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; AND PHIL WEISER,
Respondents.

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

BRIEF FOR THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS; THE LUTHERAN CHURCH–MISSOURI SYNOD; AND ISLAM AND RELIGIOUS FREEDOM ACTION TEAM, RELIGIOUS FREEDOM INSTITUTE AS *AMICI CURIAE* SUPPORTING PETITIONERS

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INTERESTS OF *AMICI CURIAE*[1]

Amici are religious organizations with a shared commitment to defending religious freedom under the Constitution. Some of us have joined *amicus* briefs in previous litigation before the Court. See, *e.g.*, *Fulton* v. *Philadelphia*, 141 S. Ct. 1868 (2021); *Espinoza* v. *Montana Dep't of Revenue*, 140 S. Ct. 2246 (2020); *Obergefell* v. *Hodges*, 576 U.S. 644 (2015). Despite our theological differences, we share the religious belief that God intends marriage to be between a man and a woman. While respecting the right of others to hold contrary views and recognizing that same-sex couples have a legal right to marry, we claim the right under the First Amendment to express, teach, and practice our sincere religious beliefs regarding marriage.

SUMMARY OF ARGUMENT

Obergefell assured religious Americans that recognizing a right to same-sex marriage would not threaten religious freedom. Indeed, this Court's other major LGBT rights decisions likewise say that religious freedom will be fully respected. *Amici* rely on that assurance. We and our members seek to live out our lives according to our religious beliefs and identities. That requires the freedom to express our faith and to avoid affirming beliefs we do not hold.

Religious speech lies at the heart of the freedom of speech. Speech about religion and speech from a

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[1] Pursuant to Supreme Court Rule 37.3, counsel for all parties have submitted letters to the clerk expressing their blanket consent to *amicus curiae* briefs. Pursuant to Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part and that no entity or person, besides *amici*, their members, and their counsel, made any monetary contribution toward the preparation or submission of this brief.

religious perspective are doubly covered by the Free Speech Clause and the Free Exercise Clause. Numerous decisions attest to the protection that religious speech merits. The Court has consistently vindicated religious speech against contrary State and local laws, however well-intentioned.

Religious speech about marriage warrants special protection. Dissenting Justices in *Obergefell* warned that a novel right to same-sex marriage could be used to suppress contrary religious beliefs. But the Court committed to protecting those who, based on "decent and honorable religious" beliefs, understand marriage in traditional religious terms or "deem same-sex marriage to be wrong." *Obergefell*, 576 U.S. at 673; see also *id.* at 679–80. Hence, neither side of the marriage debate can enforce its beliefs through legal coercion. That was essential to *Obergefell*'s pluralistic compromise and promise.

Yet petitioners face the very coercion *Obergefell* disclaimed. Colorado's public accommodations law bars them from posting a statement describing Lorie Smith's traditional religious beliefs about marriage and forces them, contrary to those beliefs, to create custom websites with words promoting same-sex marriage. Their only escape is to stay out of the wedding industry, forcing Smith to choose between sacrificing her religion or her livelihood. That is an intolerable affront to the First Amendment and a betrayal of *Obergefell*. Without vigilant protection for free speech, all those with traditional religious understandings of marriage could face similar threats. We urge the Court to conclude that Colorado's application of its public accommodations law transgresses bedrock principles under the First Amendment and cannot stand.

ARGUMENT

I. RECOGNIZING LGBT RIGHTS WAS NOT INTENDED TO DIMINISH RELIGIOUS FREEDOM.

A. Obergefell *held that religious beliefs about traditional marriage are constitutionally protected.*

In *Obergefell*, 576 U.S. at 644, a sharply divided Court concluded that the Fourteenth Amendment requires States to license and recognize same-sex marriage. See *id.* at 680–81. That decision sought to end a long-running national debate. "After years of litigation, legislation, [and] referenda," the American people had become "divided on the issue of same-sex marriage." *Id.* at 663. A few States embraced same-sex marriage. *Id.* at 685–87. But many others—more than 40 at one point—adopted statutes and constitutional amendments affirming marriage as the union of a man and a woman. See Alison Smith, Cong. Rsch. Serv., RL31994, Same-Sex Marriages: Legal Issues 20–27 (2010).

Religious people and institutions were understandably anxious at the implications of redefining marriage. Some *amici* asked the Court to "consider how a ruling mandating same-sex marriage would adversely affect religious liberty." Brief of Major Religious Organizations as *Amici Curiae* Supporting Respondents at 2, *Obergefell* v. *Hodges*, 576 U.S. 644 (2015) (Nos. 14-556, 14-562, 14-571, 14-574). They feared that recognizing a right to same-sex marriage could implicitly condemn religious adherence to traditional marriage. *Id.* at 3 (warning that such a right could "stigmatize" religious Americans as "fools or bigots, akin to racists" for their views on marriage).

