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

Brief for the Jewish Coalition for Religious Liberty as *Amicus Curiae* in Support of Petitioners

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Interest of Amicus Curiae[1]

The Jewish Coalition for Religious Liberty (JCRL) is a nondenominational organization of Jewish communal and lay leaders. JCRL is devoted to ensuring that First Amendment jurisprudence enables the flourishing of diverse religious viewpoints and practices in the United States. JCRL advocates for religious liberty protections that allow religious adherents to practice their faith while fully participating in American life.

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[1] No counsel for a party authored this brief in whole or in part, and no person other than amicus and its counsel made any monetary contribution intended to fund the preparation or submission of this brief. Per Supreme Court Rule 37.3(a), all parties consented to the filing of this brief.

Summary of Argument

Over the past fifteen years or so, the courts have seen a spate of cases that fit a familiar pattern: close-knit artisanal companies with a handful of employees have objected to providing a creative, customized service for a same-sex wedding. The similarity between these objecting firms is no coincidence. At larger companies that employ artisans of different faiths, such conscience-testing tasks could easily be handed off to another artisan. But close-knit firms like 303 Creative do not have this option. Indeed, Lorie Smith, Jack Phillips, Elaine Huguenin, and other artists of faith work in these religious-centric businesses precisely so they can follow their beliefs while plying their trades. And over the past fifteen years, the questions presented in these cases have consistently been repeated, yet somehow have evaded final review. Now is the time to settle these matters.

This brief proceeds in two parts. Part I identifies the problem from *Amicus*'s perspective: the Tenth Circuit's ruling would lead to particularly problematic situations for Jewish artisans who object to speaking about certain topics. If a Jewish baker would make a cake celebrating a wedding anniversary on November 9th, must he also make a cake celebrating the anniversary of Kristallnacht on that date? If a Jewish website designer would make a website for two Jews marrying, must he make a website for a Jew marrying a Christian? If a Jewish photographer would take a headshot of an unmarried Jew for a dating app, must he take the same headshot for a married Jew's profile on an app to facilitate adultery? In each of these hypotheticals, the Tenth Circuit's holding would force the Jewish artist to betray his conscience so the state

can achieve its purported compelling interest. But is this interest actually compelling?

Part II of the brief addresses this question. History and state practice suggest that the government lacks a compelling interest to enforce its public accommodations law against a closely-knit firm in which the artisans share the same religious objections to speaking certain messages. If the Court agrees with this contention, the concerns raised in Part I would be obviated in this case, and virtually all future such cases. The conflicts that began with *Elane Photography, LLC v. Willock* can end with *303 Creative LLC v. Elenis*.

Argument

I. The Tenth Circuit's ruling would be particularly problematic for Jewish artisans who object to speaking certain messages

The question presented directly implicates the freedom of speech. But in this dispute, and related wedding cases, the freedom of speech is intertwined with the free exercise of religion. These artisans of faith objected to expressing messages that conflict with their religious beliefs. Yet the lower court held that the state's compelling interest to protect "equal access to goods and services" trumped those First Amendment objections. *303 Creative*, 6 F.4th at 1180. Under this ruling, "the government could regulate the message communicated by *all* artists, forcing them to promote messages approved by the government in the name of 'ensuring access to the commercial marketplace.'" *Id.* at 1204–05. (Tymkovich, C.J. dissenting) (emphasis in original). More pressingly for

Amicus, the lower court's ruling creates unique problems for Jewish artisans who object to speaking particular messages.

Consider a cake that says "Happy November 9th!" A Jewish baker would have no problem making that cake for someone whose anniversary falls on the ninth day of November. But a Jewish baker would object to a Neo-Nazi requesting a cake with that same message intended to celebrate Kristallnacht. That horrific pogrom against Jews in Nazi Germany began on November 9, 1938. Justice Alito flagged this hypothetical in another First Amendment challenge to the Colorado Anti-Discrimination Act. Transcript of Oral Argument at 68, *Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n* (No. 16-111). If the lower court's ruling stands, a state would have a compelling interest to force the Jewish baker to create the Kristallnacht cake so as not to "relegate" the Neo-Nazi "to an inferior market because [the baker's] services are by definition, unavailable elsewhere." *303 Creative*, 6 F.4th at 1180.

