No. 21-476

In the
Supreme Court of the United States

303 Creative LLC, et al.,
Petitioners.

v.

Aubrey Elenis, et al.,
Respondents.

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

BRIEF OF AMICUS CURIAE OF ASSOCIATION OF CERTIFIED BIBLICAL COUNSELORS INC. IN SUPPORT OF PETITIONERS

MICHAEL S. OVERING
Counsel of Record
EDWARD C. WILDE
790 E. Colorado Blvd., #320
Pasadena, CA 91101
Tel: (626) 564-8600
movering@digitalmedialaw.com
ewilde@digitalmedialaw.com
Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Treatises

INTEREST OF THE AMICUS CURIAE[1]

The Association of Certified Biblical Counselors Inc. ("ACBC") is a Section 501(c)(3) corporation whose purpose is to promote and defend the provision of counseling which accords with historical Christian teaching on human life. They believe freedom and justice will be served by reversal of the ruling of the Tenth Circuit.

INTRODUCTION AND SUMMARY OF ARGUMENT

Neither the government nor any individual can legally coerce a person or business to produce a good or service[2].

---

[1] The parties have consented to the filing of this brief. In accordance with Rule 37.6, counsel affirms 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 the amicus curiae made a monetary contribution to its preparation or submission.

[2] *United States v. Kozminski*, 487 U.S. 931, 942 (1988) ("The Thirteenth Amendment declares that '[n]either slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.'") "Involuntary servitude" is defined to include compulsion to perform an action: "[I]n every case in which this Court has found a condition of involuntary servitude, the victim had no available choice but to work or be subject to legal sanction." *Id.*, p. 943 The exceptions which apply to war-fighting or one convicted of a crime do not apply here. Since the law compels labor under threat of sanction of law, the doctrine of involuntary servitude is implicated.

There are two distinct infringements upon constitutional rights by the Colorado Anti-Discrimination Act (CADA). First, the law requires citizens of Colorado to enter into contracts against their will, and to produce goods or services under penalty of prosecution. To force one to create a product or provide a service is, by definition, "involuntary servitude".

As will be explained below, this is quite different than requiring a true public accommodation to honor contracts. Thus, the law violates the Thirteenth Amendment to the United States Constitution.

Second, since this law mandates the creation of expressive products it violates the First Amendment prohibition against coerced speech and viewpoint discrimination.

Thus, CADA presents a unique offense to the Constitution.

Amicus herein certifies counselors who provide counseling services to the public. The improper designation of those who provide expressive services as "public accommodations" means that members of ACBC could find themselves prohibited from exercising their First Amendment rights.

The government cannot command a citizen to become a book publisher, an artist, a photographer, or otherwise. Nor can a photographer be commanded that she only photograph puppies or train stops.

This does not mean that the government lacks all authority in the area of commerce. When someone

has in fact produced a good and *offered the completed good* for sale, the government can regulate the *sale* of that good. But, the government cannot command a factory to produce photocopiers, file cabinets, or printers. In contrast, once the product has been completed and placed into commerce, the government can regulate the market for that product. The act of placing the completed product into commerce is critical.

This distinction exists between production and sale; and runs throughout the law. The government cannot force a newspaper to hire a particular writer to cover a particular story or write a particular opinion. But when the newspaper is printed and *offered for sale*, the government has the power to regulate the manner of the sale of that newspaper. The government cannot impose editorial control over a newspaper; but once the newspaper is offered for sale, it cannot restrict sales to female readers.

Likewise, if an editor of a collection of essays publishes a limited edition of the book that he does *not sell* but rather gives away, the government cannot force the editor/publisher to give copies to every member of the public.

Thus, the government's power to regulate the distribution of goods and services extends to (1) completed products, (2) which have been offered for sale. It does not have the ability to compel production in the first instance, nor mandate expressive content.

The issue presented by 303 Creative LLC and by amicus arises because the government has gone beyond its power to regulate a completed product

offered for sale and now seeks to extend that authority to compel *the creation* of the product. To be clear: a completed website offered for sale can be regulated; but, the government cannot and must not intervene to tell the website designer that she must create a website or dictate the content of that website.

