No. 21-476

IN THE

Supreme Court of the United States

303 CREATIVE LLC, LORIE SMITH,

Petitioners,

—v.—

AUBREY ELENIS, SERGIO RAUDEL CORDOVA, CHARLES GARCIA, RICHARD LEE LEWIS, JR., MAYUKO FIEWEGER, CHERYLIN PENISTON, JEREMY ROSS, DANIEL WARD, PHIL WEISER,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR *AMICUS CURIAE* TANENBAUM CENTER FOR INTERRELIGIOUS UNDERSTANDING IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the United States District Court for the District of Colorado and the United States Court of Appeals for the Tenth Circuit correctly held that Colorado's Anti-Discrimination Act, Colo. Rev. Stat. § 24-36-601(2)(a) (2016) ("CADA"), does not offend the Free Speech Clause of the First Amendment of the United States Constitution.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE(S)

Cases

Statutes

Other Authorities

INTEREST OF *AMICUS*

Tanenbaum Center for Interreligious Understanding ("Tanenbaum" or "*Amicus*")[1] is a secular, non-sectarian organization dedicated to building a society in which mutual respect for different religious beliefs and practices and those who are non-believers is the norm in everyday life. In accord with this goal, Tanenbaum dedicates its resources to protecting religious freedom and pluralism by creating practical strategies for, among other things, combating religious harassment and discrimination in workplaces and public accommodations. The anti-discrimination law that is the subject of this case, and other laws like it, protect people using public accommodations from experiencing discrimination based on multiple characteristics, including their religious or nonreligious beliefs. Such anti-discrimination laws therefore preserve and protect the freedom of belief and religious pluralism that Tanenbaum seeks to actualize. Tanenbaum is an organization that time and time again utilizes the full force of its resources to promote religious freedoms. In this case, religious liberties for all are best protected when public accommodations laws like CADA are enforced. Tanenbaum submits this *amicus* brief because this impactful case requires the Court to weigh core rights and clarify that the requirements of public accommodations are a mechanism that protects and puts into practice both religious freedom and

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[1] 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. The parties have filed blanket consent waivers with the Court consenting to the filing of all *amicus* briefs.

religious pluralism, and does not impose undue burdens on public accommodations. It is Tanenbaum's conviction that the best way to protect religious freedom is to preserve the government's ability to implement anti-discrimination laws to the fullest extent possible to combat discrimination on the basis of religion, and to protect and preserve the religious freedom and religious pluralism sanctified by the U.S. Constitution and upheld throughout our nation's history.

SUMMARY OF ARGUMENT

Petitioners—a design company and its founder and sole member-owner—attempt to justify their refusal to create wedding websites for same-sex couples and their publication of that refusal on their website under the guise of freedom of speech. Not only does petitioners' refusal violate CADA, but their argument fails to recognize the statute's compelling interest in promoting equality in the public square and precedent that individual liberty can be appropriately constrained in certain instances, including in ensuring equal access to public accommodations.

While petitioners posit multiple theories to avoid being subject to CADA, theories that were properly rejected by the United States Court of Appeals for the Tenth Circuit, Tanenbaum takes issue with petitioners' request that this Court except them from public accommodations laws pursuant to the Free Speech Clause of the U.S. Constitution. Tanenbaum works to combat religious prejudice. Conversely, petitioners promote a legal standard that misconstrues free speech precedent and would serve as the very basis for such prejudice. Neither this Court's free exercise nor free speech precedent favors petitioners, but this should not serve as a basis to concoct a standard composed of petitioners' favorite elements of both of them. Religious liberty and free speech must be balanced, not blended beyond recognition.

As set forth in their submissions to the Court, and in the briefs of the *amici* who support their position, petitioners seek a ruling from the Court that would effectively nullify anti-discrimination laws on the basis that the Free Speech Clause authorizes discrimination against others, including in the name

of religion. This position is at odds with the fundamental and traditional principle of religious liberty and foretells a dubious future for freedom of religion, and for the First Amendment in its entirety. To expand the Free Speech Clause as suggested by petitioners to include requirements that simply do not exist in free speech precedent, collapses two distinct legal clauses together in a way that is inconsistent with this Court's precedent. Doing so pits two freedoms of the First Amendment—religion and speech—against one another in a manner sure to destroy the sanctity of freedom of religion and the balance historically preserved between freedom of speech and freedom of religion.

Petitioners also erroneously suggest that their freedom of speech is impermissibly curtailed by another fundamental and historical legal protection: public accommodations and similar anti-discrimination laws like CADA. Petitioners suggest that these two protections cannot be reconciled, and that anti-discrimination laws, specifically, CADA, must yield to the Free Speech Clause. To accept this proposition is not only an incorrect understanding of the Free Speech Clause, it *is* an impermissible curtailment of religious liberties. This exceedingly broad proposition cannot be, and is not, a correct interpretation under the U.S. Constitution or this Court's precedent.

First, anti-discrimination laws like CADA actualize the core values embodied in and motivating the religious freedom we enjoy in this country and the concept of equality enshrined in the U.S. Constitution. As such, they have become part of the fabric of both state and federal law. Together, both anti-discrimination laws and the principles of religious liberty preserve religious freedom, freedom

of conscience, religious pluralism, and equality. Anti-discrimination laws like CADA advance these aims and put religious freedom into practice by prohibiting public establishments from persecuting individuals based on their personal religious beliefs, among other things, and eliminating and "vindicat[ing] the deprivation of personal dignity that surely accompanies denials of equal access to public establishments." *Heart of Atlanta Motel* v. *United States*, 379 U.S. 241, 250 (1964).