Obergefell sought to accommodate both sides of this white-hot controversy by recognizing same-sex

marriage as a constitutional right *and* promising to protect religious freedom. To that end, the Court assured those with "decent and honorable" religious beliefs regarding traditional marriage that their religious freedom would be secure. See *Obergefell*, 576 U.S. at 672. The Court noted the "untold references" to the beauty of traditional marriage "in religious and philosophical texts spanning time, cultures, and faiths[.]" *Id.* at 657. And it assured religious people and institutions that their First Amendment rights would be preserved:

> Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered.

Id. at 679–80.

Obergefell's solicitude toward religious viewpoints about marriage sharply distinguishes the Court's position on contested beliefs about same-sex marriage from its position on racial equality. Take *Loving* v. *Virginia*, 388 U.S. 1 (1967). It condemned State laws outlawing interracial marriage as "measures designed to maintain White Supremacy" and therefore repugnant to "the central meaning of the Equal Protection Clause." *Id.* at 11, 12. In a similar vein, *Bob Jones University* v. *United States*, 461 U.S. 574 (1983), sustained the denial of tax-exempt status to a religious

college with segregationist beliefs. "[R]acial discrimination in education violates deeply and widely accepted views of elementary justice." *Id.* at 592.

No such criticism is even hinted at in *Obergefell*. It sought to resolve the national controversy over same-sex marriage in a kind of peace treaty among honorable people divided by fundamentally opposing beliefs—without condemning either side. It affirmed same-sex marriage as a constitutional right but expressly rejected the reductive argument that religious commitments to a traditional understanding of marriage resemble the dark sentiments that fed Jim Crow. To indulge any such equivalence ignores what *Obergefell* takes pains to stress—that sincere religious beliefs in marriage as the union of a man and a woman are not to be "disparaged." 576 U.S. at 672.[2]

Religious communities and people of faith depend on *Obergefell*'s reassurances to order their affairs. *Obergefell*'s holding on same-sex marriage is the law of the land. But the deal remains that traditional faith communities and their adherents may still profess and live out their honorable religious understanding of marriage without fear of official hostility or punishment. See, *e.g.*, *Masterpiece Cakeshop* v. *Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1727, 1732 (2018).

By recognizing same-sex marriage rights while pledging to safeguard religious freedom, *Obergefell* implicitly rests on the principle of pluralism, the idea that a healthy society encourages and protects people with diverse viewpoints on matters of fundamental

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[2] Similarly, this Court's stern condemnation of racism contrasts with its decisions involving abortion, where differing viewpoints enjoy judicial respect. See *Stenberg* v. *Carhart*, 530 U.S. 914, 946 (2000) (O'Connor, J., concurring).

importance. Respecting religious pluralism has especially deep roots in our national past.

James Madison identified pluralism as the solution to the challenges posed by "the violence of faction." The Federalist No. 10, at 56 (James Madison) (Jacob E. Cooke ed., 1961). By *faction* Madison meant "a number of citizens * * * who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community." *Id.* at 57. Factions introduce "instability, injustice and confusion" into public life, he explained, and these are "the mortal diseases under which popular governments have every where perished." *Id.* at 56, 57.

What we now call pluralism was Madison's solution. "In a free government, the security for civil rights must be the same as for religious rights. It consists in the one case in the *multiplicity of interests*, and in the other, in the *multiplicity of sects*." The Federalist No. 51, at 351–52 (James Madison) (emphasis added). By discouraging concentrations of power, pluralism inhibits freedom-suppressing conformity. And it offers an "indispensable means of limiting the influence of governmental orthodoxy on important areas of community life." *Bob Jones Univ.*, 461 U.S. at 609 (Powell, J., concurring).

Obergefell is not alone in acknowledging the importance of pluralism. Other decisions advancing LGBT rights likewise express the Court's respect for religious freedom.

B. Bostock *held that recognizing LGBT rights is not intended to diminish religious freedom.*

In *Bostock* v. *Clayton County*, 140 S. Ct. 1731 (2020), the Court held that the ban on sex discrimination in Title VII of the Civil Rights Act of 1964 implicitly

extends to discrimination based on sexual orientation or gender identity. *Id.* at 1737. This holding came with the assurance that religious freedom would not be jeopardized. The Court agreed that expanding the coverage of Title VII risked forcing "some employers to violate their religious convictions." *Id.* at 1753–54. But the Court also emphasized its commitment to "preserv[e] the promise of the free exercise of religion enshrined in our Constitution[.]" *Id.* at 1754. To that end, "future cases" must give "careful consideration" to how *Bostock*'s reading of Title VII would impact legal protections for religious believers, including Title VII's religious employer exemption, the "super statute" of RFRA, and the ministerial exception. *Id.*

Dissenting Justices shared the majority's concern about the implications of an expanded Title VII. Justices Alito and Thomas warned that Title VII should accommodate churches and other religious organizations in advocating their religious messages on marriage. *Id.* at 1781 (Alito, J., dissenting) (writing that otherwise such messages "may be lost if the school employs a teacher who is in a same-sex relationship"). Like the majority, Justice Kavanaugh acknowledged the "important exemption[s] for religious organizations" found in federal law and the First Amendment. *Id.* at 1823 n.2 (Kavanaugh, J., dissenting).

