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 OF *AMICUS CURIAE* THOMAS MORE LAW CENTER IN SUPPORT OF PETITIONERS

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STATEMENT OF IDENTITY AND INTERESTS OF THE *AMICUS CURIAE*

Pursuant to Supreme Court Rule 37, *Amicus Curiae*, the Thomas More Law Center, respectfully submits this brief requesting that the Court defend and protect the free exercise of religion and speech guaranteed by the First Amendment.[1]

The Thomas More Law Center ("TMLC") is a national, public interest law firm that defends and promotes America's Christian heritage and moral values, including the religious freedom of Christians, time-honored family values, and the sanctity of all human life from the moment of conception to natural death. TMLC accomplishes its mission through litigation, education, and related activities. TMLC's purpose is to be the sword and shield for people of faith, providing legal representation without charge. It achieves this goal principally through litigation, seeking out significant cases consistent with its mission. TMLC has over 60,000 members nationwide.

Last term, TMLC was before this honorable Court as a Petitioner seeking to protect its donors'

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[1] Petitioners and Respondents have granted blanket consent for the filing of *amicus curiae* briefs in this matter. *Amicus Curiae* further states that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this *amicus* brief.

information and First Amendment freedom of association from the State of California, who required that non-profit corporations disclose their top donors' names and addresses to solicit in the state. *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373 (2021). This Court found California's disclosure requirement facially unconstitutional. *Id*. at 2385. TMLC has experienced, firsthand, the hardship and stress caused by a state's regulatory overreach and how this infringement can chill First Amendment liberty and expression.

TMLC believes that Colorado's Anti-discrimination Act ("CADA") unconstitutionally forces Petitioners to create speech that their religious faith and conscience forbid. Public accommodation laws must not be used compel Petitioners, or any other Americans, to violate their sincerely held religious beliefs.

BACKGROUND

Petitioner Lorie Smith is a Christian business owner who believes in the Biblical view of marriage. Pet.App.181a. She owns 303 Creative, a company specializing in website and graphic design, marketing, and social media messaging. *Id*. Petitioners create graphic art and design websites. *Id*.

Petitioners strive to follow and honor God in all she does, including the artistry and work she creates for customers through 303 Creative. Pet.App.180a-83a. Therefore, Petitioners cannot accept work that demeans Christianity or its biblical teachings

including the teaching that marriage is a sacred bond exclusively between one man and one woman. Pet.App.183a-84a. Recognizing that potential customers might request that Petitioners create content that would conflict with their religious faith, she developed terms to reflect this in the general provisions of their Contract of Services that she provides for their customers. Pet.App.184a. Petitioners' contract provision runs afoul to CADA in two ways. First, CADA prohibits both direct and indirect refusals to create content due to a customer's "sex, sexual orientation, marital status." Colo. Rev. Stat. 24-34- 601(2)(a); Pet.App.171a–72a. Second, CADA prohibits a business from communicating to customers that its "services" will be declined or would be "unwelcome, objectionable, unacceptable, or undesirable because of" someone's protected status. Colo. Rev. Stat. 24-34- 601(2)(a); Pet.App.172a. While Petitioners' beliefs are not built upon animus for any person in a protected class and are solely motivated by adherence to their faith, Colorado's Commission on Civil Rights considers Petitioners to be "using religion to perpetrate discrimination." J.A. 190.

The Tenth Circuit upheld the Commission's understanding and application of CADA. While it found that Petitioners' artistic creation was speech under the First Amendment and invoked strict scrutiny, the court surprisingly held that the State's application of the law satisfied this most demanding standard in constitutional law. Pet.App.20a-28a. The Tenth Circuit went so far as stating that

"[e]liminating" Petitioners' religious expression was the "very purpose" of CADA. Pet.App.23a-24a.