In great measure, religious freedom laws promote these same aims by prohibiting governmental persecution based on religious beliefs and, ultimately, laying the foundation for equality among people with diverse beliefs and from different religious and nonreligious communities. Thus, although anti-discrimination laws and the principles of religious liberty operate differently, at a fundamental level they seek consistent, compelling ends. Both are critical to preserving the core values underlying the U.S. Constitution and its protection for freedom of religion.

Second, petitioners' position must be rejected because petitioners are asking this Court to use the Free Speech Clause to undermine anti-discrimination laws which will inevitably and irreparably impair the religious freedom and religious pluralism that the First Amendment was adopted to protect. Petitioners have muddied the legal standards and distinctions between the Free Speech Clause and Free Exercise Clause, and if this Court accepted such a position, would impermissibly expand the Free Speech Clause. For this reason, we ask this Court to reject petitioners' free speech argument.

A rule that would authorize religious liberties to justify discrimination, or would allow the same result under the Free Speech Clause, would—with constitutional imprimatur—allow an individual, on the basis of religious beliefs, to discriminate against a variety of others because of their religious beliefs, non-beliefs, or creeds. Perhaps unwittingly, petitioners have thereby left themselves vulnerable; the same justification they advance today, if successful, may very well be used to justify future acts of discrimination against them precisely because of their particular religious beliefs. While petitioners apparently endorse this result, this Court must not.

Finally, requiring petitioners to comply with CADA is entirely consistent with the First Amendment and this Court's Free Speech Clause precedent.

For the foregoing reasons, we urge the Court to affirm the United States Court of Appeals for the Tenth Circuit's decision.

ARGUMENT

I. PUBLIC ACCOMMODATIONS LAWS FURTHER THE PRINCIPLES OF RELIGIOUS LIBERTIES.

Public accommodations laws, including CADA and others that have been adopted by 45 states, the District of Columbia, and the federal government, are designed to guarantee protections for individuals, including for those exercising religious beliefs or non-belief. The policies and purposes underlying these laws are the elimination of invidious discrimination, and the promotion of individual freedom, liberty, and equality. They help to accomplish these goals by ensuring equal economic and social opportunity and access, thereby removing the stigma of the second-class citizenship that results from being subjected to discriminatory acts in everyday life based on, among other things, religion.

These laws implement deeply imbedded principles articulated by this Court. Thus, this Court has long recognized that, historically, the elimination of religious persecution (*i.e.*, discrimination, dehumanization, violence, and human rights violations based on religion) was a foundational premise of the drafters of the First Amendment. *See Church of Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 532 (1993); *Bowen* v. *Roy*, 476 U.S. 693, 703 (1986).

Religious liberty and public accommodations laws are, thus, convergent. Both are designed to preserve individual liberty and freedom by protecting Americans from the indignity of being persecuted simply because they hold different beliefs (or, in the case of many public accommodations laws, also

because they are of different races, genders, or sexual orientation, etc.). Petitioners' argument overlooks this reality. Instead, it posits a view on the Free Speech Clause that is limitless in its capacity to undermine the efficacy of anti-discrimination laws nationwide, to stifle the protections of the Free Exercise Clause of the U.S. Constitution, and, ultimately, to severely erode freedom from religious persecution.

A. Anti-Discrimination Laws Like CADA Are a Legal Tradition in This Country.

CADA declares that "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 . . . creed . . . [or] 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), Colo. Rev. Stat. (2016).[2] Derived from the common law, 21 other states and the District of Columbia have enacted public accommodation statutes prohibiting discrimination because of sexual orientation, *see* Lucien J. Dhooge, *Public Accommodation Statutes and Sexual Orientation: Should There Be a Religious Exemption for Secular Businesses?*, 21 WM. & MARY J. WOMEN & L. 319, 325, n. 24 (2015) (collecting statutes), and 45 states, plus the District of Columbia and the federal

2 "Creed" is not defined in the statute. Webster's Dictionary defines "creed" as "a brief authoritative formula of religious belief" or "a set of fundamental beliefs, a guiding principle." Creed, Merriam Webster Online Dictionary, https://www.merriam-webster.com/dictionary/creed (last visited Aug. 19, 2022).

government, prohibit discrimination in public accommodations based on religion. *See*, *e.g.*, 42 U.S.C. § 2000a(a); *State Public Accommodation Laws*, NAT'L CONF. OF STATE LEGIS. (June 25, 2021) (describing state statutes), *available at* http://www.ncsl.org/research/civil-and-criminal-justice/state-public-accommodation-laws.aspx.

Anti-discrimination laws are not limited to protections in public accommodations. Many states have enacted them to prohibit discrimination in areas such as employment[3] and housing.[4] And the federal government has adopted laws prohibiting discrimination in, *inter alia*, employment, housing, and education. *See*, *e.g.*, 42 U.S.C. § 2000e *et seq*. (employment); 42 U.S.C. § 3601 *et seq*. (housing); 42 U.S.C. § 2000d (education).

