NO. 21-476

In the
Supreme Court of the United States

303 CREATIVE LLC; 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 U.S. COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a commercial provider has standing, and its claim is ripe, when it has not entered the market, has no customers, has not created a product, and has not shown a credible threat of enforcement under the challenged law?

2. Whether a commercial provider can evade compliance with a neutral and generally applicable public accommodations law based on a sincerely held religious belief?

3. Whether this Court should overrule *Employment Division v. Smith*, 494 U.S. 872 (1990)?

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INTRODUCTION

Certiorari is not appropriate because (1) this case is not justiciable, (2) there is no meaningful circuit split, (3) this case is not a good vehicle to reexamine *Employment Division v. Smith*, 494 U.S. 872 (1990), and (4) Colorado's Anti-Discrimination Act (the Act) is constitutional.

First, 303 Creative LLC and its owner (together, the Company) fail to show that it faces a credible threat of enforcement under the Act. Nor can it demonstrate that the case is fit for judicial review. The record contains no evidence that anyone has asked the Company to create a website for a same-sex wedding; that Colorado has threatened enforcement; or that any future wedding website would convey a message that would be attributed to the Company. The Company lacks standing, and this case is not ripe.

Second, the Company overstates the conflicts prior cases present. In arguing that there is a circuit split, it relies on a case that this Court vacated; other cases decided on narrow, fact-specific grounds; and a case about charitable donations by Amazon. And all the cases predate *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021).

Third, this is not the appropriate case to reconsider *Smith*. The Act has a religious purpose exception, and this pre-enforcement challenge on hypothetical facts will not allow this Court to reliably analyze that exception. The Act is neutral and generally applicable because it was not enacted to target any religious beliefs or practices and does not allow for individualized exemptions. Colorado also has enhanced free exercise protections since *Masterpiece* and

Fulton; these recent changes provide additional reason not to review the pre-enforcement challenge here, but to decide the future of *Smith* on a full record.

Finally, the Act is a straightforward regulation of commercial conduct. Like other public accommodations laws that apply to companies providing commercial goods and services, it satisfies constitutional requirements. Additionally, even if a business offers expressive products and services, the message communicated by those products and services is attributable to the customer, not the business.

For these reasons, certiorari should be denied.

STATEMENT OF THE CASE

The Company challenges two provisions of the Act. The "Public Accommodations Clause" prohibits businesses from denying service based on a person's protected class, and the "Communication Clause" prevents businesses from advertising that they will deny service based on a person's protected class. Colo. Rev. Stat. § 24-34-601(2)(a) (2021).

A. The Colorado Anti-Discrimination Act.

Colorado first enacted the predecessor to its Anti-Discrimination Act in 1957. In 2008, Colorado updated the law to prohibit discrimination by covered entities based on sexual orientation.

The Act has a straightforward enforcement process. Any person may file a charge of discrimination with the Colorado Civil Rights Division. Colo. Rev. Stat. § 24-34-306(1)(a). The Division then investigates to determine whether there is probable cause to conclude that a violation of the Act occurred. *Id.* at (2)(a)–(b). If so, the Division's Director issues a letter, notifying the parties of the Division's findings. *Id.* at (2)(b). The Division uses the same process to investigate all charges brought under the Act, including allegations of discrimination in housing, employment, and public accommodations. *Id.* at (2)(a).

The Colorado Civil Rights Commission, any Commissioner, and the Attorney General may also file a charge of discrimination. *Id.* at (1)(b). But they have never used that authority to bring a public accommodations case based on sexual orientation.

Since September 2016, individuals have filed 47 public accommodations complaints based on sexual

orientation discrimination. The Division found probable cause for only two of the complaints. And for one of those complaints, the probable cause finding ultimately arose from grounds other than sexual orientation discrimination. The Division dismissed 30 complaints for lack of probable cause and administratively closed 15 complaints. Administrative closure can result from settlements, voluntary withdrawals, no jurisdiction determinations, and right to sue notices.

If the Division determines there is no probable cause, the complainant can appeal the finding to the Commission. *Id.* at (2)(b)(I)(A). The Commission has never remanded a case back to the Division or overturned a no probable cause finding in a case involving a business denying services based on a customer's sexual orientation.

If the Division issues a finding of probable cause, it tries to resolve the dispute through compulsory mediation. *Id.* at (2)(b)(II). If the Division cannot resolve the dispute, it is referred to the Commission for a hearing determination. *Id.* at (4). In the past ten years, the Commission has set only ten public accommodations cases for hearing before an administrative law judge.

Since this Court's decision in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), the Commission has not adjudicated a public accommodations case through a final hearing. Since then, all the cases that the Commission has referred for hearing have resulted in settlements, and no administrative law judge has issued a decision in a public accommodations case. For the same reason, the Commission has not issued a final agency order in

a public accommodations case since its revision to the Masterpiece order based on this Court's ruling.

None of the Commissioners who decided *Masterpiece* in 2014 remain on the Commission.

B. The Company sought pre-enforcement review of the Act.

The Company offers graphic and website design services to the public. Pet. App. 115a. It does not currently offer wedding website design services, but its owner, Lorie Smith, says she would like to expand the business to do so. *Id.* at 115a–16a, 159a. Due to Ms. Smith's religious beliefs about marriage, the Company says that it would decline any request it received from a same-sex couple to design a wedding website. *Id.* at 115a–16a. Besides hoping to enter the wedding website market, the Company also says that it wishes to post a statement on its website describing Ms. Smith's beliefs about marriage and a statement that the Company will not create wedding websites for same-sex marriages. *Id.* at 116a–17a.

