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 FOR *AMICI CURIAE* THE WESTERN JURISDICTION OF THE UNITED METHODIST CHURCH; THE ROCKY MOUNTAIN CONFERENCE OF THE UNITED CHURCH OF CHRIST; UNITARIAN UNIVERSALIST ASSOCIATION; AND RECONSTRUCTIONIST RABBINICAL ASSOCIATION IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae ("Amici") are religious stakeholders who represent traditions rooted in centuries of American history and who affirm religious liberty and equal rights.

The Western Jurisdiction of the United Methodist Church encompasses the eight westernmost regional annual conferences of the United States, including United Methodist churches in Alaska, Arizona, California, Colorado, Hawaii, Idaho, Montana, Nevada, Oregon, Utah, Washington, Wyoming, Guam, and other territory in the Pacific region. The Western Jurisdiction is multicultural and inclusive, engaged in the life of its communities, with confident, effective lay and clergy leadership who, in diverse ministry settings, form disciples who live out the Good News of Jesus as global citizens.

The Rocky Mountain Conference of the United Church of Christ is the conference of UCC congregations in Colorado, as well as Utah and Wyoming, who support and nurture one another in local and wider ministry and mission. The United Church of Christ is a Protestant denomination of nearly 4,800 churches and nearly 800,000 members throughout the United States that proclaims the Gospel of Jesus Christ,

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

celebrates diversity, honors the gifts of all people, and seeks justice and peace for everyone.

Unitarian Universalist Association was founded in 1961 and has nurtured a heritage of providing a strong voice for social justice and liberal religion. Unitarian Universalism is a caring, open-minded faith community that traces its roots in North America back to the Pilgrims and the Puritans. Unitarian Universalists believe in the inherent worth and dignity of all people.

Reconstructionist Rabbinical Association ("RRA"), established in 1974, is the professional association of Reconstructionist rabbis. Comprised of 380 rabbis, the RRA represents the rabbinic voice within the Reconstructionist movement.

Amici come from faiths that have addressed social and religious questions affecting lesbian, gay, bisexual, and transgender ("LGBT") people in different ways over time. But Amici unite in believing it is both morally wrong and not constitutionally required to permit discrimination in the public marketplace for goods and services based on the personal religious beliefs of merchants with respect to same-sex couples' rights and relationships.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici support affirming the decision below on different grounds than those relied upon by the Court of Appeals. The Tenth Circuit held that Colorado's Anti-Discrimination Act ("CADA") compels petitioners—Lorie Smith, a website designer, and her company, 303 Creative LLC—to create speech that expresses approval and celebration of same-sex marriages. The court then subjected CADA to "strict scrutiny." Amici do not believe this was the correct way to analyze the effect of enforcing CADA. Rather, Amici believe that CADA merely requires petitioners to provide equal access to website design and copywriting services offered to the general public and that any "speech" thus created is understood to be that of the customer, not the vendor. Enforcing CADA thus does not infringe petitioners' free speech rights.

Attributing the speech of petitioners' customers to petitioners—and then creating a broad free-speech carve-out permitting discrimination based on religious objections to same-sex couples' marriages—would create rather than solve problems and, perversely, jeopardize not just civil rights enforcement but also religious freedom. Amici submit this brief to highlight such risks and to rebut the argument—explicitly and implicitly advanced by petitioners and some supporting *amici*—that evenhanded enforcement of public accommodation laws protecting LGBT individuals and

couples is inherently hostile to or in conflict with religion.[2]

As an initial matter, within the diverse panorama of American religious thought, a significant portion of the religious community welcomes, accepts, and celebrates LGBT individuals and their families and rejects the notion that they should be subject to public discrimination based on differing religious viewpoints. Views embracing LGBT equality—based on the religious belief in the dignity and worth of all people—are widely shared by, among others, Christian denominations such as The Episcopal Church, the Evangelical Lutheran Church in America, the Presbyterian Church (USA), and the United Church of Christ; the Unitarian Universalist Association; Judaism's Conservative, Reconstructionist, and Reform movements; and countless individual religious believers from faiths ranging from Roman Catholicism to Islam.

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[2] *See*, *e.g.*, Pet. Br. 4, 23 ("Smith is also Christian, and her religious beliefs—along with those of other Abrahamic faiths—teach that marriage is only between one man and one woman." CADA "forces Smith to change her message."); Brief of Amici Curiae Colorado State Legislators, at 18 (LGBT equality "unavoidably introduces hostility and inequity toward the viewpoints and identity of many religious people"); Brief of Amicus Curiae Institute for Faith and Family, at 21-24 ("Where the law protects a category defined by conduct that many religious traditions consider sinful, faith-neutral application is virtually impossible. People of faith will inevitably challenge laws forcing them to abandon their core religious convictions about marriage."); Brief of Amici Curiae C12 Group, et al., at 6 ("the conflict between religious commands and LGBT rights has been described as a 'zero-sum game' ").

Consistent with these views, many leaders among longstanding pillars of the faith community—including Episcopalians, Lutherans, Presbyterians, and Unitarian Universalists, as well as the Central Conference of American Rabbis and the United Church of Christ—have objected to claims for broad religious exemptions from antidiscrimination laws. These faiths recognize that our legal system distinguishes between the ironclad protections provided to religion in its own sphere and the different balances that society strikes in laws regulating commercial interactions in the civil sphere. Any suggestion that "religion" or "people of faith" as a whole reject LGBT equality—or that civil rights enforcement is inherently hostile to religion—is false.

