeech element" is all there is, on the ground that any speech intertwined in Ms. Smith's refusal to design certain websites "proposes illegal commercial activity." Brief in Opposition 32. As an initial matter, Ms. Smith's message is "illegal" only because CADA exists in an unconstitutional form. As demonstrated in Section I, there is a discernible (and lawful) message here: Ms. Smith's belief that marriage is intended as "a gender-differentiated union of man and woman," a view that has long "been held—and continues to be held—in good faith by reasonable and sincere people here and throughout the world." *Obergefell*, 576 U.S., at 657.

When assessing governmental regulations of expressive conduct, the Court has identified several relevant factors, including whether the public interest in regulation "is unrelated to the suppression of free expression," and whether "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of" the government's interest. *O'Brien*, 391 U.S., at 377. Colorado argues that it seeks only to ensure equal access to places of public accommodation, Brief in Opposition 30, but Ms. Smith (and most creative professionals in similar situations) has never asserted that she intends to deny service to any class of persons, including those who identify as homosexual. Instead, she seeks only to avoid a situation in which *any customer* compels her to speak a *message* with which she disagrees.

Hence, CADA's restriction is clearly "greater than is essential to the furtherance of" the government's interest in ensuring equal access because Ms. Smith already offers all customers access to the same services—services which do not include designing websites for events of any type that violate her religiously informed moral convictions. *O'Brien*, 391 U.S., at 377. Colorado's real interest in compelling Ms. Smith to design wedding websites that violate her conscience is intimately related to the suppression of free expression to which the State objects. It is therefore impermissible.

B. The State has argued further that, even if the design of a particular product for use in a particular wedding implicates the freedom of speech, the only message discernible in such an exchange is one that

is properly attributable to the customer rather than the product designer. Brief in Opposition 29–31. More specifically, Colorado asserts that "there is little likelihood that others will identify the resulting product as communicating the views" of Ms. Smith. *Id.,* at 29.

The same argument was previously raised in oral argument before this Court in a similar case concerning the provision of services for a same-sex ceremony. See, *e. g.*, *Masterpiece Cakeshop Ltd.* v. *Colorado Civil Rights Commission*, No. 16-111, Tr. Of Oral Arg. 15:6-7 ("A hairdo is to show off the person, not the artist."). Because this argument[2] "would justify any law that compelled protected speech[,] . . . this Court has never accepted it." *Masterpiece*, 138 S. Ct., at 1744 (Thomas, J., concurring). These cases are not about appearances; they are about *conscience*—the inherent right of an individual "to speak [her] own mind" on matters of public concern and private belief. *Barnette*, 319 U.S., at 634.

The State, through its anti-discrimination law, seeks to compel Ms. Smith to provide services in support of a practice and cause which she cannot in conscience support. It is irrelevant that the world

[2] Interestingly, at the same time it advances this argument, Colorado also expresses a concern that Ms. Smith's denial of wedding-website services to same-sex couples could be misinterpreted as an endorsement of her message by the State. See Brief in Opposition 35. If implied endorsement is a reasonable concern for a state entity, it is certainly a reasonable fear for an individual.

may never know that Ms. Smith has violated her own conscience because *she herself* will be intimately aware of that fact. "To sustain the compulsory" provision of website services in this case, the Court must find that the First Amendment leaves the way "open to public authorities to compel [Ms. Smith] to utter what is not in [her] mind." *Id.* There is no precedent even hinting that the government has the authority to put words in a speaker's mouth (*e. g.*, forcing an Orthodox Jewish designer to design a website for a Jews for Jesus celebration), and plenty of countervailing precedents that make abundantly clear it does not.

In every case in which this Court has affirmed the dignitary benefits of anti-discrimination law, the law under review coerced conduct that was *not* expressive. See, *e. g.*, *Heart of Atl. Motel* v. *United States*, 379 U.S. 241, 250 (1964); *Roberts* v. *U.S. Jaycees*, 468 U.S. 609, 625 (1984). And conversely, in two cases, the Court has directly addressed the question of "dignitary harm" to persons who identify as homosexual and found that it cannot justify state compulsion of speech. In *Hurley* v. *Irish-American Gay, Lesbian, and Bisexual Group of Boston*, Massachusetts state courts found that the exclusion of a gay-pride group from participation in an annual parade conducted and organized by another private group (the South Boston Allied War Veterans Council), violated state public-accommodation law. 515 U.S., at 561–562. This Court, however, held that the Veterans' Council's exclusion of the group was constitutionally protected expression, because "one important manifestation of the principle of free speech is that one who chooses to speak may also

decide what not to say," and the inclusion of the group would have materially altered the content of the parade host's message. *Id.,* at 573 (internal quotations omitted). When speakers decide to voice an opinion in public, they do not thereby open themselves up to a governmental command that they simultaneously voice *other* opinions, including opinions contrary to their own beliefs. Outside of requirements of truth in commercial advertising, the State "may not compel affirmance of a belief with which the speaker disagrees." *Id.*

