NO. 21-476

IN THE

Supreme Court of the United States

303 CREATIVE LLC AND LORIE SMITH,
Petitioners,

v.

AUBREY ELENIS, *et al.*
Respondents.

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

BRIEF OF CENTER FOR RELIGIOUS EXPRESSION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*

Amicus Curiae Center for Religious Expression ("CRE") is a national non-profit legal organization dedicated to the defense of the Christian voice and conscience. Since its inception in early 2012, CRE has represented the legal interests of various individuals and businesses in federal and state courts across the country to ensure their fundamental right to free speech, including the right to not speak. The *amicus* is highly interested in the outcome of this case due to its mission and conviction that the government should never force anyone to write, publish, or otherwise create messages they cannot support in good conscience.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

Inherent in the right to free speech articulated in the First Amendment to the U.S. Constitution is that as American citizens we enjoy independence over the words we express. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). Consequently, the State cannot force website designers, like Lorie Smith (hereinafter

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[1] In compliance with Supreme Court Rule 37.6, counsel for *amicus* represents that he authored this brief in its entirety and neither the parties, nor their counsel, nor anyone other than *amicus* and *amicus* counsel, made a monetary contribution to fund the preparation or submission of this brief. Also, pursuant to Supreme Court Rule 37.3, counsel for *amicus* represents that he received requisite consent from counsel of record of all parties to file this brief.

"Smith")[2] of 303 Creative, LLC (or other creative professionals) to create, design, write or publish messages contrary to their wishes and violative of their consciences.

The State of Colorado encroaches on this first freedom, demanding Smith exercise her artistic talents to create and convey messages when she would rather abstain. Colorado reckons Smith must forego her constitutional freedoms to participate in the contemporary marketplace. But this cost of doing business is too high, flouting protections assured by the First Amendment. Public accommodation laws, no matter how noble their purpose or lofty their goal, cannot work to make citizens utter words against their conscience. *See Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 573, 578 (1995) (invalidating application of anti-discrimination law to compel inclusion of pro-LGBT message in privately-run parade).

While an expressive activity must convey an idea to qualify as speech meriting protection, *see Spence v. Washington*, 418 U.S. 405, 409 (1974) (per curium), no such assessment is triggered with Smith choosing words as her means of communication. In any context words constitute pure speech. *Bigelow v. Virginia*, 421 U.S. 809, 817 (1975).

And, as pure speech, words contributing to website designs cannot be compelled, just as they

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[2] Because Petitioners' briefing identifies Lorie Smith as "Smith", *amicus* adopts the same reference to avoid any possible confusion.

cannot be censored. A citizen does not have to say what she does not wants to say – even if the government really, really wishes she would. No public accommodations law can supplant this inalienable right. In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Com'n*, the Court recognized this understanding of truly free speech, albeit indirectly. 138 S.Ct. 1719, 1732 (2018). The instant case gives the Court opportunity to make the implicit doctrine explicit.

ARGUMENT

I. Selection and Writing of Words is Pure Speech that Can Not be Compelled by the State

Selecting and writing particular words and messages is an obvious form of pure speech. *Bigelow*, 421 U.S. at 817. A governmental entity targets pure speech – not conduct – when "[t]he only 'conduct' which the State [seeks] to punish is the fact of communication [or refusal to do so]." *Cohen v. California*, 403 U.S. 15, 18 (1971). *See Bartnicki v. Vopper*, 532 U.S. 514, 526-27 & n. 11 (2001) (holding that law restricted "pure speech" where "what gave rise to statutory liability in this suit was the information communicated"). Colorado crosses this constitutional line in threatening to punish Smith for her website messaging.

As Colorado acknowledges, Smith will serve anyone, regardless of race or sexual orientation or any other type of classification. She will gladly create

custom graphics and websites for clients or organizations identifying as any category under the LGBT umbrella. Pet. App. 184a. But Smith will not, cannot, design, create, or publish content, and specifically words, for LGBT clients or anyone else that promote messages contrary to her earnestly held religious beliefs – including messages supporting a marriage other than a marriage between one man and one woman. Pet. App. 184a.