Bostock reflects the same broad commitment to pluralism in this fraught arena as *Obergefell*. The Court reassured the country that recognizing LGBT rights does not signal the retreat of religious freedom. Once again, the Court affirmed the necessity of applying legal "doctrines protecting religious liberty." *Id.* at 1754.

C. Lawrence *and* Romer *acknowledge respect for religious freedom.*

Other decisions establishing LGBT rights likewise respect religious viewpoints and those who hold them.

1. *Lawrence* v. *Texas*, 539 U.S. 558 (2003), voided on substantive due process grounds a Texas law criminalizing private homosexual conduct. *Id.* at 578. There too, the Court included religion among the "powerful voices" that had spoken on human intimacy. *Id.* at 571. The permissibility of same-sex relations had long "been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family." *Id*. The Court acknowledged that these beliefs reflected "profound and deep convictions[.]" *Id.* Like *Obergefell*, *Lawrence* affirmed the right of religious people to speak with a "powerful voice[ ]" on matters of human sexuality. See *id.*

2. *Romer* v. *Evans*, 517 U.S. 620 (1996), overturned a popular referendum amending the Colorado Constitution to prohibit laws singling out gays and lesbians for special protection. *Id.* at 630–31. There, the Court stressed that Colorado may not "deem a class of persons a stranger to its laws." *Id.* at 635. But it acknowledged that the referendum aimed to secure "respect for other citizens' freedom of association, and in particular, the liberties of landlords or employers who have personal or religious objections[.]" *Id.* Securing such respect was a legitimate aim for the State, the Court noted, but the amendment's broad language was "far removed" from that concern. *Id.*

Read together, major LGBT rights decisions from *Romer* to *Bostock* teach that in recognizing LGBT rights the Court will also ensure that religious freedom is secure. *Obergefell* specifically held that

"[t]he First Amendment ensures that religious organizations and persons are given proper protection." 576 U.S. at 679. Because petitioners invoke the First Amendment, we next review what such protection means.

II. SETTLED FIRST AMENDMENT PRINCIPLES CONFER VIGOROUS PROTECTION FOR RELIGIOUS SPEECH.

The First Amendment declares that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech." U.S. Const., amend I. Religious speech gets double coverage. It is both *speech* within the meaning of the Free Speech Clause and *the exercise of religion* within the meaning of the Free Exercise Clause. See, *e.g.*, *Board of Educ. of Westside Comm'y Schs.* v. *Mergens*, 496 U.S. 226, 250 (1990); *Good News Club* v. *Milford Cent. Sch.*, 533 U.S. 98, 121 (2001) (Scalia, J., concurring).

Numerous decisions demonstrate that "private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression[.]" *Capitol Square Review & Advisory Bd.* v. *Pinette*, 515 U.S. 753, 760 (1995). As Justice Scalia memorably wrote, "government suppression of speech has so commonly been directed *precisely* at religious speech that a free-speech clause without religion would be Hamlet without the prince." *Id.* at 759 (emphasis in original). Repeatedly, in a variety of contexts and under various theories, this Court has assiduously protected religious speech against government suppression. The following are a few examples demonstrating this Court's vigor in securing that fundamental right.

1. Religious people and institutions, including *amici*, often exercise religion through speech. "Adherents of particular faiths and individual churches frequently take strong positions on public issues including * * * vigorous advocacy of legal or constitutional positions." *Walz* v. *Tax Comm'n of N.Y.*, 397 U.S. 664, 670 (1970). Every year, this Court receives scores of *amicus* briefs from religious organizations advocating diverse viewpoints on important public controversies. Compare, *e.g.*, Brief of the Union of Orthodox Jewish Congregations of America as *Amicus Curiae* in Support of Petitioners, *Carson* v. *Makin* (No. 20-1088) (criticizing the distinction between religious status and use in public funding) with Brief of Religious and Civil-Rights Organizations as *Amici Curiae* in Support of Respondents, *id.* (defending the distinction between religious status and use in public funding). This brief illustrates that phenomenon. Formal court filings are only one instance of religious speech. In legislatures and city councils, workplaces and street corners, blog posts and kitchen tables, Americans often couch their opinions on matters of public concern in the grammar of faith.

But religious speech on matters of public concern is not all that the Free Speech Clause protects. It guards religious speech in a broad array of settings. Religious speech has been sheltered under the Free Speech Clause for believers proselyting door-to-door, *Watchtower Bible and Tract Soc'y of N.Y. Inc.* v. *Stratton*, 536 U.S. 150, 153 (2002); holding worship meetings in public parks, *Niemotko* v. *Maryland*, 340 U.S. 268, 269–70 (1951); showing a religious film at a public school, *Lamb's Chapel* v. *Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 388–89 (1993); and publishing a newspaper with a Christian viewpoint, *Rosenberger* v. *Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 825–26 (1995). These and other decisions protecting

religious speech have established leading principles under the First Amendment.