Similarly, in *Boy Scouts of America* v. *Dale*, 530 U.S. 640 (2000), the Court affirmed the First Amendment associational right of a private organization to deny membership to a man because his advocacy of homosexual causes conflicted with the values that the Boy Scouts intended to impart to their members. Relying upon *Hurley*, the Court noted that permitting anyone to join a private organization without respecting the organization's values would allow the group's overall message to "be shaped by all those protected by the law who wish to join in with some expressive demonstration of their own." *Id.,* at 658 (quoting *Hurley*, 515 U.S., at 572–573).

Distilled to their essence, this Court's decisions have upheld public-accommodations laws that target discriminatory acts "against individuals in the provision of publicly available goods, privileges, and services." *Hurley*, 515 U.S., at 572. It has stricken laws that "target speech or discriminate on the basis of its content." *Id.* CADA plainly falls into the latter category.

Requiring Ms. Smith to provide website design services for same-sex ceremonies would similarly deform the content of her intended message by allowing it to be substituted for the desired message of others. If the First Amendment "eschew[s] silence coerced by law—the argument of force in its worst form," *Whitney* v. *California*, 274 U.S. 357, 275 (1927), then it certainly prohibits speech coerced by law as well.

Ms. Smith's desire to provide services in the marketplace, and to control her own speech in a manner consistent with her religious beliefs, "is as sound as [her speech] is expressive." *Hurley*, 515 U.S., at 574. It is also a message conveyed in her own voice, which cannot be lawfully commandeered by the voice of another backed by the power of the state. In holding otherwise, the Tenth Circuit erred.

III. The meaning of speech is inherently contextual, and the meaning conveyed by Ms. Smith's speech is substantively different from the kinds of "dignitary harm" combatted by public-accommodations laws.

Having established that (1) there is no state interest in eliminating offensive ideas from the public square, (2) Ms. Smith's website designs constitute pure speech under the First Amendment, and (3) even under Colorado's theory Ms. Smith's designs constitute expressive conduct, the next question is the nature of the message conveyed by Ms. Smith's speech. The inquiry into "whether and how an expressive item's purpose and context determine the message it carries" is, in many

respects, the central question in free-speech law. Girgis, Filling in the Blank Left by the Masterpiece Ruling: Why Gorsuch and Thomas Are Right, Public Discourse (Jun. 14, 2018), https://www.thepublicdiscourse.com/2018/06/21831/. The Court has long held that "the context in which a symbol is used for purposes of expression is important, for the context may give meaning to the symbol." *Spence*, 418 U.S., at 410.[3] Here, the context is illustrative: Ms. Smith operates a website-design business, and the websites that the State seeks to compel her to create would promote a ceremony celebrating a union between two individuals of the same sex.

In First Amendment cases, "the ultimate conclusions of law are virtually inseparable from findings of fact." *Boy Scouts*, 530 U.S., at 648. The relevant facts here are not disputed by Colorado: Ms. Smith "offers graphic and website design services to the public," and she "would like to expand the business" to offer wedding websites. Brief in Opposition 5. But she "would decline any request [she] received from a same-sex couple to design a wedding website," and she fears this would subject her to legal penalties under CADA. *Id.*

"Forcing [Ms. Smith] to make custom wedding [websites] for same-sex marriages requires [her] to,

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[3] See also *Masterpiece*, 138 S. Ct., at 1744 (Thomas, J., concurring) ("The meaning of expressive conduct, this Court has explained, depends on 'the context in which it occur[s].'" (quoting *Johnson*, 491 U.S., at 405)).

at the very least, acknowledge that same-sex weddings are 'weddings' and suggest that they should be celebrated—the precise messages [she] believes [her] faith forbids." *Masterpiece*, 138 S. Ct., at 1744 (Thomas, J., concurring). Even the dissenting Justices in *Masterpiece* acknowledged that the meaning of a particular symbol is context-dependent, and that a couple who seeks to purchase a particular wedding-related product are requesting a product "celebrating *their* wedding—not a [product] celebrating heterosexual weddings or same-sex weddings." *Id.*, at 1750 (Ginsburg, J., dissenting) (emphasis in original). Compulsion in this case would require Ms. Smith to "affirm[] a belief with which [she] disagrees," an outcome that the First Amendment forbids. *Hurley*, 515 U.S., at 573.