Certain *amici* supporting petitioners suggest that this growing acceptance of LGBT rights within organized religion and society at large renders it unnecessary to include LGBT people in civil rights enforcement. The factual premise for this argument is overstated; anti-LGBT bias persists and in some spheres has increased. But whether discrimination is waxing or waning at any given moment does not negate the need to enforce public accommodation laws in an evenhanded manner whenever they are violated. Legislatures—the proper forum for this question—have not repealed such laws despite the even stronger consensus against discrimination based on race, sex, and national origin.

Amici believe that CADA can be enforced in this case without infringing petitioners' free speech rights. Amici recognize that many people of faith—and

religious institutions—have differing views on LGBT rights, including the freedom to marry, and strongly support the rights of such individuals and organizations to hold those beliefs and express those views. CADA, however, does not interfere with these rights, because it simply bars petitioners from excluding LGBT people from equal access to services offered to the general public. Providing such access does not constitute forced speech because the content of a wedding website is understood to be the speech of the couple itself, not the designer of the site. This understanding of public accommodations has preserved for decades the right of individuals to hold and express views hostile to protected classes while giving effect to the public policy of preventing discrimination in access to publicly offered goods and services—and the dignitary harm that such discrimination inflicts.

In contrast, the exemption from CADA that petitioners seek lacks any reasonable and realistic limiting principle. It would thus undermine antidiscrimination laws and, more broadly, civil rights enforcement across the United States. People of faith in particular would be harmed because many public accommodations would be permitted to deny goods and services to those who do not share their religious affiliations or convictions. Paradoxically, petitioners' exemption, which they assert in the name of religious liberty and expression, would open the door to discrimination against people of faith.

On the flip side of that coin, the ruling petitioners seek would undermine the current understanding

that providers of public accommodations are simply following the law and not "speaking" when they do not discriminate—suggesting instead that any perceived "message" associated with a customer's use of purportedly "expressive" goods and services should be attributed to the merchant. Such a change in understanding would cause people of faith to violate anti-discrimination laws out of fear that compliance will now be seen as their "speech," creating a perceived need to choose between their religious convictions and following those laws. Petitioners' "exemption" would therefore create the very problem it purports to remedy.

Amici urge the Court to reject petitioners' plea for a free-speech-premised exemption from CADA. Petitioners have every right to their religious beliefs concerning marriage and to express and act on those beliefs in their personal and religious lives. But, once they hold themselves out as website designers to the general public, they become subject to public accommodation laws like CADA. Affirming the ability of state and local governments to prevent discrimination in public accommodations will not constitute an attack on religion or signal a judicial imprimatur on changing social mores. Rather, such a result will confirm that the religious pluralism woven into the fabric of American law, culture, and society requires that all, regardless of faith, are entitled to equal treatment under the law.

ARGUMENT

America's religious landscape is vast and diverse.[3] Religious adherents differ, within and between denominations, on contentious issues, and religious bodies have evolved and disagreed over time on various civil rights and social issues. In view of that history and the wide range of modern religious thought concerning respect for LGBT persons and their place in civic life, it would be wrong to conclude that evenhanded enforcement of antidiscrimination statutes protecting LGBT individuals is inherently hostile to or inevitably in conflict with religion or people of faith. Rather, such enforcement preserves the traditional distinction between a religious actor's ability to hold and express any view personally and the obligation to honor antidiscrimination laws when participating in public commerce. Such legal compliance is not and should not be viewed as attributing to the merchant the "speech" of a customer, and changing this understanding by carving out a "free speech" exception from public accommodation laws would unleash a cascade of unintended consequences. The lack of any limiting principle for such an exception would eviscerate civil rights

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[3] *See* Public Religion Research Institute, The 2020 Census of American Religion, July 8, 2021, https://perma.cc/FYD2-SD4T; Pew Research Center, *When Americans Say They Believe in God, What Do They Means?* (Apr. 25, 2018), https://perma.cc/98FM-BZQ6; Pew Research Center, *Detailed Tables*, https://perma.cc/5MTJ-SMQG; Pew Research Center, *Religious Landscape Study Database Tool*, https://perma.cc/WV2H-AW4V.

enforcement and, ironically, could well foster more, not less, social strife and discrimination against people of faith.

I. The Inherent Dignity Of LGBT Persons Informs The Theology Of Amici And A Wide Cross-Section Of American Religious Traditions

Religious Americans increasingly affirm that the dignity of LGBT persons follows logically and theologically from the basic tenets of their religion. Some traditions reflect this evolution in approving LGBT persons for ministry,[4] selecting prominent leaders,[5]

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[4] *See* Mireya Navarro, *Openly Gay Priest Ordained in Jersey*, N.Y. Times, Dec. 17, 1989, https://perma.cc/2ZEJ-FG2E; LGBTQ Ministries Multicultural Growth and Witness, *LGBT History & Facts for Unitarian Universalists* (2012), https://perma.cc/4P5V-L62E; Rabbi Shawn I. Zevit, *JRF Homosexuality Report and Inclusion of GLBTQ Persons*, https://perma.cc/3MUM-K4KQ; Central Conference of American Rabbis, *Report of the Ad Hoc Committee on Homosexuality and the Rabbinate of the Central Conference of American Rabbis Annual Convention* (1990), https://perma.cc/46L3-NPXF; Amy Stone, *Out and Ordained, New York's Jewish Theological Seminary Graduates its First Openly Lesbian Rabbi*, Lilith (2011), https://perma.cc/EDD2-544E; Brendan O'Brien, *Presbyterian Church Ordains First Gay Minister*, Reuters, Oct. 9, 2011, https://perma.cc/2PXY-G5F8; Elizabeth Evans, *Denver Mennonites Take First Step Toward Gay Ordination*, Wash. Post, Feb. 3, 2014, https://perma.cc/339W-8AH2; NPR, *Transgender Bishop Steps into Historic Role in the Evangelical Lutheran Church*, Sept. 11, 2021, https://perma.cc/P7VQ-CW48.