The difference is critical: the government can command stores to be open to all; and, the wares offered to one, must be made available to all. If a restaurant opens its doors for lunch, the cook may not avoid serving burgers to all who order; but the cook cannot be compelled by law to create Crab Louie for a particular patron. That would violate the Thirteenth Amendment.

This distinction becomes more obvious in the context of speech acts. Compelled expressive activities are subject to a much higher burden on the government to justify. The unconstitutional reach of Colorado in this instance goes beyond the single issue of involuntary servitude (forcing someone to manufacture a good or render a service against his will). Here, the goods and services at issue entail expression protected by the First Amendment.[3] The government is coercing and forbidding speech based

[3] *303 Creative LLC v. Elenis*, 6 F.4th 1160, 1176 (10th Cir. 2021) ("Appellants' creation of wedding websites is pure speech.") Therefore, the federal courts have the duty of protecting that speech. "[T]he federal courts . . . have primary obligation to protect the rights of the individual that are embodied in the Federal Constitution." *Harris v. Reed*, 489 U.S. 255, 267 (1989) (Stevens, J., concurring).

upon its content[4]: moreover, the content restriction is based upon viewpoint[5], which is a particularly pernicious form of content-based restriction.

ARGUMENT

I. COLORADO EQUIVOCATES ON PUBLIC ACCOMMODATION

Equivocation occurs when two different senses of a word are used. It becomes a fallacy when we pretend they mean the same thing in both uses. Here,

---

[4] *303 Creative LLC v. Elenis,* 6 F.4th 1160, 1177 (10th Cir. 2021) ("The Accommodation Clause also 'compels' Appellants to create speech that celebrates same-sex marriages.") The First Amendment prohibits compelled speech. *See*, *e.g.*, *United States v. United Foods, Inc.*, 533 U.S. 405, 410 (2001); *Wooley v. Maynard*, 430 U.S. 705, 714-715 (1977). More than other sorts of restrictions, the act of government *compulsion* is especially demeaning and damaging to a culture of free speech. *See Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31* (2018) 138 S. Ct. 2448, 2464 (2018) ("When speech is compelled, however, additional damage is done. In that situation, individuals are coerced into betraying their convictions. Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning, and for this reason, one of our landmark free speech cases said that a law commanding 'involuntary affirmation' of objected-to beliefs would require 'even more immediate and urgent grounds' than a law demanding silence.") (quoting *Barnette*, 319 U.S. at 633).

[5] *303 Creative LLC v. Elenis*, 6 F.4th 1160, 1178 (10th Cir. 2021) ("Because the Accommodation Clause compels speech in this case, it also works as a content-based restriction.") Such restrictions as a general rule offend the constitution. *See Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018) [content-based restrictions offend the First Amendment]; *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) (same); *see also Matal v. Tam*, 137 S. Ct. 1744, 1765–66 (2017) (viewpoint restrictions offend the First Amendment).

Colorado's argument below obscures the distinction between production and sale by means of equivocating on the phrase "public accommodation".[6] Colorado changes the definition of the words, so that now, a photographer or website designer or book publisher, a counselor, an artist, et cetera, have become a "public accommodation."[7]

It is not contested that a properly denominated "public accommodation" like a common carrier or a retail market can be regulated by non-discrimination laws. The width of doorways, wheelchair ramps are public goods. All true public accommodations have made offers and invited the public inside. That is not the case with a bespoke service or product. A lawyer is not a utility. The trouble here is that the concept of "public accommodation" is being used to describe businesses and persons who are not properly defined as "public accommodations,"[8] as they lack the

---

[6] "Specifically, CADA defines a public accommodation as "any place of business engaged in any sales to the public and any place offering services, facilities, privileges, advantages, or accommodations to the public." Colo. Rev. Stat. § 24-34-601(1). "*303 Creative LLC v. Elenis*, 6 F.4th 1160, 1168 (10th Cir. 2021)

[7] "There may be a tug of appeal in the suggestion that law is a means to justice and the jury is an appropriate tribunal to ascertain justice. This is a simplistic syllogism that harbors the logical fallacy of equivocation, and fails to take account of the different facets and dimensions of the concept of justice. We must not be beguiled by a play on words." *United States v. Brawner* 471 F.2d 969, 988 (D.C. Cir. 1972)

[8] See, Alfred Avins, *What is a Place of "Public" Accommodation*? 52 Marq. L. Rev. 1 (1968); Susan Nabet, *For Sale: The Threat of State Public Accommodations Law to the First Amendment Rights of Artistic Business* 78 Brook.L. Rev. (2012). The nature of the public accommodation doctrine is based upon the fact that

historical meaning of those words. Even though their places of business may be public accommodations, contracts for their services and goods are not. Having misapplied the term, Colorado uses the phrase "public accommodation" as an excuse to strip its citizens of the protections of the First Amendment. This is Orwellian.

