No. 21-476

In the Supreme Court of the United States

303 CREATIVE LLC AND LORIE SMITH,
Petitioners,

v.

AUBREY ELENIS, ET AL.,
Respondents.

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

BRIEF OF *AMICUS CURIAE* CATHOLICVOTE.ORG EDUCATION FUND IN SUPPORT OF PETITIONERS

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CatholicVote.org Education Fund ("CVEF") is a nonpartisan voter education program devoted to serving the Nation by supporting educational activities that promote an authentic understanding of ordered liberty and the common good. Given its educational mission and focus on the dignity of the person, CVEF is deeply concerned about the threat that *303 Creative LLC v. Elenis*, 6 F.4th 1160 (2021) poses to freedom of speech. When public accommodations laws, like the Colorado Anti-Discrimination Act ("CADA"), are applied to the expression of businesses, religious liberty and freedom of speech are endangered. CVEF, therefore, comes forward to support the right of all citizens to (1) practice their art (and earn their living) in a manner that is consistent with their religious faith and (2) participate fully in ongoing discussions regarding important local and national issues, such as same-sex marriage.

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[1] Each party consented to the filing of this amicus brief. Pursuant to Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part and that no person other than the *amicus* and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

ARGUMENT

This case requires the Court to consider the intersection of public accommodations laws and the broad protection afforded speakers under the First Amendment. *See New York Times Co. v. Sullivan,* 376 U.S. 254, 270 (1964) (describing the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open"). As the scope of public accommodations laws has grown—in terms of both the types of entities classified as public accommodations and the number of groups protected from discrimination—the possibility for conflict with First Amendment speech rights has increased. This case is a prime example. The Tenth Circuit denied First Amendment protection to Appellants' "pure speech," 6 F.4th at 1176, even though CADA prevents Lorie Smith ("Smith") from posting her personal religious statement and prohibits 303 Creative LLC from creating custom-designed websites celebrating Smith's Biblical view of marriage unless she agrees to design websites celebrating same-sex marriage.

The Tenth Circuit's decision is inconsistent with this Court's free speech precedents. While *Hurley* acknowledges that public accommodations laws generally are constitutional when applied to a business's conduct, it also holds that such laws must yield to the First Amendment when "the sponsors' speech itself [is taken] to be the public accommodation." *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557, 573 (1995). Using public accommodations laws in this way, "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.* When a State applies its public accommodations laws to a business's expression, the speaker retains the right "to shape its expression by speaking on one subject while remaining silent on another." *Id.* at 574; *Riley v. Nat'l Fed. of the Blind of N.C., Inc.*, 487 U.S. 781, 796-97 (1988) (confirming that a speaker has the right to determine "both what to say and what *not* to say").

As applied to Appellants' speech, CADA violates these fundamental First Amendment principles. The Communication Clause imposes a viewpoint-based speech restriction on Smith, preventing her from explaining her religious view in support of traditional marriage while allowing web designers who approve of same-sex marriage to discuss their opinions freely. Although the First Amendment generally precludes such viewpoint-based discrimination, the Tenth Circuit contends that CADA's speech restriction is constitutional under *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973). *See* 6 F.4th at 1182 (citing *Pittsburgh Press* for the proposition that "Colorado may prohibit speech that promotes … unlawful discrimination"). Because the Accommodation Clause makes it illegal for Appellants to refuse to design custom wedding websites for same-sex couples, *Pittsburgh Press* permits Colorado to prohibit Smith's publishing any statement indicating that she would refuse her creative services to same-sex couples. *Id.* Thus, the constitutionality of the Communication Clause depends on the constitutionality of the Accommodation Clause.

The fatal flaw in the Tenth Circuit's analysis is that it upholds the Accommodation Clause based on a novel application of strict scrutiny, one that is inconsistent with *Hurley*, *Wooley*, *Riley*, and *Pittsburgh Press*. Under *Pittsburgh Press*, the central question is whether "the [speech] restriction … is incidental to a *valid* limitation on economic activity." 413 U.S. at 389 (emphasis added). The Communication Clause is not. Its restriction on Smith's speech is based on the Accommodation Clause, which unconstitutionally compels and restricts Appellants' speech. The Accommodation Clause mandates a Hobson's choice: either convey a message with which Appellants disagree (by designing and creating websites that celebrate same-sex weddings) or remain silent and forego sending their desired message (through custom wedding sites supporting opposite-sex marriage). This CADA cannot do. *See Wooley v. Maynard*, 430 U.S. 705, 715 (1977) (holding that the government cannot compel speakers "to foster … an idea they find morally objectionable"); *Riley*, 487 U.S. at 796 (explaining that "in the context of protected speech, the difference [between compelled speech and compelled silence] is without constitutional significance").

Putting businesses that create custom-designed expression to this choice—create a government-mandated message or remain silent—violates the freedom of thought and mind that the First Amendment was meant to safeguard. *See Wooley*, 430 U.S. at 714 (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)) ("The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.' "). Consequently, the

Tenth Circuit's analysis contravenes "the usual rule that governmental bodies may not prescribe the form or content of individual expression," *Cohen v. California*, 403 U.S. 15, 24 (1971), even when others might view "those choices of content" as "misguided, or even hurtful." *Hurley*, 515 U.S. at 574. And given that the Accommodation Clause is unconstitutional as applied to Appellants' expression, the Communication Clause's viewpoint-based restriction on Smith's religious views also violates the First Amendment.

