No. 21-476

In The Supreme Court of the United States

303 CREATIVE LLC, a limited liability company,
LORIE SMITH,

Petitioners,

v.

AUBREY ELENIS; CHARLES GARCIA;
AJAY MENON; MIGUEL RENE ELIAS;
RICHARD LEWIS; KENDRA ANDERSON;
SERGIO CORDOVA; JESSICA POCOCK; PHIL WEISER,

Respondents.

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

BRIEF OF PUBLIC TRUST INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The Public Trust Institute is the leading Colorado-focused public-interest law firm. It was created to guard Colorado's heritage of ordered liberty, prosperity, and a limited, constitutional government that promotes Burke's "little platoons" of civil society essential for human flourishing.

As the leading defender of constitutional rights in Colorado, the Institute has a substantial interest here. Colorado is the frontline of a constitutional crisis involving official opposition to the essential role religious freedom plays in a pluralistic society. A disproportionate number of this Court's cases pitting the rights of religious people against anti-discrimination laws come from the Centennial State (and the west more broadly). Until this Court makes clear that religious people and institutions may speak according to the dictates of their conscience and exercise their religion freely (even if at a small cost to competing state interests like anti-discrimination), the Public Trust Institute and the people of Colorado will be fighting rearguard actions against recalcitrant state officials who openly flout the Constitution and this Court.

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

SUMMARY

1. The problem.

In the decision below, the Tenth Circuit ruled that Colorado's government can compel speech from Lorie Smith and her company, 303 Creative, because Colorado has a compelling interest in ensuring same-sex couples have access to, and feel welcome in, Ms. Smith's supposed market-of-one wedding-website design service. If Ms. Smith wants to participate in Colorado's marketplace, she can't say what she believes (that she's a Christian who views marriage as a lifelong union between one man and one woman) and she can't provide her design services according to the dictates of her conscience (refusing to participate in and celebrate what she sees as immoral acts). Nor, according to the court below, does Colorado discriminate against religion despite its law granting message- and sex-based exemptions to its anti-discrimination law, but not religious exemptions.

The Tenth Circuit's decision is, as Chief Judge Tymkovich explained in dissent, an astonishing act of hubris and a rejection of our Constitution's North-Star rights. It plants its flag with the culture's absolutists—once a state says anti-discrimination is its goal, no competing interests matter. "[W]hat my lawsuit has revealed," Ms. Smith recounted shortly after the decision, "is that the courts are even more open than many . . . realized to letting officials punish religious freedom and silence free speech." Lorie Smith, *10th Circuit Court Rules Against Religious Liberty for Artists Like*

Me, Real Clear Religion (Sept. 27, 2021), https://bit.ly/3v6F1j7.

But this illiberality isn't surprising. Ms. Smith is just the latest morally traditional business owner to face official sanction merely because she desires to practice her religion beyond the doors of a church, synagogue, mosque, or temple. The lived reality in Colorado and other western states is that religious-exercise rights are ignored or denigrated as mere masks for bigotry indistinguishable from Jim Crow. That's what happened in *Minton v. Dignity Health*, 39 Cal. App. 5th 1155 (Ct. App. 2019), *cert. pending* No. 19-1135, in which the California Court of Appeals ruled that a Catholic hospital cannot refuse to sterilize a biological female who identifies as a man, even though performing the procedure would violate the Ethical and Religious Directives for Catholic Health Care. And it's what happened in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), where a commissioner equated Christians who hold orthodox views on human sexuality with slavers and Nazis. *Id.* at 1729. It's what happened here, too. The Tenth Circuit agreed with Colorado that the "very purpose" of Colorado's Antidiscrimination Act is to "eliminat[e]" Ms. Smith's "ideas" from the public square. App.24a. But, raising the specter of *Greenbook*-style segregation defeated by the Civil Rights Act of 1964 and this Court's decision in *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964), the Tenth Circuit ruled that Ms. Smith and 303 Creative must be

silenced to ensure access to the unique services of each individual website designer in Colorado. App.27a.