Chief Judge Tymkovich wrote a dissent noting that the majority of the Tenth Circuit incorrectly applied strict scuritny and its application of the law was "unprecedented." Pet.App.51a, 80a. He warned, "[n]o case has ever gone so far." Pet.App.51a. The Chief Judge wrote that Petitioners' religious expression need not be controlled or penalized by the State because "there are reasonable, practicable alternatives Colorado could implement to ensure market access while better protecting speech" for religious individuals like Petitioner', Pet.App.78a. The Chief Judge warned that the majority's holding "[t]aken to its logical end, the government could regulate the messages communicated by all artists." Pet.App.80a.

SUMMARY OF THE ARGUMENT

The Tenth Circuit's decision violates Petitioners' right to religious expression and free speech under the First Amendment. The First Amendment prohibits the State from enacting a public accommodation law that infringes upon the free exercise of religion or abridges the freedom of speech. U.S. Const. amend. I. Inherent in these freedoms is the understanding that the government must allow its citizens to freely exercise and voice their religious and political beliefs without interference or punishment.

This Court affirmed this essential constitutional principal in *Cantwell v. Connecticut*, 310 U.S. 296,

300-311 (1940) to invalidate a state law prohibiting a group of Jehovah's witnesses from proselytizing door-to-door. This Court found that the First Amendment freedoms of religious exercise and free speech outweighed the State's interests in controlling solicitations and public order. *Id*. The Court championed religious and political discourse and the disagreement that naturally follows such discourse as evidencing liberty in an enlightened society. *Id*. 310; *see also W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 641–42 (1943).

The lower court's decision, unfortunately ignore this founding principle. The State's application of CADA violates Petitioners' religious expression. It forces Petitioners to choose to either: (1) create speech that is directly contrary their religious beliefs or (2) face prosecution under CADA. Under the First Amendment, a State may only pass a law that burdens religious exercise when the law is facially neutral and general applicable. *See, e.g.*, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 523 (1993); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2756 (2014). When a law specifically burdens a particular religious belief, however, it is not neutral or generally applicable, and therefore must be "justified by a compelling governmental interest" and be "narrowly tailored to advance that interest." *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 531-32. Respondents' application of CADA is not justified by a compelling governmental interest and is not narrowly tailored. Respondents' right to operate a business creating art, in the form of graphic or website design, in accordance with their faith is protected under the

First Amendment. Respondents' application of CADA violates Petitioners' constitutional rights.

Furthermore, the lower court's opinion contradicts this Court's precedent regarding the weight accorded to free exercise and free speech concerns when these liberties conflict with a State public accommodations law. *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston,* 515 U.S. 557, 568-81 (1995). The *Hurley* Court held that a State must not interfere with these important liberties or compel an individual to espouse a belief contrary to his or her religious beliefs "however enlightened [the] purpose may strike the government." *Hurley*, 515 U.S. at 579. The lower court's opinion cannot be squared with *Hurley*, and this Court should reassert the important constitutional principles protected by that holding.

ARGUMENT

The First Amendment embodies an ideal that is uniquely American—that true liberty exists only where men and women are free to hold and exercise conflicting religious and political beliefs. Under this standard, the government must not interfere with its citizens freedom of speech, especially when it espouses a disagreeing viewpoint, but embrace the security and liberty only a pluralistic society affords.

This ideal is well demonstrated by *Cantwell v. Connecticut*, 310 U.S. 296 (1940), the first case this Court analyzed upon incorporating the First Amendment's protection of free exercise through the Due Process Clause of the Fourteenth Amendment. In

Cantwell, this Court invalidated a Connecticut statute requiring individuals to obtain a state license prior to making door-to-door religious solicitations. *Id*. at 303-11. Plaintiffs, Newton Cantwell and his two sons, were Jehovah's Witnesses proselytizing in a predominantly Catholic neighborhood. *Id*. at 300–01. Plaintiffs distributed religious materials and played a phonograph record describing a book called "Enemies," which attacked the Catholic Church. *Id*. at 301. Plaintiffs' speech and actions were not well received and offended men in the neighborhood. *Id*. at 302-03. One man even had to resist the temptation to hit the plaintiff. *Id*. Plaintiffs were charged and convicted of violating Connecticut's solicitation statute and a breach of the peace ordinance. *Id*. at 305-311.