The Company filed its complaint despite failing to identify any investigation into the Company's conduct or any complaint filed against the Company. *Id.* at 165a–67a. And no actual customer has requested the Company to design any specific wedding website. *Id.* at 166a. Rather, the Company sued seeking a broad declaration that the Act violates the Company's free speech and free exercise rights under the First Amendment. *Id.* at 7a.

C. The district court upheld the Act.

The district court partially granted Colorado's motion to dismiss. *Id.* at 169a–70a. It held that the Company had not suffered an injury-in-fact sufficient for standing to challenge the Public Accommodations Clause. *Id.* at 165a–67a. It concluded that the Company did not face a credible threat of enforcement because the possibility of enforcement was too "attenuated" and rested on "multiple conditions precedent," such as the Company offering to build wedding websites, a same-sex couple requesting a website, the Company declining the request, and a complaint being filed. *Id.* Because *Masterpiece* was pending before this Court, the district court stayed proceedings on all other outstanding issues. *Id.* at 170a.

After *Masterpiece*, the district court granted summary judgment for Colorado on the Company's Communication Clause challenge. *Id.* at 112a–13a, 146a. The district court held that the Communication Clause is a neutral law of general applicability and satisfies rational basis review. *Id.* at 141a–43a. The district court also held that the First Amendment permits Colorado to prohibit speech that proposes an act of illegal discrimination. *Id.* at 132a–34a. Finally, the district court rejected the Company's argument that the Communication Clause is vague and overly broad. *Id.* at 127a–28a, 135a.

D. The Tenth Circuit affirmed.

The Tenth Circuit affirmed the district court's grant of summary judgment. *Id.* at 3a. It held that the Company showed an injury-in-fact sufficient to challenge both the Accommodations and Communication Clauses. *Id.* at 17a–19a. The court further concluded

the Accommodations Clause was a content-based restriction on speech as applied to the Company's proposed wedding website design services. *Id.* at 23a–24a. Even so, the Accommodations Clause did not impermissibly compel speech because it merely required that should the Company decide to offer an expressive service to the public, it could not deny the service to members of the public based on their protected class. *Id.* at 24a–28a. The Accommodations Clause withstood strict scrutiny review because it was narrowly tailored to Colorado's compelling interest in ensuring equal access to publicly available goods and services. *Id.* at 26a–27a. The court emphasized that exempting the Company from the Accommodations Clause would deny customers full access to the market for goods and services based on their sexual orientation. *Id.* at 28a. It employed similar reasoning to conclude that the Communication Clause did not violate the Company's free speech rights. *Id.* at 34a.

The Tenth Circuit also applied *Fulton* and *Smith* to conclude that the Act is a neutral law of general applicability. *Id.* at 34a–46a. The court found that the Company provided no evidence that Colorado would enforce the Act in a non-neutral fashion after *Masterpiece*. *Id.* at 36a–37a. The court held that the Act's exemptions for religious organizations and sex-based restrictions with a bona fide relationship to public accommodations offerings did not alter the Act's general applicability. *Id.* at 44a–46a.

Chief Judge Tymkovich dissented from the panel opinion, concluding that the Act violated the Company's First Amendment rights.

REASONS FOR DENYING THE PETITION

I. Certiorari is not appropriate because this case is not justiciable.

The Company has never offered wedding website services to any customer. Nor has Colorado, or any person, challenged the Company's business practices. Rather, the Company seeks this Court's review on abstract facts about potential future customers and websites that it predicts will materialize. Because this case is not justiciable, certiorari should be denied.

A. The Company has not shown a credible threat of enforcement.

Because the Act has no criminal penalties; the Company has not entered the wedding website business; and Colorado, unlike other states, does not proactively enforce the Act; the Company has not shown it faces a credible threat of enforcement.

To have standing to bring a pre-enforcement challenge, a plaintiff must show that "there exists a credible threat of prosecution" under the statute. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014). Where, as here, no criminal penalties attach to conduct, a plaintiff must show a credible threat of enforcement. *See Davis v. Federal Election Comm'n*, 554 U.S. 724, 733 (2008) (plaintiff had standing because the relief sought "would have removed the real threat that the FEC would pursue an enforcement action").

Several courts have considered whether business owners have standing to bring pre-enforcement challenges to antidiscrimination laws. All these courts have held that a state must take significant action to

enforce its statute for a plaintiff to face a credible threat of enforcement.

Applying the *Susan B. Anthony* factors, a court recently found no credible threat of enforcement in a similar pre-enforcement case brought by a photographer who did not wish to photograph same-sex weddings because of his religious beliefs. *Updegrove v. Herring,* No. 1:20-cv-1141, 2021 WL 1206805, at *1–3 (E.D. Va. Mar. 30, 2021). No one had approached the photographer to work at a same-sex wedding, nor had he stated his decision not to provide photography for same-sex weddings publicly. *Id.* at *3. So the photographer had "no reason to suspect that [the State] might attempt to penalize him using a statute he ha[d] never violated." *Id.*

That the photographer did not face the risk of criminal prosecution decreased the statute's potential chilling effect. *Id.* at *5. And in the almost nine months since the statute became effective, no complaint had been filed under it, diminishing the threat that it would be enforced against the photographer. *Id.* at *3.

