No. 21-476

In the
Supreme Court of the United States

303 CREATIVE LLC, *et al.*,
Petitioners,

v.

AUBREY ELENIS, *et al.*,
Respondents.

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

BRIEF OF *AMICI CURIAE* 27+ LAY ROMAN CATHOLICS IN SUPPORT OF RESPONDENTS

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I.

INTERESTS OF THE *AMICI CURIAE*

This brief is submitted by "27+ Lay Roman Catholics", *amicus curiae*, in support of the anti-discrimination efforts of the Respondents Aubrey Elenis et al. on behalf of the State of Colorado. We are an advocacy group of faithful, practicing members of the Roman Catholic Church. Pursuant to the teachings of Jesus Christ, as emphasized by Pope Francis, our faith supports welcoming all people, including gay, lesbian, bisexual, and transgender individuals, with closeness, compassion and tenderness.[1] 27+ Lay Roman Catholics filed a previous brief, *amicus curiae,* with this Court in *Fulton v. City of Philadelphia,* 141 S. Ct. 1868 (2021), https://perma.cc/S9KB-VGC5.

For purposes of argument, Professor Robert Cummings Neville, an illustrious and world recognized theologian, professor and dean, now retired, at the Department of Theology and Philosophy of Boston University, was teaching a course in philosophy at Fordham College, Bronx, N.Y., on April 8, 1966. *Time Magazine* had just published its issue with the words, "Is God Dead?" on the front cover.[2] In

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

[2] "Is God Dead?", Time Magazine, April 8, 1966, https://perma.cc/V6BT-6HN8. The general accuracy of these remarks of Professor Neville, submitted as a concept to be

answering spontaneous questions from his students about that article, Professor Neville replied that to argue either side of this theological, or philosophical, dispute is in itself, *ipso facto,* a religious exercise. In short, whether one is arguing either for, or against, the existence of God, the entire argument remains fundamentally a religious experience.[3]

Recognizing this position, *amici* emphasize that in the process of determining whether a religious-based exemption should be granted by a government entity, in order to avoid disputes which could quickly become claims to religious freedom on both sides, the analysis should be primarily directed at the impact of the grant upon the citizenry, if any, and to what possible extent the impact from the grant of the exemption would be harmful or adverse to others. Throughout this Brief, any proposed process to consider or evaluate religious liberty claims must

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explored in this argument of *amici*, were confirmed by email between Counsel of Record for the *amici* and Professor Neville on July 11, 2022.

[3] Professor Neville's teaching in the decades after 1966 is apposite: "The most acute issues of this sort for Christianity on our current watch, however, has to deal with equal human rights for gay, lesbian, bisexual and transgender people… Those among us who 'just know' that marriage is between one man and one woman, and to think that it had to be between people of the same race, those who find gays, lesbians, bisexuals, and transexuals to be deviants from natural sexuality simply are enslaved to a visceral cultural code that itself is evil." Robert Cummings Neville, "*To Face Life*" from the "*Nurture in Time and Eternity*" series, Marsh Chapel, Boston University, June 25, 2006, https://perma.cc/2CG4-UPC8.

emphasize adverse impacts upon members of the population entitled to equal protection, *i.e.*, equal status, including LGBTQ+ people.

Roman Catholic laity are expected to speak out on matters of concern especially where the need for justice is compelling. Paul Halsall, *Modern History Sourcebook: John Henry Newman (1801-1890): On Consulting the Faithful in Matters of Doctrine July 1859*, Internet History Sourcebook Project, Fordham University (1998), https://perma.cc/JH44-8Q7C. The Second Vatican Council, in 1964, promulgated that: "By reason of the knowledge, competence, or pre-eminence which they have, the laity are empowered – indeed sometimes obliged – to manifest their opinion on those things which pertain to the good of the Church." *Lumen Gentium (Dogmatic Constitution of the Church*) paragraph 37, https://perma.cc/4P6Y-3EGM.

The laity have always played a role in the development of moral teachings of the Roman Catholic Church; a number of essential tenets in Church teachings, which have developed over time, are the result of lay people identifying imperatives that arise from emerging social or scientific developments. These pressures of lay advocates have been heard, with corresponding results throughout history. https://perma.cc/EFE3-YQXF.

Pope Francis has said, ". . . the work of a bishop is wonderful: it is to help one's brothers and sisters to move forward the bishop *ahead* of the faithful to mark out the path; the bishop *in the midst* of the faithful, to foster communion; and the bishop *behind* the faithful because the faithful can often sniff out the path."

[emphasis added] Press Conference of Pope Francis, July 28, 2013, s*upra.* https://perma.cc/N6QP-YLG4.

27+ Lay Roman Catholics file this Brief *inter alia* based upon the authority of 69% of American Roman Catholics who, according to polling, support same sex marriages. https://news.gallup.com/poll/322805/catholics-backed-sex-marriage-2011.aspx. Further, in the U.S., the percentage of adults who self-identify as gay, lesbian, bisexual, transgender, or other than heterosexual, is estimated at 7.1%. as of the close of the 2021 year. Jeffrey M. Jones, Ph.D., What Percentage of Americans Are LGBT? Gallup, February 17, 2022. https://news.gallup.com/poll/332522/percentage-americans-lgbt.aspx; https://perma.cc/RH86-9MNW. The consciences of American Roman Catholics and those of the *amici*, individually and collectively (*sensus fidei fidelis)* support the marriages of caring committed couples, same sex or otherwise. See Michael Sean Winters, *The Sensus Fidei*, National Catholic Reporter, (June 30, 2014), https://perma.cc/BHC5- 682H. Recognizing "informed conscience," '*sensus fidei fidelis*" and Catholic Social Teaching, the *amici* now accept Fr. Bryan Massingale's challenge for the Church to extend its support for human rights "to more fully include the LGBTQ community." *Id.*

Our faith teaches that those who identify as LGBTQ+ are never to be marginalized, stigmatized, or excluded. We oppose any arguments of Christians or Roman Catholics, including those of institutional Churches, who support, or allow, the rejection, purportedly on religious grounds, of LGBTQ+ individuals seeking business services. We must never

have a nation where certain people are always advantaged because of religion; while, at the same time and to the contrary, certain people are disadvantaged for who they are due to their gender or sexual identification.