Moreover, the Tenth Circuit's reliance on *Pittsburgh Press* is misplaced for another reason. Smith's proposed statement, which explains her religious motivation for creating only custom-designed websites that comport with her Biblical understanding of marriage, is not commercial advertising. Her statement does not propose a commercial transaction; rather, it conveys her religious views on an ongoing national issue—same-sex marriage. Thus, *Pittsburgh Press* provides no basis for silencing her expression.

I. The Tenth Circuit's strict scrutiny analysis impermissibly vests Colorado with broad authority to impose content-based and viewpoint-based speech restrictions on any expressive business subject to the Accommodation Clause.

Although the First Amendment states only that "Congress shall make no law … abridging the freedom of speech," U.S. CONST., Amend. 1, the Supreme Court has long held that it prevents the government from both restricting and compelling speech: "the right of freedom of thought protected by

the First Amendment against state action, includes both the right to speak freely and the right to refrain from speaking." *Wooley*, 430 U.S. at 714; *Riley*, 487 U.S. at 796-97 ("[T]he First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say."). Consequently, "as a general matter, ... government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Ashcroft v. ACLU,* 535 U.S. 564, 573 (2002) (internal quotation marks omitted); *Barnette*, 319 U.S. at 642 ("[N]o 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."). The government also lacks the authority to compel speech because such compulsion similarly "invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." *Id.*; *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994) (affirming that "[a]t the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence," and that any "[g]overnment action that … requires the utterance of a particular message favored by the Government[] contravenes this essential right").

The problem is CADA does both—it restricts and compels Appellants' speech. The Communication Clause prohibits Smith from "publish[ing] … any written, electronic, or printed communication … that indicates that the full and equal enjoyment of the goods, services, facilities … of [Appellants] will be

refused, withheld from, or denied … because of … sexual orientation." Colo. Rev. Stat. 24-34-601(2). The Accommodation Clause, in turn, compels Appellants to convey a government-favored message by requiring them to design wedding websites for same-sex couples or to exit the wedding website business altogether.

Because the government "'has no power to restrict expression because of its message, its ideas, its subject matter, or its content,'" content-based and viewpoint-based speech restrictions, like the Communication Clause here, "are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert*, 135 S.Ct. 2218, 2226 (2015) (quoting *Police Dept. of Chicago v. Mosley,* 408 U.S. 92, 95 (1972)). The Tenth Circuit attempts to avoid subjecting the Communication Clause to strict scrutiny by invoking *Pittsburgh Press* to support its claim that "Colorado may prohibit speech that promotes unlawful activity, including unlawful discrimination." 6 F.4th at 1182. Because Colorado declared that all discrimination by public accommodations based on sexual orientation in the provision of goods and services is illegal (whether or not it compels expression), Colorado can restrict speech expressing the intent to engage in such discrimination. *Id*. at 1183. Thus, even though the Communication Clause imposes a viewpoint-based restriction on Smith's speech, it is allegedly constitutional because "'the restriction on advertising is incidental to a valid limitation on economic activity.'" *Id*. (quoting *Pittsburgh Press*, 413 U.S. at 389).

In *Pittsburgh Press*, the Court upheld a city ordinance that precluded newspapers from listing employment advertisements in sex-designated columns. The Court concluded that the advertisements and the newspaper's headings were "classic examples of commercial speech." 413 U.S. at 385. But the commercial nature of the speech did not justify the content-based speech restriction; rather, the Court upheld the ordinance "because the discriminatory hirings proposed by the advertisements, and by their newspaper layout, were themselves illegal." *Virginia State Bd, of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 759 (1976). Just as "a newspaper constitutionally could be forbidden to publish a want ad proposing a sale of narcotics or soliciting prostitutes," the ordinance could ban "an overtly discriminatory want ad" that proposed "discriminat[ion] against women in … hiring decisions." *Pittsburgh Press*, 413 U.S. at 388.

As *Tornillo* emphasized, *Pittsburgh Press* "took pains to limit its holding within narrow bounds," *Miami Herald Pub. Co. Tornillo*, 418 U.S. 241, 255 (1974), upholding the Pittsburgh ordinance only because it did not "authorize any restriction whatever, whether of content or layout, on stories or commentary originated by Pittsburgh Press, its columnists, or its contributors." *Pittsburgh Press*, 413 U.S. at 391. Thus, speech restrictions are permissible under *Pittsburgh Press* only "when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity." *Id.* at 389. The government must satisfy both conjuncts: it must declare the underlying commercial activity illegal,

and any speech compulsion (or restriction) related to the limitation on economic activity must be *valid*. As a result, the panel cannot avoid the strict scrutiny inquiry. Given that the Accommodation Clause both compels and restricts speech when applied to expressive businesses, it is valid only if it survives strict scrutiny.