Consider another hypothetical closer to the facts in *303 Creative*. A Jewish man and a Jewish woman, who are engaged to be married, ask a Jewish website designer to build a website to celebrate their nuptials. No problem. Mazal tov! Another Jewish man and a Christian woman, who are engaged to be married, ask a Jewish website designer to build a website to celebrate their nuptials. Big problem. Don't stomp the glass. Many Jews consider intermarriage an existential threat to the future of Judaism.[2] Under the

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[2] Rabbi Menachem Schneerson, *What's Wrong With Intermarriage*, CHABAD.ORG, https://bit.ly/3wPo8fz (last visited May 30, 2022) (describing intermarriage as a "calamit[y]" that

10th Circuit's ruling, the Jewish artisan would be compelled to voice support for an existential threat to the future of his faith.

Let's turn from marriage to adultery. An unmarried Jewish person asks a Jewish photographer to take a photograph for his JDate dating profile. Swipe right for the *shidduch*.[3] Next, a married Jewish person asks a Jewish photographer to take a photograph for his AshleyMadison.com dating profile.[4] Swipe left for this *shanda*.[5] After all, adultery is a violation of the Seventh Commandment.[6]

In each of these examples, a Jewish artist would be compelled to betray his conscience. Yet, the Tenth Circuit would force the Jewish artisans to lend their voices to these breaches of faith. The Supreme Court has recognized that "forcing free and independent individuals to endorse ideas they find objectionable is always demeaning." *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31,* 138 S. Ct. 2448, 2464 (2018). And this "damage is done" when "individuals are coerced into betraying their convictions." *Id.* The Tenth Circuit failed to meaningfully account for how its novel interpretation

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"concerns the whole Jewish people"), Rabbi Steven Weil, *After Pew: What Will It Take to Save American Jewry*, JEWISHACTION.COM, https://perma.cc/7ZN8-8UXW (last visited May 30, 2022) (noting that an "astoundingly high intermarriage rate" is one reason why "American Jewry is on a train speeding headlong into self-destruction").

[3] In Jewish circles, the word *shidduch* describes the dating process that (hopefully) leads to a Jewish marriage.

[4] Scott Cameron, *The Infidelity App*, NPR.ORG, https://perma.cc/UNE9-6959 (Last visited May 30, 2022).

[5] *Shanda* is a Yiddish word to describe something shameful.

[6] *The Ten Commandments*, CHABAD.ORG, https://bit.ly/3LQZteT (Last visited May 30, 2022).

of the First Amendment would damage and demean artisans of different faiths who object to speaking about certain topics. But more importantly, the Tenth Circuit erred in finding that the state had a compelling interest to pursue this damaging and demeaning end.

II. The government lacks a compelling interest to enforce its public accommodations law against a closely-knit firm in which the artisans share the same religious objections to speaking

Courts often declare, without hesitation, that the government has a compelling interest to enforce prohibitions on discrimination. But reality is a bit more nuanced. For more than five decades, Title VII of the Civil Rights Act of 1964 has not prohibited discrimination at firms with fewer than fifteen employees. Likewise, under the so-called Mrs. Murphy exemption, certain landlords with small properties are exempt from the Fair Housing Act. The states have largely followed these federal practices.