Invoking and applying Colorado's Anti-Discrimination Act (CADA) against Smith, the State equates her reticence to express objectionable messages to a refusal to serve persons based on their sexual orientation or some other protected class, dubbing her pure speech an "illegally discriminatory transaction." Opp.to Pet. for Cert. [Opp.], p. 32. Colorado demands Smith compose and write words to celebrate same-sex marriage as though she was describing a celebration of an opposite-sex marriage, regardless of her convictions on the matter, denigrating her refusal to do so as running a business for "Straight Couples Only." Opp., p. 31.

Portraying Smith's core beliefs this way, Colorado contends its compulsion is beyond the reach of the First Amendment. They liken the application of CADA to the requirement to supply a university room discussed in *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006). Opp., p. 32. But the analogy is inapt.

First, the notion that Smith's expressive creations are fungible services or "conduct" is

wrongheaded. Her websites are inherently expressive, communicating various unique messages through words and other media. Pet. App. 186a-187a. She retains considerable editorial oversight and control in choosing the commissions she accepts, creating the messages she conveys, developing the designs she employs, and selecting the words she presents, in consideration of how she can best promote the event or topic of a given website. Pet. App. 183a. Pressganging such discretion to cause Smith to convey a message she does not support is the precise abuse the compelled speech doctrine is intended to prevent. *Wooley*, 430 U.S. at 714.

Second, a message promoting an opposite-sex wedding is fundamentally different from one promoting a same-sex wedding because the two events are fundamentally different. *See Brush & Nib Studio, LLC v. City of Phoenix*, 448 P.3d 890, 909-10 (Ariz. 2019) (rejecting argument that artists' custom wedding invitations were "fungible products, like a hamburger or a pair of shoes," because "even one word or brush stroke can change [their] entire meaning"). Colorado insinuates that these two kinds of legalized unions are essentially the same, with interchangeable parts. But Smith does not view these weddings in the same light. And the compelled speech doctrine keeps the State from making Smith adopt its point of view and act as its ambassador on the issue. *See Hurley*, 515 U.S. at 574, 579 (noting a speaker has the right to determine what "merits celebration" and the First Amendment has "no more certain antithesis" than government prescribing that determination for them).

Thus, *Rumsfeld* lends no support to Colorado's position. The provision upheld as constitutional in *Rumsfeld* did not compel the law school to produce words celebrating or approving the military, its policies, its recruitment efforts, or even its presence on campus. 547 U.S. at 62, 65.[3] The law school was only obliged to provide a room. *Id.* at 60, 66. Conversely, the burden Colorado seeks to impose on Smith is significant greater, demanding she custom design and present words in support of ideas conflicting with her religious beliefs. Pet. App. 184a. *See Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1062 (9th Cir. 2010) ("[T]he processes of writing words…[and] painting a picture are purely expressive activities…"). The imposition "amounts to nothing less than a proposal to limit speech in the service of orthodox expression." *Hurley*, 515 U.S. at 579.

The incidence of a public accommodation law does not lessen the impact of this infringement. *See Telescope Media Grp. v. Lucero*, 936 F.3d 740, 752 (8th Cir. 2019) (rejecting argument that public accommodation's production and editing of wedding

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[3] The law schools' argument in *Rumsfeld* was that by providing access (through a room) to military recruiters they would be perceived as endorsing military policies. 547 U.S. at 64-65. The discrimination analog of such a "guilt-by-association" theory would be an unwillingness of Smith to sell products or services to certain persons because the sale would send an implicit message endorsing the customer's lifestyle and status. However, Smith provides all services to all persons regardless of status; she is only selective in the events and topics she chooses to promote through words. Pet. App. 184a.