Fr. James A. Martin, S.J., an internationally recognized American Jesuit priest, advocates within the Church for LGBTQ individuals. In his role as a Consultor to the Dicastery for Communication at the Vatican, he helps to communicate the welcoming message of Pope Francis. He is the editor-at-large of *America Magazine: The Jesuit Review of Faith and Culture* and author of the very relevant book, Building A Bridge: How the Catholic Church and the LGBT Community Can Enter into a Relationship of Respect, Compassion and Sensitivity (2017; Revised and expanded, 2018), which received formal ecclesiastical approval from his Jesuit superiors—the *Imprimi Potest*. In Building A Bridge, *supra*, Fr. Martin describes how LGBTQ individuals should be welcomed and accepted in the Church and must never be judged exclusively by their sexuality. Fr. Martin emphasizes how the Catechism calls upon Catholics to treat homosexuals with "respect, compassion, and sensitivity" Catechism of the Catholic Church, No. 2358, https://perma.cc/P89DKZCD.

Fr. Bryan Massingale is Professor of Theological and Social Ethics and the Senior Fellow in Fordham University's Center for Ethics and Education. He has served as President of the Catholic Theological Society of America. The primary area of his scholarship, addressed in his book, Racial Justice and the Catholic Church (2010), is the history of

racism within the Church. Olga Segura, *Meet Father Bryan Massingale: A Black, Gay, Catholic Priest Fighting for an Inclusive Church*, The Revealer—A Magazine of Religion and Media (June 3, 2020), https://perma.cc/C43T-9UXF. Fr. Massingale endorses the right of LGBTQ individuals, under present Church teaching, to participate fully both within civil society and within the Church. He identifies the need for the Church, under Catholic Social Teaching, to extend its existing support for human rights to include the LGBTQ community. On these matters, Fr. Massingale calls upon all Catholics to "...Refuse to be silenced. Continue to speak our truth even when we know it's not going to be welcome." He has determined that "genuine doctrinal development" concerning the religious treatment of LBGTQ individuals is presently occurring within the Church. Robert Shine, *Fr. Bryan Massingale to LGBT Catholics: '" Refuse to Be Silenced. Continue to Speak Our Truth*.", New Ways Ministry (May 24, 2017), https://perma.cc/CH9J-9FMB.

Lisa Fullam, a Professor of Moral Theology at the University of Santa Clara Jesuit School of Theology, emphasizes that in refusing to recognize the civil marriage of "... same-sex couples, we discriminate against them precisely because they are homosexuals, a form of unjustifiable discrimination that is contrary to Catholic Social Teaching." Lisa Fullam, *Civil Same-Sex Marriage: A Catholic Affirmation,* New Ways Ministry (2019), https://perma.cc/JV7D-XSBP.

Dr. Fullam also notes, "No aspect of magisterial sexual teaching [of the Roman Catholic Church] has been infallibly defined [Emphasis added] ...

Historically, the development of doctrine is often driven by the diligent work of scholars..." *Id.* One central concern of this ongoing development is the extent to which traditional Church teaching about LGBTQ individuals should now be transformed to align with recent advances in scientific understanding concerning human sexuality. She concludes that Church leaders seem to regard "... Magisterial teaching on sexuality as irreformable, while in fact there has been considerable development in authoritative sexual teaching over the centuries. To assert that sexual teaching as we have it now, has reached perfection is unjustified in light of the history of development." *Id.*

The work of Todd A. Salzman and Michael G. Lawler is concentrated in the fields of human sexuality and theology including their published books, "Introduction to Catholic Theological Ethics: Foundations and Applications" (2019) and "The Sexual Person-Toward A Renewed Catholic Anthropology" (2008). Professor Salzman is the Amelia and Emil Graff Professor of Catholic Theology at Creighton University; Professor Lawler is the Emeritus Amelia and Emil Graff Professor of Catholic Theology at Creighton University. On June 25, 2020, they published an article in National Catholic Reporter, *Can U.S. bishops' support of discrimination against LGBT be sustained*. [https://perma.cc/K39E-X5TH]. In this article, they state, "Catholic Social Teaching is clear: discrimination on the basis of sexuality or gender is always unjust and immoral."; they continue, "The Catechism of the Catholic Church clearly states that, 'the equality of men [and women] rests essentially on their dignity as persons and the

rights that flow from it." *Id.* Continuing, "every form of social or cultural discrimination in fundamental personal rights on the grounds of sex, race, color, social conditions, language, or religion must be curbed and eradicated as incompatible with God's design.'" *Id*

II.