Such widespread exemptions, which have persisted for decades, undermine the compellingness of the state's interest to enforce anti-discrimination laws. And recent decisions have recognized this principle. *See Fulton v. City of Philadelphia*, 141 S.Ct. 1868, 1882 (2021); *Burwell v. Hobby Lobby Stores*, 573 U.S. 682, 727 (2014). This "history and state practice" can "help structure the inquiry and focus the Court's assessment" of whether a state's interest is in fact "compelling." *Ramirez v. Collier*, 142 S.Ct. 1264, 1288 (2021) (Kavanaugh, J., concurring). And this "history and state practice" suggests that the government

lacks a compelling interest to enforce its public accommodations law against a closely-knit firm in which the artisans share the same religious objections to speaking about certain topics.

A. Federal law exempts closely-held entities from discrimination laws

For more than five decades, Title VII of the Civil Rights Act of 1964, as amended, has only applied to firms with at least fifteen employees. 42 U.S.C. §2000e(b). Why 15? "[T]here is little in the record to suggest a studied effort to arrive at precisely the right threshold, other than to find the threshold leaving enough small business owners outside the Act's coverage to make the new law palatable."[7] And so "long as [a firm] employs no more than fourteen, it can refuse to hire women, Moslems, or disabled persons, and it will not be in violation of federal discrimination law."[8] This exemption sweeps broadly. These closely-held firms employ approximately twenty-million workers.[9] The history beyond this exemption is complex, and multifaceted, but a primary "goal articulated by congressional proponents of the small firm exemption was to secure a limited sphere for a right of personal relationships, free from government interference."[10] And half a century later, this exemption—and its underlying purpose—endures.

The Fair Housing Act of 1968 includes a similar carveout. The landmark statute exempts "an

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[7] Richard Carlson, *The Small Firm Exemption and the Single Employer Doctrine in Employment Discrimination Law*, 80 St. John's L. Rev. 1197, 1270 (2006).

[8] *Id.* at 1197.

[9] *Id.* at 1199.

[10] *Id.* at 1261.

establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence." 42 U.S.C. §2000a(b)(1). At the time, estimates predicted that more than two million units would be excluded from the FHA—about 3% of the total housing supply. 114 Cong. Rec. 2495 (1968). This exemption stems from the famous *Mrs. Murphy* hypothetical—a woman who would refuse to rent a spare room in her home to certain people. Senator Walter Mondale, a sponsor of the Fair Housing Act, observed that "[t]he sole intent of [the Mrs. Murphy exemption] is to exempt those who, by the direct personal nature of their activities, have a close personal relationship with their tenants." *Id.* Of course, "implicit was an understanding that the First Amendment right at stake was specifically Mrs. Murphy's right not to associate with African Americans."[11] The Mrs. Murphy exemption exists to this day.

B. State law exempts closely-held entities from anti-discrimination laws

Thirty-three states exempt businesses below a certain threshold from their employment discrimination laws:

- two or three employees: Wyo. Stat. §27-9-101, et. seq.; Conn. Gen. Stat. §46a-60, et. seq.
- four employees: 19 Del. Code §710, et. seq.; Kan. Stat. §44-1001, et. seq.; N.M. Stat. §28-1-7, et. seq.; Ohio Rev. Code §4112.01, et. seq.; Pa.

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[11] James D. Walsh, *Reaching Mrs. Murphy: A Call for Repeal of the Mrs. Murphy Exemption to the Fair Housing Act*, 34 Harv. C.R.-C.L. L. Rev. 605, 607 (1999).

Stat. tit. 43, §951, et. seq.; R.I. Gen. Laws §28-5-1, et. seq.