Anti-discrimination laws have become of a fixture of American jurisprudence, following a common law tradition predating the founding of this country. Modeled after the Civil Rights Act of 1866, Congress passed Section 1983 in 1871 to enforce the Fourteenth Amendment of the U.S. Constitution. David H. Gans, *Repairing Our System of Constitutional Accountability: Reflections on the 150th Anniversary of Section 1983*, Constitutional Accountability Center (Nov. 2021). Section 1983 was

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[3] *See State Laws on Employment-Related Discrimination*, Nat'l Conf. of State Legis., http://www.ncsl.org/research/labor-and-employment/discrimination-employment.aspx (last visited Aug, 19, 2022) (aggregating state employment discrimination laws).

[4] *See*, *e.g.*, N.Y. Exec. Law § 296 *et seq*. (McKinney 2017); N.J. Stat. Ann. § 10:5-12(f) (West 2016); Colo. Rev. Stat. Ann. § 24-34-502(1)(a) (West 2014); Va. Code Ann. § 36-96.3(A) (West 2017); New Mex. Stat. Ann. 1978, § 28-1-7(G) (West 2017); Wisc. Stat. Ann. § 106.50 (West 2017).

enacted to protect those victimized and discriminated against by official abuse of power and the "horrific state and Ku Klux Klan violence aimed at undoing Reconstruction and a criminal justice system that systematically devalued Black life." *Id.* at 2. Despite more recent interpretations of the law by this Court, the original intent and purpose of Section 1983 was unequivocally the promotion of fundamental rights and to enjoy the promise of freedom from discrimination. This legal tradition has endured for over 150 years, establishing the web of anti-discrimination laws enacted across this country today.

The animating policy behind these laws is illustrated in the legislative history of the Civil Rights Act of 1964. *See* H.R. COMM. ON THE JUDICIARY, H.R. REP. NO. 88-914 (1963). Congress viewed such laws as necessary to "redress . . . denials of equal protection of the laws on account of race, color, religion, or national origin" and "to meet an urgent and most serious national problem." *Id.* at 18. As the Senate Committee on Commerce observed, "[d]iscrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public." S. COMM. ON COMMERCE, S. REP. NO. 88-872, at 16 (1964). The goal of the Act was, therefore, "to remove the daily affront and humiliation involved in discriminatory denials of access to facilities ostensibly open to the general public." H.R. REP. NO. 88-914, at 18.

Indeed, anti-discrimination laws help to create a more egalitarian society, where the personal dignity of those perceived to be "different" because of their beliefs, gender, skin color, or sexual orientation, is

protected. *See* Andrew Koppelman, *Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law*, 88 S. CAL. L. REV. 619, 639-53 (Mar. 2015) (describing anti-discrimination laws as designed to "ameliorate . . . economic inequality," to redress "insult [and] dignitary harm" that accrues when "one is in danger of losing real and important economic opportunities," and to "eliminate patterns of stigma and prejudice that constitute some classes of persons as inferior members of society"); *see also Heart of Atlanta Motel*, 379 U.S. at 286 (Douglas, J. concurring) (Title II of the 1964 Civil Rights Act "put[s] an end to all obstructionist strategies and allow[s] every person—whatever his race, creed, or color—to patronize all places of public accommodation without discrimination").

Anti-discrimination laws not only help to prevent invidious discrimination, but they also secure true individual freedom. *See* S. REP. NO. 88-872, at 22. In its report on the Civil Rights Act of 1964, the Senate Committee on Commerce observed as much:

> [I]n order to assure that the institution of private property serves the end of individual freedom and liberty it has been restricted in many instances. . . . Slaves were treated as items of private property, yet surely no man dedicated to the cause of individual freedom could contend that individual freedom and liberty suffered by emancipation of the slaves. . . . Nor can it be reasonably argued that racial or religious discrimination is a vital factor in the ability of private property to constitute an effective vehicle for assuring personal freedom. The pledge of this Nation is to secure freedom for every individual;

> that pledge will be furthered by [public accommodations laws.]

Id. at 22-23.

States have endorsed parallel policy interests by adopting anti-discrimination laws, recognizing their value in preserving human dignity, and promoting individual liberty and equal participation of individuals in society. *See*, *e.g.*, Tenn. Code Ann. § 4-21-101(a) (West 2017) ("It is the purpose and intent of the general assembly to . . . [s]afeguard all individuals within the state from discrimination . . . in connection with employment and public accommodations . . . [and] protect their interest in personal dignity and freedom from humiliation"); N.Y. Exec. Law § 290 (McKinney 2017) ("the legislature hereby finds and declares that the state has the responsibility to act to assure that every individual within this state is afforded an equal opportunity to enjoy a full and productive life and that the failure to provide such . . . menaces the institutions and foundation of a free democratic state"); Minn. Stat. Ann. § 363A.02(1) (West 2017) ("[i]t is the public policy of [Minnesota] to secure for persons in this state, freedom from discrimination . . . such discrimination threatens the rights and privileges of the inhabitants of this state").