2. A leading principle of free speech is that government may not compel people and institutions (religious or not) to deliver its preferred message. Take *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 (1943). It held that the First Amendment prevented a school board from compelling schoolchildren to participate in the Pledge of Allegiance. *Id.* at 641. Jehovah's Witness students objected to the Pledge on religious grounds. *Id.* at 629. The students were expelled and threatened with criminal juvenile reformatories, and their parents were prosecuted and fined. *Id.* at 630. Justice Jackson, in a stirring tribute to freedom of thought and speech, explained that "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion *or force citizens to confess by word or act their faith therein*." *Id.* at 642 (emphasis added).

Another case illustrating the freedom from compelled speech is *Wooley* v. *Maynard*, 430 U.S. 705, 714 (1977), where a man refused to display New Hampshire's state motto, "Live Free or Die," on his car's license plate. *Id.* at 707. For this violation of State law he was prosecuted three times in five weeks and ultimately served 15 days in county jail. See *id.* at 708, 712.

On certiorari, the question presented was "whether the State may constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public." *Id.* at 713. The Court concluded that the State may not compel the individual's speech. *Id.* The majority opinion began

with the axiom that First Amendment protections "include[ ] both the right to speak freely and the right to refrain from speaking at all." *Id.* at 714 (citing *Barnette*, 319 U.S. at 633–34). It stressed that the Constitution denies States authority to "force[ ] an individual * * * to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable." *Id.* at 715. And it added that "where the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message." *Id.* at 717.

Other decisions have likewise rebuffed government attempts to compel private speech. See also *Nat'l Inst. of Family and Life Advoc.* v. *Becerra*, 138 S. Ct. 2361, 2377 (2018) (voiding a "government-scripted, speaker-based disclosure requirement that is wholly disconnected from California's informational interest"); *Riley* v. *Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 798 (1988) (holding that a State law compelling the disclosure of fees charged by fundraisers was compelled speech that would "clearly and substantially burden the protected speech" of fundraisers).

3. Another important principle is that government may not place arbitrary impediments on religious speech. In *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940), a pair of Jehovah's Witnesses were charged with preaching without a license and breach of the peace. *Id.* at 300–04. As to the licensing scheme, the Court found that it allowed unbounded discretion for a government official to judge the religiosity of a solicitor's pitch. "[T]o condition the solicitation of aid for the perpetuation of religious views or systems upon a license, the grant of which rests in the exercise of a

determination by state authority * * * is to lay a forbidden burden upon the exercise of liberty protected by the Constitution." *Id.* at 307. As to the supposed breach of the peace, the Jehovah's Witnesses committed "no assault or threatening of bodily harm, no truculent bearing, no intentional discourtesy, no personal abuse" and so had been engaged in constitutionally protected speech. *Id.* at 310. Similar laws have been likewise ruled invalid. See, *e.g.*, *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943) (voiding a municipal solicitation tax on the sale of religious literature).

4. Still another free-speech principle is that government may not deny religious speakers equal access to public property. *Widmar* v. *Vincent*, 454 U.S. 263 (1981), is the leading decision on that point. It holds that a university must allow a student religious group to use university classrooms. *Id.* at 274. Since secular student groups had access to classrooms, the university had created an open forum and could not exclude groups who met there for "religious worship and discussion. These are forms of speech and association protected by the First Amendment." *Id.* Religious speech, in fact, is fully secured "by the Free Exercise Clause and in this case by the Free Speech Clause as well." *Id.* at 277–78.

Other decisions affirm that religious speakers are entitled to equal access when the government opens its facilities for use by others. *Good News Club*, 533 U.S. at 102, 106, 108–09 (a school violated the Free Speech Clause by refusing after-hours access to its property for a religious group when it opened its property for other groups to conduct secular discussions); *Lamb's Chapel*, 508 U.S. at 397 (1993) (holding that a school district violated the Free Speech Clause by denying permission for a religious group to show

after-hours films on school property when other groups were given after-hours access).

5. A crucial free-speech principle is that government may not discriminate against viewpoints it dislikes. *Rosenberger*, 515 U.S. at 828 (1995) affirmed that rule forcefully. There, the Court held that a public university violated the free speech of a student-run religious publication by denying financial support on equal terms with other student publications. *Id.* at 819. "In the realm of private speech or expression, government regulation may not favor one speaker over another" and "[d]iscrimination against speech because of its message is presumed to be unconstitutional." *Id.* at 828. By funding secular student publications, the university created a limited public forum and could not treat religious publications differently from others. *Id.* at 829.

6. Free-speech protections do not slacken because some may consider particular religious speech objectionable. Indeed, "a function of free speech under our system of government is to invite dispute: it may indeed *best* serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Terminiello* v. *Chi.*, 337 U.S. 1, 4 (1949) (emphasis added). This understanding applies without qualification to religious speech:

> Plainly a community may not suppress * * * the dissemination of views because they are unpopular, annoying or distasteful. If that device were ever sanctioned, there would have been forged a ready instrument for the suppression of the faith which any minority cherishes but which does not happen to be in

> favor. That would be a complete repudiation of the philosophy of the Bill of Rights.