videos was mere conduct under antidiscrimination law, commenting, "[s]peech is not conduct just because the government says it is."); *see also Hurley*, 515 U.S. at 572-73, 578 (application of anti-discrimination law unjustifiably compelled speech, despite law's purpose to prevent conduct of discriminating). Nor does the context of commercial trade convert Smith's words into proscribable conduct. *See Telescope Media Grp.*, 936 F.3d at 751 (speech did not become conduct merely because it was produced through for-profit enterprise); *Brush & Nib Studio*, 448 P.3d at 907-08 (for-profit sale of custom-designed wedding invitations did not render them mere "business activit[y]"); *see also Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952) (for-profit nature of motion pictures did not strip them of First Amendment protection). Smith is not required to sell her soul to sell her words. *See Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (newspaper company has First Amendment right to refuse to publish political candidate's response to criticism published in the company's newspaper).

Colorado invalidly treats Smith's words as a public accommodation itself, unsheathing and wielding CADA to forcibly extract government-favored speech from her. *Cf. Hurley*, 515 U.S. at 573 (application of law improperly treated parade – speech itself – as public accommodation). This oppressive puppetry cannot stand. Smith's heart, mind and words are hers alone; she cannot be "a passive receptacle or conduit" for Colorado, or anyone else. *Tornillo*, 418 U.S. at 258.

II. All Opinions in the *Masterpiece Cakeshop* Decision Unanimously Recognize Words Cannot be Compelled

In *Masterpiece Cakeshop*, this Court considered an analogous circumstance, deciding whether Colorado could require a cake baker named Jack Phillips (Phillips) to create custom wedding cakes designed to celebrate same-sex marriages against his will. 138 S.Ct. 1719, 1724 (2018). Like Smith, Phillips was happy to sell his pastry creations to anyone willing to buy them, regardless of status, but he did not want to design custom cakes promoting events and causes defying his religious beliefs, a conviction that put him at odds with Colorado's application of CADA. *Id.* at 1724-25. In Phillips' view, custom wedding cakes for same-sex unions promoted and celebrated a type of marriage he believes unbiblical. *Id.* at 1724. And for this simple reason, he declined a request from a same-sex couple to design and make a cake for their wedding, without considering any written inscription for the cake. *Id.*

The Colorado Civil Rights Commission punished Phillips for his decision, and the matter eventually came to this Court's attention, contemplating whether the action violated Phillips' rights to free speech and free exercise of religion. *Id.* at 1725-27. Before the Court was the question of whether the act of baking a cake (as contrasted with writing words on the cake) qualified as speech for First Amendment purposes. *Id.* at 1723. Ultimately, this Court put the issue aside, finding the pervasive hostility shown by the Colorado Civil Rights

Commission toward Phillips' religious beliefs violated his free exercise of religion, trumping all other considerations. *Id.* at 1732.

In addition to the Majority opinion, the *Masterpiece Cakeshop* decision produced a wide array of concurring opinions, as well as a dissenting opinion, with each member of the Court other than the Chief Justice offering a view divergent from the main holding itself. *Id.* at 1732-52. But one common strand -found in every opinion, connecting every member of the Court - was the universal understanding that the State cannot invoke public accommodation laws to compel words.

The Majority opinion, written by Justice Kennedy and joined by Chief Justice Roberts and Justices Breyer, Alito, Kagan, and Gorsuch, referred to the free speech question as a difficult one in the context of Phillips' dilemma because he did not contemplate a written inscription for the cake. *Id.* at 1723-24. The Majority compared Phillips' refusal to bake a wedding cake with a refusal to "design a special cake with words or images celebrating the marriage," observing these kinds of "details might make a difference." *Id.* at 1723. The underlying assumption of the Majority was the compulsion to write words celebrating a marriage to which one objects is a violation of free speech, whereas the compulsion to design a cake without words posed a closer question.

The Majority cemented this thought in its analysis of the William Jack cases, where three

bakers refused requests to bake cakes with specific words and images criticizing same-sex marriage because the bakers found the messages offensive. *Id.* at 1730. Analogizing those cases to the situation involving Phillips, the Majority found the Commission's inconsistent treatment signaled religious discrimination against Phillips "quite apart from whether the cases should ultimately be distinguished." *Id.* The Majority opinion left open for another day the issue of whether a cake design without words can be compelled, while generally reaffirming that written words and images cannot be.