State courts have, likewise, approved of these policy aims. *See*, *e.g.*, *Elane Photography, LLC* v. *Willock*, 309 P.3d 53, 62 (N.M. 2013) (New Mexico's "intent to prevent discrimination" services a "strong state policy of promoting equality for its residents"), *cert. denied*, 134 S. Ct. 1787, 188 L. Ed. 2d 757 (2014); *Swanner* v. *Anchorage Equal Rights Comm'n*, 874 P.2d 274, 283 (Alaska 1994) (anti-discrimination laws curb "discrimination that degrades individuals,

affronts human dignity, and limits one's opportunities"), *cert. denied*, 513 U.S. 979, 115 S. Ct. 460 (1994); *Micu* v. *City of Warren*, 382 N.W.2d 823, 827, 147 Mich. App. 573, 582 (Mich. Ct. App. 1985) ("civil rights legislation has traditionally been enacted to enable individuals to have access to opportunity based upon individual merit and qualifications and to prohibit decisions based upon irrelevant characteristics"), *lv. denied sub nom.*, *Bill* v. *Northwestern Nat. Life Ins. Co.*, 389 N.W.2d 863, 425 Mich. 877 (Mich. 1986).

The continued preservation of public accommodations laws like CADA is critical to making equality a reality rather than a concept—including equality of religious belief or non-belief. Public accommodations laws, and anti-discrimination laws generally, promote the compelling interests of individual dignity, freedom, opportunity, and equality, by prohibiting persecution based on differences, including differences in religious beliefs, gender, race, and sexual orientation.

B. Anti-Discrimination Laws Promote Religious Liberties.

At their core, the foregoing goals of anti-discrimination laws are the same as the goals of religious liberty sanctified in the U.S. Constitution. Thus, the anti-discrimination laws promote freedom and equality in societal participation that is free of stigmatization. They further sustain religious liberty and the freedom to hold one's religious beliefs safely, without persecution, and with security that there will be equality of rights among the various religious communities, and unequivocal protection of religious pluralism. *See Madison Letter* (noting "the equality of all Religious Sects in the eye of the Constitution").

For example, this Court has observed, "it was 'historical instances of religious persecution and intolerance that gave concern to those who drafted the Free Exercise Clause.'" *Church of Lukumi*, 508 U.S. at 532 (quoting *Bowen*, 476 U.S. at 703); *see also McGowan* v. *Maryland*, 366 U.S. 420, 464 (1961) ("[i]n assuring the free exercise of religion, the Framers of the First Amendment were sensitive to the then recent history of those persecutions").

The legislative history of the Civil Rights Act of 1964 (and many other anti-discrimination laws) confirms that preventing religious discrimination has been a key driver of such statutes. Indeed, it was squarely contemplated by Congress when it adopted that anti-discrimination law. *See*, *e.g.*, H.R. REP. NO. 88-914 at 18 (public accommodations law would advance "redress of denials of equal protection of the laws on account of race, color, *religion*, or national origin") (emphasis added); S. REP. NO. 88-872 at 77 (Statement of Sen. Cotton) (observing that "[d]iscrimination because of race or religion is abhorrent to all right thinking men and repugnant to the basic principles of our Republic"). In fact, Congress further protected the cause of religious liberty when it expressly prohibited discrimination based on religion in public accommodations (and elsewhere). *See*, *e.g.*, 42 U.S.C. § 2000a(a). By including religion in these statutes, Congress revealed a clear legislative intent to adopt laws to properly advance, preserve, and protect the free exercise guarantees imbedded in the U.S. Constitution—including the individual liberty of religious persons who might otherwise face persecution because of their beliefs. *See* S. REP. NO. 88-872 at 22-23 ("Nor can it be reasonably argued that racial or *religious* discrimination is a vital factor

in the ability of private property to constitute an effective vehicle for assuring personal freedom") (emphasis added).

Religious liberty and public accommodations laws (and, more generally, anti-discrimination laws) are mutually reinforcing and designed to function together to achieve the same interests—individual liberty and equality. As such, petitioners cannot be heard to argue that the foundational policies underlying religious liberty require expansion of the Free Speech Clause, and then, in the same breath, argue that the anti-discrimination laws—which give life to those foundational policies—are not essential for preserving them. There can be no argument but that the multitude of anti-discrimination laws, like CADA, and those adopted by legislatures across the country, preserve the underlying values and rights imbedded in our freedom of religion.

II. A RULING FOR PETITIONERS WOULD UNDERMINE RELIGIOUS LIBERTIES.

Petitioners argue for an exception from CADA and, in so doing, are asking this Court to permit them, and ultimately others, to engage in discrimination justified by religious beliefs. The scope of such an exception could adversely impact the panoply of public accommodations and anti-discrimination laws described above. For good reason, this Court has previously rejected similar arguments. In addition, petitioners' proposed exception invites discrimination justified by one person's religion, not only against same-sex couples, but also, among other things, against those of differing faiths or even differing interpretations or sects of the same faith. As set forth above, this result would ultimately undermine the goal of our nation's historic commitment to religious

freedom and our Constitution's fundamental commitment to individual liberty and equality.

A. Free Speech is Incidental to the Right Petitioners Actually Seek to Protect.

Petitioners ultimately seek to protect their right to freely practice their interpretation of the Christian faith. Pet. Br. at 6 (an entire section entitled "Smith's desire to celebrate what her faith teaches about marriage"); *Id.* ("Creating custom wedding content and websites for clients would provide Smith opportunities to support her faith's view of God's design for marriage"); Pet. Br. at 33 (explaining that Smith wants to run her business "consistent with her faith"); Pet. Br. at 4 (Smith wants to run her business "in ways that glorify and honor God"); Pet. Br. at 5 (Smith wants to "promote issues she cares about," including "church missions").