In contrast, Minnesota's antidiscrimination law, challenged in *Telescope Media Group v. Lucero*, carried criminal penalties and was enforced by "'testers' to target noncompliant businesses." 936 F.3d 740, 750 (8th Cir. 2019). Videographers sought pre-enforcement review of the Minnesota law, claiming it was unconstitutional to require them to make same-sex wedding videos. *Id.* The court found that the potential criminal penalties, along with the state's use of testers, its public announcements that the law "require[d] all private businesses, including photographers, to

provide equal services for same- and opposite-sex weddings," and its recent "successful enforcement action against a wedding vendor who refused to rent a venue for a same-sex wedding" created enough of a threat to establish standing. *Id.*

Here, the Company has not shown a sufficiently credible threat of enforcement to have standing. The Company asserts, without record support, that "Colorado continues to threaten prosecution." Pet. 36. But Colorado cannot impose criminal penalties under the Act, so any suggestion of criminal prosecution is unfounded. At most, a business faces a $500 fine per violation under the Act. Colo. Rev. Stat. § 24-34-602(1)(a).

In contrast, the antidiscrimination provisions challenged in *Brush & Nib* and *Telescope Media* imposed criminal penalties. *See* Phx. Mun. Code § 18-7; Minn. Stat. § 363A.30, subdiv. 4; *Brush & Nib Studio, LC v. City of Phoenix*, 448 P.3d 890 (Ariz. 2019). As a result, these provisions create much greater chilling effects than Colorado's Act. *See Brush & Nib*, 448, P.3d at 901–902; *Updegrove*, 2021 WL 1206805, at *5.

And the Company has received no threat of any kind that it faces civil enforcement. In the three and a half years since *Masterpiece*, Colorado has not imposed any civil penalties related to same-sex wedding services. Unlike Minnesota, Colorado does not use testers or other proactive efforts to target businesses. Rather, Colorado responds only to complaints brought to the Division's attention. And though the Commissioners and Attorney General may file a charge with the Division, they have never done so in any wedding case. Colo. Rev. Stat. § 24-34-306(1)(b). *Compare Telescope*, 936 F.3d at 750.

Nor does the Act incentivize suits by private individuals as it does not award attorney fees for successful cases. This feature distinguishes the Act from Minnesota's antidiscrimination law, which allows the prevailing party to recover a reasonable attorney fee as part of its costs. Minn. Stat. § 363A.33, subdiv. 7.

The Company's claim of threatened enforcement falls short on this record.

B. The Company has not established key factual assertions necessary to establish ripeness.

The Company's hypothetical wedding websites and theoretical future customers do not constitute a record fit for review. "A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998) (quotation omitted). In considering pre-enforcement challenges to antidiscrimination laws, this Court and others have emphasized the importance of a fully developed record.

In *Masterpiece*, "the parties disagree[d] as to the extent of the baker's refusal to provide service." 138 S. Ct. at 1723. This Court explained that it would have benefitted from a more developed record, because the details and scope of the baker's refusal might be critical. *Id.*

In *Brush & Nib*, the owners of an art studio who would not make custom artwork for same-sex weddings because of their religious beliefs brought a pre-enforcement action challenging Phoenix's antidiscrimination law. 448 P.3d at 899. At the time, no same-sex

couple had asked the plaintiffs to create custom wedding products. *Id.* at 900. The Arizona Supreme Court held that the plaintiffs' "sweeping challenge" to the law "implicate[d] a multitude of possible factual scenarios too 'imaginary' or 'speculative' to be ripe." *Id.* at 901. It explained that "for most of Plaintiffs' products, the factual record [wa]s not sufficiently developed." *Id.*

The court allowed the plaintiffs to proceed only with a narrow challenge to the law as it applied to custom wedding invitations, the only type of services that plaintiffs had placed detailed examples of in the record. *Id.* The rest of the plaintiffs' claims—like all the Company's claims here—related to hypothetical future creations, and the court affirmed the dismissal of those counts. *Id.* at 902.

Telescope Media also highlights the problems posed by undeveloped records. After obtaining a preliminary injunction, the videographers sought dismissal of their case with prejudice before discovery concluded. In granting their motion, the district court noted that Minnesota had "been compelled to litigate what has likely been a smoke and mirrors case or controversy from the beginning, likely conjured up by Plaintiffs to establish binding First Amendment precedent rather than to allow them to craft wedding videos, of which they have made exactly two." *Telescope Media Group v. Lucero*, No. 16-4094 (JRT/LIB), 2021 WL 2525412, at *3 (D. Minn. April 21, 2021). By applying settled law on ripeness, courts can avoid such "smoke and mirrors" litigation.

Here, the Company asserts that it received a "request for a same-sex-wedding website," Pet. 5, 36; and that it has provided a "sample marriage website [the

Company] will create." *Id.* at 5. Neither of these assertions is sufficiently developed to render this dispute fit for judicial decision.

The Company's one sample website, made with no apparent customer input and reflecting only a website that the Company "desire[s] to design," does not allow this Court to understand how the Company would facilitate a specific future client's website; what messages the website might contain; and to whom those messages might be attributed. CA10 Aplt. App. 2-333–61; Pet. App. 187a. The Company suggests that it will work in "close contact" with clients to "collaborate" on websites. Pet. App. 182a. But the only example in the record is made up—it does not show how an actual collaboration with a real client would result in a message attributable to the Company instead of to the couple.

Nor does the Company's complaint allege that it has been asked to design a custom website for a same-sex wedding. Rather, the Company asserts that, after it sued, it received a "request for a same-sex-wedding website." Pet. 5.

But the "request" referred to by the Company was not a request for a website at all, but just a response to an online form asking about "invites" and "place-names," with a statement that the person "might also stretch to a website." Pet. App. 166a.