SUMMARY OF THE ARGUMENT

The majority opinion in *Employment Division, Dept. of Human Res. v. Smith*, 494 U.S. 872 (1990), in the opinion of a majority of, constitutes the most important actions undertaken by Justice Antonin Scalia in his entire career; it is his ultimate judicial legacy. *Smith* is especially consequential in the present stage of this Court's historical jurisprudence. It should not be avoided, or evaded, by end run parsing of religiously based exemption claims clothed in the guise of free speech. If religion is the catalyst for the proposed exemption, whether it be ensconced in First Amendment free exercise, free speech, free press, or free association concepts, *Smith* should rule. The impact, or consequences, of any abandonment of *Smith*—or its relegation to judicial desuetude--will never be comprehensible to the American public. This court is now being requested by Petitioner 303 and it supporters to enter upon either a "near occasion", or actual, establishment of religion which, as dreaded by Justice Scalia, will impose religion upon the American public in a manner never contemplated by this Nation's Founders. The result, to use Justice Scalia's very own words, "Any society adopting such a system **would be courting anarchy**, but that danger increases in direct proportion to the society's diversity of religious beliefs, and its determination to coerce or

suppress none of them." [Emphasis added] *Smith, Id.* at 888.

Second, *amici* also propose that a new test for religious exemption claims be considered by this Court if it determines that *Smith*, standing alone, is not sufficient to resolve this matter.

Third, *amici* submit that this Supreme Court should now more clearly confirm that LGBTQ+ persons as a classification are entitled to 14th Amendment Equal Protection of The Law.

III.

ARGUMENT

A. Justice Scalia's Judicial Legacy In *Employment Division v. Smith,* Should Never Be Abandoned By This Supreme Court.

Justice Scalia repeatedly made clear his thoughts, or, rather, serious concerns about religious liberty claims in his extrajudicial speeches, writings, and appearances on television. To capsulize his 1990 majority opinion in *Employment Division, Dept. of Human Res. v. Smith*, 494 U.S. 872 (1990), he often used a particular analogy—the French cheese analogy, sometimes theatrically, to illuminate how the inordinate or unfettered recognition of individualized free exercise religious claims, under the First Amendment, considering our diverse, "melting pot" population, would harm American society:

> A separation of church and state was more politically needful in the American Republic than elsewhere, because of the

> sheer diversity of religious views. (**A prominent French judge once explained to me the essential difference between France and the United States as follows: France has two religions and 300 cheeses. The United States has two cheeses and 300 religions** [Bold and underlining for emphasis] "Church and State", Address by Justice Scalia, Pontifical North American College, Rome, December 10,1989, Scalia Speaks Reflections on Law, Faith, and Life Well Lived, (2017).[4]

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[4] "Justice Scalia used his analogy that "France has two religions and 300 cheeses while the United States has two cheeses and 300 religions" continually throughout his lifetime including, as but examples only and certainly not limited to: Appearance before joint meeting of American Constitutional Society and Federalist Society, November 11, 2013 ("Justices Breyer and Scalia Converse on Constitution, YouTube 52:50); Appearance on C-SPAN with Justice Breyer on Constitutional issues (December 5, 2006); Book: Antonin Scalia, On Faith—Lessons From An American Believer (2019) (Introduction By Justice Clarence Thomas); Chapter on the Two Kingdoms—Christians and State Authority (Includes France and cheese analogy) p.100 & Chapter dedicated to Employment Division v. Smith, p.140; Book: Antonin Scalia, Scalia Speaks—Reflections on Law, Faith and Life Well Lived (2017)(Forward by Ruth Bader Ginsburg), Chapter on "Church and State"" (includes France and cheese analogy) p.134 & Chapter titled "Dissents" which includes discussion of Employment Division v. Smith [although it is not a dissent]p.279; Sophia Feingold, *Supreme Court Justice Antonin Scalia Takes Aim at the Separation of Church and State,* National Catholic Register, (October 14, 2012), https://perma.cc/GU69-MA9N for those seeking to more

After mentioning the variance in the number of religions between France and the United States, Justice Scalia continued:

> But perhaps more than any other principle of American government that one-- the separation of church and state-- has swept the western world. I hope you will excuse my cynicism if I believe that the single most significant cause of that healthy development has been, quite probably, a decline in the vigor of religious belief. Keeping the state out of matters of religion is a much easier political principle for the agnostic than it is for the true believer (to use Eric Hoffer's term) of any faith. If one is a skeptic, or not entirely convinced of the truth of one's own religious beliefs, it is quite easy to agree that those beliefs should not be imposed, and indeed should not even be fostered, by the state. After all, they might be wrong. But for the Ayatollah Khomeini--or, for that matter, for devout Christians of the sort who managed the Inquisition the doctrine is more difficult. If one truly believes that the hereafter is all important, that the pleasure and griefs of

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intensively explore Justice Scalia's speeches are partially open to researchers at the library of Harvard University School of Law --events dated to May 1991 (Series III: Speaking Engagement and events; box 83, folder 24 is available) The remaining files at present are closed due to donor restrictions.

> our 80 years or so in this world are insignificant except as a means of entering the next, then the temptation is to take whatever action is necessary including coercive action by the state, to save people for their own good, whether they know it or not. *Id.*

One must first wonder whether these words, if expressed by a commissioner such as one sitting to hear the matter of Masterpiece Cake in Colorado, would be deemed so hostile to religion that any hearing being conducted would be vitiated. *Masterpiece Cake v. Colorado,* 138 S. Ct. 1719 (2018). Justice Scalia uttered those most important words one month after *Smith* was argued on November 6, 1989; his majority decision in *Smith* was issued just four months after this address in Rome. Complex religious challenges, based upon our nation with its hundreds of religions, were anticipated by Justice Scalia in both in his Rome address and in *Smith*: "[I]f 'compelling interest' really means what it says . . . many laws will not meet the test. Any society adopting such a system would be courting anarchy, but that danger increases in direct proportion to the society's diversity of religious beliefs, and its determination to coerce or suppress none of them. *Smith* at 888. Justice Scalia continued, ". . . precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order." *Id.*

Possible harmful impacts, which could result from recognition of religious practices, were

condemned by this Court as early as 1871 in *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 728 (1871), "In this country the full and free right to entertain any religious belief, to practice any religious principal, and to teach any religious doctrine...which **does not infringe personal rights** [emphasis added] is conceded to all".