2. The solution.

This case calls out for summary reversal. The Tenth Circuit's decision is so egregiously wrong it fails First Amendment 101. Every civics student knows that, under our Constitution, a state cannot seek to eliminate a class of ideas from the public square simply because the ideas offend the sensibilities of someone in power. The state "is not free to interfere with speech for no better reason than promoting an approved message or discouraging a favored one." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 579 (1995). Nor may it force individuals to say things they don't believe. That project would violate the "fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." *Id.* at 573.

But summary reversal is needed for a more fundamental reason. The ongoing constitutional crisis in Colorado and the west—unflagging official resistance to the rights of religious people—needs setting back. A summary reversal would instruct both wayward state officials and the culture more broadly that free speech and free exercise are not code words for bigots; they're positive features of a healthy liberal polity. The Public Trust Institute thus urges the Court to grant the petition for certiorari and summarily reverse the decision below.

ARGUMENT

1. The Tenth Circuit's decision is egregiously wrong.

Ms. Smith is a Christian who believes marriage is a lifelong union between one man and one woman. App.6a. No one disputes that she serves all customers regardless of their sexual orientation. *Id*. She merely declines to design wedding websites for same-sex marriages because to do so would convey a message that violates her orthodox Christian beliefs. App.7a. She also wants to publish a statement of faith on her website that explains why, consistent with her beliefs, she cannot create works that celebrate such weddings. *Id.* The Colorado Anti-Discrimination Act (CADA), however, prohibits her from doing those things.

Ms. Smith thus filed suit seeking a declaration that the "Accommodation" and "Communication" clauses of the CADA violate her rights to free speech and free exercise under the First Amendment. CADA's Accommodation Clause prohibits places of public accommodation from refusing service to "an individual or group, because of . . . sexual orientation." Colo. Rev. Stat. § 24-34-601(2)(a) (2020). And the Communication Clause prohibits public accommodations from communicating that "an individual's patronage . . . is unwelcome, objectionable, unacceptable, or undesirable because of . . . sexual orientation." *Id.*

The Tenth Circuit agreed with Ms. Smith that these clauses compel speech. "Creation of wedding websites," explained the court, "is pure speech." App.

20a. And in requiring Ms. Smith to make websites celebrating same-sex weddings, the challenged clauses require her to say things that violate her conscience. App. 20a–24a.

The government asserted two interests to justify this compulsion: (1) an interest in protecting "the dignity interests of members of marginalized groups" and (2) an interest in ensuring members of such groups have access to the commercial marketplace. App. 24a. The court agreed with Colorado that both these interests are compelling. As to dignity interests, however, CADA's means of doing so—prohibiting speech that offends those interests—was not narrowly tailored to its goal. App. 26a. The court nevertheless upheld the statute because it was narrowly tailored to the second asserted interest—market access. But the market defined by the court was minuscule—a market of one. According to the Tenth Circuit, "excepting [petitioners] from [CADA] would necessarily relegate LGBT consumers to an inferior market because [petitioners'] *unique* services are, by definition, unavailable elsewhere." App. 27a–28a.

The Tenth Circuit's opinion is egregiously wrong. There are at least five ways it gets core constitutional doctrines basically backwards.

First, government compulsion of speech violates the "fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." *Hurley*, 515 U.S. at 573. It is the "fixed star in our constitutional constellation . . . that no official, high or petty, can

prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). Under that principle, this case is easy. Colorado's government will only allow Ms. Smith to speak about same-sex weddings if she sings from the state-approved hymnal. But that is precisely the opposite of the course we've chosen as a Nation, "to protect even hurtful speech on public issues to ensure that we do not stifle public debate." *Snyder v. Phelps*, 562 U.S. 443, 461 (2011).