CADA rests on this logical fallacy. For purposes of clarity, we can reduce the government's argument below to a syllogism:

> Major premise: All "public accommodations" must comply with CADA
>
> Minor premise: Every business which offers to provide a good or service to the public *including those who offer to create bespoke items of "pure speech"* is a "public accommodation."
>
> Conclusion: Therefore, one who offers to create bespoke works of "pure speech" must comply with CADA.

---

the offer has already been made to the public. This was explained by Blackstone on the basis of the offer *having been made*: "Inns and carriers are engaged in public service not because of their function as part of the travel industry but simply because they are open to the public. Being open to the public they create a "universal assumpsit" -- effectively, a promise to the world to accept and serve any traveler who seeks such service. They have a duty to do what they have represented they would do -- provide shelter for any travelers who come to them, as long as they have room." Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 Nw.U.L. Rev. 1283, 1309-1310 (1996)

The minor premise is false. CADA's improper definition of "public accommodation" is so broad as to include a ghost-writer, a painter, an attorney, a counselor, et cetera. This improper use of a definition allows CADA to hijack the logic which applies to a true "public accommodation" and apply it to the creation of "pure speech."

The equivocation on the definition allows CADA to steal a moral intuition. It seems only reasonable to require "public accommodations" to be open to all. We picture the segregated lunch counter in our mind's eye when we hear "public accommodation." We all agree that true "public accommodations" should be accessible. But that is the trouble with the equivocation on the definition: by using the word "public accommodation," CADA imports a certain emotional resonance and then misapplies that moral capital onto circumstances to which it does not apply.

To treat a writer like a retail vendor, a counselor as a lunch counter, a painter as a public bus turns the population into purveyors of whatever speech the government deems "approved." And whatever one may think of CADA's policy aims, we cannot pretend that the effort will stop here if this Court grants such power to every legislature and city council.

A. Plaintiff Below and Amicus are not "Public Accommodations"

It is true that a legislature could, in the manner of Lewis Carrol's Humpty-Dumpty define things in an

utterly arbitrary way[9]. If a website designer is a "public accommodation" because the designer offers her services to the public then nothing stops Colorado from defining attorneys, accountants, and artists as a public accommodation[10]. Indeed, anything could be called a "public accommodation" by Colorado. The only thing which limits this power is imagination and will.[11]

The misappropriation of the concept is a glove on a fist of censorship and tyranny. If the government can force us to speak, we are no longer free. We can be coerced to contract, to write, to paint, to draw, to speak whatever three city-council persons or 16 state-legislators demand. All they need to say is "public

---

[9]

> "When *I* use a word," Humpty Dumpty said in rather a scornful tone, "it means just what I choose it to mean—neither more nor less."
> "The question is," said Alice, "whether you *can* make words mean so many different things."
> "The question is," said Humpty Dumpty, "which is to be master—that's all."

Alice Through the Looking Glass.

[10] The appellate court found the designer was engaged in the creation of speech which would otherwise be protected by the First Amendment.

[11] The potential for abuse is a matter acutely concerning to the instance Amicus. ACBC offers counseling services from a distinct perspective. Since the counselors offer counseling to members of the "public," the ability of the government to extend the range of "public accommodations" is grossly overbroad. If the First Amendment rights can be overborne by merely designating someone or some practice as a "public accommodation," then the "public accommodations" doctrine grants to any governmental agency the power to simply vanish such rights by application of a label.

accommodation," and like magic the rights of citizens dematerialize.

However, such an arbitrary abuse of language settles nothing. A misuse of the legislative power merely raises problems for the courts.