In *Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972), Chief Justice Burger stated, "The Court must not ignore the danger that an exception (221) from a general obligation of citizenship on religious grounds may run afoul of the Establishment Clause..." He encouraged the need for a sensible and realistic application of the Religion Clauses. In dissent, Justice William O. Douglas expressed concerns about harmful impact from the grant of that religious exemption, "...I think the children are entitled to be heard; the education of the child is a matter on which the child will often have decided views. He may want to be a pianist or an astronaut or oceanographer. To do so he will have to break from Amish tradition…" Yoder, *Id.* at 244, 245.

Smith was relied upon by the Court of Appeals in its rejection of the Petitioner's arguments. Yet, reviewing the vast majority of filings submitted on behalf of the Petitioner thus far, the absence of any references to *Smith* epitomizes both its importance and the weight it carries against the reasoning of Petitioner or those who support petitioner as amici. No-where does *Smith* state that it only applies to Establishment Clause or Free exercise claims; no-where does *Smith* state that it does not apply to religious claims framed upon the Free Speech

provisions of the First Amendment. This Supreme Court in its grant of certiorari did not direct that Smith was not to be referred to or mentioned.

Religious exemption cases are almost always accompanied with the existence of unrepresented, adversely impacted interests such as the Amish children in *Yoder* and LGBTQ+ people in the instant matter involving 303 Creative. The Constitutionally proper restraint which it imposes upon religious liberty claims, like those of the Petitioner 303, is apparent. Justice Scalia's reasoning in *Smith,* based upon his real-life observations, experiences, and concerns as well as those in the law, was foundational to his jurisprudence. As a Supreme Court Justice, he embedded each of these into the fabric and structure of *Smith*'s text to protect this nation from what he truly feared could become chaos. Justice Scalia's legacy in *Smith,* carefully crafted and in place for more than 30 years, cannot be disregarded and it must not be abandoned.

B. The Prerequisites For The Grant of Any Religious Liberty Exemption Are The Absence of Animus and Recognition of Equal Status of Persons

In *Fulton v. City of Philadelphia,* 141 S. Ct.1868 (2021), Justice Barrett, in the portion of a concurring opinion joined by both Justice Kavanaugh and Justice Breyer, inquired:

> **"Yet what should replace *Smith*? The prevailing assumption seems to be that strict scrutiny would apply whenever a neutral and generally**

> **applicable law burdens religious exercise. But I am skeptical about swapping *Smith*'s categorical antidiscrimination approach for an equally categorical strict scrutiny regime…" *Fulton*, *Id.* 3**

To abandon *Smith* would give free range to the "categorical strict scrutiny regime" which was such a great concern of Justices Barrett, Breyer and Kavanaugh in this concurrence, *Fulton*, *Id.* To avoid disputes which might often be accompanied by unacceptable hostility, the analysis is best directed to identification of any possible harmful impacts upon the public. This would serve well in matters such as the instant one; the approval of petitioner 303's request for an exemption would have a broad universal negative impact on LGBTQ+ citizenry—each deserving equal status, each a person entitled to equal protection of the law under the 14th Amendment.

As stated in *Smith*: "It is horrible to contemplate that federal judges will regularly balance against the importance of general laws the significance of religious practices." *Id.* at 889 n.5. Many believe, however, that a robust test is necessary to buttress *Smith*. That test would weigh religious liberty, free exercise and also free speech claims grounded upon religion. Any such test must focus primarily on the impact, in particular adverse impacts, which the grant of the religious exemption might generate.

Zalman Rothschild of Stanford Constitutional Law Center and New York University School of Law, in a *Cornell Law Review* article now being published,

analyzes the history of free exercise and religious liberty claims in great detail; he concludes that the Court should not abandon *Smith* in the absence of a test to be applied universally to such claims. *Amici* submit that any such test must be linked with the holding of *Smith* which remains indispensable. Rothschild, Zalman, Free Exercise Partisanship (October 7, 2020). Forthcoming, Cornell Law Review, Vol. 107, No. 4, 2022, Available at SSRN: https://ssrn.com/abstract=3707248 or http://dx.doi.org/10.2139/ssrn.3707248; https://perma.cc/2UBA-H5BE.[5]

The *amici* strongly condemn any religious liberty, free exercise, or free speech arguments which marginalize LGBTQ+ individuals. In his exhaustive analysis of the history of such claims, Rothschild concludes that this Court should neither abandon, nor dilute, the standard of *Smith* without the creation of a benchmark to be applied as a buttress, or in a much less preferred manner, as a substitute for *Smith*?

The (i) inveterate search for, and application of, exceptions, often of a trivial nature; (ii) the emerging

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[5] *Amici* employ the word, and concept of "buttress" when referring to possible additional support for *Smith*; on this issue, Nelson Tebbe employs the word, and concept, "guardrail" in discussing Smith and religious conscience exemptions including freedom of speech and association. Nelson Tebbe, *The Principle and Politics of Liberty of Conscience*, Harvard Law Review, 135:267 (2021), https://perma.cc/U53F-4RDY. Using somewhat different wording ("market citizenship" and "market protection") and primarily economic analysis to support the same conclusions: Hila Keren, *Separating Church and Market: The Duty to Secure Market Citizenship for All*, 12 U.C. Irvine L. Rev. 911 (2022), https://perma.cc/Z74M-K2HD.

imposition of "most favored nation status," and (iii) the automatic application of strict scrutiny to neutral laws of general applicability each fail to fulfill that essential purpose. These approaches disregard the foundational dynamics of our First Amendment Establishment and Free Exercise provisions. The unlimited application of these approaches to religious liberty claims, as Justice Scalia among others has emphasized, would result in a proliferation of prohibited Establishments with harmful impacts. The *amici* oppose all efforts to abrogate the application of *Smith; amici,* however, would not oppose a determination of this Court to create a new test, not categorical, hopefully to be joined with *Smith* based upon this Court's historic jurisprudence and extant Supreme Court case law.