Murdock, 319 U.S. at 116.

The Court's longstanding commitment to protecting religious speech in diverse settings where government seeks to suppress it gives *Obergefell*'s promise of "proper protection" for religious people and institutions real meaning. 576 U.S. at 679. It remains to explain how these principles apply in this case.

III. RELIGIOUS SPEECH ABOUT MARRIAGE REQUIRES VIGILANT CONSTITUTIONAL PROTECTION.

A. Colorado seeks to censor and compel petitioners' speech about marriage.

The question presented asks "[w]hether applying a public-accommodation law to compel an artist to speak or stay silent violates the Free Speech Clause of the First Amendment." Lorie Smith's identity as an artist does not determine her free speech rights. Free speech jurisprudence ordinarily depends on the character of the speech—not the identity of the speaker. See *First Nat'l Bank of Bos.* v. *Bellotti*, 435 U.S. 765, 777 (1978) ("The inherent worth of the speech * * * does not depend upon the identity of its source, whether corporation, association, union, or individual."); accord *Pac. Gas and Elec. Co.* v. *Pub. Util. Comm'n of Cal.*, 475 U.S. 1, 8 (1986) (holding that the "identity of the speaker is not decisive in determining whether speech is protected").

It is undisputed that petitioners are engaged in religious speech. They have brought a pre-enforcement challenge to contest Colorado's application of its public accommodations statute to suppress their speech. App. 7a. In particular, Smith wants to expand her

website-design business by offering custom websites for weddings. See App. 186a. The parties have stipulated that Smith will "gladly create custom graphics and websites" for LGBT customers. *Id.* 184a.[3] But her religious beliefs as a Christian preclude her from creating custom sites that promote or facilitate same-sex marriage and various other things. *Id.* 188a. To publicly clarify her position, she wants to post a short message explaining how her faith affects what services she will provide. Her religious beliefs do not allow her to create online content that "contradicts biblical truth; demeans or disparages others; promotes sexual immorality; supports the destruction of unborn children; incites violence; or *promotes any conception of marriage other than marriage between one man and one woman*." *Id.* 184a (emphasis added). The parties agree that Smith's religious beliefs regarding marriage are sincere. See *id.* 183a, 188a.

B. Petitioners' speech is protected under the Free Speech Clause.

1. A divided panel of the Tenth Circuit found that petitioners' creation of custom websites consists of "pure speech." App. 20a. It also found that the challenged provisions of Colorado law are not content-neutral. *Id.* 24a. Yet, implausibly, the lower court held

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[3] Smith's narrow objection to assisting with a same-sex marriage sharply distinguishes her claims from cases involving a blanket refusal to serve members of a protected class. See *Newman* v. *Piggie Park Enter., Inc.*, 256 F. Supp. 941, 945 (D.S.C. 1966) (owner of restaurant chain could not exclude black patrons based on his religious beliefs opposing racial integration), *aff'd in relevant part and rev'd in part on other grounds*, 377 F.2d 433 (4th Cir. 1967), *aff'd and modified on other grounds*, 390 U.S. 400 (1968).

that such restrictions survive the severe rigors of strict scrutiny.

First, the Tenth Circuit took the "remarkable—and novel—stance that the government may force [petitioners] to produce messages that violate [Smith's] conscience." *Id.* 51a (Tymkovich, C.J., dissenting). Colorado law prohibits a place of public accommodations from refusing to perform an otherwise available service "because of [the customer's] * * * sexual orientation." Colo. Rev. Stat. § 24-34-601(2)(a). That prohibition unmistakably "'compels' [petitioners] to create speech that celebrates same-sex marriages." App. 22a. As such, the law "works as a content-based restriction." *Id.* 23a. Compelling speech in support of same-sex marriage is intended to counter what Colorado views as "a long and invidious history of discrimination based on sexual orientation." *Id.* 23a–24a. The Tenth Circuit ominously observed that "[e]liminating such ideas" opposed to gay equality "is [the Colorado law's] very purpose." *Id.* 24a. In a case about religious beliefs and speech about marriage, that shocking fact alone should have ended the matter in petitioners' favor.

