NO. 21-476

In the Supreme Court of the United States

303 CREATIVE LLC; LORIE SMITH,

Petitioners,

v.

AUBREY ELENIS; SERGIO RAUDEL CORDOVA; CHARLES GARCIA; RICHARD LEE LEWIS, JR.; MAYUKO FIEWEGER; CHERYLIN PENISTON; JEREMY ROSS; DANIEL WARD; PHIL WEISER;

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF PROFESSOR TOBIAS B. WOLFF AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

Tobias Barrington Wolff is the Jefferson Barnes Fordham Professor of Law at the University of Pennsylvania Law School. He writes and teaches on the First Amendment and served as lead appellate counsel in *Elane Photography, LLC* v. *Willock*, 309 P.3d 53 (N.M. 2013), *cert. denied*, 134 S. Ct. 1787 (2014). His work on the First Amendment has focused on compelled speech doctrine and its proper application in commercial and non-commercial settings.

SUMMARY OF THE ARGUMENT

This Court should reject Petitioner's attempt to cloak its discriminatory business conduct in the mantle of free speech. The Speech Clause of the First Amendment has never been a license for businesses to discriminate in the commercial marketplace. To the contrary, an unbroken line of cases has rejected all such attempts. When a business sells goods and services in the market, it is not a street corner speaker engaging in a personal act of expression. Customers do not pay for the privilege of promoting a commercial vendor's own message. Customers pay for goods and services chosen by them and tailored to their needs. Selling goods and services in the marketplace is commercial conduct that the State may regulate, and anti-discrimination statutes like the Colorado Anti-Discrimination Act (CADA) do not provoke any First

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[1] Petitioner and Respondent have lodged blanket amicus consent letters with the Court. Respondents Aubrey Elenis et al. have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part, and no entity other than amicus and his counsel made a monetary contribution to the preparation or submission of this brief.

Amendment scrutiny in that setting. This proposition holds equally true when a business sells a product or service that involves creative or artistic skill.

Three well-established principles require the rejection of Petitioner's Speech Clause arguments.

First: Anti-discrimination laws regulate conduct in the marketplace, not speech. Discrimination by a business against its customers or employees is commercial conduct, regardless of the service the business offers or the belief system that motivates its conduct, and discrimination in the marketplace "has never been accorded affirmative constitutional protections." *Hishon* v. *King & Spaulding*, 467 U.S. 69, 78 (1984).

Second: When a business sells goods and services to the public, it is not a "speaker" engaged in its own private expression, it is a vendor engaged in a business transaction. Customers do not pay for the privilege of facilitating the vendor's message, they pay for a product tailored to their own needs. Many businesses provide goods and services that involve artistic skill or expressive talent: law firms, private schools, architectural firms, website designers, commercial photographers—the list is long. In each case, when the business offers its goods and services for sale to paying customers, it is not engaged in its own act of personal expression, it is providing a commercial service.

Third: The compelled speech doctrine has no application in this setting. This Court's compelled speech cases define and protect against two specific kinds of harm: They reject *compelled orthodoxy*, prohibiting government from choosing a preferred message and requiring others to promote or facilitate that message; and they protect

against *intrusion into the messages of private speakers*, prohibiting government from dictating to a speaker what content his own message must include. *See Rumsfeld* v. *Forum for Acad. and Institutional Rights, Inc.*, 547 U.S. 47, 63–65 (2006) (*FAIR*). These protections are vital. They are not boundless. Compelled speech doctrine protects against specific, defined harms. Those harms are absent in this case.

Attempts to use the Speech Clause to subvert anti-discrimination laws in the commercial marketplace are nothing new. Major steps forward for previously ostracized groups have often been met with attempts by businesses to use the First Amendment as a shield for acts of discrimination. Now that lesbian, gay, bisexual and transgender people have begun to escape their long history of second-class citizenship and secure a greater measure of equal treatment in the marketplace, another chapter in that story is unfolding. This Court has consistently rejected past attempts to use the Speech Clause to license discrimination in commercial transactions. It should do so again here.

ARGUMENT

I. CADA Does Not Regulate Speech.

The Colorado Anti-Discrimination Act does not regulate speech. Nothing in the statute makes reference to speech or expression. *See* Colo. Rev. Stat. § 24-34-601. Neither was CADA enacted to punish businesses for their opinions, nor to regulate conduct as a pretext for targeting symbolic speech. On its face and as applied to the services Petitioner wants to offer, CADA regulates business conduct: discrimination against customers in the commercial market.

