

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*

REPLY BRIEF FOR PETITIONERS

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CORPORATE DISCLOSURE STATEMENT

The Corporate Disclosure Statement in the Petition for Writ of Certiorari remains unchanged.

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT	i
TABLE OF AUTHORITIES	iii
REPLY ARGUMENT SUMMARY	1
ARGUMENT	2
I. The Tenth Circuit correctly held this case is justiciable.	2
A. The Tenth Circuit rightly held that Lorie showed a credible enforcement threat.....	2
B. Lorie’s self-censorship creates an ongoing injury that Colorado fails to address.	4
C. The Tenth Circuit correctly held this case is ripe.	5
II. This Court should resolve the circuit split over the free-speech question and review the indefensible rule allowing the government to compel speech.	6
III. This Court should resolve the circuit split on free-exercise comparability and overturn <i>Smith</i>	9
IV. Colorado’s response underscores the need for this Court’s review.	11
CONCLUSION	13

TABLE OF AUTHORITIES

Cases

<i>Brush & Nib Studio, LC v. City of Phoenix</i> , 448 P.3d 890 (Ariz. 2019)	3, 7
<i>Central Rabbinical Congress of United States & Canada v. New York City Department of Health & Mental Hygiene</i> , 763 F.3d 183 (2d Cir. 2014)	9
<i>Chelsey Nelson Photography LLC v. Louisville/Jefferson County Metro Government</i> , 479 F. Supp. 3d 543 (W.D. Ky. 2020)	6
<i>Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah</i> , 508 U.S. 520 (1993).....	10
<i>City of Revere v. Massachusetts General Hospital</i> , 463 U.S. 239 (1983).....	5
<i>Coral Ridge Ministries Media, Inc. v. Amazon.com, Inc.</i> , 6 F.4th 1247 (11th Cir. 2021)	7
<i>Does 1-6 v. Mills</i> , 16 F.4th 20 (1st Cir. 2021).....	9
<i>Elane Photography, LLC v. Willock</i> , 309 P.3d 53 (N.M. 2013)	7
<i>Emilee Carpenter, LLC v. James</i> , 2021 WL 5879090 (W.D.N.Y. Dec. 13, 2021)	12
<i>Free Enterprise Fund v. Public Company Accounting Oversight Board</i> , 561 U.S. 477 (2010).....	3

<i>Fulton v. City of Philadelphia</i> , 141 S. Ct. 1868 (2021).....	7
<i>Hurley v. Irish- American Gay, Lesbian and Bisexual Group of Boston</i> , 515 U.S. 557 (1995).....	8
<i>Masterpiece Cakeshop Inc. v. Elenis</i> , 445 F. Supp. 3d 1226 (D. Colo. 2019).....	2
<i>Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission</i> , 138 S. Ct. 1719 (2018).....	7, 10
<i>MedImmune, Inc. v. Genentech, Inc.</i> , 549 U.S. 118 (2007).....	3
<i>State v. Arlene’s Flowers, Inc.</i> , 441 P.3d 1203 (Wash. 2019)	7
<i>Susan B. Anthony List v. Driehaus</i> , 573 U.S. 149 (2014).....	2, 3
<i>Telescope Media Group v. Lucero</i> , 936 F.3d 740 (8th Cir. 2019).....	3
<i>Updegrove v. Herring</i> , 2021 WL 1206805 (E.D. Va. Mar. 30, 2021)	3
<i>Vermont Right to Life Committee, Inc. v. Sorrell</i> , 221 F.3d 376 (2d Cir. 2000)	3
<i>Virginia v. American Booksellers Association</i> , 484 U.S. 383 (1988).....	4
<i>We The Patriots USA, Inc. v. Hochul</i> , 17 F.4th 266 (2d Cir.), opinion clarified, 17 F.4th 368 (2d Cir. 2021).....	9, 12
<i>Whole Woman’s Health v. Jackson</i> , 2021 WL 5855551 (U.S. Dec. 10, 2021).....	5