The Company did not respond. No full name for the person who submitted the form can be found in the record. Nor does the record show that the Company took any steps to verify that this was, in any way, an actual potential customer or a serious inquiry. The

record contains no suggestion that the Company's desire not to serve same-sex couples would ever matter in this inquiry. Reasons other than protected class status, such as price, responsiveness, or availability might well have turned away these alleged customers.

The Company's reliance on this lone, vague inquiry reveals why more facts are needed before an important and complicated constitutional dispute would be fit for this Court's resolution.

II. The Company overstates the conflicts in the courts.

On the merits, the Company overstates the conflicts in the pre-*Fulton* cases it relies on.

First, this Court vacated the Oregon decision the Company cites to support the alleged conflict, and no new opinion has issued. Pet. 11–13, 32 (discussing *Klein v. Oregon Bureau of Labor & Indus.*, 410 P.3d 1051 (Or. Ct. App. 2017), vacated by 139 S. Ct. 2713 (2019)). A decision this Court vacated cannot create a split.

Second, two of the cases the Company relies on heavily, *Telescope Media* and *Brush & Nib*, were decided on narrow, case-specific grounds under more stringent antidiscrimination laws.

The Eighth Circuit's opinion did not finally resolve *Telescope Media*. Rather, the case ended when, after remand, the videographers moved to dismiss the case with prejudice before discovery concluded. *Telescope Media*, 2021 WL 2525412, at *1. They said they had filmed just two weddings during the five-month period before COVID-19 restrictions limited live

events. *Id.* The district court granted the opposed motion, noting that the case had "likely been a smoke and mirrors case or controversy from the beginning." *Id.* at *1, *3. Minnesota obtained a final judgment in its favor, and the videographers never established any of their claims. The final judgment in *Telescope Media* does not conflict with this case.

The Arizona Supreme Court's holding in *Brush & Nib* was narrow and fact specific. The court's holding was "limited to Plaintiffs' creation of one product: custom wedding invitations that are materially similar to the invitations contained in the record." *Brush & Nib*, 448 P.3d at 916. The court denied Brush & Nib's remaining claims that mirror the Company's claims here, including the claim for "a blanket exemption from the Ordinance," and did not "reach the issue of whether Plaintiffs' creation of other wedding products may be exempt from the Ordinance." *Id.* at 895–96. Because *Brush & Nib* largely rejected the claims like those here, any split of authority it creates is minimal at best.

And a third case relied on by the Company, *Coral Ridge Ministries Media, Inc. v. Amazon.com, Inc.*, did not involve wedding service providers or denials of service to customers. 6 F.4th 1247 (11th Cir. 2021). There, Amazon chose not to make Coral Ridge an eligible charity to receive donations because another organization had designated it a hate group. *Id.* at 1250–51. The Eleventh Circuit held that the public accommodations law at issue—Title II of the Civil Rights Act—did not apply to the charitable donations of a company. *Id.* at 1256. It then correctly held that forcing a company to donate to an organization it did not

wish to support violated the First Amendment. This case did not involve a denial of goods or services by a public accommodation.

Moreover, all these cases, including *State v. Arlene's Flowers, Inc.*, 441 P.3d 1203 (Wash. 2019), and *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013), were decided before *Fulton* and did not benefit from this Court's ruling there. If some tension remains among some of these courts' decisions, it would be premature for this Court to intervene before the lower courts have had a chance to consider these issues under *Fulton*.

Because the cases cited by the Company do not create a meaningful circuit split, and intervention would be premature, there is no need for this Court to grant certiorari here.

III. This is not the appropriate case to reconsider *Smith*.

Colorado's antidiscrimination law exempts a broader class of religious organizations than most states and does not permit discretionary exceptions. Colorado has also enhanced free-exercise protections since *Masterpiece*. These considerations make the Act unsuitable to reconsider *Smith*, particularly when the Company does not address the traditional factors justifying a departure from settled precedent.

A. Colorado has a religious exception to its public accommodations laws that may prevent review of the *Smith* question.

The Act excludes from definition of public accommodation "a church, synagogue, mosque or other place that is principally used for religious purposes." Colo.

Rev. Stat. § 24-34-601(1). This religious-use test applies to all types of potential public accommodations, not just schools, churches, or clergy.

Colorado's effort to accommodate religious free exercise by specifically exempting any place principally used for religious purposes may complicate any effort to reconsider *Smith* for two reasons.

First, other states have much narrower exclusions to accommodate free exercise in their public accommodations laws. And review of Colorado's law could affect federal laws with similar religious-use tests.

For example, Washington state's law—at issue in *Arlene's Flowers*—only excludes places that "by [their] nature [are] distinctly private" or any "educational facility, columbarium, crematory, mausoleum, or cemetery operated or maintained by a bona fide religious or sectarian institution." Wash. Stat § 49.60.040.

Phoenix, at issue in *Brush & Nib*, exempts only "bona fide religious organizations" and affiliated "charitable" or "educational" organizations from "the prohibitions concerning marital status, sexual orientation, or gender identity or expression." Phx. Mun. Code § 18-4(A)(9); (B)(4)(a).

These approaches more narrowly accommodate the free exercise of religion than does Colorado.

Rather, Colorado's approach bears some similarity to how courts have construed the religious organization exception to Title VII of the Civil Rights Act. *See, e.g.*, *LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n,* 503 F.3d 217, 226 (3d Cir. 2007) (finding community center exempt from portions of Title VII because its "structure and purpose were primarily religious");

Garcia v. Salvation Army, 918 F.3d 997, 1003 (9th Cir. 2019) (applying statutory exemption when entity's "purpose and character are primarily religious" (quotation omitted)). Finding Colorado's approach impermissible under the Free Exercise Clause could have significant impacts on long-established law under Title VII.