- five employees: West's Cal. Gov. Code §12900, et. seq.; Idaho Code §67-5909, et. seq.; Va. Code 2.1-714, et. seq.
- six employees: Ind. Code §22-9-1-1, et. seq.; Laws of Mass. Gen. Laws, ch. 151B, §1, et. seq.; Mo. Stat. §213.010, et. seq.; N.H. Rev. Stat. §354-A:1, et. seq.
- eight employees: Ky. Rev. Stat. §344.040, et. seq.; Tenn. Code §4-21-201, et. seq.; Wash. Rev. Code §49.60.010, et. seq.
- nine employees: Ark. Code §16-123-101, et. seq.
- twelve employees: W. Va. Code §5-11-1, et. seq.
- fifteen employees: Ariz. Rev. Stat. §41-1461, et. seq.; Fla. Stat. §760.01, et. seq.; Ga. Code §45-19-20, et. seq.; Md. State Government Code §20-601, et. seq.; N.C. Gen. Stat. §143-422.1, et. seq.; Neb. Rev. Stat. §48-1101, et. seq.; Nev. Rev. Stat. §613.310, et. seq.; S.C. Code §1- 13-30, et. seq.; Tex. Lab. Code §21.001, et. seq.; Utah Code §34a-5-101, et. seq.
- twenty employees: Ala. Code §25-1-20, et. seq.; La. Rev. Stat. §23:301, et. seq.

In total, twenty-four states meet, or exceed, the fifteen-employee threshold from Title VII.

Seventeen states, plus the District of Columbia, extend their employment discrimination laws to businesses of any size: Alaska Stat. §18.80, et. seq.; Colo. Rev. Stat. §24-34-401 et. seq.; D.C. Code §2-

1402, et. seq.; Haw. Rev. Stat. §378.1, et. seq.; Iowa Code §216.1, et. seq.; 775 Ill. Comp. Stat. 5/1-101, et. seq.; Me. Rev. Stat. Tit. 5, §4572, et. seq.; Mich. Comp. Laws §37-2202, et. seq.; Minn. Stat. §363A.08, et. seq.; Mont. Code §49-2-101, et. seq.; N.D. Laws §14-02.4, et. seq.; N.J. Stat. §10:5-12, et. seq.; N.Y. Exec. Law §290, et. seq.; 25 Okla. Stat. §1301, et. seq.; Or. Rev. Stat. §659a.001, et. seq.; S.D. Cod. Law §20-13-1, et. seq.; Vt. Stat. tit. 21, §495, et. seq.; Wis. Stat. §111.31, et. seq.

With regard to fair housing, only Maryland follows the five-unit threshold from the federal standard. Md. Code, State Government 20-704(a)(2). Twenty-four states set the threshold at four units: Ala. Code §24-8-7; Ariz. Rev. Stat. §41-1491.02(A)(2); Colo. Rev. Stat. §24-34-502(8)(a)(II); Del. Code tit. 6, §4607(e); Fla. Stat. §760.29(1)(a)(2); Ga. Code §8-3-202(b)(1); 775 Ill. Comp. Stat. 5/3-106(B); Ind. Code §22-9.5-3-1(a)(2); Kan. Stat. §44-1018(b)(2); La. Rev. Stat. §51:2604(B)(2); Mo. Rev. Stat. §213.040(13)(2); N.C. Gen. Stat. 41A-6(a)(1); N.D. Cent. Code §14-02.5-09(2); N.H. Rev. Stat. 354-A:15(II); N.M. Stat. 28-1-9(D); Nev. Rev. Stat. §118.060(2)(b); Okla. Stat. tit. 25, §1453(C); S.C. Code §31-21-70(A); Tex. Prop. Code §301.041(a)(2); Utah Code 57-21-3(3); Va. Code 36-96.2(B); Wash. Rev. Code §49.60.222(2); W. Va. Code 5-11A-4 (2)(b); Wyo. Stat. §40-26-110(b).