Statutes

Colo. Rev. Stat. 24-34-306..... 4, 6
Colo. Rev. Stat. 24-34-601..... 11

Regulations

3 Colo. Code Regs. 708:1-10.2..... 4

Other Authorities

Colorado Civil Rights Commission, Transcript
of 11th Monthly Meeting (2018)..... 1
Massachusetts Amici Brief, *Updegrove v. Herring*,
No. 21-1506 (4th Cir. Aug. 27, 2021)..... 1, 12
Stephen M. Shapiro et al., *Supreme Court*
Practice (10th ed. 2013) 7

REPLY ARGUMENT SUMMARY

Lorie Smith faces real and imminent harm. Five years after leaving her corporate position to open her own website-design business, she remains in limbo, unable to offer her design services for marriage celebrations—prohibited even from posting a statement about her marriage beliefs—and losing income.

Lorie has already received a request to design a website celebrating a same-sex wedding, and if past is prologue, Colorado will sue her, even sans a complaint. Colorado sought to enforce CADA against cake artist Jack Phillips less than a month after this Court decided *Masterpiece Cakeshop* and only stopped when recordings revealed Colorado officials were bad-mouthing this Court's decision and Jack's marriage beliefs. Tr. of 11th Monthly Meeting at 10, 30 (2018), <https://perma.cc/2GTF-VKUR>.

Colorado ignores the extensive, stipulated facts and proposes rules just as Orwellian as the Tenth Circuit's. Colorado even disavows that court's merits analysis—doubtless because this Court forbids officials from compelling and suppressing speech based on content and viewpoint. Yet 19 states have already relied on the decision below to argue that officials may use public-accommodation laws to compel citizens to speak in violation of their conscience. Mass.Amici.Br. 19, 21, *Updegrove v. Herring*, No. 21-1506 (4th Cir. Aug. 27, 2021). The free-speech rights of nearly half the country are at stake.

And those stakes are dire. If left in place, the Tenth Circuit's decision will allow officials to compel democratic speechwriters to plug republican candidates and Muslim artists to create cartoon parodies of Allah. Certiorari is imperative.

ARGUMENT

I. The Tenth Circuit correctly held this case is justiciable.

Applying *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157 (2014) [*SBA List*], the Tenth Circuit held that Lorie established injury-in-fact and ripeness. Pet.App.10a–19a. Colorado says the court got it wrong, but it is Colorado that is mistaken.

A. The Tenth Circuit rightly held that Lorie showed a credible enforcement threat.

The Tenth Circuit properly rejected Colorado’s denial of a credible enforcement threat. Pet.App.14a–17a. Colorado stipulates that 303 Creative is subject to CADA, Pet.App.189a, and would create wedding websites but for CADA, Pet.App.186a. Colorado also says that Lorie violates CADA by seeking “permission to discriminate against same-sex couples.” Defs.’ Mot. to Dismiss at 2, *303 Creative LLC v. Elenis*, No. 16-cv-02372, 2016 WL 6677566. Indeed, CADA’s “very purpose” is to “eliminat[e]” beliefs like Lorie’s. Pet.App.24a.

Colorado has also prosecuted religious speakers like Lorie for the past decade because they cannot create messages that violate their faith. Pet.App.178a. Colorado says not to worry, it “has not imposed any civil penalties related to same-sex wedding services.” Opp.10. But not for lack of trying. Colorado sought to enforce CADA against cake artist Jack Phillips less than a month after *Masterpiece Cakeshop*, stopping only after a federal district court found that the State continued to act with hostility toward Jack’s marriage beliefs. *Masterpiece Cakeshop Inc. v. Elenis*, 445 F. Supp. 3d 1226, 1241 (D. Colo. 2019).

Finally, Colorado has never disavowed enforcement. As the Tenth Circuit found, “Colorado’s strenuous assertion that it has a compelling interest in enforcing CADA indicates that enforcement is anything but speculative.” Pet.App.17a.