Therefore, to determine whether this is a public accommodation, the Court must consider what is captured by the phrase "public accommodation." Amicus propose that a public accommodation is best understood in the terms of the general rule agreed at the beginning of this brief: Neither the government nor an individual can coerce another to *produce* a good or service, but the government can regulate the sale of existing goods (or goods and services which are already offered for sale).

B. Colorado Fails to Rightly Distinguish True Public Accommodations

Colorado, by glossing over the distinctions between commercial and creative services and wrongly including creative expression as "public accommodation," actually forces all services providers to *make an offer* to the public. Under what conceivable ground can Colorado construe an advertisement as an offer? To do so impairs the fundamental right to freedom of contract and forces acceptance on terms inimical to one's interests which is involuntary servitude: it *forces* someone to *serve* against their will or face severe penalty and re-education.

Under a proper view of "public accommodation" and antidiscrimination laws, such laws do not offend against either the First Amendment or the freedom of

contract. A public accommodation is a physical location, open to the public. The good has been created; it is available to purchase at the location. "To inflate the concept of a common carrier or public accommodation to apply to businesses such as amici's is far afield from the history and purpose of antidiscrimination law in this country." Richard A. Epstein, *Public Accommodations Under the Civil Rights Act of 1964: Why Freedom of Association Counts as a Human Right*, 66 Stan. L. Rev. 1241, 1261–65 (2014)

The negotiations which take place between the principals to the contract do not entail the sales provided by a public accommodation. "Public accommodations" do little more than offer goods and services on a commercial basis. They are physical locations entered by the public, not the services of a web designer, a photographer or a book publisher who is asked to create something bespoke. *Parker v. Metropolitan Life Insurance Company*, 121 F.3d 1006, 1010 (6th Cir. 1997)("As is evident by Section(s) 12187(7), a public accommodation is a physical place.") The concept itself is derived from a public inn or a public train. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 656 (2000); *Welsh v. Boy Scouts of America*, 787 F. Supp. 1511, 1527 (N.D. Ill. 1992) ("[P]ublic accommodation statutes were derived from the common law duties of innkeepers and common carriers."). It is a place of bare commercial transaction. *See Levorsen v. Octapharma Plasma, Inc.,* 828 F.3d 1227, 1235 (10th Cir. 2016) (Holmes, J., dissenting))

The question of contractual rights has not been well-considered with respect to anti-discrimination laws and public accommodations. We must start with the general proposition that freedom of contract is a fundamental right. *ABT Building Products Corp. v. National Union Fire Insurance*, 472 F.3d 99, 135 (4th Cir. 2006) A state cannot force a person to make an offer to contract, nor can a state force a person to accept an offer to enter into a contract. *O'Gorman Young v. Hartf'd Ins. Co.* 282 U.S. 251, 267 (1931) ("That the right to contract about one's affairs is a part of the liberty of the individual protected by this clause, [of the Fourteenth Amendment] is settled by the decisions of this court and is no longer open to question.") (internal quotation marks omitted). To conclude otherwise would mean the state could force people into performing expressive services against their will: that is involuntary servitude and is prohibited by the Constitution.

In the case of amicus no offer has been made. The contract, if any, is negotiated client-by-client. But, under CADA, Colorado seeks to compel an offer to be made or to coerce an acceptance to be given. This is a fundamentally different exercise of state power.

Creatives must do their best work. If the web design is poor, Colorado will contend that the designer has discriminated in the service. The pressure to do a "good job" will be even greater than the normal threats of "we won't pay you," with threats of state prosecution and reeducation.

Forcing the creative to enter a contract with a person not of her choosing is to compel speech in the form of her assent. Forcing her to build a website,

counsel a person, paint a picture or write a book, is compelled speech by definition.

II. THE FUNDAMENTAL DUTY OF THE COURT IS TO PROTECT SPEECH OVER THE OBJECTION OF THE MAJORITY

> 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.

Board of Education v. Barnette, 319 U.S. 624, 642 (1943)

A constant temptation for all involved with causes which are popular, or causes that seem to be matters of "commonsense" or good civic virtue is to whittle away at constitutional protections. We are all part of the world of "commonsense," and the general will by the sheer fact of it being "common" becomes part of our own thinking. When the majority have the same opinion, it begins to become "objective" and unquestionable. Those who differ are seen to be insufferable fools, or worse, dangerous bigots. Those who disagree must be made to conform or must be driven from the public square. No longer can the creative decide what to say or when to say it: the government makes servants of all who speak in public. This is the logic of CADA.