Second, because the Company brought a pre-enforcement challenge, there has been no opportunity to see how the "principally used for religious purposes" exemption may apply here. Unlike the Washington or Phoenix laws, Colorado does not per se exclude the Company from this exception solely based on its corporate form.

This stylized case on hypothetical facts does not lend itself to reliable analysis of Colorado's religious exception. The Company makes no allegations one way or the other about this exclusion, and the stipulated facts do not address it. While it is improbable that an existing website designer seeking to add a new product line would ever be considered a place "principally used for religious purposes," some of the Company's assertions suggest that it perhaps believes otherwise. *See, e.g.*, Pet. 4 ("Lorie seeks to bring glory to God by creating unique expression that shares her religious beliefs.")

Because the Company has not developed facts to create an actual record, the role the Act's religious-use exception plays here remains uncertain. If the Company asks the Court to assume that the exception does not apply here, or in similar cases, such an assumption

would inadequately recognize the decision that Colorado has made to balance free exercise concerns with its public accommodations law.

And Colorado's choice to apply its use-based test—excluding places "principally used for religious purposes"—rather than some of the balancing tests suggested to replace *Smith* means that Colorado's statutory protection for religious liberty may, in some cases, provide more protection than whatever test this Court might develop to replace *Smith*. For example, if this Court adopts a test that looks to the legal form of the type of entity raising the objection, Colorado's law would likely provide more protection, because Colorado accounts for the religious use, regardless of the type of entity at issue. So an individual, charity, and corporation would all fall under the same test. *See, e.g.*, *Fulton*, 141 S. Ct. at 1883 ("Should entities like Catholic Social Services—which is an arm of the Catholic Church—be treated differently than individuals?" (Barrett, J., concurring)).

Because the Company has chosen not to develop facts to determine whether the Act's religious-use exemption applies, this case is not an appropriate vehicle to review the interplay between the First Amendment and public accommodations laws.

B. The Act meets the *Fulton* standard.

Because the Act is a neutral and generally applicable law under the standard from *Smith* and reaffirmed in *Fulton*, the Act is subject to rational basis analysis. *Smith*, 494 U.S. at 878–82. A neutral law of general applicability regulating conduct does not trigger strict scrutiny review, even if it incidentally burdens religion. *Id.*; *Fulton*, 141 S. Ct. at 1876. *Fulton*

clarified that individualized exemptions prevent a law from being a neutral law of general applicability. 141 S. Ct. at 1877. The Act here meets this demanding requirement.

First, the Act is neutral. Colorado has a long history of prohibiting discrimination in places of public accommodation. *Masterpiece*, 138 S. Ct. at 1724–25. And unlike in *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, there is no claim that history shows the Act was enacted to target any religious beliefs or practice. 508 U.S. 520, 534–35 (1993). Nor does the Company allege Colorado added protections against discrimination based on sexual orientation in 2008 in order to target religious practice.

The Company's persistent claim that the Act is not neutral is baseless. The new Commission has not taken final action against any business that declined to provide services for a same-sex wedding for any reason, religious or secular. Because the Act is facially neutral and the Company has failed to establish a record of any lack of operational neutrality post-*Masterpiece*, the Act satisfies the *Smith* and *Fulton* requirements of neutrality.

Second, the Act is generally applicable. The Company, relying on the record in *Masterpiece*, alleges that Colorado enforces the Act through a series of individualized exemptions that it grants for secular, but not religious reasons. Pet. App. 38a–40a. The Company alleges that Colorado allowed three bakers to decline requests to create cakes with messages opposing same-sex marriage. *Id.* at 38a. But there is no factual basis for this recycled claim. The Commission found that those bakers' refusal to create cakes with a message

disparaging a group of people was consistent no matter who requested the message or whom was being targeted by the disparaging message. *Masterpiece*, 138 S. Ct. at 1730–31. Thus, the refusals were not based on protected class status. *Id.*

And bringing up allegations already before this Court in *Masterpiece* only emphasizes how little factual development the Company has chosen to undertake in this case. The Company's allegations about the importance of this case rest on news articles and untested statements in other complaints, not facts found in this record. Pet. 31–34.

The Commission recently modified its regulations—though not used and not complained about here—to ensure the Act is generally applicable under *Fulton*. The Commission removed a provision in its regulations that allowed a case to be closed "in the discretion of the director." 3 Colo. Code Regs. § 708-1, Rule 10.5(C)(3) (identified as 10.5(C)(1)(b) in posted proposed rule and will be reflected in final rule as 10.5(C)(3)). To Colorado's knowledge, no director has invoked this rule since its addition to the Division's rules in 2014. But the Commission still changed the rule to ensure the Commission's procedures fully comply with *Fulton* and make clear the Director lacks discretion to close a case. Because the Director lacks this discretion, Colorado law does not allow for individualized exemptions.

Nor is there a basis to argue that the Act treats a comparable secular activity more favorably than religious exercise such that it is not generally applicable. *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021). The

Company points to the provision that allows public accommodations to restrict admission to "individuals of one sex" so long as such a "restriction has a bona fide relationship" to the offerings of the public accommodation. Pet. 28. But the Company has shown no way that this provision results in the more favorable treatment of a comparable secular activity than religious exercise. Nor could it, as the Company, by seeking to refuse service to same-sex couples, does not seek to provide services to "individuals of one sex." And this argument proves much too much, as it would cast doubt on the ability of schools to have separate locker rooms for children or colleges to have women's basketball teams.