Despite the offense and animosity plaintiffs' actions aroused, this Court reversed their criminal convictions, holding that their conduct was protected by the Free Exercise Clause. *Id*. This Court avowed,

> In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. . . . But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.

Id. at 310.

Three years later, in holding that state action compelling a student to salute the American flag infringed upon a student's religious beliefs, this Court famously declared,

> [W]e apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization. . . . We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the State as those we deal with here, the price is not too great. ***But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order. If 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.***

W. Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 641–42 (1943) (emphasis added).

The need for liberty and raring appeals for freedom remain just as important and relevant today, as when this Court first penned *Cantwell* and *Barnette*. *See,*

e.g., *Watchtower Bible & Tract Soc'y of New York, Inc. v. Vill. of Stratton*, 536 U.S. 150, 169 (2002) ("The rhetoric used in the World War II-era opinions that repeatedly saved plaintiffs' coreligionists from petty prosecutions reflected the Court's evaluation of the First Amendment freedoms that are implicated in this case. The value judgment that then motivated a united democratic people fighting to defend those very freedoms from totalitarian attack is unchanged. It motivates our decision today.").

The Free Exercise Clause of the First Amendment still protects religious individuals from penalties and persecution due to the exercise of their sincerely held religious beliefs. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 523 (1993). This protection includes the right to abstain from actions that violate one's religious faith and expression. *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707 (1981). This right of abstention includes "[b]usiness practices compelled or limited by the tenets of a religious doctrine." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2756 (2014). Indeed, just a few years ago, this Court found that business practices motivated by one's religious faith "fall comfortably within the understanding of the 'exercise of religion' that this Court set out in *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U. S. 872, 877." *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2756. The First Amendment protects Petitioners' right to abstain from certain business practices that directly violate their Christian faith. This Court must reverse the Tenth Circuit's decision that punishes Petitioners' religious expression.

I. THE FIRST AMENDMENT SAFEGUARDS PETITIONERS' RELIGIOUS EXPRESSION AND FREEDOM OF SPEECH.

a. The First Amendment's Free Exercise Clause Requires Reversal.

"The Free Exercise Clause . . . withdraws from legislative power, state and federal, the exertion of any restraint on the free exercise of religion. Its purpose is to secure religious liberty in the individual by prohibiting any invasions there by civil authority." *Abington School District v. Schempp*, 374 U.S. 203, 222-23 (1963). As this Court recognizes, "This principle . . . is so well understood that few violations are recorded in our opinions." *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 523. Under the Free Exercise Clause, a State may only pass a law that burdens religious exercise when the law is facially neutral and of general applicability. *Id.* at 531. *However*, when a law burdens religious exercise because it is *not actually neutral or generally applicable,* it must be "justified by a compelling governmental interest" and be "narrowly tailored to advance that interest." *Id.* at 531-32.

In *Lukumi*, this Court determined that a law is not neutral or generally applicable when it "infringes upon or restricts practices because of their religious motivation," or "in a selective manner imposes burdens only on conduct motivated by religious belief." *Id.* at 533, 543. The Court emphasized that the Free Exercise Clause "forbids subtle departures from

neutrality, and covert suppression of particular religious beliefs." *Id.* at 534 (internal quotations and citations omitted). Here, as in *Lukumi*, Respondents' application of CADA is not generally applicable because individuals who proscribe to certain religious beliefs that differ from Petitioners are unaffected by the State's enforcement of the public accommodation law. For example, individuals who disavow the Christian faith, such as agnostics or atheists, may freely continue their business practices while individuals who ascribe to Christianity and its strict adherence to its biblical teachings are specifically targeted and burdened. Since the Respondents' application of CADA targets individuals who share Petitioners' Christian beliefs, while leaving individuals of other faith persuasions untouched by the law's prohibitions, it is not generally applicable and this Court should apply strict scrutiny analysis.[2]