Colorado tries to minimize any threat because CADA does not impose criminal penalties. Opp.9–10. But plaintiffs need not incur civil “liability” before challenging “threatened [government] action.” *Med-Immune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128–29 (2007); accord *Free Enter. Fund v. Public Co. Acct. Oversight Bd.*, 561 U.S. 477, 490 (2010). The threat of onerous administrative proceedings—like CADA’s—is sufficient. *SBA List*, 573 U.S. at 165.

Colorado’s best cases bolster this conclusion. Standing in *Telescope Media Group v. Lucero* and *Brush & Nib Studio, LC v. City of Phoenix* turned on likely enforcement, not criminal penalties. *TMG*, 936 F.3d 740, 750 (8th Cir. 2019); *B&N*, 448 P.3d 890, 901–02 (Ariz. 2019). That’s because “the fear of civil penalties” is just as serious as a “threatened criminal prosecution” in pre-enforcement, free-speech suits. *Vt. Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 382 (2d Cir. 2000).

Colorado’s final case, *Updegrove v. Herring*, 2021 WL 1206805 (E.D. Va. Mar. 30, 2021), conflicts with *SBA List* and turned on Virginia’s representation (since recanted) that it had not “received, filed or investigated any complaints” under Virginia’s version of CADA. Appellants’ Br. 16–17, *Updegrove v. Herring*, No. 21-1506 (4th Cir. July 14, 2021). In contrast, Colorado receives hundreds of complaints annually, <https://perma.cc/CAK7-FTG8>, and acts on them. There is a credible enforcement threat.

B. Lorie’s self-censorship creates an ongoing injury that Colorado fails to address.

Lorie left the corporate world to start 303 Creative “because she desired the freedom to use her creative talents to honor God.” Pet.App.181a. She serves any customer but cannot create messages for anyone that violate her religious beliefs. Pet.App.184a, 189a. She is compelled by those beliefs “to promote God’s design for marriage in a compelling way,” Pet.App.186a, yet must self-censor under CADA, Pet.App.189a, twice over. Colorado ignores these two injuries.

First, the Accommodation Clause forbids her from even “indirectly ... withhold[ing]” certain services, and CADA allows the state to initiate “on its own motion” complaints alleging a practice that CADA prohibits, including mere “omissions.” Colo. Rev. Stat. 24-34-306(1)(b), 2(a); 3 Colo. Code Regs. 708:1-10.2. Lorie’s mere practice of offering only websites for opposite-sex weddings would violate CADA, and CADA deters her from entering the wedding market.

Second, the Communications Clause forbids Lorie from publishing the statement she attached to her complaint. Pet.App.188a–89a. Lorie’s self-censorship is objectively reasonable because Colorado considers her statement illegal. *E.g.*, Appellees’ Br. 3, 50–57 (10th Cir. April 23, 2020). This harm is “one of self-censorship; a harm that can be realized even without an actual prosecution.” *Virginia v. Am. Booksellers Ass’n*, 484 U.S. 383, 393 (1988). Lorie can sue to challenge the Publications Clause because it chills her speech.

That second chilling injury is also caused by the Accommodation Clause. Whether Colorado can ban Lorie’s statement depends on whether the Accommodation Clause can constitutionally compel Lorie to create websites that violate her religious beliefs. That’s because the Accommodation Clause defines the alleged illegal behavior which is then enforced and harms Lorie through the Communications Clause. Opp.31. Because the two Clauses are intertwined, Lorie has standing to challenge both. See *Whole Woman’s Health v. Jackson*, 2021 WL 5855551, at *8–9 (U.S. Dec. 10, 2021) (standing for licensing officials to challenge abortion law enforced through other statutes); *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 243 n.5 (1983) (“we could not resolve the question . . . [of] standing without addressing the constitutional issue”).