Justice Kagan, joined by Justice Breyer, wrote a concurrence echoing this same notion about words. *Id.* at 1732-33. They reasoned that it is "obvious[ly]" proper to distinguish between a baker declining to make a cake without words versus one declining to make a cake with words." *Id.* at 1733. Justice Kagan argued the bakers in the William Jack cases could not have violated the law because they refused to "make a cake (one [with words] denigrating gay people and same-sex marriage) that they would not have made for any customer." *Id.* This concurring opinion recognized the bakers had a right to avoid the creation of written messages they personally opposed.

Justice Gorsuch, joined by Justice Alito, separately concurred as well, indicating the same understanding about words, though coming at it from another angle. *Id.* at 1738. They placed the bakers in the William Jack cases and Phillips on equal footing, believing they all should be free to decline an offer to make a product "advanc[ing] a message they deemed

offensive." *Id.* at 1738-39. Thus, while this concurring opinion took issue with much of Justice Kagan's, they shared common ground in thinking citizens cannot be forced to convey words they oppose.

Justice Thomas, joined by Justice Gorsuch, also concurred with the result of the Majority, but unlike the others, they did not shy away from the free speech issue in the case, considering the matter too important to ignore. *Id.* at 1740. These justices pegged custom-designed wedding cakes, even one without words, as expressive, communicating "'a wedding has occurred, a marriage has begun, and the couple should be celebrated.'" *Id.* at 1742-43 & n. 2. Figuring "the Constitution looks beyond written or spoken words as mediums of expression," this concurring opinion figured Phillips had sustained a free speech violation, implicitly recognizing written words as even clearer examples of speech than "expressive conduct" in noting neither can be legitimately compelled. *Id.* at 1742.

Finally, Justices Ginsburg and Sotomayor dissented on the basis that they did not perceive a free exercise of religion violation in the matter. *Id.* at 1748. Like the concurring opinion authored by Justice Kagan, these justices opined it appropriate for the bakers in the William Jack cases to decline the requests due to their opposition to the proposed wording. *Id.* at 1749. The dissent noted that the bakers, by declining to generate written messages they would not make "for any customer," treated William Jack like anyone else – "no better, no worse." *Id.* at 1750. But the dissent contrasted this

arrangement from Phillips' case because his refusal did not involve written messages. *Id.*

Despite the assorted and significant disagreements between the members of this Court in *Masterpiece Cakeshop*, every opinion in the case, the majority, all of the concurrences, the dissent, agreed that individuals cannot be forced to write objectionable messages. This unanimous position of the Court supports Smith's position in the present case. Colorado cannot punish her for refusing to create and convey words on websites commending marriages she finds morally objectionable.[4]

This Court need only confirm its individual reasoning in *Masterpiece Cakeshop* with a collective decision here.

CONCLUSION

For the reasons espoused herein and in the brief of the petitioners, *amicus* asks this Court to reverse the decision of the district court below,

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[4] This issue as it relates to words was not foreign to the justices of this Court in *Masterpiece Cakeshop.* Colorado specifically argued that it was constitutionally appropriate for the State to enforce CADA to make Phillips equally inscribe "congratulatory text" on his cakes upon request. Brief for Respondent Colorado Civil Rights Commission at 24-25, *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S.Ct. 1719, *available at* http://www.scotusblog.com/case-files/cases/masterpiece-cakeshop-ltd-v-colorado-civil-rights-commn/. The Court's uniform rejection of this notion is telling, and perhaps, a harbinger of a ruling to come.

restoring the First Amendment freedom to avoid the compelled utterance of words. No one should ever be forced to express beliefs she does not believe in, and especially through a product of her own making, "for to go against conscience is neither right nor safe."[5]

Respectfully Submitted,

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[5] Martin Luther, Address at the Diet of Worms 1521 (April 18, 1521).