[5] *See*, *e.g.*, Sarah Pulliam Bailey, *ELCA Lutherans Elect First Openly Gay Bishop* (June 3, 2013), https://perma.cc/K8DE-E6GD;

extending religious blessing and rites to same-sex unions,[6] or otherwise providing religious affirmation of LGBT relationships.

Such practices show that religious respect for LGBT persons and their relationships—including respect by "traditional" or "mainstream" religions—is deep, but not new. It was thirty-seven years ago that the United Church of Christ, with nearly one million members today, adopted a policy of membership

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Lesbian Rabbi Is to Become President of Reform Group, N.Y. Times (Mar. 15, 2015), https://perma.cc/E4TQ-JCJR.

[6] *See* LGBTQ Ministries Multicultural Growth and Witness, *LGBT History & Facts for Unitarian Universalists* (2012), https://perma.cc/4P5V-L62E; Resolution of Immediate Witness, *Support of the Right to Marry for Same-Sex Couples*, General Assembly of the Unitarian Universalist Association (1996), https://perma.cc/EJ2A-AC42; United Church of Christ, *In Support of Equal Marriage Rights for All* (July 4, 2005), https://perma.cc/6VUY-3C36; United Church of Christ, *Order for Marriage, An Inclusive Version*, https://perma.cc/HEK3-LTM3; Elliot Dorff, Daniel Nevins & Avram Reisner, *Rituals and Documents of Marriage and Divorce for Same-Sex Couples*, Rabbinical Assembly (Spring 2012), https://perma.cc/5HS8-4FLW; *Resolution On Same Gender Officiation*, 111th Convention of the Central Conference for American Rabbis (Mar. 2000), https://perma.cc/52JN-SVY5; *Reconstructionist Movement Endorses Civil Marriage for Same-Sex Couples*, Reconstructionist Rabbinical College, et al. (Feb. 24, 2010), https://perma.cc/HEA7-VQS9; Journal of the 78th General Convention of The Episcopal Church, Resolutions 2015-A036 & 2015-A054, at 778-83 (New York: General Convention 2015), https://perma.cc/32UW-84CE, https://perma.cc/8T4J-CSDK; Laurie Goldstein, *Largest Presbyterian Denomination Gives Final Approval for Same-Sex Marriage*, N.Y. Times (Mar. 17, 2015), https://perma.cc/7E79-ER2Q; Letter of Elizabeth A. Eaton, Presiding Bishop of the Evangelical Lutheran Church in America (June 30, 2015), https://perma.cc/4VWJ-PGDT.

nondiscrimination regarding sexual orientation.[7] In 1989, the 45th General Assembly for the Union of Reform Judaism, representing 1.3 million Reform Jews, resolved to "[u]rge [its] member congregations to welcome gay and lesbian Jews to membership, as singles, couples, and families."[8] More recently, in 2009, the Evangelical Lutheran Church in America, with approximately 3.5 million members, adopted a statement affirming that the church "has called upon congregations and members to welcome, care for, and support same-gender couples and their families."[9] The Episcopal Church,[10] the Presbyterian Church (USA),[11] Reconstructionist Judaism,[12] Unitarian Universalism,[13] and

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[7] *Resolutions: Calling on United Church of Christ Congregations to Declare Themselves Open and Affirming*, Open and Affirming Coalition United Church of Christ: UCC Actions (1985), https://perma.cc/G4SQ-R7GZ.

[8] *Resolutions: Gay and Lesbian Jews*, Union for Reform Judaism (1989), https://perma.cc/JD9S-D43W. *Cf.* Central Conference of American Rabbis, *Report of the Ad Hoc Committee on Homosexuality and the Rabbinate of the Central Conference of American Rabbis Annual Convention*, 262 (1990), https://perma.cc/46L3-NPXF.

[9] Evangelical Lutheran Church in America, *Human Sexuality: Gift and Trust*, 19, 23 (Aug. 19, 2009), https://perma.cc/TS27-YH38.

[10] Resolution 2006-A167, *Reaffirm Church Membership of Gay and Lesbian Persons*, 75th General Convention of The Episcopal Church (2006), https://perma.cc/267N-HEJM.

[11] 217th General Assembly, Theological Task Force on Peace, Unity and Purity of the Church, *A Season of Discernment*, 20 (2006), https://perma.cc/A97F-H2EB.

[12] *See* Zevit, *supra*, note 4.

[13] *Business Resolution: Confronting Sexual Orientation and Gender Identity Discrimination*, General Assembly of the

myriad other faiths similarly embrace a theological belief in the fundamental human dignity of LGBT Americans and their families.