The State's argument to the contrary relies upon a mistaken assumption about the purpose of anti-discrimination law. A comparison to the situation in the Jim Crow South is illustrative. Under that legal regime, African Americans were routinely denied service in places of public accommodation because of their skin color. The Civil Rights Act of 1964 sought to remedy that specific harm by outlawing a particular form of conduct—"denials of equal access to public establishments"—and barred race-based discrimination "to vindicate the deprivation of personal dignity" that African Americans suffered when denied service on an equal basis with whites. *Heart of Atl. Motel*, 379 U.S., at 250 (internal quotations omitted).

In other words, the Civil Rights Act aimed to "fight the peculiar social harm that *results from*

being excluded from the public square." Girgis, *supra*, 125 Yale L.J. F., at 412 (emphasis in original). Because the exclusion of certain groups from public life "doesn't serve civil society; it depopulates it," the federal government was justified in "fight[ing] racial humiliation by integrating schools, restaurants, theaters, and inns." *Id.* But "[a]s the definition of 'public accommodation' has expanded from clearly commercial entities, such as restaurants, bars, and hotels, to membership organizations" (and even individual website designers), "the potential for conflict between state public accommodations laws and the First Amendment rights of [individuals] has increased." *Boy Scouts*, 530 U.S., at 657.

States today routinely try to cast their own efforts at speech compulsion in a similar light, arguing that they operate in the same lineage as the Civil Rights Act and seek only to prevent denials of service to certain people as a class. See Brief in Opposition 33 (explaining the purpose of CADA as "preventing the harm, both dignitary and economic, inflicted by denials of equal access to commercially available goods and services"). But there is a world of difference between Jim Crow and the kind of expressive conduct threatened by CADA; it is the "difference between the humiliation of being denied a seat at the table of public life and the pain of sitting by people who oppose decisions you prize." Girgis, *supra*, 125 Yale L.J. F., at 413. Only the former is properly the subject of anti-discrimination law, because it "was about avoiding contact with certain patrons[] by refusing them any service *at all*." *Id.*, at 412 (emphasis added). The legal

prohibition on conduct imposed by anti-discrimination law is justified by the *nature* of the harm, rather than its scale.

Vociferous disagreement concerning life's central questions, while often uncomfortable, "is unavoidable in free societies and conducive to reform." *Id.*, at 412. Free societies are boisterous societies because they safeguard the rights of individuals to think for themselves, to voice the conclusions at which they arrive, and to associate with others who think similarly. The First Amendment rights of free expression and association are "especially important in preserving political and cultural diversity and in shielding dissident expression from the majority." *Boy Scouts*, 468 U.S., at 622. When the State uses its power to purge "dissident expression" by compelling individuals to speak only state-approved messages, it oversteps the bounds imposed upon it by the First Amendment.

CONCLUSION

America is stalked by an ancient fear: The creeping suspicion that "[i]t is impossible to live with those whom we regard as damned." J. Rosseau, The Social Contract 122 (Maurice Cranston trans., Penguin ed., 1968) (1762). The First Amendment stands as a stark manifestation of a more hopeful and confident philosophical tradition. Although this Court does not exist to adjudicate competing strands of moral philosophy, it *is* tasked with preserving the structural arrangements enshrined in our shared Constitution.

Ongoing disagreement over the most fundamental moral questions is not a sign that our constitutional arrangements for fostering debate have failed, but that they still do their job of securing a public square in which competing claims of ultimate truth can be tested against each other. "[D]isagreement on matters of principle is not the exception but the rule in politics," and a government that attempts to use its power to settle contentious disputes in favor of one side does not merely seek to end an argument—it seeks to extinguish politics itself. J. Waldron, Law and Disagreement 15 (1999).

And so, each of us is confronted daily with ideas and opinions that we find ill-considered, annoying, reprehensible, or that even strike at the heart of our own conceptions of the good and the true. This perpetual "verbal cacophony," though perhaps exhausting, is "not a sign of weakness, but of strength." *Cohen*, 403 U.S., at 25. Freedom of speech strengthens citizens because it enables them to interrogate their own beliefs and forces them to engage with the ideas of others. It is "a powerful medicine in a society as diverse and populous as ours," and ultimately aims to "produce a more capable citizenry and more perfect polity." *Id*., at 24.

It is often tempting to accept the despairing view that free speech inevitably tends towards social dissolution and that only a government willing to sort the intellectual wheat from the backwards-thinking chaff can set things right. But that approach does not "comport with the premise of individual dignity and choice upon which our political system rests." *Id.* Accepting the premise that freedom of speech is better than the alternative

can sometimes feel like an article of faith, but this country and its legal infrastructure for the protection of individual rights were built on nothing less.

The Court should reverse.

June 2, 2022 Respectfully submitted,

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