Second, the Tenth Circuit agreed with Colorado that "[e]liminating such ideas," i.e., Ms. Smith's orthodox beliefs about sexuality, "is CADA's very purpose." App. 24a. But it has been clear for more than a quarter century that "produc[ing] a society free of . . . biases" is an unconstitutional objective if it infringes First Amendment rights. *Hurley*, 515 U.S. at 578–79; *accord Fulton v. City of Phila.*, 141 S. Ct. 1868, 1924–25 (2021) (Alito, J., concurring) (citing six cases); *see also Pompeo v. Bd. of Regents of the Univ. of N.M.*, 58 F. Supp. 3d 1187, 1188, 1190–91 (D.N.M. 2014) (finding this principle so well established that court denied qualified immunity to public university that punished speech "harshly critical of . . . lesbian characters portrayed in [a] film and of lesbianism in general"). This is because every sect in our diverse country can point to speech that wounds them, but trying to prevent those wounds by "[s]uppressing speech . . . is a zero-sum game." *Fulton*, 141 S. Ct. at 1925 (Alito, J.,

concurring). Indeed, this one-sided regime that privileges some groups' dignity over others has more than a whiff of a "disadvantage . . . born of animosity toward [a particular] class of persons," *Romer v. Evans*, 517 U.S. 620, 634 (1996). In his dissent, Chief Judge Tymkovich quoted George Orwell, which in almost any other case would be overwrought. App.51a. "If liberty means anything at all," the chief judge recited, "it means the right to tell people what they do not want to hear." App.51a. Here, however, Orwell is spot-on. Colorado has set out to anathematize and eliminate a set of "decent and honorable" ideas that are grounded in millennia of religious thought and shared by millions of religious believers practicing creeds both new and old, major and minor, *Obergefell v. Hodges*, 576 U.S. 644, 672 (2015). And the Tenth Circuit blessed that project.

Third, to justify Colorado's disregard of Ms. Smith's right to speak and believe freely, the court below compared Ms. Smith to segregationists. To highlight "the commercial consequences of public accommodations laws" like CADA, the court invoked *Heart of Atlanta*, and its recognition of the "overwhelming evidence of the disruptive effect that racial discrimination has had on commercial intercourse." App.27a. Apart from *Heart of Atlanta*'s inappositeness (it wasn't a free-speech or free-exercise case), its invocation makes clear that, for the Tenth Circuit, orthodox Christian views on human sexuality require the same approach our Nation and this Court (rightly) took toward segregation. The court below did not, like the

commissioner in *Masterpiece I*, expressly say that Ms. Smith's views were on par with Nazism and slavery. But its legal rationale implied as much, putting Ms. Smith's moral opposition to same-sex marriage on the same level as segregation and white supremacy. *See generally Obergefell*, 576 U.S. at 741 (Alito, J., dissenting) ("The implications of th[e] analogy [between racism and traditional sexual morality] will be exploited by those who are determined to stamp out every vestige of dissent.").

Fourth, the compelling interest identified by the court below—equal access to Ms. Smith's "*unique* services," App.28a, rather than access to the market generally—presupposed its desired result: that CADA satisfies strict scrutiny. But defining Colorado's compelling interest as equal access to a market-of-one collapses the ostensibly separate compelling-interest and narrow-tailoring prongs of strict scrutiny. In other words, the Tenth Circuit has come up with a neat trick to circumvent "the most exacting scrutiny" the Constitution applies to laws burdening free speech and free exercise: define the compelling interest at the lowest-possible level of generality, and then the means chosen will always be narrowly tailored to that end. *Masterpiece I*, 138 S. Ct. at 1739 (Gorsuch, J., concurring); *see also Cal. Democratic Party v. Jones*, 530 U.S. 567, 582 (2000) (rejecting as "circumlocution" a state interest reframed to reach a desired result).

Fifth, the decision below violated the promise made by this Court six years ago in *Obergefell* that recognizing the constitutional rights of gay people in the

United States would not harm the constitutional rights of religious people. Justice Kennedy, writing for the Court, "emphasized 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." 576 U.S. at 679. "The First Amendment," he continued, "ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered." *Id.* at 680. *Obergefell* teaches that, when confronted with cases pitting the rights of gay people against those of religious folks, lower-court judges and state officials tasked with upholding the Constitution must accept that *both* a marketplace open to people of all sexual orientations *and* a public square open to free professions of faith are essential elements of the American understanding of liberty. The Tenth Circuit's myopic reasoning fell far below that call. In contrast to *Obergefell*'s spirit of broadmindedness, the decision below says that, when it comes to stamping out discrimination against gays and lesbians, no other interest matters.

2. *303 Creative* is only the latest example of Colorado and western-state officials ignoring the rights of religious people.