Any such test should primarily address adverse impacts to identifiable segments of the population such as LGBTQ+ persons. *Amici* emphasize that in the process of determining whether a religious-based exemption will be granted, and to avoid disputes which could become religious exercises, such as the support for gay and lesbian people by the instant *amici* for faith-based reasons of inclusivity and social justice, the analysis should be primarily directed at any adverse impacts, if any, upon the citizenry, or members of the public, which would result from the grant of the religious exemption.

A solution to this challenge may be found in the carefully reasoned test for the grant of religious exemptions developed by Corey Brettschneider. It requires, as a prerequisite, application of this Court's animus doctrine combined with the application of equal status principles under the Free Exercise, Equal

Protection and Establishment Clauses. Corey Brettschneider*, Praying for America: The Anti-Theocracy and Equal Status Principles of the Free Exercise, Equal Protection and Establishment Clauses*, 47 BYU L. Review 1127 (2022), https://perma.cc/V2BB-7AEH. This approach would serve as a beneficial roadmap for judicial resolution of religious liberty, religiously based free speech and free exercise exemption claims of whatever nature – whether based upon the Establishment Clause or Free Speech assertions, or otherwise.

Brettschneider places great weight upon the foundational work of John Locke, especially his 1689 *Letter Concerning Toleration*. He notes that Locke's writings greatly influenced James Madison. Brettschneider also relies upon arguments of John Rawls, a contemporary American moral and political philosopher: "religious reasons have a fundamental role in public life as long as they are translatable in secular terms and respect the equal status of persons." (Brettschneider, *supra.*, p.1138)

Brettschneider's approach would allow governmental references to religious concepts, and even prayer, in instances such as the creation of the Martin Luther King, Jr. Memorial in Washington, D.C. which includes religious expressions of Reverend King. However, petitions such as those found in *Masterpiece Cake, Ltd. v. Colorado Civil Rights Commission,*138 S. Ct. 1719 (2018) and the instant petitioner's *303 Creative* matter, which violate the animus doctrine and abrogate equal status of gay and lesbian persons, would be rejected.

In crafting this test, Brettschneider relies upon the animus doctrine set forth in the line of cases which includes *Romer*, supra., which is especially relevant to the instant controversy. Relying on the animus doctrine, this Court held in *Romer* that Amendment 2 of the Colorado State Constitution violated the equal protection clause. Colorado's Amendment 2, as approved by the citizens of that State, singled out homosexual and bisexual persons, imposing on them a broad disability by denying them the right to seek and receive specific legal protection from discrimination. *Romer* standing on its own, controls the instant matter, but it also serves as a linchpin of Brettschneider's template.

Professor Brettschneider proceeds to combine the animus doctrine with the application of anti-theocratic principles, as recognized by Locke, which hold that "citizens have the right to advocate theocratic beliefs, but not a right to use government power to impose those beliefs." (Brettschneider, *supra., p. 1138*). Reference on this point is also appropriate, *amici* submit to the condemnation of harmful impacts by this Court in *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 728 (1871), "In this country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine...which does not infringe personal rights is conceded to all."

Under these principles, religious liberty claims seeking governmental approval of actions, whether in the nature of free exercise or free speech, would only be cognizable when a neutral law of general applicability is challenged if: (i) independent secular

reasons are identifiable which would support such actions i.e. the reasons and purposes of the action are "translatable" (comprehensible) on secular grounds; (ii) the proposed action does not contain a material ingredient of animus directed at any identifiable segment of the population; and (iii) the proposed action is respectful of the equal status of citizens and, assumably, not violative of 14th Amendment "equal protection" principles', i.e. in the instant case of petitioner 303 Creative, not discriminatory on the basis of factors such as race, gender, or LGBTQ+ identity.

Brettschneider has crafted a beneficial approach to weigh claims for religious liberty or free exercise exemptions whether based upon Establishment or Free Speech grounds. To avoid intrusion into religious arguments either for or against a requested exemption, the central focus must be upon the impact which would follow if the exemption was to be granted. If a modification to Smith is deemed essential, the template identified by Professor Brettschneider should be buttressed to, or joined as a guardrail with, *Smith*'s holding. It is a reasonable solution to a problem which would otherwise become unresolvable with accompanying unconstitutional indifference to the equal status rights of a substantial number of citizens of this nation.

C. This Supreme Court Should Now Formally Confirm That LGBTQ+ Persons Are Entitled To Heightened Scrutiny and 14th Amendment Equal Protection of The Law When They Are The Subject of Religious Exemption Challenges

LGBTQ+ persons as a group or classification are entitled to equal protection of the law under the 14th Amendment to the United States Constitution. A primary reason this should be broadcast in its decision on the instant matter of 303 Creative is to protect religion under the dynamic of our First Amendment. Our nation cannot function while countenancing rejection in public commercial settings of a discrete category of our citizenry based solely upon the individualized religious faiths of the rejectors. If the type of religious exemption now sought by Petitioner 303 is recognized, the failure to expressly secure equal access and equal dignity protection will result in the harmful commercial disenfranchisement of LGBTQ+ people. Incredibly, in the 21st Century, would gay and lesbian people, and their friends and relations, be compelled to regularly consult a new version of Victor Hugo Green's "The Negro Motorist Green Book" to identify those businesses which refuse to serve LGBTQ+ people? https://perma.cc/JGT3-R7JL; Erin Blakemore, *A Black American's Guide to Travel in the Jim Crow Era*, SMITHSONIAN MAG. (Nov. 3, 2015), https://www.smithsonianmag.com/smart-news/read-these-chilling-charming-guides-black-travelers-during-jim-crow-era-180957131/, [https://perma.cc/UNS7-Y9J9].

