No. 21-476

# In The
# Supreme Court of the United States

303 CREATIVE LLC, et al.,

*Petitioners,*

v.

AUBREY ELENIS, et al.,

*Respondents.*

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

## BRIEF OF *AMICUS CURIAE* THE FREEDOM AND JUSTICE FOUNDATION, INC. IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

## INTEREST OF THE *AMICUS CURIAE*[1]

The Freedom And Justice Foundation, Inc. is a Section 501(c)(3) corporation whose purpose is to promote and defend freedom and justice. We believe freedom and justice will be served by reversal of the ruling of the Tenth Circuit.

## INTRODUCTION AND SUMMARY OF ARGUMENT

In *Obergefell v. Hodges*, 576 U.S. 644 (2015), this Court, by a five-to-four vote, ruled that states may not "bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex." To assuage concerns about possible adverse consequences of that decision to those persons that believe that marriage is a union between one man and one woman, the majority assured them that such fears were baseless:

> [I]t is appropriate to observe [that recognition of same-sex] marriages would pose no risk of harm to . . . third parties.
>
> Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost,

[1] The parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae* made a monetary contribution to its preparation or submission.

> sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered. The same is true of those who oppose same-sex marriage for other reasons.

This case, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018), and other similar cases involving small businesspersons who have been fined or paid damages or threatened with same for violating the public accommodation laws of certain states if they decline to provide personalized services for same-sex weddings are, collectively, an unintended consequence of *Obergefell*. Therefore, the Court should show that it meant what it said in *Obergefell* about that decision "posing no risk of harm" to them.

This Court granted the petition to determine "[w]hether applying a public-accommodation law to compel an artist to speak or stay silent violates the Free Speech Clause of the First Amendment." With all due respect, we believe that question does not fully capture the crux of the issue. A more expansive question might be "[w]hether applying *any* law to compel an artist to create a work of art that endorses a viewpoint contrary to that of the artist or stay silent violates the Free Speech Clause of the First Amendment or Section 1 of Thirteenth Amendment."

In any event, the answer to the Court's question seems self-evident to us. Yet, we fear that because of the ambiguity of the First Amendment and the inherent subjectivity of various analytical approaches that courts use to assess whether a law abridges it, a split decision is possible. On the other hand, we believe a unanimous decision (in favor of the petitioner) is highly likely if the Court focuses on whether the Colorado Anti-Discrimination Act (CADA), by coercing the petitioner to create a website celebrating a same-sex wedding, violates the Thirteenth Amendment's unambiguous prohibition of involuntary servitude.

## ARGUMENT

### I. THE REASONING OF THE TENTH CIRCUIT MAJORITY EVINCES A TROUBLING WILLINGNESS TO TREAT CONSTITUTIONAL RIGHTS AS ANACHRONISTIC HINDRANCES TO CONTEMPORARY POLICY CHOICES.

The individual petitioner, a website designer, advanced several arguments in the lower courts, all of which were rejected by the Tenth Circuit majority, including that (1) CADA, as applied to her, violates the Free Exercise of Religion and Free Speech Clauses of the First Amendment, and (2) her refusal to create a website for a same-sex wedding is not the result of

discrimination against the betrothed,[2] for whom she would willingly create custom websites consistent with her values.

The Tenth Circuit correctly found that CADA compels the petitioner to create a website that, under this Court's precedents, constitutes viewpoint-based compelled speech protected by First Amendment. That finding should have ended the case, as it did in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995) ("While 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.").