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[2] If this Court were to find CADA is generally applicable, and thus potentially subject to the rule in *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990), that case would nonetheless be distinguishable on the very grounds cited by the *Smith* Court. This case involves "hybrid" rights of free speech, free exercise, and religious expression and thus falls within the exception the *Smith* Court carved out based on cases such as *Cantwell*, *supra*, and *Wisconsin v. Yoder*, 406 U.S. 205 (1972). *See Smith*, 494 U.S. at 881-82 (citing *Cantwell,* 310 U.S. at 304-307 (invalidating a licensing system for religious and charitable solicitations under which the administrator had discretion to deny a license to any cause he deemed nonreligious); *Murdock v. Pennsylvania,* 319 U.S. 105 (1943) (invalidating a flat tax on solicitation as applied to the dissemination of religious ideas); *Pierce v. Society of Sisters,* 268 U.S. 510 (1925) in conjunction with *Yoder,* 406 U.S. 205 (upholding constitutional right of parents, to direct the education of their children, while invalidating compulsory school-

Indeed, Respondents require that Petitioners choose between (1) disavowing the tenets of their religious faith significant to their biblical worldview and create art and expression to which she disagrees, or (2) facing prosecution under CADA, incurring financial penalties and punishment due to their religious beliefs. This Court has repeatedly held that government regulations imposing such Hobson's choices on its religious citizens violate the First Amendment. *See Thomas,* 450 U.S. at 717 (holding the State must not require a religious individual to choose "between fidelity to religious belief or cessation of work"); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (invalidating the application of a regulation forcing a religious individual "to choose between following the precepts of their religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of their religion in order to accept work, on the other hand."); *Wisconsin v. Yoder*, 406 U.S. 205, 208, 219 (1972) (ruling that the State must not require an individual "to perform acts undeniably at odds with fundamental tenets of their religious belief."). This is the exact type of State action that the Free Exercise Clause forbids and that requires "the most rigorous of scrutiny." *Id.* at 546.

In order to pass strict scrutiny, Respondents must show that CADA was enacted to fulfill a compelling

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attendance laws as applied to Amish parents who refused on religious grounds to send their children to school); *Wooley v. Maynard,* 430 U.S. 705 (1977) (invalidating compelled display of a license plate slogan that offended individual religious beliefs); *Barnette,* 319 U.S. 624 (invalidating compulsory flag salute statute challenged by religious objectors)).

state interest involving a "high degree of necessity." *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2741 (2011). "The State must specifically identify an 'actual problem' in need of solving, and the curtailment of [the asserted right] must be actually necessary to the solution." *See id.* at 2738 (citations omitted). Respondents must demonstrate "some substantial threat to public safety, peace, or order," or an equally compelling interest, that would be posed by exempting the Petitioners. *See Yoder*, 406 U.S. at 230.

Requiring website or graphic design a specific artist is not an interest involving the "highest degree of necessity." On the contrary, other artists could be commissioned to complete the requested work. Respondents have not shown that there is a shortage of such designers in the State of Colorado or that upholding Petitioners' religious expression threatens the State's public safety, peace, or order.

Per CADA, the State of Colorado exempts certain localities used for religious purposes from compliance with its public accommodations law. 24-34-601(1)(a), C.R.S. 2014. In other sections of its statutory scheme, CADA also exempts religious employers from compliance with certain provisions. *See, e.g.*, 24-34-402(6) and (7). There is no constitutional reason why Respondents could not either 1) allow Petitioners a narrow exemption from CADA based solely on their sincerely held religious expression, or 2) interpret CADA in a manner that does not violate the First Amendment.