Although the decision below was egregiously wrong, it was unsurprising. Over the last decade, there

has been a marked shift in the view western-state governments take of constitutional claims made by traditionally minded religious people. Chief Judge Tymkovich described this phenomenon as a move from the historical ethos of the American west—"live and let live"—to "you can't say that." App.52a. This is because many western-state officials "lump[] those who hold traditional beliefs about marriage together with racial bigots." *Fulton*, 141 S. Ct. at 1925 (Alito, J., concurring). Along with the decision of the Tenth Circuit below, the following list of cases highlights the ongoing constitutional crisis in Colorado and other western states—a crisis of massive resistance to religious freedom. The Court is familiar with many of these decisions, as several ended in a denied petition for certiorari. The list will continue to grow until this Court steps in on behalf of the Constitution's protection of religious liberty in the expanding thicket of anti-discrimination laws.

Colorado

- *Masterpiece I*. This Court is familiar with the first part of Jack Phillips's saga with CADA and Colorado's Civil Rights Commission. In *Masterpiece I*, this Court rebuked the Commission's overt animus toward Mr. Phillips's traditional religious beliefs and ruled that such clear animus violated the Free Exercise clause. 138 S. Ct. at 1731. Key to this holding were statements by commissioners that equated Mr. Phillips's beliefs with slavery and the Holocaust. *Id.* at 1729. Though *Masterpiece I*'s holding was narrow (all state officials need to do to avoid its holding is keep

their views about Christian sexual ethics quiet) the decision did remind lower courts and government officials that traditional believers are entitled to a "neutral and respectful consideration" of their claims of religious belief. *Id.*

- *Scardina v. Masterpiece Cakeshop Inc.*, No. 2019CV32214 (Denver Dist. Ct. 2021). And yet, the assault on Mr. Phillips continues. The day this Court granted the petition for certiorari in *Masterpiece I*, a Denver lawyer called the cakeshop to request a pink and blue cake to celebrate a gender transition. When Mr. Phillips politely refused, again citing his religious faith, the lawyer filed a claim for discrimination with the Civil Rights Commission and ultimately sued Phillips in state court. After a bench trial, the district court entered judgment against Mr. Phillips for violating CADA, denying dispositive motions raising free-speech and free-exercise defenses. The case is pending before the Colorado Court of Appeals.

- *Morris v. Centura Health Corp.*, No. 2019CV31980 (Arapahoe Cty. Dist. Ct. 2020). Centura Health is a Colorado-based network of health care providers and facilities, including Catholic and Adventist hospitals. After consulting an activist lawyer in Washington State, a physician at one of its Catholic hospitals identified a Centura patient eligible for physician-assisted suicide and helped qualify the patient under Colorado's End of Life Options Act. Though the physician knew her conduct violated religious doctrines expressed in the Ethical and Religious Directives for Catholic Health Care promulgated by the United States Conference of Catholic Bishops (ERDs), she sued Centura

seeking to ignore the ERDs so she could prescribe lethal drugs to the patient. Upon learning of this physician's confession that she violated the ERDs as a result of the lawsuit, Centura promptly fired the physician, and the suit became one essentially for wrongful termination. Centura asserted a counterclaim and affirmative defenses based on the First Amendment's religious-freedom protections and its right to avoid complicity in killing. The state district court dismissed the counterclaim, declared the affirmative defenses out of bounds, ruled that the First Amendment was not implicated in the case, and ordered Centura and its attorneys to cease using the term "assisted suicide" because it was supposedly inflammatory. The latter gag order, despite clear constitutional infirmity, remains in place, and the state court of appeals twice refused to lift it. Though the district court recently entered full summary judgment for Centura on essentially contractual grounds, the court maintained its refusal even to countenance Centura's First Amendment right to provide healthcare consistent with Catholic doctrine. The case remains active, pending parties' decisions related to appellate review.

California

- *Minton v. Dignity Health* (Cal. App. 2019). Mercy San Juan Medical Center is a Catholic hospital in California founded by the Sisters of Mercy. In 2016, a person with gender dysphoria requested a hysterectomy from Mercy. Providers at the hospital explained that such a procedure violated the ERDs, and so they could not perform the surgery.