Remarkably, the Tenth Circuit concludes that Colorado has a compelling interest in mandating access to the speech of businesses and that CADA is narrowly tailored to that interest. *See* 6 F.4th at 1179. This conclusion is wrong for at least two reasons. First, the panel focuses on the wrong state interest. The court considers whether there is a compelling interest supporting CADA generally instead of whether Colorado has a compelling interest in denying Appellants an exemption. Second, based on this Court's free speech precedents, there is no compelling reason to deny Appellants such an exemption in this case.

A. When a business's speech is taken to be the public accommodation, courts must determine whether there is a compelling reason for refusing to give the speaker an exemption.

Whereas the district court simply *assumed* that the Accommodation Clause was constitutional, *303 Creative LLC v. Elenis*, 385 F.Supp.3d 1147, 1159 (D. Colo. 2019), the Tenth Circuit acknowledges that the Clause compels "pure speech" that "celebrates same-sex marriages." *303 Creative*, 6 F.4th at 1176-77. Like the public accommodations law in *Hurley*, "CADA has the effect "of declaring the sponsors' speech itself to be the public accommodation,"

thereby triggering First Amendment protection. *Id.* at 1177. Contrary to *Hurley*, however, the Tenth Circuit concludes that Colorado *can* treat Appellants' speech as a public accommodation and require website designers—as well as all other expressive businesses—to create speech "they find morally objectionable." *Wooley v. Maynard*, 430 U.S. 705, 715 (1977). Whereas Massachusetts's public accommodations law had to give way to the First Amendment in *Hurley*, CADA allegedly does not, surviving strict scrutiny even though it both compels and restricts fully protected speech.

How does the Tenth Circuit reach such a novel result? It addresses the wrong issue, focusing on Colorado's reasons for adopting CADA instead of its interest in denying First Amendment protection to Appellants. While States generally have a compelling interest in prohibiting "the act of discriminating against individuals in the provision of publicly available goods, privileges, and services on the proscribed grounds," this Court has never recognized a compelling reason for "declaring the sponsor's speech itself to be the public accommodation." *Hurley*, 515 U.S. at 572-73. Undeterred, the Tenth Circuit upholds CADA's speech restrictions and compulsions based on "Colorado's interest in ensuring 'equal access to publicly available goods and services.' " 6 F.4th at 1179 (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 624 (1984)). Although "[t]hat goal … plainly serves compelling state interests of the highest order," *Roberts*, 468 U.S. at 624, Colorado's reasons for adopting CADA are *not* at issue in this case. No one questions that public accommodations laws "do not, as a general matter, violate the First or Fourteenth

Amendments." *Hurley*, 515 U.S. at 573. What is at issue is how the analysis differs when antidiscrimination laws are "applied in a peculiar way," *i.e.*, when they "target speech" or "discriminate on the basis of its content." *Id.* In such situations, "the statute ha[s] the effect of declaring the sponsors' speech itself to be the public accommodation," triggering First Amendment safeguards. *Id.* Thus, identifying a compelling basis for public accommodations laws tells us nothing about how the First Amendment limits such laws when applied to a business's expression.

Roberts and *Hurley* highlight this important distinction. In *Roberts*, the Jaycees "failed to demonstrate that the Act imposes any serious burdens on the male members' freedom of expressive association." *Id.* at 626. There simply was "no basis … for concluding that admission of women as full voting members will impede the organization's ability to engage in these protected activities or to disseminate its preferred views." *Id.* at 627. Stated differently, "[t]he principle of speaker's autonomy was simply not threatened." *Hurley*, 515 U.S. at 580; *Pacific Gas*, 475 U.S. at 12 (explaining that *PruneYard* did not implicate "any concern that access to this area might affect the shopping center owner's exercise of his own right to speak; the owner did not even allege that he objected to the content of the pamphlets"). Consequently, the Court applied Minnesota's antidiscrimination law to prevent the Jaycees from discriminating against women.

In contrast, Massachusetts's public accommodations law violated the First Amendment because it interfered with the parade organizers'

desired message. Even though a State normally can "ensure equal access" to public accommodations, it cannot do so if compelled access would "trespass on the organization's message itself." 515 U.S. at 580. In *Hurley*, the disagreement between GLIB and the parade organizers did not involve "the participation of openly gay, lesbian, or bisexual individuals in various units in the parade." *Id.* at 572. No members of GLIB alleged that the parade organizers excluded homosexual individuals from marching as part of an approved parade group, and the organizers disclaimed any such intent to exclude. The problem in *Hurley* arose only when GLIB sought to participate in the parade organizers' speech activity by marching in the parade under its own banner. *Id.* Applying the Massachusetts law to the selection of participants forced the parade organizers "to alter the expressive content of their parade" and transferred authority over the message conveyed to "to all those protected by the law who wished to join in with some expressive demonstration of their own." *Id.* at 573. *Hurley* held that, even assuming the parade was a public accommodation, "GLIB could nonetheless be refused admission [to the parade] as an expressive contingent with its own message just as readily as a private club could exclude an applicant whose manifest views were at odds with a position taken by the club's existing members." *Hurley*, 515 U.S. at 580-81 (discussing *New York State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 13 (1988)).