The need to recognize the equal protections rights, and as a corollary apply heightened security, to gay and lesbian individuals is not original to this brief; an excellent treatment of the issue was published by Daniel J. Galvin, Jr. in the William and Mary Journal of Race, Gender and Social Justice— "*There's Nothing Rational About It: Heightened Scrutiny for Sexual Orientation Is Long Overdue*" (2019), https://perma.cc/NFF8-E6EN. In that article, Galvin first traced the history of equal protection, then explored the history of gay rights and sexual orientation classifications, and finally argued compellingly that sexual orientation in all cases meets the burden to be deemed a suspect classification with resulting application of equal protection: "sexual orientation meets the standard as "suspect" under the "test" developed over the years by the Supreme Court..." Galvin, *Id*. As a result, in all cases where LGBTQ+ persons present a Fourteenth Amendment Equal Protection Clause argument based upon on sexual orientation, "the Court should apply heightened scrutiny analysis". Galvin, *Id*. at 431.

In *Masterpiece Cake v. Colorado*, 138 S. Ct. 1719, 1727 (2018), this Court ruled: "Our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth." Continuing, "[I]t is unexceptional that Colorado law can protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public." *Masterpiece*, 138 S. Ct. at 1728. In *Masterpiece*, however, what is missing, and which should have been

present, is an express holding that an equal protection violation (using those important words) had occurred as a result of the baker's actions and that Colorado's anti-discrimination law was enacted *inter alia* to protect the equal protection rights of LGBTQ+ customers, including those preparing for their legally sanctioned weddings, against religious exemption challenges.

On this issue of equal protection, a second case, *Romer v. Evans*, 517 U.S. 620 (1996), involving Colorado, also controls; it blocked the efforts which, by state constitutional amendment, would have endorsed discrimination against LGBTQ+ persons. In *Romer, Id*. as Professor Brettschneider, this Court invalidated a state constitutional amendment denying civil rights protections to homosexuals. This Court ruled: "…the laws and the Constitution can, and in some instances must, protect them in the exercise of their civil rights.".

Daniel Galvin's article also analyses in great detail how "sexual orientation meets the burden for suspect classification.' *Id*. at 424 et. seq. He relies in part on the work of Marcy Strauss, *Reevaluating Suspect Classifications Amici,* 35 Seattle U. L.Rev.135 (2011), https://perma.cc/ZE8Q-96BC, and Courtney A. Powers, *Finding LGBTs a Suspect Class: Assessing the Political Power of LGBTs as a Basis for the Court's Application of Heightened Security,*17 Duke J. Gender L. & Pol'y 385 (2010), https://perma.cc/7V7N-WKNX. Galvin concludes, based upon extensive facts:

> It is time the court recognized what has been established through the decades since Bowers. …LGBs are a discrete and

> insular minority making up about only about 10% of the population. There is a lengthy documented history of discrimination based on sexual orientation…For these reasons sexual orientation meets the standard for suspectness under the "test" developed over the years by the Supreme Court. As a result, in cases raising a 14th amendment equal protection clause claim based on sexual orientation the court should apply heightened security in its analysis.

On these issues, Lawrence G. Sayer of the University of Texas Law School and Nelson Tebbe, of Cornell law school have published an important article, "*The Reality Principle*", University of Minnesota Law School Scholarship Repository (2019), https://perma.cc/TQA3-QG7T, concerning the recognition of full and equal citizenship for all Americans including LGBTQ+ people; it includes detailed discussion of *Masterpiece Cake* and emphasizes that, "Refusals by vendors in the wedding industry to provision same sex weddings operate in the shadow the history of structural injustice that the Court has so conspicuously set itself against" Id. page 188.

Reality Principle also argues that the work of Charles L. Black, Jr. is particularly relevant to the continuing conflicts with regard to same sex couples and exemption claims of religious objectors. They cite Black's *The Lawfulness of the Segregation Decisions*, 69 Yale L.J. 421 (1960), https://perma.cc/5TRJ-RP7A,

and in particular his "reality principle" which they incorporate in their own title. Sager and Tebbe note that the work of Black has also been cited and identified as pertinent to the issues of LGBTQ+ equality in James M. Oleske, Jr. "*State Action, Equal Protection, and Religious Resistance in LGBT Rights*", 87 U. Colo. L. Rev. 1, 1 (2016), https://perma.cc/6WMR-55E5, and Toni M. Massaro, "The Lawfulness of Same-Sex Marriage Decisions: Charles Black on Obergefell", 25 Wm. & Mary Bill of Rights J., 321 (2016), https://perma.cc/U5W7-PWKV. *Reality Principle* argues powerfully, that the work of Charles Black is relevant to these continuing conflicts with regard to same sex couples and claims of religious objectors. Black's arguments correctly lead to the conclusion that the equal protection provisions of the 14th amendment must be recognized, applied and enforced for LGBTQ+ people including those considering same sex marriage.