Petitioner argues that it deserves a special exemption from CADA because it sells a product that involves creative skill. *See, e.g.*, Pet. Br, at 2–3. That is not the law. The First Amendment does not exempt companies from general business regulations simply because they sell creative goods or services. When government enacts evenhanded laws that regulate the conduct of all businesses, no First Amendment scrutiny is required. Only when government targets the expressive component of a business's activities is the Speech Clause implicated. CADA does no such thing.[2]

In *Hishon* v. *King & Spaulding*, 467 U.S. 69 (1984), this Court applied these principles to the commercial practice of law. Legal practice occupies an important place under the First Amendment: lawyers produce creative written work when they advocate for a client, and the legal profession gives meaning to the right of access to court. Nonetheless, commercial legal practice is fully subject to laws that prohibit discrimination in the workplace. *Hishon* held that Title VII of the Civil Rights Act of 1964 forbids a law firm from refusing to promote a female associate because of her sex. *Id.* at 71–73, 77–79. In seeking to avoid that result, the firm argued that it was exempt from Title VII because its work enjoys First Amendment protection. *Id.* at 78. The Court rejected the argument. Title VII neither regulates speech nor targets the expressive content of a company's work. Rather, the Court explained, it targets the conduct of workplace discrimination, and

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[2] The Tenth Circuit's treatment of CADA as imposing a content-based regulation on speech when applied to 303 Creative is self-evidently wrong and would turn a slew of ordinary commercial discrimination cases into constitutional disputes. This Court should reject it out of hand.

"invidious private discrimination * * * has never been accorded affirmative constitutional protections." *Id.*

In contrast, when government restricts the viewpoint that lawyers can express when arguing on behalf of their clients, it provokes First Amendment scrutiny. The Court affirmed this principle in *Legal Services Corp.* v. *Velazquez*, 531 U.S. 533 (2001), holding that the Speech Clause prohibits Congress from imposing a restriction that "prevents [a Legal Services] attorney from arguing to a court that a state statute conflicts with a federal statute or that either a state or federal statute * * * [violates] the United States Constitution." *Id.* at 536–537. Because Congress sought "to exclude from litigation those arguments and theories [it found] unacceptable," *id.* at 546, its law targeted expression and provoked First Amendment scrutiny, *id.* at 555. In contrast, CADA—like Title VII—does not target the expressive content of any business.

This Court has applied the same principle to private schools. Direct regulation of a private school's expressive mission—for example, dictating the viewpoint teachers must convey to students—would present serious First Amendment problems. But discriminatory commercial practices receive no such protection. In *Runyon* v. *McCrary*, 427 U.S. 160 (1976), a private school refused to admit African-American students, prompting the children to sue for admission under section 1 of the Civil Rights Act of 1866, 42 U.S.C. 1982. 427 U.S. at 169. The school said that teaching non-white children would violate its segregationist beliefs and argued that the First Amendment gave it a right to discriminate. *Id.* at 175–177. The Court rejected the argument. "[I]t may be assumed that parents have a First Amendment right to send their children to educational institutions that promote the belief that racial

segregation is desirable," the Court explained. *Id.* at 176. "But it does not follow that the *practice* of excluding racial minorities from such institutions is also protected by the same principle." *Id.*

The Court reiterated this principle yet again in *Arcara* v. *Cloud Books*, 478 U.S. 697 (1986), a case involving the application of New York's public nuisance law to force the closure of an adult bookstore after State authorities found that the bookstore was facilitating prostitution on its premises. 478 U.S. at 698–699. Although applying these laws to the bookstore impeded the store's ability to sell constitutionally protected materials, the First Amendment was not implicated. When a law targets conduct and not speech, the Court explained, "we have not traditionally subjected every criminal and civil sanction imposed through legal process to 'least restrictive means' scrutiny simply because each particular remedy will have some effect on the First Amendment activities of those subject to sanction." *Id.* at 706. It is only where the "conduct * * * that drew the legal remedy" has "a significant expressive element" that the Court has subjected such restrictions to scrutiny. *Id.* at 706–707. In the present case, the "conduct * * * that [would draw] the legal remedy" is 303 Creative's discrimination against same-sex couples, refusing to sell them wedding-related websites if and when it begins offering that service. "[I]nvidious private discrimination" of this kind lacks a "significant expressive element" and "has never been accorded affirmative constitutional protections." *Hishon*, 467 U.S. at 78; *Arcara*, 478 U.S. at 706.