The patient obtained the hysterectomy from a different hospital three days later. Despite having been able easily to obtain the procedure elsewhere, the patient sued Mercy for violating California's anti-discrimination laws. The California Court of Appeals ruled that Mercy's First Amendment rights were not even implicated by performing the procedure. 39 Cal. App. 5th at 1165–66. According to the decision, all California law required of Mercy was "simple obedience" to California's anti-discrimination laws, not "to convey a verbal or symbolic message" in "support for the law or its purpose." *Id.* A petition for certiorari is pending in the case. *See Dignity Health v. Minton*, No. 19-1135.

- *Knight v. St. Joseph Health N. Cal., LLC*, No. DR190259 (Humboldt Cty. Super. Ct. 2019). Like *Minton*, *Knight* involves a discrimination claim against a Catholic hospital that refused to perform a hysterectomy on a person with gender dysphoria. *Knight*, and the fate of Catholic healthcare in California, turns on the outcome of the petition for certiorari in *Minton*.

New Mexico

- *Elane Photography v. Willock*, 309 P.3d 53 (N.M. 2013). Much like the Tenth Circuit did in the decision here, the New Mexico Supreme Court ruled that the New Mexico Human Rights Act did not violate the free-speech or free-exercise rights of a Christian wedding photographer who, consistent with her faith, would not photograph same-sex weddings. *Id.* at 59. Even worse than the present

case, however, the *Elane Photography* court reasoned that the New Mexico Human Rights Act did not compel speech. So free speech was not even a material consideration. *Id.* at 64–66.

Oregon

- *Richardson v. Nw. Christian Univ.*, 242 F. Supp. 3d 1132 (D. Or. 2017). A Christian university fired a professor who was openly cohabitating and having sexual relations with a man to whom she was not married. The university concluded that to continue to employ this professor would damage the university's Christian mission and witness. The court, however, characterized this as unlawful "marital status" discrimination. *Id.* at 1151–54. Now, religious organizations in Oregon are forced to employ persons who openly flout the organization's teachings on traditional sexual morality.

- *Klein v. Bureau of Labor & Indus.*, 410 P.3d 1051 (Or. Ct. App. 2017). Again objections to same-sex weddings are at issue, and again the religious must abandon their beliefs and promote the state's preferred position on the subject or face punishment. Melissa and Aaron Klein are bakers who make cakes for all sorts of customers but, because of their religious beliefs, decline to make cakes to celebrate same-sex weddings. *Id.* at 1061. As with *Elane Photography*, the court denied that the case involved compelled speech or expressive conduct. *Id.* at 1064–74. The case is currently on remand for reconsideration in light of *Masterpiece I.* 139 S. Ct. 2713 (2019).

Washington

- *Woods v. Seattle's Union Gospel Mission*, 481 P.3d 1060 (Wash. 2021). Union Gospel Mission has for decades followed its Biblical call to serve the homeless of Seattle. *Id.* at 1063. One aspect of its ministry is providing legal services to Seattle's homeless population. *Id.* Matthew Woods, a bisexual in a same-sex relationship, applied for a position in the Mission's legal clinic, fully aware of the Mission's adherence to traditional Christian views on sexuality. *Id.* When the Mission hired a co-religionist for the position instead of Mr. Woods, he filed suit. *Id.* Washington's anti-discrimination law excludes religious non-profits from its definition of "employer." Citing this exemption, the trial court granted summary judgment to the Mission. *Id.* The Washington Supreme Court reversed. In an apparent effort to narrow the rights of religious Washingtonians, the court held that it might have been unconstitutional for the legislature to provide a religious exemption in the first place and remanded for consideration of that question. *Id.* at 1070. If allowed to stand (a petition for certiorari is pending, *see Seattle's Union Gospel Mission v. Woods*, No. 21-144), every religious nonprofit in Washington could be forced to hire employees whose beliefs and conduct oppose the group's religious mission.