II. Diverse Faith Groups And Religious Observers, Including Amici, Affirm The Place Of LGBT Persons And Families In Civic Life And Favor Their Protection Under Antidiscrimination Laws and Obligations

Religious endorsement of the dignity of LGBT persons extends beyond theological expressions to advocacy for equal treatment in civil society. Traditions that run the gamut of American religious expression support legal nondiscrimination protections for LGBT individuals. Majorities of Americans who identify as Unitarian Universalists, Jews, Hispanic Catholics, white Catholics, Buddhists, white mainline Protestants, Black Protestants, Latter-day Saints, Hindus, Hispanic Protestants, Muslims, Orthodox Christians, and white evangelical Protestants favor laws protecting LGBT people against discrimination in jobs, public accommodations, and housing.[14] Furthermore, majorities

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Unitarian Universalist Association (2010), https://perma.cc/E8XR-7GDM.

[14] Public Religion Research Institute, *Broad Support for LGBT Rights Across all 50 States: Findings from the 2019 American Values Atlas* (Apr. 14, 2020), https://perma.cc/V2XK-97P4; *see also* Public Religion Research Institute, *Americans' Support for Key LGBTQ Rights Continues to Tick Upward*, Mar. 17, 2022, https://perma.cc/WBF7-HU76; Public Religion Research Institute, *More Than Eight in Ten Americans Support LGBTQ*

of Americans who identify as Unitarian Universalists, Jews, Buddhists, Black Protestants, Orthodox Christians, Hispanic Catholics, Hindus, white Catholics, white mainline Protestants, Hispanic Protestants, and Muslims oppose religiously based refusals to provide business services to gay and lesbian people.[15] The point is not that polling data should determine the scope of individual liberties, but that such evidence refutes the suggestion of some *amici* supporting petitioners that enforcement of antidiscrimination laws protecting LGBT persons is inherently hostile to religion.

Indeed, many religious groups deem the embrace of civil nondiscrimination to be encouraged or even required by foundational religious tenets. For example, in 2018, the General Assembly of the Presbyterian Church (USA) unanimously passed a resolution to "[d]irect the Stated Clerk and the Office of Public Witness" of that body, and "[e]ncourage synods and presbyteries," to oppose legislative, judicial, and administrative efforts at the state and federal levels to limit the protection of persons based upon, among other things, sexual orientation, gender identity, or gender expression. The General Assembly further resolved to:

> Encourage all Presbyterians to distinguish between our historical understanding of our religious freedom to practice the essential tenets of our faith, and the misuse of the term

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Nondiscrimination Policies, Oct. 5, 2021, https://perma.cc/6G6V-L4CX.

[15] *Id.*

> religious freedom as a justification for discrimination in the provision of secular employment or benefits, healthcare, public or commercial services or goods, or parental rights to persons based on race, ethnicity, sex, gender, physical limitations, sexual orientation, gender identity, religion or gender expression.[16]

Individual religious leaders also have felt compelled by their faith to advocate for civil nondiscrimination. For example, the Bishop of the Episcopal Diocese of Mississippi opposed state legislation seen as privileging certain religious views with respect to LGBT rights, including same-sex couples' marriage rights, declaring that the "baptismal covenant requires that each of us will respect the dignity of every human being."[17]

Religious leadership and advocacy groups have also, over the course of several years, explicitly opposed interpreting constitutional doctrines or extending legislative provisions protecting religious freedom to "enable religious liberty claims to prevail in a way that would permit discrimination against protected classes

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[16] *Resolution On Clarifying the Position of the PC(USA) Regarding Appropriate Boundaries of Religious Liberty*, 223rd PC(USA) General Assembly (2018), https://perma.cc/8BBC-57B2.

[17] Press Release, The Episcopal Church in Mississippi, *Statement by the Rt. Rev. Brian R. Seage, Bishop of the Episcopal Diocese of Mississippi* (Mar. 31, 2016), https://perma.cc/3HZD-52J7.

and other minorities, including but not limited to the LGBT community."[18]

In short, a broad swath of American religious institutions and individuals embrace LGBT persons' civil equality. This position, shared by Amici here, is grounded in an abiding sense that the essential worth and dignity of all people is not just a guidepost of theological reflection, but also an ethical precept that should inform equal application of civil law to LGBT persons. Certainly there are contrary views within the rich diversity of American religious thought and practice. But petitioners and certain *amici* supporting them cannot be heard to speak for all religious people. It is no longer possible, if it ever was, for anyone to claim that a rejection of dignity and equality of LGBT people represents the unified view and voice of Christianity, much less American religion as a whole.

Recognizing this reality, several *amici* supporting petitioners pivot to the view that growing support for LGBT equality, including support "in the religious arena," shows that LGBT persons no longer need protection—asserting that discrimination is now rare and/or that LGBT people can always obtain services

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[18] *See* Central Conference of American Rabbis, *Resolution on State Religious Freedom Restoration Acts* (May 6, 2015), https://perma.cc/J3ZK-KTGD; Zac Baker, Reconciling Works: Lutherans for Full Participation, *Georgia Clergy Unite to Oppose Religious Refusal Bills* (Jan. 14, 2015), https://perma.cc/33QB-WXS8; Anthony Moujaes, *UCC social justice advocates keep watch on 'religious freedom'*, United Church of Christ (Apr. 12, 2016), https://perma.cc/6MTF-FNGM.

from a vendor who does not discriminate against them.[19] These positions are fundamentally flawed and do not alter Amici's view that evenhanded enforcement of public accommodation laws remains critically important.