One can imagine a law firm or private school making the same arguments Petitioner presses before this Court. A law firm's work is "expressive in nature," the argument would go. *See* Pet. Br. at 4. "Anyone viewing" a firm's

briefs and advocacy "will know that they are [the firm's] original []work because they will" see the firm sign its name to papers submitted to the court, conveying the client's message. *See id.* at 6. Likewise some private schools select their customers, the students, to "pursue [a] dream" and "communicate ideas" about how society should function, *see id.* at 5, seeking to live their values by orchestrating a pedagogical environment that will exemplify "the message [the school] convey[s]" in its teaching. *See id.* at 2. All these assertions would be true. None would call into question the obligation of a law firm or a private school to obey neutral, generally applicable laws that prohibit commercial entities from discriminating in the workplace or the marketplace. The same holds true for Petitioner.

II. CADA Does Not Violate the Compelled Speech Doctrine.

Petitioner's effort to reframe its claim as a compelled speech argument does not change the result. This Court has identified two circumstances that can give rise to a compelled speech problem: (1) when the state imposes its chosen message on unwilling adherents, or (2) when state compulsion forces a speaker to incorporate unwanted elements into its own private act of expression. Neither circumstance is present here. CADA does not impose any state-chosen viewpoint, and Petitioner is not propounding its own message when it sells website services to customers with whom it transacts business in the marketplace.

A. CADA Neither Compels Affirmation of Belief nor Imposes a State-Chosen Message.

West Virginia State Bd. of Educ. v. *Barnette*, 319 U.S. 624 (1943), was the foundational compelled speech case,

establishing the principle that the State may not impose its chosen ideology on unwilling adherents. *Barnette* involved a West Virginia law that required school children to recite the Pledge of Allegiance to the American flag, a patriotic message chosen by the State and involving "affirmation of a belief and an attitude of mind." *Id.* at 633. In striking down the law, the Court declared that government may not "prescribe what shall be orthodox in politics, nationalism, religion, or matters of opinion or force citizens to confess by word or act their faith therein." *Id.* at 642.

This Court has repeatedly applied this principle when government has imposed its chosen message on unwilling speakers. In *Miami Herald Publ'g Co.* v. *Tornillo*, 418 U.S. 241 (1974), the Court struck down a Florida law that compelled newspapers to publish responses from political candidates when the papers ran editorials critical of those candidates. In *Wooley* v. *Maynard*, 430 U.S. 705 (1977), the Court prohibited New Hampshire from penalizing a couple who covered the state motto on their car license plate, holding that the State cannot "require[] an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public," *id.* at 713, nor force drivers to "use their private property as a 'mobile billboard' for the State's ideological message," *id.* at 715. And in *Pacific Gas & Elec. Co.* v. *Public Utilities Commission of California*, 475 U.S. 1 (1986) (*PG&E*), the Court invalidated a California policy that compelled a utility company to send customers environmental literature that the State chose based on viewpoint.

The core violation in each of these cases was the same: The State selected a message and compelled people to

affirm that message or become unwilling public ambassadors for it. Such compulsion is impermissible if the chosen message embodies the State's own ideology, as in *Barnette* and *Wooley*, or if the State selects a private speaker's viewpoint and requires others to promote it, as in *Tornillo* and *PG&E*.

CADA involves no such compulsion. The statute does not impose the State's own message on unwilling speakers. Neither does it select a private message based on viewpoint and require businesses to publish it. CADA has nothing to do with messages. It prohibits a form of business conduct—discrimination against customers—and applies that prohibition to all businesses that operate as public accommodations without reference to expression. The *Barnette/Wooley* line of cases is inapplicable.

Petitioner insists that CADA "exact[s] a penalty on the basis of the content" of speech. Pet. Br. 32 (quoting *Tornillo*, 418 U.S. at 256). That is incorrect. *Tornillo* and *PG&E* involved attempts by the State to compel a specific message in response to specific speech by the business: in *Tornillo*, editorials criticizing political candidates; in *PG&E*, a newsletter encouraging electricity usage. CADA does nothing of the kind. Petitioner is not forced to express any view about marriage or same-sex couples, and CADA's anti-discrimination provision is not triggered by a business's speech. CADA requires only that a business selling goods and services in the open market treat customers equally. 303 Creative remains free to voice opposition to marriage equality in the public square without penalty.