In *Reality Principle*, Sager and Tebbe note:

> Civil rights in Colorado--and in every other jurisdiction of which we are aware—protects religious believers against discrimination based on their beliefs. What it does not do is give religiously motivated persons a blanket exemption from public accommodations laws to which they object. The exemption aim of civil rights law is to protect members of vulnerable groups from the harms of structural injustice; that vital project would be undermined by a broad carve out for religious dissent.

> Antidiscrimination law does not take sides in a purported cultural war, nor does it violate the liberal and democratic commitment to government neutrality among comprehensive conceptions. to the contrary it stipulates what citizens who are divided on questions of profound importance nonetheless owes to each other in order to live together as equals in our political community.

Reality Principle, supra., p. 173.

Sager and Tebbe continue:

> [In *Masterpiece,* this Court ruled that] …religious actors are not constitutionally entitled to exemptions from public accommodations laws under normal circumstances these laws which protect members of vulnerable groups against discrimination by those who choose to provide goods and services to the public on two important to equal citizenship to allow for exemptions based on conscience.

In the decision in *Masterpiece*, on these central points all nine justices endorsed the application of the rule of *Smith*, *supra.*, to typical public accommodations laws. *Supra.*, 494 U.S. 872. Sayers and Tebbe emphasize that "the court declined the invitation of advocates to distinguish between discrimination on the basis of sexual orientation and discrimination on the basis of race" *Id.* at 175, continuing, "the Court instead assimilated LGBTQ

rights to the model of racial equality and to the paradigm of full and equal citizenship for everyone. "They emphasize that *Masterpiece* relies upon *Newman v. Piggy Park Enterprises, Inc.*, 390 U.S. 400, 402 n.5 which described the contentions of a segregated restaurant owner that the Civil Rights Act of 1964 interfered with the free exercise of the [owner's] religion as "patently frivolous".

These arguments take direct aim at those who have "long argued about courts and legislators should treat race and sexual orientation differently, denying religious exemption from race nondiscrimination mandates but authorizing religious exemptions from social sexual orientation discrimination." Douglas Ne Jaime and Reva Siegel, "*Religious Exemptions and Anti-Discrimination Law in Masterpiece Cakeshop*", 128 Yale L.J.F. 201, 204 (2018).

Continuing, *Reality Principle* challenges and disputes those "lawyers and scholars who have long argued that 'dignitary' or 'stigmatic injury' to same sex couples should not count as harm at all, or at least, not a harm that was sufficiently serious to override religious freedom" (specifically referring in part to Douglas Laycock's "*Religious Liberty for Politically Active Minority groups: A Response to Ne Jaime and Siegel*", 125 Yale L.J.F. (2016). **In short, Sager and Tebbe make the case that the harm suffered by LGBTQ+ persons are much greater and much more real, impactful and adverse than Laycock and others have asserted.**

Douglas Laycock is a Professor of Law at both the Universities of Texas and Virginia who has studied and advocated on these issues throughout his

long career. His most recent work includes: *The Broader Implications of Masterpiece Cakeshop,* Brigham Young University Law Review (2019), https://perma.cc/G8VN-7VN4, *Religious Liberty for Politically Active Minority groups: A Response to Ne Jaime and Siegel*, 125 Yale L.J.F. (2016), https://perma.cc/3HAJ-4GHF.

The *amici* do agree with one particular aspect of his recent work, disagree with much of the remainder and flatly dispute his recent efforts to diminish the history of suffering, discrimination and harm that LGBTQ+ persons have historically suffered. First, *amici* agree, and this Court should also, with Professor Laycock when he argues that the compelling interest test may apply to those instances where LGBTQ- persons are refused services in certain locations where "discrimination is widespread"; he fails, however, to inform how particular locations where such widespread discrimination is occurring are to be identified in systematic manner. *Amici* submit that such discrimination is present anywhere and everywhere one encounter refusal or rejections of service to LGBTQ+ persons. Laycock continues:

> Of course, I do not claim that all problems of hostility to the LGBT have been solved. Sporadic discrimination and even violence continues. **In some communities, discrimination is still widespread**, and in those places, if most wedding vendors (or the only wedding vendor) discriminate, **religious exemptions must be denied on**

> **compelling interest grounds**.
> [Emphasis added]

Douglas Laycock, *The Broader Implications of Masterpiece Cakeshop,* Brigham Young University Law Review (2019), https://perma.cc/BQ4K-CB3W.

Leaving the task to this nation's Courts to identify purported pockets of discrimination against gay and lesbian persons (when it nevertheless remains universal) and to inject religious exemptions into the process would generate the kind of chaos and anarchy that Justice Scalia anticipated when he rendered his decision in *Smith*, *Id.*

To openly apply equal protection in this case involving 303 Creative, including actual use of those Constitutionally sacred words, would bring a just and appropriate end to the squabbling within our judicial system—a place where such differences need not and should not be aired—between Christians and those of other religious faiths who intend to treat LGBTQ+ persons exclusively and Christians and those of other religious faiths, including the *amici*, who intend to treat LGBTQ+ persons inclusively. The advocacy and arguments of those who wish to welcome, and of those who wish to reject, are both often motivated by religious faith—not just by secular reasons; those issues never belong in our courts.