A. The Essence of the First Amendment is To Protect Speech Disfavored by the State or the Majority.

But our system of government specifically creates room and protection for that which is contrary to the general will. The majority sees "truth," and the minority sees "truth." Yet when it comes to the existential matters of human life, what is "true" in a pluralistic society is never so certain. That is the blessing and the curse of liberty.

We have created a space for liberty for the crank and for the prophet. We also create space for those who wish to simply go about their lives differently than "us." The Amish still drive buggies.

But this space is not made by the political branches: the general will drives the legislative branch and the executive branch; as it should. The one who is out-of-step cannot look for hope there. It is the unelected judiciary, a deliberately "undemocratic institution," that serves as a bulwark to preserve our democracy.

This undemocratic, unpopular bulwark saves our humanity. In his duly famous speech "Live not by," the late Alexander Solzhenitsyn said that, "Will not write, sign, nor publish in any way, a single line distorting, so far as he can see, the truth." https://www.solzhenitsyncenter.org/live-not-by-lies And what is the "truth" on matters of human life are often matters of profound disagreement. CADA gives one view, the popular view in Colorado, of the truth. But there are other views of the truth. Suppressing another's voice is not the answer to this conflict.

It would be so easy as a judge to take the popular view; especially when that view is the view of the judge. This creates pressure upon the judge. Yet,

however much the individual judge sympathizes with one side in any debate, the duty remains, the obligation imposed by the judicial oath is "to administer justice without respect to persons;" a duty to protect the speech and religion of those whom the judge personally finds disagreeable. *Nat'l Review, Inc. v. Mann*, 140 S. Ct. 344, 347-48 (2019) ("Our decisions protecting the speech at issue in that case and the others just noted can serve as a promise that we will be vigilant when the freedom of speech and the press are most seriously implicated, that is, in cases involving disfavored speech on important political or social issues.")

The majority, being the majority, can always obtain legislation to compel or restrict speech. That is the power of majority rule. This does not mean the majority is always right. The history of this country has shown time-and-again that majority legislative determinations are not static. What is beyond-the-pale today is commonplace tomorrow. Today's majority is tomorrow's minority.

This change in public opinion is possible because the judiciary protects the minority opinion. The minority is given the right to respond, to critique, to object. At times this will be uncomfortable for many; but it is necessary for all. That is the genius of the First Amendment.

But this self-governing, self-correcting power can only continue to function if the judiciary strikes down laws which restrict or compel speech. Indeed, the history of our courts is the history of striking down laws which offend against the First Amendment. *Wooley v. Maynard*, 430 U.S. 705, 715 (1977);

National Socialist Party v. Skokie, 432 U.S. 43 (1977) (displaying Swastikas is protected speech) "[This is] the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation — and their ideas from suppression — at the hand of an intolerant society.…But political speech by its nature will sometimes have unpalatable consequences, and, in general, our society accords greater weight to the value of free speech than to the dangers of its misuse." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995)

It is the minority who most need protection before the Court. As Justice Stevens wrote, "[T]he federal courts . . . have primary obligation to protect the rights of the individual that are embodied in the Federal Constitution." *Harris v. Reed*, 489 U.S. 255, 267 (1989) (Stevens, J., concurring).

Where the political process will not act to protect fundamental rights to speech or to religion, it is the duty of the court to protect those rights even for those whose beliefs and opinions repel the majority. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2605 (2015).[12]

---

[12] This Court has repeatedly affirmed the First Amendment's limitation on governmental power, especially content-based and viewpoint-based exercises of such power. *See*, *e.g.*, *Thonen v. Jenkins* 491 F.2d 722, 723 (4th Cir. 1973)(per curiam) ("But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."); *Mainstream Loudoun v. Board of Trustees of Loudoun*, 2 F. Supp. 2d 783, 795 (E.D. Va. 1998)["We are therefore left with the First Amendment's central tenet that content -based restrictions on speech must be justified