Petitioners' bid to avoid compliance with CADA asserts an incidental right to free speech to justify the exercise of their religion in a manner that discriminates against others. Petitioners seek this rather than accurately asserting what they are really seeking. To be sure, freedom of speech is a core right protected by the U.S. Constitution. But that does not mean it petitioners rewrite this Court's precedent so free speech can serve as a trump card to which all other legal rights must fold. In fact, Justice Kagan has already warned against weaponization of the First Amendment's Free Speech Clause against non-speech interests. *Janus* v. *Am. Fed'n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2501 (2018) (Kagan, J. dissenting). *Janus*, cited by petitioners, took the incidental speech element in the union bargaining context and weaponized it to achieve protection for the non-speech interest of paying union

dues. Petitioners hope to achieve the same result here by deploying the incidental impact of speech on an issue that fits squarely within the bounds of well-settled Free Exercise Clause analysis.

This approach was problematic at best in *Janus*, and is unconstitutional at worst in this case. In the string of cases brought by wedding vendors who refuse their services to same-sex couples, the vendors base that refusal on religious grounds, just as petitioners have done in practice but not in legal argument. *See*, *e.g.*, *Elane Photography*, 309 P.3d at 53; *see also Arlene's Flowers, Inc.* v. *Washington*, 138 S. Ct. 2671 (2018). To the extent that religion serves as the basis for discrimination, speech becomes merely incidental to the plainly non-speech, religious liberty interest.

This is the third case that has come before this Court in an attempt to resolve whether free speech can circumvent a non-discrimination law where the speaker objects to same-sex marriage on religious grounds. *See Masterpiece Cakeshop, Ltd.* v. *Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018); *Fulton* v. *City of Philadelphia*, 141 S. Ct. 1868 (2021). In each instance, however, the Court decided the case without addressing the free speech elements. On the third attempt, petitioners now merge concepts of free exercise and free speech in a way never done by this Court. To accept petitioners' redefined concepts of free speech and free exercise is to once again miss the opportunity to correctly weigh the interests of these two critical First Amendment rights.

While multiple constitutional rights may underpin any activity, using the Free Speech Clause to promote petitioners' activity guts the extensive Free Speech Clause and Free Exercise Clause precedent of this

Court and the religious liberty traditionally enjoyed in this country. Petitioners' use of this Court now pits these two critical First Amendment rights against one another but without the benefit of Free Exercise Clause considerations to balance the interests of these rights. This approach overlooks the plain facts of this case and the petitioners' stated religious concerns. As argued, petitioners' case is free exercise masquerading as free speech, conflating two First Amendment clauses and disrupting well-settled precedent.

B. Religious Liberty, Even Ostensibly Analyzed Under Free Speech, Is Not a License to Discriminate Against Others in the Public Sphere.

Petitioners' argument boils down to the proposition that, insofar as religious beliefs (as articulated and implemented in the workplace by someone offering public services) conflict with the anti-discrimination laws described above, those anti-discrimination laws must, as a constitutional matter, give way to the exercise of their religious beliefs. Thus, as petitioners see it, if a male business owner has a sincerely held religious belief that women should remain in the home and not in the workplace, the Free Exercise Clause would require that laws prohibiting employment discrimination on the basis of gender be deemed unconstitutional. If a religious restaurant owner has a sincerely held religious belief that he or she cannot serve atheists or others who subscribe to unfamiliar religions, public accommodations laws prohibiting discrimination on the basis of religious or nonreligious belief must be deemed unconstitutional. If a person has a deeply held religious belief that interracial marriage is a sin and should not be condoned through their actions in business, anti-

discrimination laws prohibiting discrimination on the basis of race must be deemed unconstitutional. The gist of petitioners' argument is, unfortunately, not novel. But it has consistently been rejected by this Court and others. *See*, *e.g.*, *Newman* v. *Piggie Park Enters. Inc.*, 390 U.S. 400, 402, n. 5 (1968); *Dole* v. *Shenandoah Baptist Church*, 899 F.2d 1389, 1392 (4th Cir. 1990).

The principle that the free exercise of religion by petitioner and others can be subject to regulation, notwithstanding the sincerity with which they hold their religious belief, is well-established as both a point of history and by this Court's precedent. Writing in 1822, James Madison lauded "the immunity of Religion from Civil Jurisdiction, in every case *where it does not trespass on private rights or public peace*." Letter from James Madison to Edward Livingston (July 10, 1822), in 9 *The Writings of James Madison* 98, 100 (Gaillard Hunt ed., 1901) [hereinafter "*Madison Letter*"] (emphasis added). In her dissent in *City of Boerne* v. *Flores*, Justice O'Connor expounded on the historical background which supports the rule that free exercise of religion is subject to regulation where, as noted by Madison, "under color of religion[,] the preservation of equal liberty, and the existence of the State be manifestly endangered." 521 U.S. 507, 556 (1997) (internal citation omitted). In fact, this Court recently acknowledged in *Masterpiece Cakeshop*, a precursor to this case, that "[t]he Court's precedents make clear that the baker, in his capacity as the owner of a business serving the public, might have his right to free exercise of religion limited by generally applicable laws." 128 S. Ct. at 1724–25.