C. Colorado has enhanced free exercise protections since *Masterpiece*.

Last year, the new Commissioners passed a resolution reaffirming the Commission's commitment to ensuring that it "discharge its duties in a way respectful of all parties." Resolution, Colo. Civil Rights Comm'n (Feb. 28, 2020), CA10 Supp. App. 96. After the *Masterpiece* decision, the Director of the Civil Rights Division made clear to the Commission that "decision-making must be consistent and objective with the guarantee that all laws are applied in a manner that is neutral towards religion." CA10 Aplt. App. 3-606–07. Since that time, the Commission has not issued final orders in any case about weddings or companies raising free exercise concerns. The Commission, through voluntary settlements, has resolved all issues with the baker in *Masterpiece*, with no fines or penalties imposed. And, as discussed above, the Commission has changed its rules to ensure compliance with *Fulton*.

The Company makes much of one pending private lawsuit against the baker brought by a customer who asked for a cake that Masterpiece Cakeshop declined to make. Pet. 7, 31. But the Commission dismissed the customer's complaint with prejudice, and that case has just begun its path through the appellate process. *See* Opening Br. 1, *Scardina v. Masterpiece Cakeshop, Inc.*, No. 21CA1142 (Colo. App. Nov. 18, 2021). And, to the Commission's knowledge, no other plaintiffs have filed cases under the Act that implicate free exercise. If this Court has concerns about that case, it is better to wait to address that case on a full record. There, the court found that actual customers asked the baker to make an actual cake, and he declined to do so. Findings of Fact and Conclusions of Law 5–6, *Scardina v. Masterpiece Cakeshop*, No. 19CV32214 (Denver Dist. Ct. June 15, 2021).

The Commission's focus on following this Court's free exercise rulings reinforces the prudence of deciding this important issue on a full record rather than the pre-enforcement record here.

D. The Company does not address the *stare decisis* factors.

The Company seeks to overturn *Smith* but has not met the high burden to disturb such settled precedent. "[E]ven in constitutional cases, a departure from precedent 'demands special justification.'" *Gamble v. United States*, 139 S. Ct. 1960, 1969 (2019) (citation omitted).

Smith has governed the interplay between state statutes and free exercise concerns for over three decades. The Company offers just the bald claim that "this case offers an excellent chance" to overrule *Smith*

to justify departure from such settled precedent. Pet. 30. But departure from *stare decisis* requires more than cases that present good chances. Here, other than pointing to *Fulton* itself, the Company makes no effort to address the traditional *stare decisis* factors, such as "the quality of the decision's reasoning; its consistency with related decisions; legal developments since the decision; and reliance on the decision." *Ramos v. Louisiana*, 140 S. Ct. 1390, 1405 (2020) (quotation omitted). Its inability to do so strongly counsels against granting certiorari here.

IV. Colorado's antidiscrimination law satisfies constitutional requirements.

The Tenth Circuit affirmed the district court by relying on arguments Colorado did not advance below. Because the court's ultimate determination that the Act is constitutional is correct, and its decision on a pre-enforcement challenge imposes no obligations on anyone, Colorado focuses here on other reasons that support the constitutionality of the Act.

A. The antidiscrimination law is a straightforward regulation of commercial conduct.

Colorado's antidiscrimination law is an "unexceptional" regulation of commercial conduct. *Masterpiece*, 138 S. Ct. at 1728. "Like the regulation of wages and hours of work, the employment of minors, and the requirement that restaurants have flameproof draperies, [public accommodations] laws merely regulate a licensed business." *D.C. v. John R. Thompson Co., Inc.*, 346 U.S. 100, 116–17 (1953). In this sense, public accommodations laws serve as a modern regulatory counterpart to the common carrier principle adopted

at common law—requiring businesses to serve all comers. *See Interstate Commerce Comm'n v. Baltimore & Ohio Ry. Co.*, 145 U.S. 263, 275–76 (1892); *see also Biden v. Knight First Amendment Institute*, 141 S. Ct 1220, 1222 (2021) (Thomas, J. concurring) (recognizing that "common carriers" have a "general requirement to serve all comers").

Changing the nature of the sale—from goods to services—does not change this analysis. *See, e.g.*, *Bragdon v. Abbott*, 524 U.S. 624, 650 (1998) (applying the ADA's public accommodations provision to require a dentist to serve a client with HIV); *see also Bell v. Maryland*, 378 U.S. 226, 297 n.17 (1964) (Goldberg, J., concurring) (quoting and discussing the common law rule that smiths must serve "all the king's subjects").

These laws have a long history and tradition in our country. *See, e.g.*, *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 120 (1985) (upholding age-based antidiscrimination statute in employment); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 400 (1937) (upholding gender-based minimum wage antidiscrimination statute). There is "nothing novel" about antidiscrimination laws that cover businesses. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 259 (1964).

And this Court recognized in *Masterpiece* that "[i]t is unexceptional that Colorado law can protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public." 138 S. Ct. at 1728.

The Company seems to claim that its religious motivation for turning away customers should exempt

it from the Act's commercial regulation. Pet. 30–33. But this Court has routinely upheld commercial regulations against free-exercise and free-association challenges even when those businesses had a religious affiliation or motivation. *See, e.g.*, *Hernandez v. C.I.R.*, 490 U.S. 680 (1989) (disallowing charitable tax deductions when the church provided religious training in exchange for the contributions); *Tony and Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290 (1985) (requiring members of the nonprofit be paid a wage for their labor, despite the impact on the nonprofit's ability to operate); *Jimmy Swaggart Ministries v. Bd. of Equalization of Cal.*, 493 U.S. 378 (1990) (permitting a sales and use tax on the company's sale of religious literature and videos).