To start, *amici* supporting petitioners overstate the progress that has been made towards LGBT equality. Many faiths, groups, and individual Americans remain opposed to LGBT equality.[20] If anything, opposition to LGBT equality is on the upswing.[21] For example, "over 300 bills to restrict L.G.B.T.Q. rights have been introduced this year in 23 states," including many to "allow[] groups to refuse services to L.G.B.T.Q. people based on religious faith."[22] Discrimination also is on the upswing. GLAAD's Accelerating Acceptance study recently found that "70% of LGBTQ Americans surveyed said discrimination toward the community has increased within the last two years—in the

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[19] *See*, *e.g.*, Brief Amicus Curiae of Concerned Women for America, at 1-2, 5, 18-20; Brief of Arizona, et al., as Amici Curiae, at 24-25; Brief of Amici Curiae Ethics and Public Policy Center, at 24, 28-29; Brief of Law and Economics Scholars as Amici Curiae, at 16-17; Brief Amicus Curiae of Public Advocate of the United States, at 16-17; Brief of Scholars of Family and Sexuality as Amici Curiae, at 3, 5-6; Brief for the Church of Jesus Christ Latter-day Saints, et al., at 19.

[20] *See*, *e.g.*, Elaine S. Povich, *Without Obergefell, Most States Would Have Same-Sex Marriage Bans*, Pew Research Center, July 7, 2022, https://perma.cc/9HMU-46LQ.

[21] *See* Trip Gabriel, *After Roe, Republicans Sharpen Attacks on Gay and Transgender Rights*, N.Y. Times, July 22, 2022, https://perma.cc/XQD8-ZZAG.

[22] *Id*.

workplace, on social media, in public accommodations and even within the family."[23] And there is now a "surge in hate speech and violence directed at LGBTQ people."[24]

More fundamentally, progress towards LGBT equality is not an excuse to deny rights to LGBT people. State and local governments are permitted to prevent discrimination against LGBT people regardless of the frequency of that discrimination or the strength of any consensus that such discrimination is wrong. The national consensus against racism and other forms of discrimination is strong too, but that does not mean governments can no longer protect from discrimination all categories of persons covered by public accommodation laws.

III. CADA Does Not Infringe Petitioners' Free Speech

Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission, 138 S. Ct. 1719 (2018), recognized the "authority of a State and its governmental entities

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[23] Edward Segarra, *Most LGBTQ Americans Face Discrimination Amid Wave of Anti-LGBTQ Bills, Study Says*, USA Today, June 22, 2022, https://perma.cc/878D-2257.

[24] Rosalind S. Helderman, *At Texas GOP Convention, Loyalists Embrace Far-Right, Anti-Gay Rhetoric*, Wash. Post, June 19, 2022, https://perma.cc/9MJ8-2Z45; *see also* Adam Gabbatt, *Anti-LGBTQ+ Attacks by US Extremist Groups Surge as Right Spews Vitriol*, Guardian, June 18, 2022, https://perma.cc/24C9-XF2R; Madeline Carlisle, *Right-Wing Groups Target Pride Events Amid Rising Anti-LGBTQ Rhetoric*, Time, June 16, 2022, https://perma.cc/7KU3-39K5.

to protect the rights and dignity of gay persons who are, or wish to be, married but who face discrimination when they seek goods or services." *Id.* at 1723. The Court acknowledged both the dignity and civil equality of same-sex couples:

> Our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth. For that reason the laws and the Constitution can, and in some instances must, protect them in the exercise of their civil rights. The exercise of their freedom on terms equal to others must be given great weight and respect by the courts.

Id. at 1727. Accordingly, the Court held that, while "religious and philosophical objections [to same-sex marriage] are protected, it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law." *Id.*

CADA does no more than what *Masterpiece* permits. The statute regulates commercial conduct by prohibiting public accommodations from discriminating against individuals or groups because of their sexual orientation. It does not compel public accommodations to endorse same-sex weddings. Rather, CADA merely requires that public accommodations provide, in this context, the same copywriting and graphic design services to same-sex couples that they

provide to different-sex couples. Such services are understood to represent the speech of the client, not the website designer. *See Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 64-65 (2006) (law school's communication facilitating military recruiters is not school's speech endorsing military's Don't Ask, Don't Tell policies; students know when school is sending own message or just following equal access law); *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 81, 86-87 (1980) (shopping center not speaking for itself when it allows political canvasser to set up table near store's entrance because no one would perceive store as endorsing canvasser's messages); *see also Janus Capital Grp., Inc. v. First Derivative Traders*, 564 U.S. 135, 143 (2011) ("Even when a speechwriter drafts a speech, the content is entirely within the control of the person who delivers it. And it is the speaker who takes credit—or blame—for what is ultimately said.").

To the extent CADA affects expression, it does so only incidentally, which is constitutionally permissible in view of the important government interests served by CADA. *See Rumsfeld*, 547 U.S. at 62 ("The compelled speech to which the law schools point is plainly incidental to the Solomon Amendment's regulation of conduct."); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949) ("[I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed."); *see also United States v. O'Brien*, 391 U.S.

367, 376 (1968) (rejecting "the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea"). Affirming the result below therefore will not unconstitutionally infringe petitioners' free speech.

Certain *amici* supporting petitioners argue that *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), requires reversal here because that case preserved the ability of people of faith to oppose same-sex marriage.[25] In recognizing civil marriage equality, the Court in *Obergefell* made clear that "religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned," and that the First Amendment continues to protect the right "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." 135 S. Ct. at 2607.[26] Post-*Obergefell*,

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[25] *See*, *e.g.*, Brief for the Church of Jesus Christ Latter-day Saints, et al., at 1-2, 22.