Second, *amici* dispute Professor Douglas Laycock when he attempts, by name, to rebut Professors Sager and Tebbe and *The Reality Principle* (as well as the work of those who support them such as Black, Ne Jaime, Siegel, Oleski, Massaro, Powers, Strauss, and Galvin). *Amici* rejects Professor

Laycock's "minimizing" of the historical maltreatment of LGBTQ+ people in a disingenuous attack on the presence of "traditional indicia of suspectness" (*San Antonio Indep. School District v. Rodriguez*, 411 U.S. 1, 28 (1973); Galvin, *supra.* p. 409) Laycock propounds that "in the past" discrimination against LGBTQ+ people was less insidious, or less pernicious, than discrimination against Black people. In an attempt to obstruct the application of 14th Amendment equal protection to LGBTQ+ persons, he presents a "historical analysis" that is questionable:

> Sager and Tebbe's assertion that the LGBT community is in a similar situation today is absurd, and they make essentially no effort to support their claim. Certainly, gays and lesbians were treated badly in the past, and the problem has not been entirely solved. We might plausibly say that the combination of sodomy laws, moral disapproval, and employment discrimination was a "system" designed to keep gays and lesbians in the closet, But, even at its peak, that system was not remotely so pervasive, and did not reach nearly so many parts of life, as segregation in the American South.

Laycock, *The Broader Implications*, *supra.*, pp.190-193, https://perma.cc/BQ4K-CB3W.

First, segregation was not limited to the American South; it was rampant also in the North. Moreover, his comparison is one which should never be undertaken—who among our population, our

citizenry, or any category of human beings for that matter was treated worse or has suffered more (or is still being treated worse) for whatever unacceptable, unjust, unlawful or unconstitutional discriminatory reasons. This analysis and its conclusions are absolutely unsupportable. History is often deficient when used in a single-minded manner as Laycock does here to support an argument. Singling out one form of discrimination, or another, as purportedly treatment of human beings in a more predatory fashion, accomplishes nothing especially when each of those categories remains the subject of continuing discrimination.

While not intending to engage in comparisons of various forms of discrimination against one portion of the population versus another as examples such as Black people and Reconstruction or Jewish people and the Holocaust, the historical maltreatment and persecution of LGBTQ+ people has been recognized in exhibits at the United States Holocaust Memorial, Center For Advanced Holocaust Studies, https://perma.cc/LGB4-6FXW; https://perma.cc/FQD5-2JEV; https://perma.cc/T2GT-LNFA including in its publication of the monograph by Geoffrey J. Giles, *Why Bother About Homosexuals? Homophobia and Sexual Politics in Nazi Germany*?, https://perma.cc/U5FV-6ZZX. A visit to the "Memorial To The Homosexuals Persecuted Under The National Socialist Regime" [Nazi regime] in the Tiergarten,

Berlin, Germany is also apposite. https://perma.cc/T4VW-QLUQ.[6]

One quickly learns that the treatment of gays and lesbians was much more dire than merely keeping them," in the closet", as Professor Laycock would have all believe; the history, and it continues, is much more tragic and violent than those words convey. In innumerable historical instances, whether the particular form of discrimination was that directed at African Americans, Jews, LGBTQ+ persons or whomever, it occurred and most probably continues; further, it was often horrific and always unacceptable as instances of "man's inhumanity to man". These factors, historical in nature, support recognition of the 14th Amendment equal protection rights of LGBTQ persons. There is a great body of American history that also does so—military firings, 10,000 federal government civilian firings in the 1950's--so much more that also does so but those lie beyond the space available here.

Contrary to Laycock's attempt at simplification, the history of LGBTQ+ people is compelling but, also, complex, as noted in a recent New York Times article on the opening of LGBTQ+ museums in Amsterdam, Berlin, London and soon New York. It is often about

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[6] **Resolution of the German Bundestag from 12 December 2003**, "The Federal Republic of Germany shall erect a memorial in Berlin to the homosexuals persecuted under the National Socialist regime. With this memorial, the Federal Republic of Germany intends – to honor the victims of persecution and murder, – to keep alive the memory of this injustice, and– to create a lasting symbol of opposition to enmity, intolerance and the exclusion of gay men and lesbians."

"erasure"—throughout history, it was "best", one might say essential, if gay and lesbian persons remained invisible and those factors must be incorporated when the historical record is prepared and considered. The article also relates that a similar museum is now in the planning stages in the United States. Tom Farber, "*What Should an LGBTQ Museum Be?* New York Times, August 7, 2022." https://perma.cc/VJS8-QGGT.[7]

As noted in the initial paragraphs of this brief with regard to the remarks of Professor Neville, it is a religious exercise whether one argues that there is a God (or that he or she is "alive") or to argue that there is no God (or that he or she is "dead"). Both are religious actions—religious exercise. If this Court were to rule for Petitioner 303 Creative on the basis of its religious faith (and there is no other reason for the petition to so rule), it is not just ruling against "secularists" (or to use John Locke's word "anti-theocrats"); it is also ruling against, in contradiction to, a very substantial portion of the American populace, who are religious, including the *amici*, all of whom, based upon their faith, support anti-discrimination efforts of respondents as well as,

[7] All can ponder, as history ironically looks inward upon itself, what historical treatment the holding in this instant important matter will receive in that new museum—laudatory or condemnatory? Acknowledging both Theodore Parker and Martin Luther King, Jr., the prayer of the *amici* to this Court is that its ruling shall bend the arc of the moral universe towards justice for all including our LGBTQ+ brothers and sisters. Of course, proceeding forward with equality and justice in the real world is even more important than what we present in our historical efforts including museums.

always, the compassionate welcoming of LGBTQ+ persons. Any such action would not be fathomable, "translatable" or comprehensible to the people of this Nation. How could this Court do so in the face of Establishment Clause constraints of our First Amendment and in disregard of the Equal Protection rights of our 14th Amendment.

This Court must grant full recognition of the right of LGBTQ+ persons as a "suspect class" to heightened security, more fully recognize their right to equal status and communicate that they are fully entitled to equal protection of the laws under this Nation's 14th Amendment.

CONCLUSION

For all reasons set forth herein, the decision below should be affirmed.

Respectfully submitted,

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