B. No End Can Justify the Unconstitutional Means Chosen by Colorado.

CADA concerns speech and religious beliefs that touch upon the most fundamental human values and fundamental rights within the protection of the Constitution. *Obergefell*, 135 S. Ct. at 2599. That CADA may have an acceptable goal is no basis upon which Colorado may suppress protected speech. *Billups v. City of Charleston*, 961 F.3d 673, 683–84, (4th Cir. 2020)

To achieve its stated end, CADA resorts to unconstitutional means: it both forbids and compels speech based upon its content *and* viewpoint. *See, Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018) [content-based restrictions offend the First Amendment]; *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) (same); *see also Matal v. Tam*, 137 S. Ct. 1744, 1765–66 (2017) (viewpoint restrictions offend the First Amendment). [13] The law unconstitutionally favors one message and one viewpoint on a controversial topic of public importance while simultaneously forbidding all other

---

by a compelling governmental interest and must be narrowly tailored to achieve that end."])

[13] "Above all else, the First Amendment means that government generally has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Barr v. American Assn. of Political Consultants, Inc.*, 140 S. Ct. 2335, 2346 (2020) (internal quotation marks omitted); *Holloman ex Rel. Holloman v. Harland*, 370 F.3d 1252, 1264 (11th Cir. 2004) The Speech Clause of the First Amendment protects at least two separate, yet related, rights: (1) the right to freedom of expression, and (2) the right to be free from compelled expression.") (internal quotation marks and citation omitted).

speech on the same topic. Far from a trivial business regulation, CADA impinges on the expression of religious speech and belief (marriage is an explicitly religious rite for many, perhaps the majority of human beings), which is protected by *both* the Free Speech Clause and Free Exercise Clause. At bottom, CADA demands adherence and fealty to a government-approved message and a government-approved viewpoint on what is a sacred, religious rite for many.[14] Worse still, to fail to speak as the government demands forces one from the public marketplace and threatens ruin with fines, litigation, and re-education.

Obergefell recognized a right to same-sex marriage, but it did not eviscerate constitutional protections for those who disagree with the decision, whose religious beliefs or conscience conclude differently. Indeed, the very importance and sensitivity of the subject and the importance to all involved is precisely why this Court must protect all of the interests, not just those of what may be the majority at a given time:

---

[14] The First Amendment prohibits compelled speech. *See*, *e.g.*, *United States v. United Foods, Inc.*, 533 U.S. 405, 410 (2001); More than other sorts of restrictions, the act of government *compulsion* is especially demeaning and damaging to a culture of free speech. *See Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*,138 S. Ct. 2448, 2464 (2018) ("When speech is compelled, however, additional damage is done. In that situation, individuals are coerced into betraying their convictions. Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning, and for this reason, one of our landmark free speech cases said that a law commanding 'involuntary affirmation' of objected-to beliefs would require 'even more immediate and urgent grounds' than a law demanding silence.") (quoting *Barnette*, 319 U.S. at 633).

> [T]here are some purported interests — such as a desire to suppress support for a minority party or an unpopular cause, or to exclude the expression of certain points of view from the marketplace of ideas — that are so plainly illegitimate that they would immediately invalidate the rule. The general principle that has emerged from this line of cases is that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.

City Council v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984) (collecting cases) In the act of protecting the minority position, the Court protects the dignity of those persons as human beings: "[O]ur basic concept of the essential dignity and worth of every human being [is] a concept at the root of any decent system of ordered liberty." *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 769 (1985) (internal quotation marks and citation removed); *U.S. v. Haggerty,* 731 F. Supp. 415, 422 (W.D. Wash. 1990).

C. The First Amendment's Role in Our Constitutional Structure Underscores the Prohibition on Legislatively Compelled Speech.

"First Amendment freedoms are designed to insure the proper functioning of the democratic process and to protect the rights of individuals and minorities within that process." *West Virginians for Life, Inc. v. Smith*, 919 F. Supp. 954, 958 (S.D.W. Va. 1996)

First, the limitations on restrictions of the First Amendment exist because the minority will be disliked by the majority; because the majority will often find the speech of the minority offensive. Plainly, there is no need to limit the political minority's power; the minority, by definition, will not be the majority in the political branches. And so, the First Amendment *exists to protect speech most people don't like:* "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).