This Court has consistently adhered to this principle. *United States* v. *Lee*, 455 U.S. 252, 261

(1982) ("[w]hen followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity"); *Prince* v. *Massachusetts*, 321 U.S. 158, 167 (1944) ("the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare[] and that includes, to some extent, matters of conscience and religious conviction"); *Reynolds* v. *United States*, 98 U.S. 145, 166-67 (1878) ("Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself."). To decide this case in favor of petitioners would undermine this Court's extensive Free Exercise Clause precedent, including its decision in *Masterpiece Cakeshop* a mere four years ago.

Indeed, in other contexts, this Court and lower courts have specifically rejected the idea that exercising one's religious beliefs is a justification for discrimination. For example, this Court characterized an effort to rely on religious liberty to justify racial discrimination as "patently frivolous." *See Newman*, 390 U.S. at 402, n. 5; *see also Bob Jones Univ.* v. *United States*, 461 U.S. 574, 604 (1983) (school with policy prohibiting interracial dating and marriage had no free exercise defense to loss of tax-exempt status); *Newman* v. *Piggie Park Enters. Inc.*, 256 F. Supp. 941, 955 (D.S.C. 1966) (while franchise owner "has a constitutional right to espouse the religious beliefs of his choosing . . . he does not have the absolute right to exercise and practice such beliefs in utter disregard of the clear constitutional rights of

other citizens"), *rev'd in part on other grounds*, 377 F.2d 433 (4th Cir. 1967), *aff'd and modified*, 390 U.S. 400. Likewise, sex-based discrimination justified on religious liberty grounds has also been squarely rejected. *See Dole*, 899 F.2d at 1392 (holding that there is no free exercise exemption from a federal statute requiring equal pay for men and women); *EEOC* v. *Fremont Christian Sch.*, 781 F.2d 1362, 1364 (9th Cir. 1986) ("head of household" religious belief did not justify providing unequal health benefits to female employees).

While some of the *amici* supporting petitioners' position suggest there is a difference between race and sexual orientation in light of the historical suffering of racial minorities, it is that history which teaches us that harm to a person's individual dignity and the stigmatization of individuals as second-class citizens is unquestionably incompatible with the promise of equality for all enshrined in our Constitution. As such, the goal of laws protecting people based on each of the identities delineated in CADA and similar anti-discrimination laws, is the same: to promote equality and eliminate indignities and stigmatization. *See Obergefell* v. *Hodges*, 576 U.S. 644, 681 (2015) (same-sex couples "ask for equal dignity in the eyes of the law [and t]he Constitution grants them that right"); *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200, 214 (1995) ("[d]istinctions between citizens because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality") (citation and quotations omitted); *see also* Louise Melling, *Religious Refusals to Public Accommodations Laws: Four Reasons to Say No*, 38 HARV. J. L. & GENDER 177, 184 (2015). The fact that our civil society has advanced a step forward in

recent decades does not excuse taking two giant steps back. If this Court were to now "enshrine[e] pockets of discrimination against LGBT people in our laws, where the law has not done so elsewhere, [it would] create a second-class equality," *see id.* at 185, and a gaping hole in anti-discrimination laws.

Laws such as CADA directly aim to eradicate the same harm to dignity and stigmatization of persons who, because of some core characteristic, are treated as second-class and, therefore, unequal citizens.

Simply put, petitioners' argument is inconsistent with the values enshrined in our Constitution and throughout our history, values that both religious liberty and public accommodations laws seek to protect. Petitioners' argument, which would allow discrimination ostensibly due to a question of free speech but actually "under color of religion," endangers, among other things, equal liberty of same-sex couples. If endorsed by the Court, it could be wielded to erode the freedom of persons of other religions, races, and genders. Such pernicious employment of free speech at the expense of religious liberty ought not be accepted, either as a matter of principle or as a matter of precedent.

C. Petitioners' Proposed Exception to CADA Could Result in Impermissible Discrimination Against Individuals Because of Their Religion.

As described in Part I, *supra*, the Free Exercise Clause was adopted to protect against religious persecution. Petitioners would now invite that very persecution with the help of an overly broad and unconstitutional interpretation of the Free Speech Clause.

This concern is neither ephemeral nor remote. To the contrary, it is concrete and, bewilderingly, advocated for by petitioners and the *amici* who support them. In fact, petitioners have already adopted a practice of refusing to serve individuals because of their religious beliefs. *See* Pet. Br. at 5 ("Smith will decline any request . . . to create content that . . . promotes atheism"). Without question, such an unequivocal assertion—in which the religious or nonreligious belief of a member of the public is rejected, demeaned, and subordinated to one's own religious beliefs—contradicts the fundamental interests underlying the constitutional provision that protects our right to freedom of religious and nonreligious belief. *See West Virginia Bd. of Ed.* v. *Barnette*, 319 U.S. 624, 653 (1943) (Frankfurter, J. dissenting) ("The great leaders of the American Revolution were determined to . . . put on an equality the different religious sects . . . Religious minorities as well as religious majorities were to be equal"). Petitioners tout a wedding website wherein Smith illustrated what she desires to create: a website that "uses Bible passages that express God's plan for marriage, such as Jesus' words in the Gospel of Matthew." Pet. Br. at 6. Should a Jewish couple request Smith's services for a wedding website quoting the Torah, Smith would, according to petitioners' argument, be compelled to create a website contrary to her beliefs as a Christian follower of Jesus. To refuse to create the couple's wedding website would doubtless be unconstitutional.