[26] *Obergefell* primarily honored the longstanding freedom of religions to impose their own definitions of marriage independent of civil law. Indeed, this respect for religious autonomy permits various religions to define religious marriage in ways that would be wholly unenforceable under civil law. For example, Conservative Judaism prohibits its clergy from officiating at interfaith marriages. *See* Leadership Council of Conservative Judaism, Conservative View on Intermarriage (Mar. 7, 1995), https://perma.cc/Z69N-CLCF. Roman Catholicism declines to recognize the union of those civilly divorced and remarried. *See* United States Conference of Catholic Bishops, *Compendium*—

religions, faith-based organizations, and persons of faith remain free to define, teach, and advocate religious marriage as limited to the union of one man and one woman. CADA does not infringe those rights because it does not require public accommodations to express any religious views or religiously endorse unions they find offensive—it merely requires that they provide equal access to goods and services offered to the general public.

IV. Petitioners' Proposed Exemption Would Undermine Antidiscrimination Laws By Permitting Dignitary Injury To Same-Sex Couples

Petitioners claim the right to directly injure a class of people expressly protected by CADA, which would undermine and defeat the central and compelling purpose of that statute. *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) (state has "compelling interest in eradicating discrimination against its female citizens").

Catechism Of The Catholic Church, ¶ 349 (2006). And the Church of Jesus Christ of Latter-day Saints taught that "mixed-race marriages are a sin" well after *Loving v. Virginia*, 388 U.S. 1 (1967), ruled the Constitution requires states to allow interracial civil marriages. *See Interracial Marriage Discouraged*, The Deseret News, June 17, 1978, at 4, https://perma.cc/TXJ4-SUQT; Race and the Priesthood, The Church of Jesus Christ of Latter-day Saints, https://perma.cc/QC27-QUH5. The Church has since formally disavowed these previous teachings. *Id*.

Colorado has every right to protect a group this Court has said should be protected. In *Masterpiece*, the Court broadly stated that "gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth" and "[f]or that reason the laws and the Constitution can, and in some instances must, protect them in the exercise of their civil rights." 138 S. Ct. at 1727; *see also Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1882 (2021) ("gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth") (quoting *Masterpiece*, 138 S. Ct. at 1727); *Bostock v. Clayton County*, 140 S. Ct. 1731, 1823 (2020) (Kavanaugh, J., dissenting) ("The Court has previously stated, and I fully agree, that gay and lesbian Americans 'cannot be treated as social outcasts or as inferior in dignity and worth.'") (quoting *Masterpiece*, 138 S. Ct. at 1727). Refusing to provide goods and services in connection with same-sex marriages discriminates against potential customers because of their sexual orientation—because of who they *are*—and thus impermissibly treats them as "social outcasts or as inferior in dignity and worth." *Masterpiece*, 138 S. Ct. at 1727.

Petitioners suggest that, like the example posited in *Masterpiece* of clergy refusing to solemnize same-sex weddings, their refusal to create a wedding website for a same-sex marriage is "an exercise of First Amendment liberty 'that gay persons could recognize and accept without serious diminishment to their own

dignity and worth.'"[27] Leaving aside that the antidiscrimination law at issue here does not compel speech or impinge on core religious belief or practice, same-sex couples *cannot* "recognize and accept" this discrimination "without serious diminishment to their own dignity and worth." If a website design company refused to provide services for an interracial marriage because the company does not condone such unions, few would deny the serious injury to the dignity and worth of any interracial couple turned away on that ground. The injury to a same-sex couple rejected simply because of who they are is no different.[28]

Certain *amici* supporting petitioners argue that the comparison to racial discrimination is inappropriate.[29] But this Court drew precisely that parallel in *Masterpiece* by citing *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968). *Newman* rejected the contention that enjoining racial discrimination in public accommodations "constitutes an interference with the 'free exercise of the Defendant's religion.'" 390 U.S.

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[27] Pet. Br. 40.

[28] The Court in *Masterpiece* warned that religious exemptions to neutral antidiscrimination laws, such as for clergy, must be narrowly "confined" and "constrained" to avoid opening the door to a "community-wide stigma [against gay persons] inconsistent with the history and dynamics of civil rights laws that ensure equal access to goods, services, and public accommodations." 138 S. Ct. at 1727, 1728-29.

[29] *See*, *e.g.*, Brief of *Amici Curiae* Ethics and Public Policy Center, et al., at 3-4; Brief of Amicus Curiae Institute for Faith and Family, at 13; Brief of Amici Curiae Ethics and Public Policy Center, at 3-4.

at 402 n.5. *Masterpiece* cited *Newman* for the proposition that, although "religious and philosophical objections are protected, it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons [*i.e.*, gay and lesbian persons] equal access to goods and services under a neutral and generally applicable public accommodations law." *Masterpiece*, 138 S. Ct. at 1727 (citing *Newman*, 390 U.S. at 402 n.5).[30]

The parallel to racial discrimination also flows logically from *Masterpiece*'s observation that "gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth." *Masterpiece*, 138 S. Ct. at 1727. *Masterpiece* follows other recent