This Court reaffirmed these limits on compelled speech doctrine in *FAIR*. The dispute in *FAIR* arose when law schools sought to escape a federal statute, the Solomon Amendment, 10 U.S.C. 983, that required them to

host military recruiters at on-campus commercial job fairs, 547 U.S. at 51–53. The law schools sought to limit their involvement in military recruiting because they disapproved of military personnel policies that discriminated against gay applicants. *Id.* at 52. The Solomon Amendment required the schools to grant the military access to campus on terms equal to those available to other recruiters. *See id.*at 52–55. When law schools created or disseminated speech as part of the service they offered other participants in the job fair, they had to do the same for military recruiters: "in assisting military recruiters, [the] law schools provide[d] some services, such as sending e-mails and distributing flyers, that clearly involve speech." *Id.* at 60. The Court found no First Amendment problem: "[The Solomon Amendment] neither limits what law schools may say nor requires them to say anything. Law schools remain free under the statute to express whatever views they may have on the military's congressionally mandated employment policy." *Id.* The statute, the Court explained, "regulates conduct, not speech. It affects what law schools must *do*—afford equal access to military recruiters—not what they may or may not *say*." *Id.* Had the Solomon Amendment compelled law schools to include pro-military messages chosen by the U.S. Government in their emails, flyers and message boards then *Barnette* and *Wooley* would have been implicated. Because the statute did no such thing, it was "a far cry from the compelled speech in *Barnette* and *Wooley*." *Id.* at 62.

CADA is an even further cry from the compelled speech in *Barnette* and *Wooley*. The Solomon Amendment protects a single entity, the military, and requires equal access in a single setting, recruiting at universities. Thus, it was at least arguable in *FAIR* that federal law had used

a targeted regulation to conscript schools to serve as ambassadors for a government recruiting message using the schools' own speech as the vehicle—the kind of viewpoint targeting that *Wooley* and *PG&E* appear to forbid. The plaintiffs in *FAIR* made that argument a centerpiece in their case, but this Court rejected it squarely: "The Solomon Amendment, unlike the laws at issue in those cases, does not dictate the content of the speech at all, which is only 'compelled' if, and to the extent, the school provides such speech for other recruiters." *Id.* This holding applies with more force to CADA. The Colorado law applies to all businesses that sell goods and services to the public and it protects all people from the specified forms of discrimination. Unlike the Solomon Amendment, which was a special-purpose anti-discrimination law that protected just one institution in one setting, CADA is a law of general applicability. It is even clearer that CADA "does not dictate the content of [any] speech at all." *Id.*

CADA does not compel orthodoxy. The statute neither imposes the State's own ideological message nor conscripts businesses to host a private viewpoint of the State's choosing. *Barnette*, *Wooley*, *Tornillo* and *PG&E* are inapplicable here.

B. CADA Does Not Force Speakers to Incorporate Unwanted Elements into Their Own Messages.

CADA also does not force speakers to incorporate unwanted elements into their own speech. When Petitioner sells goods and services to the public, it is not a street-corner speaker engaged in the communication of a personal message, it is a vendor engaged in a commercial transaction. The difference is fundamental. The compelled speech

cases in which this Court has spoken about government hijacking or conscripting the expression of private speakers apply where a speaker steps forward to proclaim her own message to an audience. Those cases have no application when a business sells goods and services to paying customers in the commercial marketplace and any resulting message belongs to the customer.

Hurley v. *Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995), is the paradigm case here. *Hurley* involved a dispute between a gay Irish-American group and the private organizer of a St. Patrick's Day parade in Boston. The gay group wanted to participate as a unit marching in the parade under its own banner, but the organizer refused. *Id.* at 560–562. The group sued under a state anti-discrimination statute and prevailed before the state courts, which interpreted the law to extend outside the commercial market and treated the parade organizer's expressive event as a public accommodation, ordering the organizer to admit the unwanted group. *Id.* at 561–564. This Court reversed, finding that this application of the law to a private speaker violated the First Amendment.

The ruling in *Hurley* was based entirely on the proposition that parade organizers are "street corner" speakers and their parades "inherent[ly] expressive[]" events in which they speak in their own voice to convey a message to an audience, *id.* at 568, 579. "[W]e use the word 'parade' to indicate marchers who are making some sort of collective point," the Court explained, "not just to each other but to bystanders along the way." *Id.* at 568. The organizers must be able to select which units will march in their parade because "every participating unit affects the message conveyed by the private organizers[.]" *Id.* at 572–73.