- *State v. Arlene's Flowers, Inc.*, (Wash. 2017 and 2019). After Barronelle Stutzman politely refused to arrange flowers for a same-sex wedding, citing her faith, she was targeted by the State of Washington for violating its anti-discrimination law. The Supreme Court of Washington ruled that

Ms. Stutzman was subject to punitive fines under that law and that the First Amendment did not protect her. 389 P.3d 543, 548 (Wash. 2017). This Court vacated and remanded that decision in light of *Masterpiece I*. *Arlene's Flowers, Inc. v. Washington*, 138 S. Ct. 2671 (2018). But on remand the Washington court again ruled that Ms. Stutzman could be punished for following her religious convictions. 441 P.3d 1203, 1237 (Wash. 2019), *cert. denied*, 141 S. Ct. 2884 (2021).

- *Stormans, Inc. v. Wiesman*, 794 F.3d 1064 (9th Cir. 2015). Pro-life, Christian pharmacists who refused to dispense emergency contraceptives were targeted by a new rule from the Washington State Board of Pharmacy requiring every pharmacy to dispense every Food and Drug Administration-approved drug. A primary drafter of the rule strongly suggested that the rule was aimed at these pharmacists, and the governor took unusual steps to secure adoption of the rule. *Stormans, Inc. v. Selecky*, 854 F. Supp. 2d 925, 937–43 (W.D. Wash. 2012). But the Ninth Circuit refused to accept the district court's factual findings on discriminatory intent and held that the regulations did not violate the First Amendment. 794 F.3d at 1080–81.

That this resistance comes from the west makes a special call on the Court. That is because at least ten western states, including Colorado, agreed, as a condition of their admission to the Union, to uphold "perfect toleration of religious sentiment." Nevada Enabling Act § 4, ch. XXXVI, 13 Stat. 30, 31 (1864); Nebraska Enabling Act § 4, ch. LIX, 13 Stat. 47, 48 (1864);

Colorado Enabling Act § 4, ch. 139, 18 Stat. 474, 474 (1875); Utah Enabling Act § 3, ch. 138, 28 Stat. 107, 108 (1894); Act of Feb. 22, 1889, § 4, ch. 180, 25 Stat. 676, 677 (Dakotas, Montana, and Washington); Act of June 20, 1910, §§ 2, 20, ch. 310, 36 Stat. 557, 560, 569 (Arizona and New Mexico); *accord* Nev. Const. ordinance; N.M. Const. art. XXI § 1; N.D. Const. art. XIII; S.D. Const. art. XXII; *see also* Idaho Const. art. XXI § 19; Wyo. Const. art. XXI § 25. This language—which, in at least two cases, was imposed even before the Fourteenth Amendment made the First Amendment's requirements applicable to the states—is binding as a compact between the United States and each individual state.

Yet despite the special solicitude these states are supposed to have toward religious sentiments, several Justices of this Court have already recognized that western states are deliberately passing laws where "viewpoint discrimination is inherent in the design and structure" thereof, with the obvious purpose of "compel[ling] individuals to contradict their most deeply held beliefs, beliefs grounded in basic philosophical, ethical, or religious precepts, or all of these." *Nat'l Inst. of Family & Life Advocates v. Becerra* (*NIFLA*), 138 S. Ct. 2361, 2379 (2018) (Kennedy, J., concurring, joined by Roberts, C.J., Alito, J., and Gorsuch, J.). This tendency must be checked, forcefully.

3. Western-state courts and officials need a clear message from this Court: summary reversal.

In his now-infamous article on this Court's so-called "shadow docket," Professor Will Baude called summary reversals from this Court "lightning bolts." William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 NYU J.L. & Liberty 1, 2 (2015). That is because summary reversals "are designed to enforce the Court's supremacy over recalcitrant lower courts." *Id.* This case is ripe for summary reversal. Whether the standard for summary reversal is egregious error or "recalcitrance" the Tenth Circuit's decision here satisfies it.