The fair housing laws in sixteen states, and the District of Columbia, set the threshold at two units: Ark. Code §16-123-204(b)(1); Conn. Gen. Stat. §46a-64c(b)(1); D.C. Code 2-1402.24(a)(2); Haw. Rev. Stat. §515-4(a)(1), et seq.; Iowa Code §216.12(1)(b); Idaho Code §67-5910(7); Ky. Rev. Stat. §344.365(1)(a); Mass. Gen. Laws ch. 151B, 4(7), et seq.; Me. Rev. Stat. tit. 5, §4581(4)(B)(1); Mich. Comp. Laws 37.2503(1)(a);

Minn. Stat. 363A.21(3); Mont. Code 49-2-305(11); N.J. Stat. §10:5-5(n)(1); N.Y. Exec. Law §296(5)(a)(4)(i); R.I. Gen. Laws §34-37-4.1(a), et seq.; S.D. Cod. Law 20-13-20; Tenn. Code 4-21-602(a)(1). Vermont sets the threshold at three units. Vt. Stat. tit. 9, 4504(2).

Only seven states extend their fair housing laws to properties of all sizes: Alaska Stat. §18.80.240; Cal. Gov't Code §12955; Ne. Rev. Stat. §20-301, et seq.; Ohio Rev. Code §4112.024 et seq.; Ore. Rev. Stat. §659A.421(6), et seq. 43 Pa. Cons. Stat. §954(i), et seq.; Wis. Stat. §106.50.

This survey presents an inconvenient truth: on the federal and state level, laws are pocked with a series of exemptions that openly tolerate discrimination in employment and housing by closely-held entities. These exemptions, which have persisted for decades, undermine the compellingness of these state interests. The Court acknowledged this principle in *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

C. *Hobby Lobby* acknowledged that the government's compelling interest can be undermined by broad exemptions

Pursuant to the Patient Protection and Affordable Care Act (ACA), the Department of Health & Human Services (HHS) promulgated the so-called HHS mandate. This regulation required certain employer-provided health insurance plans "to furnish 'preventive care and screenings' for women without 'any cost sharing requirements.'" *Id.* at 697 (citing 42 U.S.C. §300gg–13(a)(4)). Employers subject to the mandate were generally required to cover four types of contraception that "may have the effect of preventing an already fertilized egg from developing

any further by inhibiting its attachment to the uterus." *Id.* at 697–98. Some employers objected to the HHS mandate because, in their view, the destruction of a fertilized egg was an abortion.

However, there were many exceptions to the HHS mandate. First, religious employers, such as churches, were exempt from the HHS mandate. *Id.* at 698. Second, certain non-profit organizations with religious objections, like the Little Sisters of the Poor, received an "accommodation" with respect to the HHS mandate. *Id.* (The Court would consider whether this accommodation complied with the Religious Freedom Restoration Act in *Zubik v. Burwell*, 578 U.S. 403 (2016)). Third, the HHS mandate only applied to "employers with 50 or more full-time employees." *Hobby Lobby*, 573 U.S. at 696. At the time, more than thirty million workers were employed by these small businesses. *Id.* at 700. Fourth, "grandfathered health plans" that existed before the ACA was enacted, and did not make certain changes, were exempt from the contraceptive mandate. *Id.* at 699. When *Hobby Lobby* was decided, "tens of millions of people" were still covered by grandfathered plans. *Id.*

Despite these sweeping exemptions, "HHS maintain[ed] that the mandate serve[d] a compelling interest in ensuring that *all* women ha[d] access to all FDA-approved contraceptives without cost sharing." *Id.* at 727 (emphasis added). This issue was actively contested throughout the litigation. The Plaintiffs countered "that HHS has not shown that the mandate serves a compelling government interest." *Id.* Specifically, the Plaintiffs argued that these

exemptions undermined the government's purported compelling interest.[12]

During oral argument, Chief Justice Roberts inquired about the exemptions. He asked Solicitor General Donald Verrilli, "Can you make a representation to us about how long the grandfathering is going to be in effect?" Transcript of Oral Argument at 59, *Sebelius v. Hobby Lobby Stores* (No. 13-354). In other words, how long would the grandfathered plans—that were exempted from the HHS mandate—stick around? Verrilli did not answer the question directly. "I can't give you a precise figure," he said, but "there's a clear downward trajectory." *Id.* Invariably, as plans were changed, they would lose their grandfather status and become subject to the HHS mandate.[13]