In the present case, Colorado has not applied CADA to remedy any refusal to serve LGBT customers based on their sexual orientation. Appellants did " 'not discriminate against anyone,' "

being "willing to work with all people regardless of sexual orientation" and "generally willing to create graphics or websites for [LGBT] customers." 6 F.4th at 1179, 1170 (citation omitted). Rather, as in *Hurley*, the dispute centers on Colorado's ability to "require[e] petitioners to alter the expressive content of their" speech activity. *Hurley*, 515 U.S. at 572-73. In *Hurley*, the public accommodations law was invoked to force the parade organizers to include "a message [they] did not like from the communication [they] chose to make." *Id.* at 574. Here, CADA is being used to require Appellants to create websites that send a message "celebrat[ing] same-sex marriages," a message that directly conflicts with both Appellants' desired message (celebrating opposite-sex marriages) and Smith's sincerely held religious beliefs. 6 F.4th at 1170.

When applied in this "peculiar way," the First Amendment is infringed, not CADA. "[D]eclaring the sponsors' speech itself to be the public accommodation" violates "the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." *Hurley*, 515 U.S. at 573; *id.* (explaining that outside the commercial speech context the government "may not compel affirmance of a belief with which the speaker disagrees"). Allowing any group of individuals protected under a public accommodations law to "have the right to participate in petitioners' speech" transfers control over what a speaker (whether a parade organizer or an expressive business) says to "all those protected by the law who wished to" communicate some message of their own. *Id.* The Tenth Circuit's opinion does just that, permitting LGBT customers

(and others) to force Colorado businesses to express views with which they disagree.

Accordingly, the central inquiry is whether Colorado has a compelling reason for trenching on Appellants' speech rights. As *Fulton* put the point, the proper question "is not whether the City has a compelling interest in enforcing its non-discrimination policies generally, but whether it has such an interest in denying an exception to [Appellants]." *Fulton v. City of Philadelphia*, 141 S.Ct. 1868, 1881 (2021). In making this determination, courts cannot "rely on 'broadly formulated interests' " and instead "must 'scrutinize[] the asserted harm of granting specific exemptions to [this] particular' " claimant. *Id.* (quoting *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 431 (2006)). Because the panel never considers, let alone scrutinizes, the specific harms that allegedly would flow from protecting Appellants' speech rights, its opinion misses the critical First Amendment issue.

B. The Accommodation Clause is an invalid restriction because Colorado has no compelling reason for denying an exemption from CADA for Appellants' custom-designed wedding websites.

The Tenth Circuit contends that the Accommodation Clause is "narrowly tailored to Colorado's interest in ensuring 'equal access to publicly available goods and services.' " 6 F.4th at 1179 (citation omitted). Colorado's interest in "ensur[ing] a free and open economy," *id.*, however, does not establish a compelling reason for forcing businesses to engage in government-approved

speech, nor does it address the particular harms that granting an exemption to Appellants would cause.

Perhaps realizing the weakness in its initial formulation of the relevant state interest, the panel expands Colorado's allegedly compelling interest to include "equal access" to "wedding-related services of the same quality and nature as those that Appellants offer." *Id.* at 1180. Even though "LGBT consumers may be able to obtain wedding-website design services from other businesses," they "will never be able to obtain wedding-related services of the same quality and nature as those that" Appellants offer. *Id.* The upshot seems to be that Colorado has a compelling interest in ensuring that those protected under CADA have access to the speech-related goods and services of *any and all* expressive businesses.

To see why, consider the Tenth Circuit's reasoning. The panel tells us that "CADA does not apply only to [expressive businesses'] of a certain level of quality or artistic merit." *Id.* Because each business is the only one offering expressive goods or services of that "same quality and nature," each business is a market (or "monopoly") unto itself. *Id.* Each is unique because its custom-designed expression is unique. To deny an LGBT consumer access to any expressive business, therefore, would be to deny that person access to goods and services of a particular "quality and nature," "necessarily relegat[ing] LGBT consumers to an inferior market" and leaving them with "a narrower selection of generic services." *Id.* at 1180, 1181. In this way, the Tenth Circuit takes to be compelling that which *Hurley* deemed unconstitutional—"requir[ing]

speakers to modify the content of their expression to whatever extent beneficiaries of the law choose to alter it with messages of their own." *Hurley*, 515 U.S. at 578.

Besides being inconsistent with *Hurley*, the interest the Tenth Circuit identifies suffers from three additional problems. First, if every custom-made expression is unique, there are no generic services. CADA applies to all expressive businesses, and each business is the only one producing goods and services of that specific "quality and nature." *Id* at 1180. Someone protected under CADA may like one business's creations more than another's, but the panel insists that CADA does not make such qualitative or artistic judgments. An LGBT consumer may prefer one business's unique expression, but that preference is predicated on the consumer's assessment of the quality and nature of the business's speech.