Instead, the Tenth Circuit majority determined that strict scrutiny analysis was appropriate: "Whether viewed as compelling speech or as a content-based restriction, the Accommodation Clause must satisfy strict scrutiny—i.e., Colorado must show a compelling

[2] Not all gay persons support same-sex marriage. See, e.g., "I'm Gay and I Oppose Same-Sex Marriage" (at https://www.thepublicdiscourse.com/2013/03/9432/); "Gays Against Gay Marriage" (at https://www.cooperhewitt.org/2019/06/05/gays-against-gay-marriage-2/); "Gay rebels: why some older homosexual men don't support same-sex marriage" (at https://theconversation.com/gay-rebels-why-some-older-homosexual-men-dont-support-same-sex-marriage-86205). If a gay website designer declines to create websites for same-sex weddings because, like the petitioner, he objects to same-sex marriages, should that person be deemed to have "refuse[d] . . . to an individual . . . because of . . . sexual orientation the full and equal enjoyment of [the website designer's] services," which is unlawful under CADA?

interest, and the Accommodation Clause must be narrowly tailored to satisfy that interest." It then asserted that "Colorado has a compelling interest in protecting both the dignity interests of members of marginalized groups and their material interests in accessing the commercial marketplace." Citing *Hurley*, it ruled that [CADA] "is not narrowly tailored to preventing dignitary harms." As to Colorado's other asserted compelling interest in "ensuring equal access to publicly available goods and services," it made this novel finding:

> This case does not present a competitive market. Rather, due to the unique nature of Appellants' services, this case is more similar to a monopoly. The product at issue is not merely "custom-made wedding websites," but rather "custom-made wedding websites of the same quality and nature as those made by Appellants." In that market, only Appellants exist.

Oblivious to the conventional definition of a monopoly as a company that dominates an entire market, the Tenth Circuit majority effectively took the position that each of the thousands of website design companies in the nation that appear to be competing with one another for customers are really quasi-monopolies because no two of them provide website designs of precisely "the same quality and nature." Building on that peculiar premise, the majority doubled down, opining that "unique goods and services are where public accommodation laws are most necessary to ensuring equal access" and ultimately concluded:

> We resolve the tension between these two lines of jurisprudence [i.e., limitations on compelled speech and public accommodation laws] by holding that enforcing CADA as to Appellants' unique services is narrowly tailored to Colorado's interest in ensuring equal access to the commercial marketplace. . . . In short, Appellants' Free Speech and Free Exercise rights are, of course compelling. But so too is Colorado's interest in protecting its citizens from the harms of discrimination. And Colorado cannot defend that interest while also excepting Appellants from CADA.

Thus, according to the Tenth Circuit majority, if two interests are compelling, one protecting the fundamental right of free speech set forth in the United States Constitution over two hundred years ago by its presumably benighted framers, and another favored by an enlightened post-*Obergefell* state legislature, the former must succumb to the latter. That reasoning is troubling because it significantly dilutes the vigor of the First Amendment.

## II. BECAUSE CADA COMPELS THE PETITIONER TO CREATE A WEBSITE FOR A SAME-SEX WEDDING, IT VIOLATES THE THIRTEENTH AMENDMENT.

Section One of the Thirteenth Amendment states: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

Plainly, if a law compelling an artist to create a website that promulgates a government-mandated viewpoint violates the Free Speech Clause of the First Amendment, it necessarily violates Section One of the Thirteenth Amendment.

In *United States v. Kozminski*, 487 U.S. 931 (1988), this Court interpreted "involuntary" in Section One of the Thirteenth Amendment to mean as a consequence of physical or legal coercion. Other than as punishment for a crime,[3] the only types of servitude this Court has found exempt from the Amendment's categorical prohibition of involuntary servitude have been those that have existed "from time immemorial." (*Robertson v. Baldwin*, 165 U.S. 275 (1897)). For example, public service like military service or jury duty are excepted. Also excepted are certain limited-term types of non-governmental servitude, e.g., a sailor who contracts to not desert a ship can be forcibly returned to it and parents can require their child to perform household chores. (*Robertson*).