Paul Clement, who represented Hobby Lobby, argued that this concession was "devastating." *Id.* at 30. When the "government pursues [a] compelling interest," Clement said, "it demands immediate compliance." The government "doesn't say, 'Get around to it whenever it's convenient.'" *Id.* Solicitor General Verrilli countered that Title VII of the Civil Rights Act of 1964 also had exemptions. Even five decades after its enactment, the Solicitor General explained to the Court, "employers with 15 or fewer people are [still] not subject to that law, and that's 80 percent of the employers in the country." *Id.* at 61. As

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[12] *See* Josh Blackman, Unraveled: Obamacare, Religious Liberty, and Executive Power 260–61 (2016).

[13] As of 2020, approximately nineteen million people were still enrolled in grandfathered plans. Katie Keith, Final Rule on Grandfathered Health Plans Will Allow Higher Consumer Costs, Health Affairs (Dec. 14, 2020), https://perma.cc/H2VA-5GHL (last visited May 30, 2022).

a result, Verrilli continued, "22 million people . . . are [still] not within the coverage" of the landmark discrimination law. *Id.* at 62. He stated, "No one would say that because the coverage is incomplete in that respect, that Title VII doesn't advance a compelling state interest." *Id.*

The Court acknowledged that the Plaintiffs' position concerning the compelling interest has some merit. The majority reasoned that "it is arguable that there are features of ACA that support [the Plaintiffs'] view." *Hobby* Lobby, 573 U.S. at 727. Ultimately, the Court did not "adjudicate this issue" of whether the mandate serves a compelling interest. *Id.* at 728. Rather, the Court simply assumed for purposes of its analysis that HHS's interest was compelling. *Id.*

Still, Solicitor General Verrilli's argument based on Title VII cannot be admitted so easily. By maintaining this sweeping exemption, Congress openly tolerates intolerance. The government's interest to prohibit workplace discrimination is certainly legitimate and important. But in a First Amendment or RFRA case, how is this interest still compelling if the federal government permits discrimination against twenty-million Americans? And what exactly makes an interest compelling?

D. "What does 'compelling' mean"?

Hobby Lobby, and related cases, largely elided over a foundational question: "what does 'compelling' mean, and how does the Court determine when the State's interest rises to that level?" *Ramirez v. Collier*, 142 S. Ct. 1264, 1287 (2022) (Kavanaugh, J., concurring). *Fulton v. City of Philadelphia* addressed this question by inspecting the law's over- and under-inclusiveness. 141 S.Ct. 1868, 1882 (2021). A policy

that is pocked with exemptions likely does not serve a compelling interest. Philadelphia's "system of exceptions . . . undermine[d] the City's contention that its non-discrimination policies can brook no departures." *Id.* Based on these carveouts, the government could not simply assert a "compelling interest in enforcing its non-discrimination policies generally." *Id.* at 1881. Rather, to satisfy strict scrutiny, the government has the burden to demonstrate that it has a compelling "interest in denying an exception to" the Plaintiffs, in particular. *Id.*

Still, *Fulton* did not explain what degree of compellingness is needed to deem an interest sufficiently compelling. One possible metric would consider "history and state practice" to "help structure the inquiry and focus the Court's assessment of the State's arguments." *Ramirez*, 142 S.Ct. at 1288 (Kavanaugh, J., concurring). Specifically, the courts can consider how the state and federal governments have pursued this interest. And the surveys of state and federal law discussed *supra* undermine the compellingness of employment discrimination laws—at least in First Amendment cases involving closely-held businesses.

Hobby Lobby reflected this principle. In that case, "three closely held corporations" asserted that certain "methods of contraception . . . violate[d] the sincerely held religious beliefs of the companies' owners." *Hobby Lobby*, 573 U.S. at 688. And the Court's holding was limited to such "closely held corporations, each owned and controlled by members of a single family." *Id.* at 717; *see also id.* at 736 (Kennedy, J., concurring). Admittedly, "'[c]losely held' is not synonymous with 'small.'" *Id.* at 757 n. 19 (Ginsburg, J., dissenting).