This Court, however, has never held that States have a compelling interest in satisfying the subjective preferences of consumers protected by public accommodations laws. In fact, it has reached the opposite conclusion. The St. Patrick's Day parade in *Hurley* was unique with "the size and success of petitioners' parade mak[ing] it an enviable vehicle for the dissemination of GLIB's views." *Hurley*, 515 U.S. at 577. Yet the Court rejected GLIB's claim that it had a right "to require speakers to modify the content of their expression to whatever extent beneficiaries of the law choose to alter it with messages of their own." *Id*. at 578 (citation omitted). GLIB could have applied for its own parade permit or joined another parade. The St. Patrick's Day

parade organizers did not "enjoy an abiding monopoly of access to spectators" and did not "enjoy the capacity to 'silence the voice of competing speakers.' " *Id.* (citation omitted). Accordingly, allowing "any contingent of protected individuals with a message [to] have the right to participate in [the parade organizers'] speech" would have violated "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.

The Tenth Circuit's analysis tracks GLIB's argument in *Hurley* and fails for the same reason. "[T]he custom and unique nature of [Appellants'] services," 6 F.4th at 1180, makes "it an enviable vehicle for the dissemination of [an LGBT consumer's] views." *Hurley*, 515 U.S. at 577. Yet Appellants *do not* have a monopoly on website-design services and *do not* have the power (or desire) to silence other expressive businesses that are willing to design and promote wedding websites for same-sex couples. Consumers who want a custom-designed website for same-sex weddings can enlist one of these other businesses or design their own site. What such consumers cannot do is invoke CADA to force Appellants to create a message with which they disagree.

Smith "clearly decided to exclude a message [she] d[oes] not like from the communication [she seeks] to make, and that is enough to invoke [her] right as a private speaker to shape expression by speaking on one subject while remaining silent on another." *Id.* at 574. Whatever her reasons for not wanting to convey a message supporting same-sex marriage, "it boils down to the choice of a speaker not to propound

a particular point of view, and that choice is presumed to lie beyond the government's power to control." *Id*. at 575. To hold otherwise—*i.e.*, to allow the government "freely … to compel … speakers to propound political messages with which they disagree"—would cause the "protection [of a speaker's freedom to] be empty, for the government could require speakers to affirm in one breath that which they deny in the next." *Pacific Gas*, 475 U.S. at 16. Of course, CADA is even worse given that the Communication Clause precludes Appellants from denying the government-compelled message.

Second, if CADA does require an assessment of the quality or artistic merit of an expressive business (such that some expressive businesses truly are unique while others are generic), then CADA still violates the First Amendment. While the First Amendment safeguards all types of expressive work, the panel's opinion provides lesser First Amendment protection to those who are "better" (under some government-mandated or court-created measure) at creating unique wedding websites, taking photographs, drawing calligraphy, playing instruments, singing, or engaging in any other expressive activity. If upheld, Colorado could use CADA to force those who produce higher quality expression to carry a government-mandated message, even though it might not be able to require those offering only "generic" expressive goods and services to do so.

The panel never provides any reason, let alone a compelling one, for treating similar speakers (*e.g.*, all custom wedding website designers) differently. Nor can it given that the First Amendment protects all

forms of expression, not just speech that a court deems "generic" or "lesser" based on some idiosyncratic measure. Because "*all* speech inherently involves choices of what to say and what to leave unsaid," all expression is protected from government speech compulsions and restrictions. *Pacific Gas*, 475 U.S. at 11 (plurality opinion); *Hurley*, 515 U.S. at 569 (explaining that "the Constitution looks beyond written or spoken words as mediums of expression"); *Joseph Burstyn, Inc. v. Wilson,* 343 U.S. 495, 503 (1952) (confirming that "the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary" with the medium of communication used). As the Tenth Circuit explained in *Cressman v. Thompson*, "[t]he concept of pure speech is fairly capacious" and covers an "expanding list" of expression, including "Arnold Schöenberg's atonal compositions, Lewis Carroll's nonsense verse, and Jackson Pollock's abstract paintings—regardless of their meaning, or lack thereof—[which] are 'unquestionably shielded' as expressions of the creators' perceptions and ideas." 798 F.3d 938, 952 (10th Cir. 2015) (quoting *Hurley*, 515 U.S. at 569).

Smith's custom-designed websites are inherently expressive, whether consumers view them as better or worse than similar businesses. *See 303 Creative*, 6 F.4th at 1176; *Packingham v. North Carolina*, 137 S.Ct. 1730, 1737 (2017) (quoting *Reno v. ACLU*, 521 U.S. 844, 870 (1997)) (explaining how social media "websites can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard" by "allow[ing] a person with an internet connection to 'become a town crier with a voice that resonates farther than it could from any

soapbox.'"); *Smith v. Plati*, 258 F.3d 1167, 1177 (10th Cir. 2001) ("[P]ublishing Netbuffs.com is undoubtedly an activity protected by the First Amendment."). When someone asks a website designer to create a custom-designed website for a wedding, the site provides family and friends with important information about the engagement, the wedding registry, and the date, time, and location of the wedding (all of which information falls within the ambit of the First Amendment). *Virginia Pharmacy*, 425 U.S. at 762 ("Purely factual matter of public interest may claim [First Amendment] protection."); *Riley*, 487 U.S. at 797-98 (describing how "compelled statements of opinion" and "compelled statements of 'fact'" both "burden[] protected speech").