More recently, in *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964), this Court rejected a challenge to Title II of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, religion, or national origin in public accommodations,

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[3] Notably, in 2008, Article II, Section 26 of the Constitution of Colorado, which was similar to the Thirteenth Amendment, and had previously stated, "There shall never be in this state either slavery or involuntary servitude, *except as a punishment for crime, whereof the party shall have been duly convicted*," was amended to eliminate the italicized exception.

based (in part) upon a claim that it subjected the business to involuntary servitude. Citing *Butler*, the Court noted that similar state laws "but codify the common-law innkeeper rule which long predated the Thirteenth Amendment." By contrast, artists in this country have always been free to make their own decisions about creating works of art. Indeed, prior to *Obergefell*, the proposition that government could compel an artist to produce a work of art would have been unthinkable.

Yet, here we are seriously considering whether such legal coercion is permissible. In *The Emperor's New Clothes*, the famous Hans Christian Andersen fairy tale, all that was necessary for the people to acknowledge the truth was to hear a child blurt it out. Like the reality of the Emperor's nakedness, it is indisputable to anyone that values objective truth that the legal coercion of CADA renders it violative of the Thirteenth Amendment.

## III. DETERMINING WHETHER CADA VIOLATES THE THIRTEENTH AMENDMENT IS LESS FRAUGHT WITH SUBJECTIVITY THAN DETERMINING WHETHER CADA VIOLATES THE FIRST AMENDMENT.

In his dissenting opinion in *Obergefell*, Chief Justice Roberts observed, "It can be tempting for judges to confuse our own preferences with the requirements of the law." Indeed, any level of scrutiny—including strict scrutiny—can serve as a malleable tool for judges tempted to give short shrift to constitutional rights

that conflict with their own policy choices (or those of other state actors) to justify a finding that a statute implementing those policy choices is not unconstitutional.

On the other hand, analyzing a claim that a law violates the Thirteenth Amendment does not allow for comparable subjectivity. Unlike the Free Speech Clause, the Thirteenth Amendment's prohibition of involuntary servitude is unambiguous and almost categorical and thus, virtually immune from subjective analysis. Therefore, all that is needed to decide this case is to apply the unambiguous text of the Thirteenth Amendment to the indisputable fact that artists supply their labor to create works of art.

Archimedes observed that the shortest path between two points is a straight line. By analogy, the easiest and least fractious way to decide this case is to determine whether CADA requires the petitioner to perform involuntary servitude. That will eliminate the temptation to resort to subjective value judgments that are inherent in deciding First Amendment questions and that have often led to split decisions in lower courts (as it did in this case). In sum, we see no principled way, regardless of one's policy preferences or judicial philosophy, to deny that, as applied in this case, CADA violates the Thirteenth Amendment. Thus, judicial unity and economy will be served by taking a "straight line" route to a decision.

## CONCLUSION

In 1964, the *Cornell Law Review* published a provocative article by Alfred Avins entitled *Freedom of Choice in Personal Service Occupations Thirteenth Amendment Limitations on Antidiscrimination Legislation* in which he asserted the following:

> That antidiscrimination laws which compel one person to serve another are unconstitutional seems to be open to little doubt. However, most judges before whom such cases have come have acted as if they never heard of the thirteenth amendment.

The next issue of the *Cornell Law Review* contained a response by David L. Ratner entitled *Involuntary Servitude or Inapposite Solicitude* in which he argued that antidiscrimination laws do not command any particular individual to do anything and that if the owner of a business does not want to personally do what the law requires, he can hire someone to do it "but [that such a case] is not analogous to cases of involuntary servitude, in which the respondent himself must perform without any right to substitute the performance of another." The latter scenario, Mr. Ratner conceded, would be a cause for concern:

> It is of course possible that some court or administrative agency might issue an order under a state antidiscrimination law *requiring someone to perform personally services which he would not render voluntarily*. Regardless of the constitutionality of any such order, a

> strong argument can be made that it would be bad policy and bad law. (Emphasis added.)

The "bad policy and bad law" problem that Mr. Ratner thought was unlikely to occur has arrived at the United States Supreme Court, a byproduct of *Obergefell*. Fortunately, no extensive briefing or analysis is needed to reach the obvious conclusion that a law that coerces artists to supply their labor to create a website that communicates a message with which they disagree violates the Thirteenth Amendment's prohibition of involuntary servitude.

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