In recent years, this Court has mainly reserved summary reversals for badly errant decisions contrary to the Court's clear interpretations of certain statutory and regulatory schemes. The Anti-Terrorism and Efficient Death Penalty Act (AEDPA), the Federal Arbitration Act, the Sentencing Guidelines, and qualified immunity have been the main focus of this Court's recent summary reversals. *See* Edward A. Hartnett, *Summary Reversals in the Roberts Court*, 38 Cardozo L. Rev. 591, 594 (2016) (collecting case statistics). Rightly so—this Court has made clear statements about the narrow scope of review under AEDPA, the strong policy favoring arbitration reflected in the Arbitration Act, the Sixth Amendment's requirement that facts that increase a criminal sentence must be proven beyond a reasonable doubt, and when a constitutional right is clearly established. Yet despite the Court's

directions, lower courts ignored AEDPA, weakened arbitration clauses, carved out baseless exceptions to *United States v. Booker*, 543 U.S. 220 (2005), and narrowed qualified immunity. And so, in later cases violating those clear rules, the Court summarily reversed egregiously errant lower-court decisions to ensure consistent, fair, and correct application of this Court's opinions.

During the Civil Rights era, too, the Court exercised its summary-reversal powers to defend constitutional rights under siege by recalcitrant state officials who refused to follow the obvious implication of the Court's merits decisions or even concede that certain rights existed. For example, this Court issued a flurry of summary decisions to extend the desegregation command of *Brown v. Board of Education*, 347 U.S. 483 (1954), to public golf courses, public buses, public beaches, public housing, and segregated traffic courts. *See Holmes v. City of Atlanta*, 350 U.S. 879 (1955) (per curiam); *Gayle v. Browder*, 352 U.S. 903 (1956) (per curiam); *Mayor of Balt. v. Dawson*, 350 U.S. 877 (1955) (per curiam); *New Orleans City Park Improvement Ass'n v. Detiege*, 358 U.S. 54 (1958) (per curiam); *Johnson v. Virginia*, 373 U.S. 61 (1963) (per curiam). Those decisions served both to bridge *Brown*'s holding beyond the schoolhouse context and as a rebuke to wayward states that refused to recognize the constitutional rights of their citizens.

The Tenth Circuit's decision here calls out for summary reversal. First, it is egregiously wrong, contrary to the clear dictates of this Court's free-speech and

free-exercise decisions. This Court needn't set the case for oral argument or extended briefing to conclude that allowing Colorado to control Ms. Smith's speech and eliminate her orthodox Christian views from the public square violates bedrock free-speech jurisprudence dating back at least to *Barnette*. This is, then, a case like lower courts' resistance to the narrow scope of AEDPA or the expansive scope of the Arbitration Act. The Tenth Circuit has not simply misapplied the relevant First Amendment precedents, it has willfully resisted them.

But summary reversal here would serve a more fundamental role. It would be a "lightning bolt" in our discourse. And it would rebuke officials of Colorado and the west, reminding them that the rights of religious believers (whether couched in terms of free speech or free exercise) are not merely a concession to a backwards minority to be construed as narrowly as possible. They are instead features of a healthy democratic society. This Court has now several times promised that its decisions recognizing the rights of gay and lesbian Americans would not simultaneously diminish the rights of religious Americans. *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1754 (2020) ("We are . . . deeply concerned with preserving the promise of the free exercise of religion enshrined in our Constitution; that guarantee lies at the heart of our pluralistic society."); *Masterpiece I*, 138 S. Ct. at 1727 ("[T]he religious and philosophical objections to gay marriage are protected views and in some instances protected forms of expression."); *Obergefell*, 576 U.S. at 679 ("[I]t must be

emphasized 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."). Religious Americans, and those that defend them like the Public Trust Institute, are depending on this Court to make good on its promises. Until it does, lower courts and recalcitrant state officials will continue to circumvent the Constitution and ignore the First Amendment rights of orthodox believers. This case demands a clear statement: summary reversal. The decisions discussed above are unacceptable in a liberal order like ours that is committed to pluralism. Official massive resistance to respect for religious faith needs setting back.

CONCLUSION

"It is not forward thinking to force individuals to be an instrument for fostering public adherence to an ideological point of view they find unacceptable." *NIFLA*, 138 S. Ct. at 2379 (Kennedy, J., concurring) (internal quotes omitted). Summary reversal would send this message loud and clear. Therefore, the Public

Trust Institute respectfully urges the Court to grant the petition for certiorari and summarily reverse the Tenth Circuit's decision.

Respectfully submitted,

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