But the wedding website does much more. Through the selection and placement of photographs, videos, and text, the sequencing of events, the choice of backdrops, the use of color schemes, and other creative choices, Appellants celebrate the dignity and importance of the event and seek to convey the personality of the couple. Smith's websites reflect her belief that God is "calling me to stand up for my faith, to explain His true story about marriage, and to use the talents and business He gave me to publicly proclaim and celebrate His design for marriage as a life-long union between one man and one woman." 385 F.Supp.3d at 1151. *See also Joseph Burstyn*, 343 U.S. at 501 (affording First Amendment protection to motion pictures because they "are a significant medium for the communication of ideas [that] may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to

the subtle shaping of thought which characterizes all artistic expression."). Such custom-designed websites *are* expression, and Colorado cannot use CADA to force Appellants to create such expression for government-preferred customers. *Hurley*, 515 U.S. at 576 (protecting self-expression where the speaker is "intimately connected with the communication advanced"); *Telescope Media Group v. Lucero*, 936 F.3d 740, 752 (8th Cir. 2019) (quoting *Joseph Burstyn*, 343 U.S. at 501) (concluding that the various actions and choices that go into wedding videography "come together to produce finished videos that are 'medi[a] for the communication of ideas' ").

Third, the Tenth Circuit never directly addresses the central issue—the specific harms of granting Appellants and exemption. The panel suggests that Colorado has a compelling interest in refusing an exception to Appellants because denying LGBT consumers access to Appellants' "*unique* services," which are "unavailable elsewhere," "would necessarily relegate [such] consumers to an inferior market." 6 F.4th at 1180. Rather than "scrutinize" this alleged harm, the Tenth Circuit states only that it is "unconvinced" that "any market harm [would be] limited" because "[i]t is not difficult to imagine the problems created where a wide range of custom-made services are available to a favored group of people, and a disfavored group is relegated to a narrower selection of generic services." *Id*. at 1181. The panel does not identify any particular problems that granting an exception would create. Instead, the panel relies on a slippery slope argument: if the court grants an exception to Appellants and other expressive businesses, the market for expressive

goods and services will fracture, creating disfavored groups with access to only a narrow selection of similar (although possibly lower quality) goods and services.

This Court has rejected such arguments in the past and for good reason. Mere speculation as to possible harms does not establish a "[compelling] interest in denying an exception" to one challenging the law. *Fulton*, 141 S. Ct. at 1881. Hence, in *Sherbert*, this Court "dismiss[ed] as 'no more than a possibility' the State's speculation 'that the filing of fraudulent claims by unscrupulous claimants feigning religious objections to Saturday work' would drain the unemployment benefits fund." *O Centro*, 546 U.S. at 436 (quoting *Sherbert*, 374 U.S. at 407). The Tenth Circuit speculates that there will be "problems," even while admitting that LGBT consumers already have access to other wedding-website design services. The panel majority *knows* that, without the ability to force Appellants to create unique, custom-made websites for same-sex couples, LGBT consumers will suffer undisclosed injuries. As a result, the panel accepts Colorado's argument, even though it "echoes the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions." *O Centro Espírita*, 546 U.S. at 436; *Holt v. Hobbs*, 574 U.S. 352, 368 (2015).

Such speculation is problematic because it enables the government to undermine well-established First Amendment principles: "The very idea that a noncommercial speech restriction be used to produce thoughts and statements acceptable to some groups or, indeed, all people, grates on the

First Amendment, for it amounts to nothing less than a proposal to limit speech in the service of orthodox expression. The Speech Clause has no more certain antithesis." *Hurley*, 515 U.S. at 579. The panel's watered down scrutiny analysis empowers States to "compel affirmance of a belief with which the speaker disagrees," whenever the speaker is a public accommodation. *Id.* at 573. A Christian website designer will be required to design a custom webpage celebrating a same-sex marriage, a Jewish choreographer will have to stage a dramatic Easter performance, a Catholic singer will be required to perform at a marriage of two divorcees, and a Muslim who operates an advertising agency will be unable to refuse to create a campaign for a liquor company. Additionally, States will be able to dictate the content of expressive works by writers, painters, musicians, and photographers who offer their services to the public. Yet requiring any of these individuals or businesses to convey messages with which they disagree "invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." *Barnette* 319 U.S. at 642; *Janus v. American Fed. of State, County, & Municipal Employees*, 138 S.Ct. 2448, 2464 (2018) (describing how compelled speech causes "additional damage" by "forcing free and independent individuals to endorse ideas they find objectionable[, which] is always demeaning" and coerces speakers "into betraying their convictions").