The *amici* supporting the result petitioners advocate take petitioners' position even further. By way of example, the Jewish Coalition for Religious Liberties suggests that, if petitioners prevail, Jewish bakers could refuse to service inter-faith marriages

between a Jew and non-Jew. Br. *Amicus Curiae* Jewish Coalition for Religion Liberties at 4. The Catholicvote.org Education Fund would have Jewish choreographers refuse to stage Christian performances. Br. *Amicus Curiae* Catholicvote.org Education Fund at 23. The Public Advocates of the United States et al. goes so far as to define marriage for the entirety of Christianity—paving ample way for Christians to discriminate against other Christians who do not practice as they do. Br. *Amici Curiae* Public Advocates of the United States et al. at 30.

Petitioners' argument is not inherently limited to the prioritization of religious beliefs in the context of weddings or so-called "expressive" conduct. Nor is it limited in any way to discrimination based on sexual orientation. Indeed, not only does petitioners' brief reveal this when it notes that petitioners refuse service to anyone who promotes atheism, but the *amici* also amply demonstrate this reality. The risk posed by this position is not confined to Colorado and to CADA. It would readily extend far beyond the Colorado borders to the various state and federal laws referenced in Part I.A., *supra*.

This Court only months ago in *Kennedy* v. *Bremerton Sch. Dist.* noted that the "Constitution and the best of our traditions counsel mutual respect and tolerance, not censorship and suppression, for religious and nonreligious views alike." 142 S. Ct. 2407, 2416 (2022). Tanenbaum lauds this position, notwithstanding that tolerance is a mere stepping stone on the road to the ultimate goal of *respect* for different religious and nonreligious views. Yet, a ruling in favor of petitioners will lead to less tolerance and diminished respect for religious and nonreligious views. Such a ruling will undoubtedly

perpetuate and open the floodgates of religious discrimination with an overly broad interpretation of free speech and no interpretation of religious liberties.

Reversal of this Court's precedent and broadening of the historical parameters of free speech to permit discrimination in the public market threatens a sea change in anti-discrimination laws, to the certain detriment of liberty, equality, human dignity, and religious freedom itself.

III. APPLICATION OF CADA ON THE PRESENT FACTS IS NOT A FREE SPEECH CLAUSE VIOLATION.

Petitioners' free speech argument is transparently inconsistent with our founders' intentions and this Court's precedent. CADA regulates conduct, not speech, and to the extent that CADA burdens expression, it only does so incidentally. Accordingly, CADA should be subject, at most, to intermediate scrutiny, but survives even the strictest scrutiny.

A. CADA Regulates Conduct, Not Speech.

Petitioners erroneously claim that CADA, by ensuring equal access to commercially available goods and services, compels them to speak about same-sex weddings. Pet. Br. at 20. This Court has identified two methods by which speech is compelled: (1) when the government selects a favored message and compels a speaker to affirm that message; and (2) where a speaker's primary objective is expression associated with their identity, though not in the provision of goods and services to the general public. CADA neither requires petitioners to pantomime a state-sponsored message, nor burdens expression.

This Court has determined that favored government messages were compelled in limited circumstances, such as commanded recitation of the Pledge of Allegiance, decrees that patriotic messages be displayed on license plates, or mandates that a political endorsement be published in a newspaper. *Barnette*, 319 U.S. at 640-42; *Wooley* v. *Maynard*, 430 U.S. 705, 715 (1977); *Miami Herald Pub. Co.* v. *Tornillo*, 418 U.S. 241, 258 (1974). Any reliance on these cases by petitioners is misplaced. Colorado has not chosen a favored message and mandated its dissemination. Rather, CADA requires that businesses engaged in commercial activity provide their services without regard to the sexual orientation of their customers. CADA does not require petitioners' to use their business to compel them to speak about same-sex marriage. CADA simply requires that petitioners' goods and services are offered to all people, including LGBTQ+ individuals.

CADA similarly does not burden petitioners' expression. Petitioners again rely on distinguishable precedent. This Court in *Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston* concluded that a parade was inherently expressive conduct, organized for the purpose of conveying a message of the organizer to participants and spectators. 515 U.S. 557, 568 (1995). A business like petitioners' is providing goods and services to the public and is not operating in the same, exclusively expressive capacity as a parade organizer. The act of selling goods and services in the public market place is not inherently expressive. While the provider of the goods or services may utilize artistic or creative skill, the message is incidental to the commercial transaction.

Rather than regulate speech, CADA regulates conduct. According to this Court's precedent, antidiscrimination laws like CADA, that ensure equal access to commercial goods and services, are content-neutral regulations of conduct. *Wisconsin* v. *Mitchell*, 508 U.S. 476, 487 (1993). Merely requiring businesses to provide such access does not burden expression.

B. CADA Should Be Subject to Intermediate Scrutiny At Most, But Survives Any Level of Scrutiny.

To the extent that this Court were to find that CADA burdens expression, its impact is merely incidental. As such, CADA is most appropriately analyzed under intermediate scrutiny. A thread of this Court's precedent applied intermediate scrutiny where the challenged law burdened expression—but only incidentally—because the government's interest in its law was unrelated to the suppression of the expression. *See*, *e.g.*, *United States* v. *O'Brien*, 391 U.S. 367 (1967). CADA's aim is to prohibit discriminatory sales practices in the public market place, a goal unrelated to discriminatory messages. Because CADA does not burden expression more than is necessary to further its substantial interest in ensuring equal access to goods and services, it satisfies intermediate scrutiny.