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[30] One group of *amici* supporting petitioners argues that the difference between this case and *Newman* is that here "Smith is not discriminating against gays and lesbians at all" because she is discriminating against same-sex marriages and not the people being married. Brief of Amici Curiae National Association of Evangelicals, et al., at 6. This position, and the related argument that petitioners do not seek to discriminate against same-sex couples because of their "status" but because of the "message" purportedly sent by providing goods and services for their marriage, do not hold water. Only LGBT individuals are likely to marry persons of the same sex. *See Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993) ("A tax on wearing yarmulkes is a tax on Jews."); *Bob Jones Univ. v. United States*, 461 U.S. 574, 605 (1983) (discrimination based on "affiliation and association" is class-based discrimination); *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (discrimination against subset of class, women with young children, is gender-based discrimination). And, as noted below, nearly all discrimination against a protected class of people can be recast as discrimination against the "message" purportedly associated with serving such people.

decisions of this Court grounding LGBT equality in a jurisprudence of human dignity.

Lawrence v. Texas, 539 U.S. 558, 567 (2003), acknowledged "that adults [who] may choose to enter upon [a same-sex intimate] relationship . . . retain their dignity as free persons." In confirming same-sex couples' right to marry, *Obergefell* affirmed that fundamental liberties "extend to certain personal choices central to individual dignity and autonomy," and that "[t]here is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices." 135 S. Ct. at 2597, 2598-99. Notably, Justices of this Court began invoking the concept of human dignity in connection with the movement for *racial* justice in the post-World War II era. *See Duncan v. Kahanamoku*, 327 U.S. 304, 334 (1946) (Murphy, J., concurring) (decrying racism as "render[ing] impotent the ideal of the dignity of the human personality"); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250 (1964) (denying persons equal access to public accommodation constitutes "deprivation of personal dignity"); *id.* at 291 (Goldberg, J., concurring) ("The primary purpose of the Civil Rights Act of 1964 [was] the vindication of human dignity.").

The ability of a same-sex couple to obtain marriage website services from another company would not remedy the indignity. The issue is not access to a service, but equal respect and dignity. *See Masterpiece*, 138 S. Ct. at 1729 ("signs saying 'no goods or services will be sold if they will be used for gay marriages' . . . would impose a serious stigma on gay persons").

Moreover, there is no way to prevent the dignitary injury of discrimination other than to prohibit the discrimination itself. *See Roberts*, 468 U.S. at 623, 625 (state has compelling interest in "eradicating discrimination" that "deprives persons of their individual dignity").

Petitioners argue that their own dignitary interests are harmed when they are not permitted to discriminate because CADA compels them to "speak" a "message" betraying their convictions, and because CADA labels their "speech" "offensive" and, quoting *Masterpiece* out of context, " 'less than fully welcome in Colorado's business community.' "[31] This position is based on the false premise that petitioners are being forced to express views. As noted, they are required only to give equal access to website creation services.

Moreover, petitioners misleadingly suggest that *Masterpiece* requires they be permitted to discriminate. *Masterpiece* reversed the Colorado Court of Appeals because the Colorado Civil Rights Commission's "hostility" towards the sincere religious beliefs of the baker, Phillips, "cast doubt on the fairness and impartiality of the Commission's adjudication of Phillips' case." 138 S. Ct. at 1729-30. In that context, the Court noted that commissioners had implied during hearings

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[31] Pet. Br. 39-42 (quoting *Masterpiece*, 138 S. Ct. at 1729). *See also* Brief of Amici Curiae Colorado State Legislators, at 18, 21 ("Colorado deprives people of faith of their dignity"); Brief of Amicus Curiae Institute for Faith and Family, at 19 (*Obergefell* "is now used to demolish the dignity of persons who respectfully disagree").

that "religious beliefs and persons are less than fully welcome in Colorado's business community." *Id.* at 1729. *Masterpiece* did not hold that Colorado must "fully welcome" discrimination against LGBT persons or other conduct that Colorado's legislature has decided should be illegal.

Petitioners also appear to argue that the Court should disregard the dignitary injury to same-sex couples (and others who would be discriminated against under petitioners' proposed exemption from CADA) because the First Amendment protects "speech" that is "hurtful."[32] This position exposes the danger lurking within their reasoning and the exemption they propose. By recasting discrimination as "speech," any injury flowing from discrimination can be cast aside. Make no mistake, nearly any form of discrimination can be characterized as an aversion to the "message" purportedly associated with providing good and services to people within a protected class. For example, a website designer could refuse to create a wedding website for an interracial couple on the ground that she should not be compelled to send a "message" endorsing interracial marriage. A maker of business cards could refuse to create cards for women based on a belief that a woman's place is in the home and an unwillingness to send a contrary "message."

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[32] Pet. Br. 39; *see also* Brief of Amicus Curiae Liberty Counsel, at 34 (suggesting the Court should reverse to protect "speech some find distasteful").

Petitioners also suggest that the "answer" for those "offended by Smith's message" is "counter-expression."[33] This is an absurdity. Unlike actual speech protected by the First Amendment, refusing to provide goods and services does not further the national conversation on same-sex marriage. And writing an editorial in favor of same-sex marriage will not undo the dignitary injury caused by such discrimination.

V. Petitioners' Proposed Exemption Would Harm People Of Faith

Beyond its immediate impact on LGBT individuals and families, the exemption to antidiscrimination laws that petitioners seek would cause widespread damage to America's social fabric because it lacks any reasonable and realistic limiting principle. Under petitioners' approach, claimed exemptions logically could not be limited to discrimination against same-sex couples or to wedding websites. Indeed, Amici are concerned that creating a religion-based license to discriminate, based on the idea that providing equal access to public accommodations constitutes "speech" endorsing customers' conduct, would harm people of faith and religious life throughout the United States in a variety of ways.