Yet this open assault on free speech was permissible, the Tenth Circuit held, because "Colorado has a compelling interest in protecting both the dignity interests of members of marginalized groups and their material interests in accessing the commercial marketplace." *Id.* 24a. In the court's view, the State could not satisfy the narrow-tailoring prong of strict scrutiny as to its interest in protecting dignitary interests, but it could satisfy that prong as to its interest in preserving equal access to the market. As the Tenth Circuit explained, "limiting offensive speech" is not narrowly tailored to guarding the dignitary interests of LGBT residents. *Id.* 26a. But the court reasoned that

excusing petitioners from providing website-design services for couples to facilitate or celebrate a same-sex marriage "would necessarily relegate LGBT consumers to an inferior market." *Id.* 28a. This is because their services are "unavailable elsewhere" and "inherently not fungible." *Id.* By equating *equal access to the market* with *access to a market with Smith as a participant* the court sought to justify compelling petitioners' speech. Petitioners must produce online content contrary to Smith's sincere religious beliefs, the Tenth Circuit held, as a supposedly narrowly tailored means of serving Colorado's interest in ensuring LGBT residents' access to the commercial marketplace. *Id.*

Second, the Tenth Circuit endorsed the State's censorship of petitioners' religious speech. Colorado law bars a place of public accommodations from "publish[ing]" any statement that its services "will be refused * * * because of * * * sexual orientation." Colo. Rev. Stat. § 24-34-601(2)(a). Petitioners may not publish their "proposed denial of services," the court of appeals reasoned, because a State "may prohibit speech that promotes unlawful activity, including unlawful discrimination." App. 34a, 33a. Colorado may bar petitioners' statement of faith, the court said, because it "expresses an intent to deny service based on sexual orientation." *Id.* 34a.

Both steps of the Tenth Circuit's analysis distort the First Amendment and the strict scrutiny test. Given this Court's assurances in *Obergefell*, Colorado has no compelling interest in suppressing petitioners' religious speech about marriage—or in coercing speech about marriages that violate Smith's religion—to advance a seemingly unbounded conception of LGBT rights. No decision of this Court has suggested otherwise. States

have compelling interests in protecting the rights of LGBT people in other contexts. But *Obergefell* forecloses that possibility in public accommodations cases involving religious speech about marriage.

The Tenth Circuit particularly failed in its narrow tailoring analysis. Removing petitioners' website-design services from the market would have no discernible effect on the ability of Colorado same-sex couples to access such services. And the court's made-up notion that the loss of a single participant in a particular market denies equal access for a protected class is wholly flawed. If compelling Smith to craft messages of support or approval of same-sex marriage contrary to her faith counts as a narrowly tailored means of ensuring equal access to the market for website-design services, "narrow tailoring must refer not to the standards of Versace, but to those of Omar the tentmaker." *Hill* v. *Colorado*, 530 U.S. 703, 749 (2000) (Scalia, J., dissenting). That conception of narrow tailoring would free Colorado to compel speech in expansive and troubling ways. A Christian bookstore could be forced to stock and sell literature advocating same-sex sexual relationships. A gay proprietor whose religious faith embraces same-sex marriage could be forced to manufacture t-shirts emblazoned with homophobic slogans. Indeed, on the Tenth Circuit's theory, a mere *supplier* to these businesses would be forced to provide such products in violation of his or her religion despite no interaction with the customer. Business owners, including sole proprietors like Smith, would have to routinely violate their faith to enter the marketplace.

Intolerable results like these are explained, perhaps, by the lower court's reluctance to uphold First Amendment rights in the face of a nondiscrimination

statute. But no mere statute, however well intended, can trump the Constitution. That is the lesson of *Masterpiece Cakeshop*, 138 S. Ct. at 1719. There, under the same statute disputed here, Colorado found that Jack Phillips unlawfully discriminated by refusing to create a custom wedding cake for a same-sex couple. *Id.* at 1728. Yet this Court struck down the State's hostile application of its public accommodations law as offensive to the First Amendment. See *id.* at 1732 ("The Commission's hostility was inconsistent with the First Amendment's guarantee that our laws be applied in a manner that is neutral toward religion.").

Indeed, *Masterpiece Cakeshop* resembles this case in many ways, and where it materially differs this case is stronger. Like Phillips, Smith will serve LGBT customers so long as her work does not promote same-sex marriage. *Ibid.* And like Phillips, Smith has collided with Colorado's refusal to accommodate her religion. See App. 7a–8a. True, the openly expressed anti-religious animus that *Masterpiece Cakeshop* denounced is not overt here. But Colorado's determination to use its public accommodations law to punish dissenting religious expression about marriage has the same effect on petitioners' First Amendment rights, rendering the absence of open hostility a distinction without much difference. In both cases the purpose of government action was to suppress a disfavored religious viewpoint in the interest of an extremely expansive interpretation of nondiscrimination law. Where the cases truly differ is in the nature of the punished expression. While some have questioned whether Phillips' religious expression was indeed burdened by having to bake a cake, here petitioners' services undisputedly involve "pure speech," *id.* 20a. See *Masterpiece Cakeshop*, 138 S. Ct. at 1723 (noting parties' disagreement about whether Phillips refused

to "design a special cake with words or images celebrating the marriage"). The distance, therefore, between *Masterpiece Cakeshop* and this case is narrow. There, this Court honored *Obergefell's* promise in the context of official anti-religious bigotry. Here, it should honor that promise in the context of Colorado's attempts to suppress religious speech.