Moreover, if a for-profit business (such as 303 Creative) does not want to convey a particular government-mandated message, Colorado cannot cure the First Amendment problem by presenting

the business with an unconstitutional alternative: stop offering its creative works to anyone who wants to get married. *See Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 286 (Colo. App. 2015), overturned on other grounds by *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S.Ct. 1719 (2018) (stating that, under CADA, Masterpiece must "sell wedding cakes to same-sex couples, but only if it wishes to serve heterosexual couples in the same manner"). On this view, silence is supposed to cure the CADA violation—Appellants can avoid discriminating based on sexual orientation by ceasing to make custom wedding websites for any engaged couple.

The problem is that compelled silence also is unconstitutional: "There is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is without constitutional significance, for the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say." *Riley*, 487 U.S. at 796-97. Speech prohibitions, like speech compulsions, constitute content-based regulations of speech and are unconstitutional for the same reason—they prevent a speaker from determining the content of her desired message. *Hurley*, 515 U.S. at 557 ("Since *all* speech inherently involves choices of what to say and what to leave unsaid, one important manifestation of the principle of free speech is that one who chooses to speak may also decide what not to say.") (citations and internal quotation marks omitted); *Wooley*, 430 U.S. at 714 ("[T]he right of freedom of thought protected by the First Amendment against state action includes both the

right to speak freely and the right to refrain from speaking at all."). Here, the Communication and Accommodation Clauses violate Smith's "right to speak freely" by precluding her from making her faith-based statement and by preventing her from celebrating opposite-sex marriages through her custom-designed websites.

Furthermore, acknowledging that the First Amendment protects Appellants' expression does not "undermine all of the protections provided by antidiscrimination laws." *Elane Photography, LLC v. Willock*, 309 P.3d 53, 72 (N.M. 2013). If a business provides non-expressive goods or services to the public, the First Amendment may not shelter the sale of such goods or services because compelled access would not interfere with any message the business sought to communicate. To qualify for First Amendment protection, a public accommodation must (1) offer goods or services involving expression or expressive activity, (2) engage in speech that an antidiscrimination law interferes with (or wish to refrain from sending a message mandated by the law), and (3) be willing to lose business from the specific customers who are refused service as well as from others who no longer wish to support the business given its views relating to members of a protected class. Each of these considerations limits the number of businesses that could—or would—object to public accommodations laws on First Amendment grounds. Although some businesses are involved in expressive activities, many more are not. And for every business that decides not to engage in expression related to members of a protected class, many others will. *See*, *e.g.*, *Washington v. Arlene's Flowers, Inc.*, 389 P.3d 543, 549 (Wash. 2017),

judgment vacated, 138 S.Ct. 2671 (2018) (noting that the florist gave the respondent "the name of other florists who might be willing to serve him" and that "a handful of florists offered to provide their wedding flowers free of charge").

The relatively few First Amendment challenges to public accommodations laws that have been working their way through the courts bear this out. Although some website designers, bakers, photographers, and florists have challenged public accommodations laws, thousands more of these businesses have not. In this way, the marketplace of ideas is self-regulating. Free speech protection from antidiscrimination laws is limited only to those who engage in expression and object to promulgating a particular government-mandated message, which ensures that members of protected classes have ready access to the types of expressive goods and services safeguarded by the First Amendment. In the rare situation where there is no such access, the government may be able to satisfy strict scrutiny. Absent that showing, however, the fact that some—or even many—individuals find the refusal to create expression for members of a protected class wrong or misguided does not obviate the protection of the First Amendment. Rather, as the Court concluded in *Hurley*, these objections confirm the need for such protection: "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." 515 U.S. at 579.

As a result, when applied to a business's expression, CADA favors "certain preferred speakers … taking the right to speak from some and giving it to others." *Citizens United v. FEC*, 558 U.S. 310, 340 (2010). In so doing, "the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice." *Id.* at 340-41. Under CADA, Appellants lose their right to promote traditional marriage through their creative works and, instead, are required to endorse same-sex marriage (through the creation of a custom website) or to get out of the wedding website business altogether. Moreover, the panel's holding jeopardizes Appellants' willingness to make any statements criticizing *Obergefell* or CADA (through an op-ed or a blog post) because such views might suggest to a reader (or judge) that Appellants would refuse, withhold, or deny service to someone based on their sexual orientation. This, in turn, chills their speech, forcing them to "steer far wider of the unlawful zone" to avoid penalties under CADA. *Speiser v. Randall*, 357 U.S. 513, 526 (1958); *see also Tornillo*, 418 U.S. at 257 (quoting *Sullivan*, 376 U.S. at 279) ("Government-enforced right of access inescapably 'dampens the vigor and limits the variety of public debate.' ").

The Tenth Circuit's opinion offers no reason for denying First Amendment protection to Appellants, and none of the Court's free speech cases justify this result. Rather, these cases compel the opposite conclusion because, as *Dale* reminds us, the First Amendment protects the "freedom to think as you will and to speak as you think" and "eschew[s] silence coerced by law—the argument of force in

worst form." *Boy Scouts of America v. Dale*, 530 U.S. 640, 660-61 (2000) (quoting *Whitney v. California*, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring)).

II. Smith's statement regarding her religious views on marriage is not commercial speech and, therefore, cannot be prohibited under *Pittsburgh Press* as a restriction on commercial advertising that is incidental to a valid limitation on economic activity.