First, people of faith in particular would suffer discrimination as a result of the exemption petitioners seek. Applying the proposed exemption would permit

[33] Pet. Br. 41.

public accommodations to deny goods and services to those who do not share their religious affiliations or convictions. For example, a website designer could refuse to make a wedding website for a couple of a different faith—or an interfaith or interracial couple—on the ground that doing so would conflict with the designer's religious beliefs.[34] Similarly, a website designer who is non-religious or an atheist could refuse to provide their services to a couple seeking to be married in a church, synagogue, or mosque, on the ground that the merchant does not want to be seen as expressing approval of any religion or religious ceremony. Beyond weddings and websites, a host of public accommodations, like florists, bakers, printers, and caterers, could claim to provide purportedly "expressive" goods and services, and then refuse to serve people of a different faith or people of faith seeking goods and services for religious life events like baptisms and bat mitzvahs.

Second, petitioners' exemption would force into an untenable position the "many people who do not personally believe in same sex-marriage" but who currently "are nonetheless willing to provide services for

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[34] *See* Brief for the Jewish Coalition for Religious Liberty as Amicus Curiae, at 3 ("If a Jewish website designer would make a website for two Jews marrying, must he make a website for a Jew marrying a Christian? . . . In each of these hypotheticals, the Tenth Circuit's holding would force the Jewish artist to betray his conscience so the state can achieve its purported compelling interest.").

it."[35] It is currently understood that providers of public accommodations are just following the law when they do not discriminate; selling their goods and services is not an endorsement of their customer's "message." The ruling petitioners seek would shift that paradigm. Any perceived "message" associated with a customer's use of purportedly "expressive" goods and services would be attributed to the merchant as a matter of law. This would do triple damage.

(1) The "many" people of faith who believe that same-sex marriage is wrong as a religious matter but who currently have no problem complying with laws that prohibit discrimination in public accommodations would, after the ruling petitioners seek, be forced to choose between their religious convictions and complying with antidiscrimination laws. Far from relieving people of faith from that conflict, the ruling petitioners seek would create it.

(2) Many such people of faith would violate antidiscrimination laws out of fear that compliance will be perceived as their "speech." The ruling petitioners seek thus would force merchants to discriminate when they otherwise would not have done so. That would injure both the merchants and the public.

(3) Relatedly, the ruling petitioners seek would force people of faith to inject their personal religious views into commercial interactions in

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[35] Brief of Arizona, et al., as Amici Curiae, at 24.

> the civil sphere. This would tear at the fabric of civil life. Notably, according to one group of *amici* supporting petitioners, "only a tiny fraction of the market seeks a conscience-based exception" to antidiscrimination laws.[36] Yet the ruling petitioners seek would create a conflict between personal convictions and following antidiscrimination laws for *all* people of faith who believe that same-sex marriage (or, indeed, *any* category of marriage) is wrong as a religious matter.

Third, the exemption petitioners seek would lead many to perceive "religion" as being opposed to LGBT equality and pluralism more generally. Professed religious affiliation has declined significantly over the past several decades.[37] In times such as these, Amici believe that adopting the broad exemption petitioners seek would make it more difficult for Amici to minister

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[36] Brief of Law and Economics Scholars as Amici Curiae, at 16.

[37] *See* Gregory A. Smith, *About Three-in-Ten U.S. Adults Are Now Religiously Unaffiliated*, Pew Research Center, Dec. 14, 2021, https://perma.cc/VUU7-W2U6 ("The secularizing shifts evident in American society so far in the 21st century show no signs of slowing. The latest Pew Research Center survey of the religious composition of the United States finds the religiously unaffiliated share of the public is 6 percentage points higher than it was five years ago and 10 points higher than a decade ago."); Jeffrey M. Jones, *U.S. Church Membership Falls Below Majority for First Time*, Gallup, Mar. 29, 2021, https://perma.cc/649M-MV93 ("Americans' membership in houses of worship continued to decline last year, dropping below 50% for the first time in Gallup's eight-decade trend. In 2020, 47% of Americans said they belonged to a church, synagogue or mosque, down from 50% in 2018 and 70% in 1999.").

to their flock and bring new members into the fold. Indeed, a significant reason why Americans have left religion is "their experience of negative religious teachings about or treatment of gay and lesbian people."[38]

* * *

Ultimately, *any* type of discrimination otherwise prohibited by a civil rights statute or obligation could be the basis for an "exemption" so long as the party wishing to discriminate claims their goods or services are "expressive." Petitioners' proposed exemption thus threatens civil rights enforcement all across America.

The Court should preserve the dignity of LGBT persons and avoid all of the foregoing problems by rejecting petitioners' asserted free speech right to exempt themselves from antidiscrimination laws like CADA.

[38] Betsy Cooper et al., *Exodus: Why Americans are Leaving Religion—and Why They're Unlikely to Come Back*, Public Religion Research Institute, Sept. 22, 2016, https://perma.cc/C768-372L ("Among the reasons Americans identified as important motivations in leaving their childhood religion are: . . . their experience of negative religious teachings about or treatment of gay and lesbian people (29%).").

CONCLUSION

For the foregoing reasons, Amici respectfully submit that the Court should affirm the decision below.

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