The Company says it does not seek to discriminate against homosexual customers as a class, just that it cannot serve homosexual customers who wish to receive wedding services. Pet. 5. But this claimed distinction between protected status and conduct contradicts this Court's settled approach to antidiscrimination law. *See, e.g.*, *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 a subset of a class, women with young children, is gender-based discrimination).

Below, the Company argued that businesses can deny services for same-sex weddings because provid-

ing those services would show "unqualified social acceptance of gays and lesbians." CA10 Appellants' Br. 32 (quoting *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 574–75 (1995)).

For good reason, the Company appears to have stepped away from relying on *Hurley* and *Boy Scouts of America v. Dale* to support their conduct-based future refusal to serve same-sex couples. Although both the Boy Scouts and the parade organizers objected to being linked to messages advocating the rights of homosexuals, the unifying feature of these cases was not the parties' views on sexual orientation. Rather, the Court's holdings in both cases hinged on the organizations being "expressive association[s]" rather than "commercial entities" or "places where the public is invited." *Boy Scouts of America v. Dale*, 530 U.S. 640, 656–57 (2000) (recognizing that "[a]lthough we did not explicitly deem the parade in *Hurley* an expressive association, the analysis we applied there is similar to the analysis we apply here").

An expressive association's main purpose is to communicate a message. *New York State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 13 (1988); *see also Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984). The collective advocacy of such groups suggests that the messages individual members speak at organizational events are understood as messages communicated by the association itself. *See Hurley*, 515 U.S. at 573.

This distinction explains how the "venerable" tradition of public accommodation law was "applied in a peculiar way" to the parade council in *Hurley*. *Id.* at 571, 572–73. "[O]nce the expressive character of both the parade and the marching GLIB contingent [a gay

pride organization] is understood … the statute had the effect of declaring the sponsors' speech itself to be the public accommodation." *Id.* at 573. As applied to the expressive association, the public accommodations law was a "noncommercial speech restriction." *Id.* at 579. Similarly, because the Boy Scouts' mission is to "instill values in young people," and it chooses which values to instill and which to reject, the organization was designed to engage in "expressive activity." *Boy Scouts*, 530 U.S. at 649–50.

In contrast, this Court has consistently upheld the application of public accommodations laws to companies that provide commercial goods and services. *See, e.g.*, *Jaycees*, 468 U.S. at 625–26 (assuring equal access is not "limited to the provision of purely tangible goods and services," which "clearly furthers compelling state interests.").

As this Court has made clear, antidiscrimination laws appropriately apply to prohibit commercial actors from discriminating in commercial transactions, even though those commercial actors remain free to express their view on such laws in public discourse. *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 388 (1973).

Fulton similarly interpreted antidiscrimination laws to apply to commercial actors that make goods and services available to the public. Because the initial screening for foster-care families was highly selective, the agency's services in that case were "not readily accessible to the public" and therefore not a public accommodation. 141 S. Ct. at 1880. In contrast,

because the Company seeks to sell commercial services, it is a public accommodation, and the Act is constitutional as applied to the Company.

B. A customer's message about their wedding is not attributed to the Company.

The Company asserts that the Act requires it to speak messages it disavows. Pet. 7. But since the Company has not actually offered wedding website design services to anyone and provides no examples of any websites developed with client input, it is impossible to discern the client's role in providing the expressive content of such a website. A company's services, even if they include expressive elements, do not automatically become messages attributable to the company because there is little likelihood that others will identify the resulting product as communicating the views of the company. *See, e.g.*, *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 81, 86–87 (1980). A state "may adopt reasonable restrictions" on "a business establishment that is open to the public," including requiring the business to host the speech of others. *Id.* at 81.

This Court's description of speechwriters in another context provides a useful analogy. "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." *Janus Capital Grp., Inc. v. First Derivative Traders*, 564 U.S. 135, 143 (2011). Similarly, a customer's message will likely not be attributable to the ancillary business when it "lack[s] the expressive quality of a parade, a newsletter, or the editorial page of a newspaper." *Rumsfeld v. Forum for*

Acad. & Institutional Rights, Inc., 547 U.S. 47, 64 (2006). As the *Rumsfeld* Court noted when it rejected a First Amendment challenge to a law requiring that universities include military recruiters, a law school sending messages facilitating military recruitment is not reasonably viewed as condoning or approving the military recruiters' own expression *Id.* at 64–65. The case of an expressive association like the Boy Scouts, however, merits a different outcome. *Boy Scouts*, 530 U.S. at 649–50.

Laws have long required public accommodations, like the Company here, to provide equal access: "The long history in this country and in England of restricting the exclusion right of common carriers and places of public accommodation may save similar regulations today from triggering heightened scrutiny—especially where a restriction would not prohibit the company from speaking or force the company to endorse the speech." *Biden*, 141 S. Ct. at 1224 (Thomas, J., concurring).

The Company, on this record, cannot make any credible claim that creating wedding websites for others will force it to "endorse" any speech. The Company has complete control over what commissioned services it offers, but if it accepts commissions, it must do so on the same basis regardless of the commissioning couple's sexual orientation. Unlike a newsletter, parade, or editorial page that communicate the writers' or organizers' own expression, the Company's services help a couple announce the couple's wedding and tell the couple's story to encourage friends and family to join the couple's celebration. No one viewing one of the Company's proposed wedding websites would confuse

the couple's "unique love story" as that of the Company's. Pet. 5. Should a couple's story include a child conceived out of wedlock, for example, the Company would not be perceived as endorsing or condoning extramarital sex. The Company, of course, remains free to disclaim its customers' views. It also may explain its own views on its website so long as it does not communicate its plans to illegally discriminate when providing commercial goods and services.