The United States Court of Appeals for the Tenth Circuit notes that, if viewed as compelled speech or as a content-based restriction, CADA's Accommodations Clause must satisfy strict scrutiny. As such, Colorado must show a compelling interest in enacting the law, and the law must be narrowly tailored to satisfy that interest. *Reed* v. *Town of Gilbert, Ariz.*, 576 U.S. 155, 164 (2015). CADA

satisfies strict scrutiny, and this Court should deem it constitutional.

This Court has explicitly recognized the critical role of public accommodations laws, which evince states' interests in and "strong historical commitment to eliminating discrimination and assuring their citizens equal access to publicly available goods and services," a goal that "plainly serves compelling states interests of the highest order." *Roberts* v. *U.S. Jaycees*, 468 U.S. 609, 624, 628 (1984). To that end, "[a] State enjoys broad authority to create rights of public access on behalf of its citizens." *Id*. at 25. This Court has routinely confirmed both the government's compelling interest in enacting such laws and its authority to do so. *Bob Jones Univ.*, 461 U.S. at 574; *Bd. of Dirs. of Rotary Int'l* v. *Rotary Club of Duarte*, 481 U.S. 537 (1987).

Colorado has an interest in preventing the ongoing discrimination of LGBTQ+ people. Notably, Colorado required this Court's intervention in *Romer* v. *Evans*, where the Court held that Colorado's state constitutional amendment, passed to frustrate efforts of municipal ordinances in Aspen, Boulder, and Denver to ban LGBT discrimination, violated the Equal Protection Clause. 517 U.S. 620 (1996). After *Romer*, Coloradans again changed their constitution, this time to deny same-sex couples the right to marry. Colo. Const. art. II, amend. 43; *see Brinkman* v. *Long*, No. 13-CV-32572, 2014 WL 3408024, at *21 (Colo. Dist. Ct. July 9, 2014) (holding Amendment 43 unconstitutional).

Colorado's rocky judicial LGBTQ+ history aside, the United States Court of Appeals for the Tenth Circuit notes that Appellants "do not appear to deny that, at least in other contexts, LGBT people may

suffer from discrimination, and Colorado may have an interest in remedying that harm." *303 Creative LLC* v. *Elenis*, 6 F.4th 1160, 1179 (10th Cir. 2021). This is exemplified by Lambda Legal research which notes that hundreds of complaints, from all across Colorado, document problems faced by LGBT people including "being kicked out of homeless shelters and domestic violence support groups" because of their identity, "to being beaten by police for displaying rainbow flags," and experiencing "other diverse forms of harassment and violence." *See* Br. *Amicus Curiae* Lambda Legal Defense and Education Fund, United States Court of the Appeals for the Tenth Circuit at 15.

This Court came dangerously close to permitting discrimination against same-sex couples reminiscent of the racial discrimination that plagued the pre-Civil Rights South. In the *Masterpiece Cakeshop* oral argument, when asked whether a decision in favor of petitioners would permit a Colorado baker to put a sign in his window that said "we do not bake cakes for gay weddings," petitioners agreed that such a sign might be permissible. Transcript of Oral Argument at 27, *Masterpiece Cakeshop, Ltd.* v. *Colorado Civil Rights Commission*, 138 S.Ct. 1719 (2018) (No. 16-111). Allowing commercial businesses and websites to regularly illuminate their prejudices and then deprive LGBTQ+ persons of their goods and services is doubtless a remedy that diminishes the dignity of LGBTQ+ people.

Petitioners suggest that Colorado's compelling interest is somehow diminished by the fact that LGBTQ+ consumers could obtain wedding website design services from other businesses. Pet. Br. at 38. This Court should find this argument unavailing. The harm of being refused services because of one's

LGBTQ+ identity is not erased because a consumer might be able to obtain goods elsewhere. *Heart of Atlanta*, 379 U.S. at 250. "The government views acts of discrimination as independent social evils even if the prospective [consumers] ultimately find" the goods or services sought. *Swanner*, 874 P.2d at 283.

CADA, and Colorado's compelling interest in implementing it, fit squarely within the bounds of case law upholding public accommodations laws including against free speech challenges.

The United States Court of Appeals for the Tenth Circuit correctly held that CADA's Accommodations Clause is "narrowly tailored to Colorado's interest in ensuring equal access to publicly available goods and services."

In an effort to ensure that LGBTQ+ individuals have equal access to the quality of goods and services that petitioners purport to offer, there could not be a law more narrowly tailored. *303 Creative LLC*, 6 F.4th at 1180. Without CADA's Accommodations Clause, LGBTQ+ consumers would be "necessarily relegated" to an "inferior market" of wedding website design services. *Id.* Petitioners' services are unique and therefore dominate the market for those services as a monopoly. *Id.* That market is not merely custom-made wedding websites, but custom-made wedding websites of the same quality and nature as those created by petitioners. As such, CADA is essential to ensure that these members of the public are not humiliated and pushed aside without dignity or equality when they merely seek services that are available to others in the general public.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Tenth Circuit should be affirmed.

Respectfully submitted,

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