The application of a public accommodations law to this expressive event would have forced the organizers to alter a message they were presenting as their own.

Petitioner labors to wrap its claim in *Hurley*'s mantle, quoting the most evocative language from that ruling shorn of its analytical context. It says that website design is "inherently expressive" and thus entitled to First Amendment protection, then cites *Hurley* to argue that applying CADA to a business like 303 Creative would "unlawfully alter[] an artist's speech." Pet. Br. at 18–19. The argument fundamentally misunderstands compelled speech doctrine. *Hurley* used the term "inherently expressive" to describe a setting in which a speaker is engaged in communicating its own personal message to an audience. A parade organizer qualifies. A business selling goods and services in the marketplace to paying customers does not. It is the customer who stands in the shoes of the parade organizer here, not the vendor.

Indeed, it would likely come as a shock to any customer if a wedding vendor proclaimed itself to be the "speaker" in this setting. Imagine a website designer, a baker, or a photographer showing up at a customer's wedding and announcing, "Here is how you must organize your ceremony, and here is what you must say in your vows. This may be your wedding, but you are using my website design, my cake, my photographic services, so this wedding is *my* message. *I* am the speaker." That is not how the real world works and it is not how compelled speech doctrine operates under the First Amendment.

Here, too, *FAIR* provides clarity. Rejecting the law schools' attempt to invoke *Hurley*, the Court held in *FAIR* that "a law school's decision to allow recruiters on campus is not inherently expressive. Law schools facilitate

recruiting to assist their students in obtaining jobs." 547 U.S. at 64. Those services "lack the expressive quality of a parade, a newsletter, or the editorial page of a newspaper[,]" *id.*, where the speaker is orchestrating and presenting its own message to an audience. So too here. As the New Mexico Supreme Court has explained, "[u]nlike the defendants in *Hurley*," a commercial vendor "sells its expressive services to the public. It may be that [the vendor] expresses its clients' messages * * * but only because it is hired to do so." *Elane Photography, LLC* v. *Willock*, 309 P.3d 53, 66 (N.M. 2013).

Some customers who hire 303 Creative may select the company because they appreciate and share its religious or ideological views, but they are not paying to facilitate the company's own message any more than a client would pay a law firm to promote the firm's own ideological agenda. Customers hire Petitioner to provide the website design that the customer chooses. A commercial website designer is neither a "parade organizer" nor a "street corner speaker," it is a vendor offering its design skills for sale in the market. *Hurley* has no application here.

CADA also does not require businesses to endorse the message of any customer when providing commercial goods and services. *See* Pet. Br. at 6 ("Anyone viewing these custom websites will know that they are Smith's original artwork because they will say 'Designed by 303Creative.com.'") As the New Mexico Supreme Court has explained, "[i]t is well known to the public that wedding [vendors] are hired by paying customers and * * * may not share the happy couple's views on issues ranging from the minor (the color scheme, the hors d'oeuvres) to the decidedly major (the religious service, the choice of bride or groom)." *Elane Photography*, 309 P.3d at 69–70.

This conclusion rests on a solid foundation. In *FAIR*, law schools attempted an endorsement argument, saying that "if they treat military and nonmilitary recruiters alike [at commercial job fairs] in order to comply with the Solomon Amendment, they could be viewed as sending the message that they see nothing wrong with the military's policies," 547 U.S. at 64–65. The Court rejected the argument: "Nothing about recruiting suggests that law schools agree with any speech by recruiters, and nothing in the Solomon Amendment restricts what the law schools may say about the military's policies." *Id.* at 65. In *PruneYard Shopping Ctr.* v. *Robins*, 447 U.S. 74 (1980), the Court rejected a similar argument made by a shopping center that objected to a law requiring equal access to its property for groups engaged in demonstrations. As the Court explained, views expressed by private citizens at "a business establishment that is open to the public" would "not likely be identified with those of the owner," particularly where there was no "governmental discrimination for or against a particular message" and the business owner was free to "disavow any connection with the message." *Id.* at 87. Equal access laws do not compel endorsement in a commercial setting.[3]

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[3] If 303 Creative has a particular desire not to be associated with customers who purchase its products then it can place a disclaimer on its website making clear that its customers' messages are not its own. Likewise, the company has the option not to place its imprint on the website designs it sells if it fears misattribution. Nothing in the stipulated facts suggests that the company's imprint is one of the services customers will pay for. *See* Petition for a Writ of Certiorari at 187a, Joint Stipulation of Stipulated Facts ¶83 (describing Petitioner's practice of including its imprint on websites with no mention that doing so is a service owed to customers).