Masterpiece Cakeshop hardly stands alone. In case after case, this Court has taught that constitutional rights prevail over contrary State and local nondiscrimination laws. See, *e.g.*, *Boy Scouts of Am.* v. *Dale*, 530 U.S. 640, 661 (2000) (holding that State public accommodations law could not require Boy Scouts to readmit openly gay scoutmaster without violating freedom of expressive association); *Hurley* v. *Irish-Am. Gay, Lesbian and Bisexual Grp. of Bos.*, 515 U.S. 557, 579 (1995) (State public accommodations law did not justify requiring private organization to admit LGBT group in city parade); see also *Fulton*, 141 S. Ct. 1868, 1881 (2021) (nondiscrimination ordinance fails free exercise challenge by religious organization that refused to place foster children with same-sex couples). Even when a nondiscrimination requirement does prevail, the Court has taken pains to say that the law remained within constitutional guardrails. See *Roberts* v. *U.S. Jaycees*, 468 U.S. 609, 623 (1984) (noting that the challenged law "does not aim at the suppression of speech, does not distinguish between prohibited and permitted activity on the basis of viewpoint, and does not license enforcement authorities to administer the statute on the basis of such constitutionally impermissible criteria").

Such a ruling would be consistent with the settled First Amendment principles we describe above, which limit how far Colorado law can advance nondiscrim-

ination norms at the expense of religious freedom. After all, "[t]he Constitution * * * is concerned with means as well as ends." *Horne* v. *Dep't of Agric.*, 576 U.S. 350, 362 (2015). Colorado cannot apply its law as an instrument for compelling orthodoxy. "While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." *Hurley*, 515 U.S. at 579.

Colorado admits that its law operates as an engine of orthodoxy in this contested religious and moral arena. Petitioners may create custom wedding websites only if they express messages in favor of same-sex marriage and remain silent about Smith's religious beliefs. The State's demands here contradict fundamental principles under the Free Speech Clause and the pluralistic heart of *Obergefell*. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas* v. *Johnson*, 491 U.S. 397, 414 (1989); see also *Matal* v. *Tam*, 137 S. Ct. 1744, 1763 (2017) ("We have said time and again that the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.") (internal quotation marks omitted); see also *id.* (collecting cases). "Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection." *Hustler Mag., Inc.* v. *Falwell*, 485 U.S. 46, 55 (1988). By applying its public accommodations law to compel and censor petitioners' speech in violation of their religious beliefs, Colorado is evidently trying to "produce thoughts and statements acceptable to some

groups or, indeed, all people." *Hurley*, 515 U.S. 579. But that objective is "fatal" under the First Amendment. *Ibid.*

C. Religious speech about marriage needs the rigorous protection that Obergefell *promised.*

1. The conflict here—between petitioners' religious speech about marriage and Colorado's nondiscrimination law—holds significance for *amici* for reasons that transcend this case.

Marriage holds for millions of Americans a central place in our religious beliefs and day-to-day lives. Roman Catholicism has a rich tradition recognizing marriage as a sacrament blessed by Jesus Christ Himself—and indispensable to the common good. See Catechism of the Catholic Church § 1601 (2d ed. 1994). Protestants, drawing on the Bible, focus on marriage as an institution that unites a man and woman in a divinely sanctioned union for companionship, for the procreation and rearing of children, and for the benefit of society. See English Standard Version, Study Bible 2543–44 (2008). Leaders of The Church of Jesus Christ of Latter-day Saints have declared that "[m]arriage between a man and a woman is ordained of God," and that "[h]usband and wife have a solemn responsibility to love and care for each other and for their children." The First Presidency and Council of the Twelve Apostles of The Church of Jesus Christ of Latter-Day Saints, The Family: A Proclamation to the World (Sept. 23, 1995), *available at* http://www.churchofjesuschrist.org/bc/content/shared/content/english/pdf/36035_000_24_family.pdf. And marriage in the Sunni Muslim understanding is, by its nature, only between men and women and, along with its rich, multilayered array of secondary purposes, has the primary purpose of procreation. See, *e.g.*, Quran, *Al-Furqan* 25:74. Despite

changes in the law, faith communities like *amici* still cherish and live these religious beliefs.

2. Without vigilant protection for free speech in cases like this—which have deep symbolic significance as well as practical implications—those with traditional religious understandings of marriage, family, and sexuality will be suppressed and silenced. In *Obergefell*, more than one Justice expressed concern that adopting a right to same-sex marriage could force those with contrary religious beliefs to the margins of American society. See 576 U.S. at 711 (Roberts, C.J., dissenting) (a right to same-sex marriage "creates serious questions about religious liberty"); *id.* at 734 (Thomas, J., dissenting) (anticipating conflicts "as individuals and churches are confronted with demands to participate in and endorse civil marriages between same-sex couples"); *id.* at 741 (Alito, J., dissenting) (worrying that the majority decision "will be used to vilify Americans who are unwilling to assent to the new orthodoxy" and threaten "those who cling to old beliefs * * * [with] being labeled as bigots and treated as such by governments, employers, and schools").