Respondents have less drastic options available to achieve their stated goal, options that notably do not involve "stifl[ing] the exercise of [Petitioner's] fundamental personal liberties." *Anderson v. Celebrezze*, 460 U.S. 780, 806 (1983). For example, if Respondents wish to ensure that individuals in need or graphic or website design can obtain this service, Respondents could publicly post information pertaining to designers who hold no faith objections to participating in such creation. Amalgamating such a list and making it accessible to the public would involve no material expense and, most importantly, would not require the violation of the fundamental personal liberties of its citizens. The State could also allow designers, such as Petitioners, who hold religious conscience objections that conflict with the State's application of CADA, to subcontract or refer clients to other designers. One could reasonably conclude that the ready availability of numerous, simple alternatives and the State's refusal to implement them demonstrates both Respondent's and the State's irrational animus toward religious people.

b. This Court's Precedent Interpreting the Conflict Between the First Amendment and Public Accommodation Laws Requires Reversal.

The Tenth Circuit's decision cannot be reconciled with this Court's holding in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston,* 515 U.S. 557, 568-81 (1995). In *Hurley*, this Court held that the First Amendment gave the organizers of a private St.

Patrick's Day parade the right to exclude a homosexual group from the parade when the parade organizers believed that the group's presence would communicate a message about homosexual conduct to which they objected. *Id.* The First Amendment protected the parade organizers' right "not to propound a particular point of view," *id.* at 575, and this Court protected the "principle of speaker's autonomy," *id.* at 580. In doing so, this Court unanimously ruled that a State's public accommodations law must not be applied to compel a speaker to communicate an unwanted message or express a contrary viewpoint. This Court condemned the notion that public accommodation laws should force free individuals to express and convey messages to which they disagree because "*this use of the State's power violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message*." *Id.* at 573 (emphasis added).

The *Hurley* Court noted that, "this general rule, that the speaker has the right to tailor the speech, applies not only to expression of value or endorsement, but equally to statements of fact the speaker would rather avoid," *id.* at 573, and the benefit of this rule is not limited to the press or just some people but is "enjoyed by business corporations generally." *Id.* at 574.

Similar to the public accommodations law analyzed in *Hurley*, Colorado's public accommodation law here declares:

> It is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of . . . sexual orientation . . . the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation . . . .

24-34-601(2)(a), C.R.S. 2014.

The Tenth Circuit, like the lower court in *Hurley*, held that the Petitioners' abstinence from participation in creating expression that violates their religious beliefs was tantamount to discrimination "because of . . . sexual orientation." Pet.App.171a–72a. Yet, this Court in later applying *Hurley*, noted that "the parade organizers did not wish to exclude the GLIB [*Irish-American Gay, Lesbian, & Bisexual Group of Boston*] members because of their sexual orientations, but because they wanted to march behind a GLIB banner." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 653–54 (2000). In *Hurley*, the parade organizers did not seek to discriminate against homosexuals, but wished to communicate their St Patrick's Day message as they saw fit, without being compelled to adopt and promote other messages in their parade.

Like the parade organizers whose First Amendment rights this Court protected in *Hurley*, Petitioners do not, and never has, wished to discriminate against anyone based on sexual orientation. Instead, Petitioners simply desire to operate their business in accordance with their Christian faith. Given that Petitioners willingly serve individuals of all sexual orientations, their objections to creating certain expressions is not motivated or based on sexual orientation. Rather, it is based on an honest expression of their sincerely held religious beliefs and that is the only cause for the denial of service when such expression violates her religious conscience. This is a matter of free expression, not one of promoting unfair discrimination.

Petitioners believe that all men are created equal. She just does not believe that all speech is equal or that she can creation or promote all messages. And the First Amendment affords Petitioners the liberty to not be forced or compelled by the State to create expression that she fundamentally cannot as a matter of religious faith. As this Court previously declared, "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.

CONCLUSION

This Honorable Court should vacate and reverse the Tenth Circuit Court of Appeals' decision and

protect the First Amendment, which protects religious expression even when it dissents or is contrary to a State's public accommodation laws.

Respectfully submitted,

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