C. The Tenth Circuit correctly held this case is ripe.

The Tenth Circuit was also “satisfied that this case is ripe.” Pet.App.19a. After all, “Article III does not require a pre-enforcement plaintiff to risk [liability] before bringing claim in federal court.” *Ibid.* Colorado’s ripeness objections ignore that holding and the record.

Colorado questions how this Court can “understand” what “messages” Lorie’s wedding websites might contain. Opp.13. But she provided a sample website. Pet.App.66a, 71a, 196a–199a. And Colorado stipulated that all her future wedding websites will celebrate and promote the couple’s wedding and unique love story. Pet.App.186a–87a.

Similarly, Colorado wonders how Lorie would “facilitate a specific future client’s website.” Opp.13, 29. But Colorado stipulated what this collaborative process looks like—and to Lorie’s final, editorial control. Pet.App.182a–84a, 186a–87a.

Colorado also questions “to whom” website “messages might be attributed.” Opp.13. Again, that’s stipulated. Viewers “will know that the websites are [Lorie’s] original artwork.” Pet.App.187a.

Finally, Colorado’s claim—that a request from “Mike” and “Stewart” for a wedding website does not reflect a same-sex wedding request—blinks reality. Opp.13. And Lorie need not make that showing anyway; as discussed above, CADA bans her desired statement and forbids her “practice” of entering the market to offer only certain websites even if she receives no requests. Colo. Rev. Stat. 24-34-306(1)(b).

II. This Court should resolve the circuit split over the free-speech question and review the indefensible rule allowing the government to compel speech.

1. The lower courts are deeply divided over how to balance free speech and public-accommodation laws. Pet.9–15; Pet.App.30a–31a (disagreeing with *B&N* and *TMG*); *Chelsey Nelson Photography LLC v. Louisville/Jefferson Cnty. Metro Gov’t*, 479 F. Supp. 3d 543 (W.D. Ky. 2020) (agreeing with those two decisions); Ariz.Br.13–19 (examining cases and concluding that individuals’ right against compelled speech depends “on where the individual lives”); Cato.Br.8–9 (“federal and state courts have provided ... conflicting guidance”). Colorado’s nitpicks about those cases do not negate that conflict.

Colorado first disregards *TMG* because the Eighth Circuit ruled at the pleading stage, and the plaintiffs later dismissed after remand because the COVID-19 pandemic affected their business. Opp.14–15. But “[c]ases are properly regarded as conflicting if it can be said with confidence that another circuit would decide the case differently because of language in an opinion in a case having substantial factual similarity.” Stephen M. Shapiro et al., *Supreme Court Practice* 479 (10th ed. 2013). That’s the situation here.

Next, Colorado shuns *B&N* as limited to “custom wedding invitations.” Opp.15. But that’s because *B&N* provided “examples” of its intended creative works, 448 P.3d at 901, just like *Lorie*, Pet.App.196a–99a. The cases are identical. *Lorie* is *not* asking for a “blanket” CADA exemption. Contra Opp.15.

Colorado then spurns *Coral Ridge Ministries Media, Inc. v. Amazon.com, Inc.*, 6 F.4th 1247 (11th Cir. 2021), for not involving a denial of goods or services. Opp.15–16. But the Eleventh Circuit there assumed a Title II violation—a denial of access to the AmazonSmile service. 6 F.4th at 1253–54.

Colorado also suggests that these cases—plus *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)—might be viewed differently after *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021). But *Fulton* did not decide a free-speech issue and does not diminish the need for this Court to resolve one—the same question the Court granted certiorari for three years ago (but ultimately did not answer) in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018).

Notably, Colorado never addresses how the Tenth Circuit’s decision contravenes this Court’s free-speech decisions about compelled speech, idea suppression, and the relevant market. Pet.19–22; Tyndale.Br.12–19; Congress.Br.5–13; First.Am.Scholars.Br.13–14, 18–20. That conflict alone warrants certiorari.

2. Colorado also refuses to defend the Tenth Circuit’s opinion and instead “focuses ... on other reasons that support the constitutionality of” CADA. Opp.24. But Colorado’s alternate arguments underscore the split and contradict this Court’s precedents.