In *Pittsburgh Press*, the Court held that the government could preclude the newspaper's speech only because the underlying commercial activity (gender-based discrimination in hiring) "is illegal and *the restriction on advertising* is incidental to a *valid* limitation on economic activity." 413 U.S. at 389 (emphasis added). Central to the Court's holding was its recognition that the newspaper's sex-designated headings for classified employment ads were part of the advertisements: "The combination, which conveys essentially the same message as an overtly discriminatory want ad, is in practical effect an integrated commercial statement." *Id.* at 388. Thus, the restriction was permissible only because (1) the newspaper's headings were part of a commercial advertisement of illegal activity and (2) given that the limitation was on purely commercial speech, it did not infringe on any decision of the newspaper regarding its content or design:

> Nor, *a fortiori*, does our decision authorize any restriction whatever, whether of content or layout, on stories or commentary originated by Pittsburgh Press, its columnists, or its

> contributors. On the contrary, we reaffirm unequivocally the protection afforded to editorial judgment and to the free expression of views on these and other issues, however controversial.

Id. at 391. Consequently, *Pittsburgh Press* applies at most to restrictions on "classic examples of commercial speech" that advertise an illegal transaction, not restrictions on otherwise protected speech. *Id*. at 385; *Virginia Pharmacy*, 425 U.S. at 759 (recognizing that *Pittsburgh Press* applies only to restrictions on commercial speech proposing actions that "were themselves illegal"); *Harris v. Quinn*, 573 U.S. 616, 648 (2014) ("[D]efin[ing] commercial speech as 'speech that does no more than propose a commercial transaction.'") (citation omitted).

Contrary to the Tenth Circuit's suggestion, Smith's proposed statement is *not* commercial speech. As the Court confirmed in *Pittsburgh Press*, "[t]he critical feature of the advertisement in *Valentine v Chrestensen* was that … it did no more than propose a commercial transaction, the sale of admission to a submarine." 413 U.S. at 385. The Court contrasted the newspaper's classified ads with the advertisement in *New York Times v. Sullivan*, which was not "commercial" and, therefore, received broad First Amendment protection. Instead of proposing a specific commercial transaction, the New York Times ad "communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives

are matters of the highest public interest and concern." 376 U.S. at 266.

Smith's proposed statement does the same. It communicates information about her business and testifies to her views on an issue of public interest and concern—the ongoing discussion and debate regarding same-sex marriage. In *Obergefell*, this Court surveyed the "ongoing dialogue" surrounding same-sex marriage and "emphasized that … 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." *Obergefell*, 135 S.Ct. at 2597, 2607. Smith seeks to do just that—witness to her religious convictions by not promoting same-sex marriage through her expressive activity. *See Masterpiece Cakeshop*, 138 S.Ct. at 1728 ("[R]eligious and philosophical objections to gay marriage are protected views and in some instances protected forms of expression."). Because such a position statement is not "commercial advertising" under *Sullivan* and *Harris*, it cannot be restricted under *Pittsburgh Press*. In addition, *Riley*, instructs that even if some portion of Smith's statement could be viewed "in the abstract" as "commercial," Colorado still could not restrict her message because "it is inextricably intertwined with otherwise fully protected speech." 487 U.S. at 796.

Moreover, even assuming *arguendo* that Smith's speech is commercial advertising—which it is not—subsequent cases have narrowed the class of purely commercial speech and have at most permitted the government to compel advertisers to include certain truthful, factual information in their

communications. The Court has not allowed the government to *prohibit* commercially-tinged speech on matters of public concern. As *Hurley* explains, while "the State may at times 'prescribe what shall be orthodox in commercial advertising,'" it may do so only "by requiring the dissemination of 'purely factual and uncontroversial information.'" 515 U.S. at 573 (quoting *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985)). "[O]utside that context" of mandating factual disclosures in purely commercial advertising, the government "may not compel affirmance of a belief with which the speaker disagrees" or violate the right of "a private speaker to shape its expression by speaking on one subject while remaining silent on another." *Id.* at 573-74. Thus, Colorado cannot rely on *Pittsburgh Press* to restrict Smith's views on marriage because her expression is not commercial speech.

CONCLUSION

As this Court recognized in *Cohen*, the "constitutional right of free expression is powerful medicine" in our diverse and populous society. 403 U.S. at 24. The First Amendment provides broad speech protection for all—individuals, associations, and businesses—to:

> remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of

> individual dignity and choice upon which our political system rests.

Id. That choice of content, "be it of the popular variety or not," is directly undermined when public accommodations laws are applied to require individuals or businesses either to speak the government's desired message or to remain silent. *Dale*, 530 U.S. at 660. This Court, therefore, should hold that the First Amendment safeguards Appellants' expression and that, consistent with *Hurley*, CADA cannot interfere with Smith's ability to choose the content of her own message. *See Hurley*, 515 U.S. at 581 ("Disapproval of a private speaker's statement does not legitimize use of the [State's] power to compel the speaker to alter the message by including one more acceptable to others.").

Respectfully submitted,

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