Commercial public accommodations that choose to offer certain goods and services for sale to the public are distinguishable from individuals compelled to display a message on their license plates with which they disagree or say the Pledge of Allegiance while saluting the flag. *PruneYard Shopping*, 447 U.S. at 88 (business was "not … being compelled to affirm their belief in any governmentally prescribed position or view, and they are free to publicly dissociate themselves from the views").

For these reasons, requiring the Company to produce the same services for same-sex couples that it produces for opposite-sex couples does not require it to speak in favor of same-sex marriage.

C. The Act prohibits only speech that proposes illegal commercial activity.

The Company also contends that the Act's Communication Clause impermissibly restrains its speech by preventing it from publishing that it will not provide services to same-sex couples. Pet. 2. But prohibiting companies from displaying what would amount to "Straight Couples Only" messages is permissible because it restricts speech that proposes illegal activity and is therefore unprotected by the First Amendment.

See Pittsburgh Press, 413 U.S. at 389 (recognizing absence of First Amendment interest for advertising when "the commercial activity itself is illegal"); *Masterpiece*, 138 S. Ct. at 1728–29 (companies should not "be allowed to put up signs saying, 'no goods or services will be sold if they will be used for gay marriages,' something that would impose a serious stigma on gay persons.").

The Act simply regulates speech which does "no more than propose a commercial transaction" by prohibiting speech that proposes an illegally discriminatory transaction. *Pittsburgh Press*, 413 U.S. at 385; *see also City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 767 (1988). Speech that proposes illegal commercial activity does not garner First Amendment protections "merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Rumsfeld*, 547 U.S. at 62 (citation omitted); *see also Cox v. Louisiana*, 379 U.S. 559, 563 (1965); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 563–64 (1980). If businesses had a right to publish exclusionary messages, companies could effectively evade Colorado's antidiscrimination law, no matter if the denial of service was founded in a sincerely held belief or invidious discrimination.

Finally, this prohibition on communicating the intention to engage in illegal conduct parallels similar restrictions in longstanding federal and state antidiscrimination laws, such as the Fair Housing Act, 42 U.S.C. § 3604(c), the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(b), and the Age Discrimination in Employment Act, 29 U.S.C. § 623(e). Similar laws can

be found from Alaska to Virginia. *See, e.g.*, Alaska Stat. § 18.80.240(7) (prohibiting statements revealing a preference for housing applicants based on a range of protected characteristics); Va. Code Ann. § 36-96.3(A)(3) (same).

The Act, along with all these similar statutes, does not conflict with the First Amendment.

D. Even if strict scrutiny applies, the Act meets that standard here.

Even if Colorado's public accommodations law were subject to strict scrutiny, it is narrowly tailored to achieve its compelling interest. Eliminating "stigmatizing injury, and the denial of equal opportunities that accompanies it" provides a powerful basis for antidiscrimination laws. *Jaycees*, 468 U.S. at 625.

Colorado's antidiscrimination law was enacted to achieve its compelling interest in preventing the harm, both dignitary and economic, inflicted by denials of equal access to commercially available goods and services.

The Company asserts that granting it an exception from the Act would not inflict such harm because other wedding website services are available to same-sex couples. Pet. 36. In briefing below, the Company cited websites that list service providers who welcome same-sex couples as clients. CA10 Appellants' Br. 54 n.11 (noting "many other website designers are available" and citing a website directory for "Gay + Lesbian Weddings"); *see also* Senators' and Representatives' Amicus Br. 9–10. In *Heart of Atlanta*, this Court identified a similar guidebook identifying safe lodging for African-Americans at a time when some hotels denied them service. 379 U.S. at 253. But rather

than hold this guidebook up as acceptable alternatives to equal access, this Court recognized it as evidence of the harm discrimination wrought upon travelers. *Id.* Similarly, a new guidebook identifying welcoming same-sex wedding website providers makes plain the harm the Act seeks to prevent.

Colorado's law preventing discrimination based on whom a person marries is no less compelling and no more burdensome than the similar regulations this Court has already upheld. The Act exempts places "principally used for religious purposes" to ensure traditional areas of religious exercise are unimpeded in their practices. To offer individualized exceptions to commercial businesses without such a purpose, however, would "place beyond the law any act done under claim of religious sanction." *Cleveland v. United States*, 329 U.S. 14, 20 (1946).

This Court has already chastised Colorado for excluding gays and lesbians from public accommodations protections. *Romer v. Evans*, 517 U.S. 620, 633 (1996). Should Colorado now authorize exemptions to those laws, it would "impose restrictions and disabilities" on people who wish to marry someone of the same sex, resulting in the same "'[d]iscriminations of an unusual character'" this Court once rejected. *United States v. Windsor*, 570 U.S. 744, 768–70 (2013) (quoting *Romer*, 517 U.S. at 633). "[A] law cannot be regarded as protecting an interest of the highest order ... when it leaves appreciable damage to that supposedly vital interest unprohibited." *Lukumi Babalu Aye*, 508 U.S. at 547 (quotation omitted).

The Act does not require the Company itself to say any particular message or require it to endorse any

worldview, consistent with this Court's recognition that "[m]any who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here." *Obergefell v. Hodges*, 576 U.S. 644, 672 (2015).

But what the Act does do is to remove the "the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied." *Id.*; *see also Norwood v. Harrison*, 413 U.S. 455, 463 (1973). Exempting the Company because of its religious motivation would create the appearance that Colorado's imprimatur attaches to that exemption.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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