Colorado adopts the same merits theories as the government defendants in *Elane* and in the initial *Masterpiece* litigation: that government can always compel commercial speakers to create speech, Opp.24–29, and a commercial speaker’s speech is attributed to customers, not the artist, Opp.29–31. But the Eighth Circuit and Arizona Supreme Court rejected those positions, Pet.14–16, as did the Tenth Circuit below, Pet.App.21a–22a. And many free-speech cases protect commercial speakers. Pet.20; Cato.Br.4–5; Tyndale.Br.8–9.

Relatedly, Colorado claims a compelling interest in “requiring businesses to serve all comers” despite religious objections. Opp.25–27. But its cited cases involved conduct, not speech. See *ibid.* And this Court has never found an interest compelling enough to justify speech compulsion. See *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp. of Bos.*, 515 U.S. 557, 573–74 (1995) (government “may not compel affirmance of a belief with which the speaker disagrees,” whether by “business corporations,” “ordinary people,” or “professional publishers”).

III. This Court should resolve the circuit split on free-exercise comparability and overturn *Smith*.

CADA contains multiple exemptions and requires religious but not secular speakers to convey messages. Pet.App.38a. Yet the Tenth Circuit held CADA generally applicable. Colorado defends this ruling, but the Tenth Circuit's free-exercise analysis misreads *Fulton* and highlights *Smith*'s inadequacies.

Colorado does not deny that a circuit split exists between the Second, Third, Fifth, and Eleventh Circuits and the Sixth, Ninth, and Tenth Circuits over the standard used to determine when secular exemptions trigger strict scrutiny under the Free Exercise Clause. Pet.24–26. The split has deepened since Lorie filed her petition.

In *Does 1-6 v. Mills*, the First Circuit upheld a vaccine regulation that prohibited religious exemptions while allowing medical exemptions, even though unvaccinated healthcare workers undermine public health goals whether a worker remains unvaccinated for religious or medical reasons. 16 F.4th 20, 30 (1st Cir. 2021). And the Second Circuit recently cited the decision below to require religious conduct to be *more* like secular conduct than it had pre-*Fulton*. Compare *We The Patriots USA, Inc. v. Hochul*, 17 F.4th 266, 289 (2d Cir.), opinion clarified, 17 F.4th 368 (2d Cir. 2021) (per curiam) (vaccine regulation that prohibited religious exemptions while allowing medical exemptions generally applicable), with *Cent. Rabbinical Cong. of U.S. & Canada v. N.Y. City Dep't of Health & Mental Hygiene*, 763 F.3d 183, 197 (2d Cir. 2014) (law banning religious but not secular conduct not generally applicable).

Colorado argues CADA is generally applicable because it does not allow “discretionary exceptions” nor “secularly-motivated objections to serving LGBT consumers.” Pet.App.40a. But officials cannot “apply a more generous legal test to secular objections than religious ones.” *Masterpiece Cakeshop*, 138 S. Ct. at 1737 (Gorsuch, J., concurring). Here, CADA allows secular speakers to decline messages while requiring religious speakers to convey state-approved messages. The Constitution prohibits this. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 543 (1993).

Colorado complains there is “little factual development.” Opp.21. Not so. Colorado admits that CADA contains an exception for message-based refusals a business would decline to create for any customer. Pet.App.38a. And Colorado stipulated that Lorie does not discriminate but would refuse to create messages celebrating same-sex marriage for anyone. Pet.App.53a, 184a.

Colorado also argues that the Bona Fide Relationship Clause does not favor secular activity over religious activity because Lorie does not provide services to “individuals of one sex.” Opp.22. But CADA’s interest is to end discrimination generally. Exempting sex discrimination undermines that interest.