CADA does not impose any state-chosen message on Petitioner. It does not regulate any "inherently expressive" setting in which Petitioner is a "street corner speaker" propounding its own message. And it does not require Petitioner to endorse any message of its customers. 303 Creative may prefer not to take business from gay couples, but that desire does not transform a prohibition on commercial discrimination into compelled speech.

C. Petitioner's Comparison of Its Website Services to Works by Great Artists is Inapposite.

These principles answer the array of comparisons that Petitioner advances. Applying CADA to Petitioner's sale of websites in the public market, it argues, would threaten to "separate Picasso from his brush or Faulkner from his pen," Pet. Br. at 20, and would "force Muslim filmmakers to promote Scientology or force lesbian artists to design church websites criticizing same-sex marriage." Pet. Br. at 26. The argument blurs the fundamental distinction between artists producing their own work and vendors setting up a business to sell goods and services in the commercial marketplace.

Artists are free to create according to their own inspiration, unhindered by government dictates about content. No painter, sculptor, filmmaker or writer can be told what subject to portray when crafting their own work. Picasso in his studio and Faulkner in his study are safe from intrusion. But when an artist sets up a business in which he sells his skills to any paying customer in the commercial marketplace, he is no longer engaged in the creation of his own work. He is selling his skills for a fee. An artist who chooses to operate that kind of business cannot

discriminate against customers based on race, sexual orientation, or religion in violation of CADA, any more than a law firm can violate federal anti-discrimination law when choosing its employees or a private school when selecting its customers. *See Hishon*, 467 U.S. at 78; *Runyon*, 427 U.S. at 175–176. The issue is not what kinds of artists are protected but what kinds of business activities are subject to commercial regulation.

Suppose that a painter sets up a store and offers to paint the portrait of any paying customer, advertising his business to the general public. When an Asian woman enters the store, however, the owner turns her away, saying, "I don't paint portraits of Asian women." The store would stand in violation of CADA and the First Amendment would pose no obstacle to liability. The painter brings his artistic talents to his work and creates a product with undoubted artistic value, but he is not engaged in his own act of expression when he sets up a portraits-for-hire store. The store creates the product specified by the customer, it does not get paid to engage in its own act of expression. That fact renders compelled speech doctrine inapposite. Discrimination against customers in this setting is commercial conduct the State may prohibit. *See FAIR*, 547 U.S. at 60. The Picassos of the world are equally bound by this principle.

In contrast, consider a painter (or a filmmaker or calligrapher, Pet. Br. at 26–27) who creates art on his own time, choosing subjects according to his own inspiration, and then sets up a store to sell his pieces to the public. *Barnette* and *Hurley* would invalidate any law that dictated the content of the artist's creations. Picasso is protected. The artist engages in his own act of expression when he chooses subjects and creates his work, and any

interference by the State would constitute a regulation of his message. However, when the same artist displays his work in a store and sells it to the general public, he may not turn away customers based on race or religion, even if he would prefer not to sell his paintings, films, or calligraphy to certain types of people. Picasso can follow his muse free from regulation, but he cannot set up a no-Jews-allowed store in the public market as the vehicle for selling his work. Selling a product in the marketplace is business conduct and a public accommodations law can prohibit discrimination in that setting without any threat to First Amendment values. *Hishon*, 467 U.S. at 78.

III. Petitioner's Position Would Replace a Clear Rule with an Unworkable Standard That Has No Limiting Principle.

This Court's cases set forth a clear rule: When a business sells goods and services in the public market, it must abide by neutral regulations on commercial conduct. The Free Speech Clause protects businesses from content-based regulation of their goods and services and prohibits laws that would force businesses to promulgate a government-chosen message, but those principles pose no obstacle to neutral regulations of business conduct. This Court has consistently adhered to that rule in the commercial marketplace, and for good reason. As Justice O'Connor emphasized in the expressive association setting, a clear rule rejecting any ability of commercial entities to "gain protection for discrimination" has been necessary to avoid "cast[ing] doubt on the power of States to pursue the profoundly important goal of ensuring nondiscriminatory access to commercial opportunities in our society." *Roberts* v. *U.S. Jaycees*, 468 U.S. 609, 632–635 (1984) (O'Connor, J., concurring).