But as discussed, the Court's majority promised a very different outcome—one of respect, dignity and protection for traditional religious beliefs. See *Obergefell*, 576 U.S. at 679–80; see also Alexander Dushku, *The Case for Creative Pluralism in Adoption and Foster Care*, 131 Yale L.J.F. 246, 250 (2021) (stating "nothing in *Obergefell* suggests that the Court will allow the effective suppression of religious beliefs about marriage").

Colorado's position here presents the very threat the *Obergefell* dissenters forecast and the majority promised to guard against. The State demands that religious believers like petitioners endorse same-sex marriage,

not merely acquiesce in its legality—or face government investigation, oversight, and penalties. See *Masterpiece Cakeshop*, 138 S. Ct. at 1725 (quoting Colo. Rev. Stat. § 24-34-605). If found to violate State law—a certainty under the Tenth Circuit's analysis—that process will end with an official declaration that petitioners have discriminated. That pronouncement will inflict public stigma. Petitioners will be officially declared *discriminators*. And all this will occur solely because Smith insists on expressing her sincere and honorable beliefs about marriage—and not being forced to express contrary beliefs—just as *Obergefell* promised.

Equally troubling is the prospect that Colorado is imposing what amounts to a civil disability, a condition on petitioners' civil rights, based on religion. The State has put petitioners to an intolerable choice. Either they conform with the State's orthodoxy on same-sex marriage, or Smith cannot ply her trade in the wedding industry. Ironically, in Colorado's use of its public accommodations law as a condition of pursuing an occupation one hears an echo of laws that were a notorious feature of an established church during America's colonial and founding eras. The parallel is worth noting briefly as a reminder of the dangers of legally established orthodoxies.

English laws during the seventeenth and eighteenth centuries excluded Catholics and other nonconformists (non-Anglicans) from certain occupations because of their faith. See, *e.g.*, Corporation Act 1661, 13 Car. 2 1 c. 321, § IX (Eng.), *reprinted in* English Historical Documents 1660–1714, at 376 (Andrew Browning ed., 1953) (requiring civic and military officials, and schoolteachers, to take communion in the Anglican church or lose their positions); 4 William Blackstone,

Commentaries 55 (1769) (explaining that Catholics "can hold no office or employment"). For some time, American laws followed a similar pattern. See Md. Const., art. XXXV (1776) (denying residents any public office or a license to practice law unless they made a public "declaration of a belief in the Christian religion").

Colorado's demand that petitioners remain silent about Smith's faith and deliver only the State's preferred messages of support and approval for same-sex marriage impose an analogous kind of barrier. Religious believers that welcome same-sex marriage may work in the wedding industry without official sanctions. Religious believers who dissent from the State's position may not engage in such work unless they violate their religious convictions.

Censorship. Compelled speech. Exclusion from one's chosen occupation. None of these are necessary to maintain a right to same-sex marriage. *Obergefell* held, to the contrary, that recognizing that right did not "disparage[ ]" religious people and institutions for their adherence to age-old understandings of marriage. 576 U.S. at 672. Yet Colorado is seemingly determined to render religious believers like Smith "a stranger to its laws." *Romer*, 517 U.S. at 635.

Religious people and institutions who cherish traditional marriage have a First Amendment right to say what they believe and refrain from saying what they disbelieve, without becoming outcasts or pariahs because of their sincere religious beliefs. They need constitutional "breathing space," no less than other unpopular groups. *NAACP* v. *Button*, 371 U.S. 415, 433 (1963). The freedoms enshrined in the First Amendment—including the freedom of speech—"are delicate and vulnerable, as well as supremely precious." *Ibid.* More than ever, those freedoms are under

assault, especially when it comes to unpopular beliefs about same-sex marriage. See also *Iancu* v. *Brunetti*, 139 S. Ct. 2294, 2302–03 (2019) (Alito, J., concurring) ("At a time when free speech is under attack, it is especially important for this Court to remain firm on the principle that the First Amendment does not tolerate viewpoint discrimination."). Religious speech about marriage, no less than any other topic, should remain "uninhibited, robust, and wide-open." *N.Y. Times Co.* v. *Sullivan*, 376 U.S. 254 (1964).

* * *

Lorie Smith occupies, or should occupy, a special place in our public discourse—a genuine religious dissident. See *Wisconsin* v. *Yoder*, 406 U.S. 205, 226 (1972) ("Even their idiosyncratic separateness exemplifies the diversity we profess to admire and encourage."). With malice toward no one, she is bravely defying strong popular opinion to remain true to her conscience. In that, she joins an honorable tradition of religious dissent—a tradition stretching back to the Greek tragedy of *Antigone*. That same tradition includes a biblical account of three men who would not bow to the king's image. See Daniel 3:18 (KJV). Colorado does not threaten to hurl Smith into a "burning fiery furnace." *Id.* But the State does seek to compel her and her business to produce messages that violate her conscience and to censor her religious speech. And that the Constitution forbids.

CONCLUSION

For these reasons, the Court should declare the challenged provisions of Colorado law void as applied to petitioners and reverse the judgment below.

Respectfully submitted,

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