Second, where citizens conclude that they cannot speak, that they cannot influence, they will begin to conceive of the government not as representative of them but as a tyranny that rules over them. *Wollschlaeger v. Governor of Fla.*, 848 F.3d 1293, 1327(11th Cir. 2017) ("The First Amendment is a counter-majoritarian bulwark against tyranny. 'Congress shall make no law ... abridging the freedom of speech,' U.S. Const. Amend. I, cannot mean 'Congress shall make no law abridging the freedom of speech a majority likes.' No person is always in the majority, and our Constitution places out of reach of the tyranny of the majority the protections of the First Amendment.")

Third, the presupposition of a democratic system is that you have the same moral value as me: we are "created equal" and have equal merit, to have our voice and opinion heard, and why we give our vote. When we have the power to shut-up or shut-down our fellow citizens *using the power of the government*, we

undermine the legitimacy of the government. "Benjamin Franklin warned that '[f]reedom of speech is a principal pillar of a free government; when this support is taken away, the constitution of a free society is dissolved, and tyranny is erected on its ruins.'" *EMW Women's Surgical Ctr. v. Beshear,* 920 F.3d 421, 461 (6th Cir. 2019) (Donald, J., dissenting).

Fourth, the First Amendment protects the audience—it protects the right of the democratic polity to listen and consider ideas with which the public may currently disagree:

> The constitutional guarantee of free speech 'serves significant societal interests' wholly apart from the speaker's interest in self-expression. *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978). By protecting those who wish to enter the marketplace of ideas from government attack, the First Amendment protects the public's interest in receiving information.

Pacific Gas Elec. Co. v. Public Util. Comm'n (1986) 475 U.S. 1, 8 (1986); *see also Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819, 831 (1995)) One hundred years ago we punished anti-war sentiment as sedition. In the 1950's Sen. Joseph McCarthy famously targeted the movie industry and its communists. More recently, students in Des Moines could not wear arm bands. The courts must go where legislators fear to tread: the necessity of the judiciary to protect First Amendment rights is most needed where it is most unwelcomed by the majority.

It is precisely because the issues raised by this appeal are of such importance to the people on all sides of the issues presented that the Court's obligation is to make room for speech and religious belief (even if it causes distress):

> If the topic of debate is, for example, racism, then exclusion of several views on that problem is just as offensive to the First Amendment as exclusion of only one. It is as objectionable to exclude both a theistic and an atheistic perspective on the debate as it is to exclude one, the other, or yet another political, economic, or social viewpoint.

Rosenberger, 515 U.S. at 831. The First Amendment is offended when anyone is kept from the "marketplace".

It is that public marketplace, unregulated by the government (in almost all circumstances), that provides the response to those who seek to suppress. Rather than obtaining government power to forbid an opponent to speak, the sides are to go to their fellow citizens (however much they think the other wrong) and persuade them. Likewise, they can both go to the court of public opinion and persuade: Do not patronize that photographer, do not buy books from that publisher, do not hire that painter:

> The way to preserve the flag's special role is not to punish those who feel differently about these matters. It is to persuade them that they are wrong. 'To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of

> popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.' *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

Johnson, 491 U.S. at 419–20 (finding burning a flag to be expressive conduct); *see also Whitney v. California*, 274 U.S. 357, 377 (1927). The public can refuse to do business with someone based upon point of view. But the government cannot prevent someone from speaking based upon their point of view.

CONCLUSION

In conclusion, Amicus herein is profoundly concerned with the outcome of this case. The freedom to contract, the freedom of speech, the freedom of religion, the freedom of association, the freedom to disagree with the majority are at stake. Amicus requests that this Court strike CADA as applied to appellant herein, and as applied to those like her. Amicus respectfully suggests that the best way to accommodate the competing demands within our society is for this Court to provide clear guidance on what sort of enterprises can constitute a "public accommodation" within the historical meaning of that phrase, and thus create space

for the freedom of contract and freedom of speech.

Dated: June 2, 2022

Respectfully submitted,

MICHAEL S. OVERING
Counsel of Record
EDWARD C. WILDE
790 E. Colorado Blvd., #320
Pasadena, CA 91101
Tel: (626) 564-8600
movering@digitalmedialaw.com
ewilde@digitalmedialaw.com
Counsel for Amicus Curiae