The position Petitioner advances would destroy that clarity. Cobbling together broad statements of principle and rhetorically powerful sentences from a wide array of precedents, Petitioner asks this Court to head down a path marked by no discernable standards with no obvious stopping point. If a commercial website designer can claim a special exemption from anti-discrimination laws because it sells products that involve creative ability, any business that sells goods or services involving skill with images or words could argue for a similar exemption. Petitioner's own papers indicate as much. *See* Pet. Br. at 4 (arguing that 303 Creative can violate anti-discrimination laws because it sells goods and services that "contain images, words, symbols, and other modes of expression").

The result would be a morass. The enforceability of myriad commercial regulations would fall into doubt and ordinary business disputes would regularly become constitutional cases. Courts would be plagued with unanswerable questions: which goods are artistic enough, and which commercial services involve sufficiently distinctive use of language, to create a colorable argument for a First Amendment exemption to general business regulations? Could an architecture firm demand searching First Amendment scrutiny for every safety regulation or zoning law that "compels" it to "change the content of its artistic message" in designing a structure? Could a tailor refuse to sell bespoke clothes to an unwanted customer based on race or religion in order to avoid the "compulsion" of creating "custom-made art" for groups the owner views with disfavor? Petitioner blithely lists every "publisher, writer, printer, painter, calligrapher, website designer, tattoo artist, photographer, and videographer" among the host of businesses that would have a special constitutional right

to operate as a public accommodation in the commercial marketplace without abiding by general business regulations. Pet. Br. at 30. The doctrine would be unsustainable and Petitioner provides no limiting principle to suggest otherwise.

The Speech Clause gives broad protection to businesses that sell products and services containing expressive or artistic elements. It prohibits government from dictating their creative method, as in *Velazquez*, prevents the State from selecting ideological messages and using businesses as tools for their dissemination, as in *Tornillo* and *PG&E*, and protects the right of business owners to engage in their own expression in the public square. But the First Amendment does not entitle businesses to operate in the marketplace without any restriction on their conduct. Discrimination against customers and employees in the market is business conduct that "has never been accorded affirmative constitutional protections." *Hishon*, 467 U.S. at 78. This Court has consistently adhered to that clear rule. It should do so again here.

IV. This Court Should Not Decide an As-Applied Challenge Asserted by a Business that has Never Offered the Service it Claims is Protected.

303 Creative has never sold wedding-related websites, never turned away an actual same-sex couple, never performed any of the services that form the basis of its as-applied challenge to CADA. Pet. Br. at 2, 6–7; Petition for a Writ of Certiorari at 189a–190a, Joint Stipulation of Stipulated Facts ¶¶95–96. The company advances its claims before this Court in a hypothetical posture. That fact makes it impossible for the Court to issue a ruling on any but the most categorical version of Petitioner's claims. If

the Court rejects those categorical claims, as clearly established law requires, then it should leave unaddressed the more fine-grained questions Petitioner attempts to advance. If necessary, those questions can be answered in a future case involving actual products sold to actual customers that will allow for meaningful as-applied analysis.

Petitioner seeks a ruling that the First Amendment shields its commercial services from CADA and other anti-discrimination laws because its wedding websites will be bespoke products made using Petitioner's artistic and creative talent. If the Court rejects the categorical argument that any "creative" business is exempt from all public accommodation laws, Petitioner and some *amici* invite the Court to use the custom nature of Petitioner's products as the basis for a holding that CADA cannot be applied to this specific business. Pet. Br. at 19–20; Brief of Amicus Curiae Prof. Dale Carpenter et al., at 11.

How is this Court to issue such a ruling when Petitioner has never created this product for a paying customer? The Court would be crafting a ruling based on description and prediction rather than a concrete record. It may turn out that wedding websites are more modular and formulaic than Petitioner suggests, with most of Petitioner's creativity going into making a well-designed template where customers simply plug in their images and details. On that set of facts, would 303 Creative lose constitutional protection that this Court previously extended on a guess? Indeed, what if the owner of 303 Creative changes her mind about expanding into the wedding business after this case is over, deciding that she has made her point? This Court will have issued an advisory opinion.