Hobby Lobby, for example, employed more than 13,000 workers. *Id.* at 702. But the HHS mandate would never even affect "small" businesses. The Affordable Care Act expressly exempted firms with fewer than fifty employees, without regard to any religious objections. And a subset of these small firms with a handful of like-minded employees are also exempt from Title VII, and employment discrimination laws in most states. These are the sorts of companies involved in wedding-related cases.

E. Wedding-related cases are brought by close-knit artisanal companies with a handful of employees that share the same religious beliefs

Over the past fifteen years or so, the courts have seen a spate of cases in which close-knit artisanal companies have objected to providing certain services related to same-sex weddings. Consider a sampling of five such firms.

First, Elane Photography LLC created customized artisanal wedding photographs. This close-knit company was owned by a husband and wife, Elaine and Jon Huguenin, who shared the same religious beliefs, and Elaine personally created the expressive photography. *Elane Photography, LLC v. Willock*, No. CV-2008-06632, 2009 WL 8747805 (D.N.M. 2009).

Second, the Masterpiece Cakeshop created customized artisanal wedding cakes. This close-knit company was owned by a husband and wife, Jack and Debbie Phillips, who shared the same religious beliefs, and Jack personally designed the creative cakes. *Masterpiece Cakeshop Inc. v. Elenis*, 445 F. Supp. 3d 1226, 1241 (D. Colo. 2019).

Third, Telescope Media Group created customized artisanal wedding videos. This close-knit company was owned by a husband and wife, Carl and Angel Larsen, who shared the same religious beliefs, and personally designed the creative wedding videos. *Telescope Media Grp. v. Lindsey*, 271 F. Supp. 3d 1090, 1097 (D. Minn. 2017), aff'd in part, rev'd in part and remanded sub nom. *Telescope Media Grp. v. Lucero*, 936 F.3d 740 (8th Cir. 2019).

Fourth, Brush & Nib Studio created customized artisanal wedding invitations. This close-knit company was owned by Joanna Duka and Breanna Koski, who shared the same religious beliefs, and personally designed the creative wedding invitations. *Brush & Nib Studio, LC v. City of Phoenix*, 247 Ariz. 269, 276, 448 P.3d 890, 897 (AZ 2019).

Fifth, 303 Creative LLC created customized artisanal wedding websites. This close-knit company had one employee: "Ms. [Lorie] Smith is its founder and sole member-owner." *303 Creative LLC v. Elenis*, 6 F.4th 1160, 1169–1170 (10th Cir. 2021). And Smith personally performed the creative website design. *Id.*

An obvious pattern emerges from this litigation. These disputes involve not just closely-held companies—like Hobby Lobby—but close-knit companies. There are usually one or two owners, often members of the same family. In *Hobby Lobby*, only the owners shared religious beliefs, while employees had a wide range of faiths. But for these close-knit firms, the artists who actually perform the creative work share the same religious beliefs, and object to creating a specific wedding-related product. And, in these close-knit firms, the creative work cannot be passed onto another in-house artist with different religious

beliefs. Indeed, these artists of faith likely work in such religious-centric businesses precisely so they can follow their beliefs while plying their trade.

F. The government does not always have a compelling interest to enforce public accommodations laws in First Amendment cases

The Supreme Court has decided several cases that consider the interaction between public accommodations laws and the First Amendment. And in these cases, the Court has found that the government generally has a compelling interest to enforce public accommodations law. *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 626 (1984) ("Assuring women equal access to such goods, privileges, and advantages clearly furthers compelling state interests."); *id.* at 628 (" . . . acts of invidious discrimination in the distribution of publicly available goods, services, and other advantages cause unique evils that government has a compelling interest to prevent—wholly apart from the point of view such conduct may transmit."); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, Inc., 515 U.S. 557, 572 (1995) (noting that public accommodations laws "are well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general matter, violate the First or Fourteenth Amendments.").