Colorado claims to have bolstered free-exercise protections since *Masterpiece*—by passing an unenforceable resolution about animus—but even those “enhanced” protections did not change CADA or the many exemptions at issue here. Promising to fix one constitutional error doesn’t excuse CADA’s other constitutional flaws.

Lastly, this case presents a clean vehicle to overrule *Smith*. To evade this Court’s review, Colorado argues—for the first time—that CADA’s religious-purpose exemption “may apply” and complicate the analysis. Opp.18. But Colorado has long insisted (and stipulated) that CADA and its Accommodation and Publication provisions apply here because Lorie operates a “place of public accommodation.” Pet.App.189a.; Opp.18. The “place of public accommodation” definition *excludes* a place “principally used for religious purposes.” Colo. Rev. Stat. 24-34-601(1). Colorado’s last-minute about-face does not countermand five years of admissions.

IV. Colorado’s response underscores the need for this Court’s review.

The Tenth Circuit held that officials may compel or silence speech if it is “unique” and “arguably” implicates a suspect class. Pet.App.11a, 28a. This decision makes a monopolist of most every creative. The more unique, skilled, or innovative, the greater the state’s interest in compelling speech. Speakers will be forced to conform to the generic which will decrease the market for unique art. Tyndale.Br.21–22. And everyone from publishers to editors to artists can be compelled to communicate messages anti-thetical to their beliefs. *Id.* at 6.

Further, in the Tenth Circuit’s view, there is no constitutional problem with anti-discrimination statutes that have the purpose of “[e]liminating ... ideas.” Pet.App.24a. The inevitable diminution in the ability to speak will “reduce [the] ideas available to a free society—especially ideas that may deviate from the governmental or societal orthodoxy.” Tyndale.Br.20.

Indeed, officials and lower courts now use this case to compel speech. In *Emilee Carpenter, LLC v. James*, the court followed the Tenth Circuit to require an artist to violate her conscience and create photographs and blogs celebrating same-sex weddings because her artwork was unique. 2021 WL 5879090, at *11 n.10, *15 (W.D.N.Y. Dec. 13, 2021). Similarly, 19 states relied on the decision below to argue that public-accommodation laws may compel speech. Mass.Amici.Br. 19, 21, *Updegrove v. Herring*, No. 21-1506 (4th Cir. Aug. 27, 2021). That the Tenth Circuit’s decision has caused nearly half the states to endorse compelling speech is appalling.

And Colorado’s response shows that officials will continue to use anti-discrimination laws to compel speech and punish religious dissenters. Colorado abandons the Tenth Circuit’s uniqueness rationale, instead making the breathtaking claim that CADA allows it to compel *any* commissioned speaker. Opp.29. Colorado even posits—astonishingly—that speech writers may be compelled to write speeches that violates their conscience. *Ibid.* Thus, candidate Biden’s PR firm could be compelled to create content for candidate Trump, and an Orthodox Jewish ad agency could be forced to create copy for pork producers.

Colorado’s response also undermines conscience protections by advocating for the selective punishment of religious speakers. Opp.20–21. And other courts have already used the opinion below to dramatically narrow *Fulton*. See *We The Patriots*, 17 F.4th at 288.

The First Amendment's promises of free speech and religious liberty are bedrock principles. Yet over the past decade, those promises have been shattered: Elaine Photography and Sweet Cakes are out of business, Barronelle Stutzman was forced to retire, Emilee Carpenter (*supra*, p. 12) is risking jail, Bob Updegrove and Chelsey Nelson (*supra*, pp. 3 & 6) are in harm's way, and Jack Phillips is *still* in court, pursued by a private enforcer who wants to finish the job. Pet.7. This Court must act now or officials with enforcement power over nearly half the country's citizens will continue compelling artists to speak against their consciences while silencing them from explaining their beliefs. The solution is a neutral one that prohibits status discrimination while protecting constitutional rights. Pet.37. Certiorari is warranted.

CONCLUSION

For the foregoing reasons, and those discussed in the petition for writ of certiorari, the petition should be granted.

Respectfully submitted,

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