Petitioner also seeks a ruling on CADA's Publication Clause (referred to as the Communication Clause by the

Tenth Circuit) based on a Proposed Statement it says it will use to announce that it will not work with gay customers when it begins selling wedding websites. Pet. Br. at 33–35. Petitioner acknowledges that the legality of an explicit announcement that it refuses to serve gay couples would rise or fall on the legality of denying service to those couples in the first place, *see id.* at 34–35, but it argues that the Proposed Statement differs from a "gay couples not served here" sign because (1) it proposes only to turn gay couples away from its wedding-related services and not other website products, which it says would not constitute discrimination at all, and (2) it argues that its denial of that service to gay customers would be constitutionally protected. Pet. Br. at 33−34.

Petitioner's repeated insistence that it does not discriminate because it only refuses to serve gay customers in one part of its business is analytical nonsense. Pet Br. at 22, 37, 40. A hotel cannot refuse to rent the honeymoon suite to Latino customers simply because it is willing to put them in standard double rooms and let them use the business center. Every discriminatory refusal to provide services to a customer is measured independently. *See, e.g.*, *McDonald* v. *Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976) (holding that two White employees alleging a single act of discrimination stated a claim under Title VII of the Civil Rights Act). If Petitioner refuses to sell wedding-related websites to gay couples, that will be illegal discrimination and an announcement of that policy of discrimination will receive no constitutional protection.

But all of this misses the heart of the Publication Clause and provisions like it in other anti-discrimination laws. Once it is clear that a business may not refuse to serve gay customers, of course the execution of that policy

through a "gays not served here" sign is unprotected. When actual customers and businesses clash over statements indicating that "the full and equal enjoyment" of a public accommodation "will be refused" on a discriminatory basis "or that an individual's patronage or presence . . . is unwelcome, objectionable, unacceptable or undesirable," CADA § 24-34-601(2)(a), they fight over messier facts. Can a statement of values at the physical or virtual door of a business ever cross a line and become a constructive denial of service, for example? There is no doubt that 303 Creative and its owner can voice objections in the public square about the requirement that they serve gay couples without fear of punishment, but suppose the company tells every gay customer, "I will comply with CADA and provide you a wedding website but I want you to know I am doing it under protest." What if gay customers encounter a hostile attitude or unwelcome patterns of speech when other customers do not, or receive goods and services of inferior quality? When will facts like these rise to a constructive denial of service and when, if ever, will the First Amendment protect the business in this setting?

This Court cannot address such questions without a party before it that has actually engaged in conduct or speech that might trigger a legal response and without a record that provides a concrete basis on which to draw careful distinctions. If the Court rejects Petitioner's categorical argument that any business selling goods and services with a creative dimension has a right to violate anti-discrimination laws, it should decline Petitioner's invitation to decide more fine-grained questions not properly presented in this case.

CONCLUSION

There is no reason to doubt that the owner of 303 Creative has a sincere desire to refuse business from same-sex couples in the wedding-related services she plans to offer. Sincerity has never been lacking in disputes involving discrimination in the public marketplace. Business owners during the era of Jim Crow sincerely believed their devotion to faith and the fabric of society itself depended on racial apartheid in public spaces. Employers in the 1940s and 50s sincerely believed that women entering the workforce should remain in professions associated with traditional gender roles. Homeowners throughout the 20th century sincerely believed that allowing Catholics or Jews to move into their neighborhoods would degrade their communities. Many people continue to hold similar beliefs today, even as the commercial practices associated with them have been made illegal under anti-discrimination laws that are now widely accepted.

The law cannot conjure away conflict among sincere beliefs, nor may it punish people whose beliefs fall out of favor. As Justice Jackson warned eighty years ago: "Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard." *Barnette*, 319 U.S. at 641. Holding the line on those principles is a primary task of the Speech Clause of the First Amendment.

What the law can do, and what Colorado has done, is to establish rules of conduct that all participants in the commercial marketplace must satisfy. Small business owners and corporate managers alike retain the right to express their views in the public square, criticize laws like CADA, and voice their objection to the requirement that

they serve unwanted customers. The First Amendment protects that speech. But the First Amendment has never granted dissenters the right to defy neutral regulations on commercial conduct. The Speech Clause protects belief and expression. It affords no sanctuary for discriminatory conduct in the public marketplace.

The judgment of the U.S. Court of Appeals for the Tenth Circuit should be affirmed.

Respectfully submitted,

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