However, in the instant case, the lower court, as well as the Respondents, do not point to *any* state's historical practice of—as the question presented states—"applying a public-accommodation law to compel an artist to speak or stay silent." Indeed, one

of the earliest such precedents is barely a decade old. *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013), *cert. denied* 572 U.S. 1046 (2014). Cases like *Jaycees* and *Hurley* are qualitatively different, as no artist in those disputes was compelled to speak or stay silent.

To the contrary, history and practice suggest that the government's interest in eradicating discrimination is not monolithically compelling. Indeed, in *Hurley* the Court observed that no "legitimate interest [had] been identified in support of applying the Massachusetts" public accommodations law to require the Veterans Council to alter the expressive content of the parade. *Hurley*, 515 U.S. at 578. *Hurley* recognized that the state's interest is weaker when the excluded parties have other available channels to achieve their goal. *Id.* (quoting *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 656 (1994) ("Considering that GLIB presumably would have had a fair shot . . . at obtaining a parade permit of its own, respondents have not shown that petitioners enjoy the capacity to 'silence the voice of competing speakers,' as cable operators do with respect to program providers who wish to reach subscribers.").

In this regard, *Hurley* was distinguishable from *Turner*. In *Turner*, the federal government had a sufficient interest to require monopolistic cable operators to set aside certain channels for broadcast signals because there were no alternate avenues. *Id* at 577 ("This power gives rise to the Government's interest in limiting monopolistic autonomy in order to allow for the survival of broadcasters who might otherwise be silenced and consequently destroyed."). By contrast, in *Hurley*, the plaintiffs had many

alternative avenues, and there was no risk that the Veterans Council would "silence" the voices of GLIB. The "survival" of GLIB did not depend on marching in the parade. Therefore, Massachusetts lacked a compelling interest to coerce inclusion. *Hurley* and *Turner* read together reflect the direct relationship between a firm's market power to speak and the state's interest to regulate that speech: as a firm's market power decreases, the compellingness of the state's interest to regulate that firm's speech also decreases.[14]

In related contexts, closely-held entities are largely exempt from federal and state employment and fair housing laws. It is true that public accommodations laws do not exempt small firms. Federal and state public accommodations laws apply to businesses without regard to their size. *See* State and Public Accommodation Laws, National Conference on State Legislatures, https://perma.cc/TG4W-G5K5. But the rationale behind these other exemptions serve to undermine Colorado's purported compelling "interest in denying an exception to" Lorie Smith, in particular. *See Fulton*, 141 S.Ct. 1882.

The government has the burden to demonstrate that it has a compelling interest to enforce its public accommodations law against a closely-knit firm in which the artisans share the same religious objections to speaking. And this burden should be satisfied with respect to "history and state practice." *Ramirez*, 142 S.Ct. at 1288 (Kavanaugh, J., concurring). To date, the

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[14] The Tenth Circuit's description of a one-member artisanal firm as a "monopoly" is in tension with *Hurley* and *Turner*. *See 303 Creative*, 6 F.4th at 1180–81.

government has not met this burden. And if the Court agrees that the government has not satisfied this burden, then 303 Creative, and other similarly-constituted firms should receive the as-applied relief they seek.

Conclusion

As the days, months, and years pass from *Obergefell v. Hodges*, the number of artisans that sincerely object to providing services for same-sex weddings, and for whom same-sex couples sincerely seek their services, will continue to dwindle. *Amicus*'s proposed analysis would settle a divisive issue, vindicate an important constitutional principle, and have a de minimis effect on the marketplace. The legal conflict that began with *Elane Photography, LLC v. Willock* can end with *303 Creative LLC v. Elenis*.

The judgment below should be reversed.

Respectfully submitted,

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