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 ADVENTIST FORUM, SEVENTH-DAY ADVENTIST KINSHIP INTERNATIONAL, INC., AND 31 INDIVIDUALS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI*[1]

This case asks whether a business that offers custom wedding websites to the general public may use free speech as a justification for refusing to sell those websites to same-sex couples in violation of anti-discrimination laws. The U.S. Court of Appeals for the Tenth Circuit answered no, and *amici* strongly urge this Court to affirm that judgment.

Amici include Adventist Forum and Seventh-day Adventist Kinship International, Inc. ("SDA Kinship"). Adventist Forum is a 501(c)(3) nonprofit organization committed to promoting community through conversation in the Seventh-day Adventist Church. Adventist Forum publishes *Spectrum*, a quarterly journal established in 1969 to discuss contemporary issues from a Seventh-day Adventist Christian viewpoint. SDA Kinship is a 501(c)(3) nonprofit organization founded in 1981 with a mission to provide a safe spiritual and social community for lesbian, gay, bisexual, transgender, queer and other ("LGBTQ") current and former Seventh-day Adventists, as well as their families and friends. Both organizations are independent of the Seventh-day Adventist Church.

Appended to this brief is a complete list of *amici*, including Seventh-day Adventist ministers (or their spouses), professors, and administrators who work or worked in the church or church-affiliated institutions.

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[1] All parties filed blanket consents to the filing of *amicus* briefs. No counsel for any party authored this brief in whole or in part, and no person or entity made a monetary contribution intended to fund the preparation or submission of this brief, which was prepared and submitted by counsel for *amici* on a *pro bono* basis.

Amici dispute petitioners' premise that same-sex marriage is necessarily at odds with Christianity or a "biblical view of marriage" (Pet. Br. 4, 19-20), as well as their suggestion that state efforts to protect same-sex couples from discrimination are inherently incompatible with religious liberty and freedom of conscience. Furthermore, while the General Conference of Seventh-day Adventists (the church's highest administrative body) joined the *amicus* brief of the U.S. Conference of Catholic Bishops and others in support of the website designer, that brief does not represent the views of many Adventists.

As with many theological issues, *amici* have diverse views on same-sex marriage. But they share a sincere belief that all persons, no matter their sexual orientation or gender identity, are created in the image of God and that respecting the right of same-sex couples to marry is consistent with biblical principles. Many members of Adventist Forum and SDA Kinship further believe that same-sex marriage is a sacred expression of God's love. *Amici* also seek to champion the Seventh-day Adventist Church's official position that, "[a]t the heart of the Adventist message is [the] abiding belief that freedom of conscience must be guaranteed to all" and that "[f]reedom of religion can only exist in the context of the protection of the legitimate and equal rights of others in society."[2]

LGBTQ persons, including members of Adventist Forum and SDA Kinship, would face grave threats to their civil rights if this Court (i) adopts petitioners'

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[2] Seventh-day Adventist Church, *Church-State Relations* (Mar. 2002), https://www.adventist.org/documents/church-state-relations/.

mistaken view that laws prohibiting discrimination based on sexual orientation such as the Colorado Anti-Discrimination Act ("CADA") compels them to speak messages that violate their religious beliefs, or (ii) endorses petitioners' novel theory that the First Amendment protects speech that is tantamount to shutting their business's door to LGBTQ persons who marry someone of the same sex consistent with their sexual orientation and conscience. As explained below, that decision would have the detrimental effect of allowing discrimination based on not only sexual orientation but also religion, undermining the very values and protections that petitioners seek to vindicate and that *amici* hold dear.

INTRODUCTION AND SUMMARY OF ARGUMENT

Many Christians, including members of Adventist Forum and SDA Kinship, believe that LGBTQ persons are created in the image of God, and that marriage—whether of opposite- or same-sex couples—is a sacred reflection of God's love for humanity. It is thus imperative for a fair and constitutionally sound resolution of this case to recognize that there are LGBTQ persons who marry someone of the same sex *not only* because of their sexual orientation *but also* because of their sincerely held religious belief that God is calling them into marriage with someone of the same sex. Anti-discrimination laws such as CADA protect both of these characteristics. In effect, CADA's prohibition of discrimination against LGBTQ persons maximizes religious freedom and cultivates the sort of

religious pluralism and tolerance advanced by the Religion Clauses of the First Amendment.

With the legalization of same-sex marriage, LGBTQ-affirming believers gained greater freedom to exercise their religion. The fact that a business owner's religious understanding of marriage excludes same-sex couples should not be a legitimate basis to deny the same goods and services to LGBTQ persons who exercise their religious belief and constitutional right to marry. Petitioner Lorie Smith is not a minister officiating weddings and her website company (303 Creative) is not a certifying authority on whether any particular wedding is consistent with "God's design for marriage." Pet. Br. 2. No commercial establishment that is asked to provide goods or services for any wedding is called upon to endorse, certify, bless, or sanctify *anything*.

The Free Speech Clause of the First Amendment does not mandate a different result. While the Tenth Circuit correctly upheld CADA's provisions prohibiting discrimination against same-sex couples, it unnecessarily accepted petitioners' premise that the statute compels speech and "works as a content-based restriction." Pet. App. 23a. As Colorado makes clear, Smith is free to use designs that express her religious view of marriage and to communicate her disapproval of same-sex marriage on her website—either of which would likely eliminate any risk that a same-sex couple would hire her. But she cannot deny those wedding websites to same-sex couples or post a sign stating "No Gay Couples." That is unlawful discrimination, whether motivated by animus or a sincere religious belief. This Court should thus reject petitioners'

attempt to recast CADA's provisions as an unconstitutional infringement on protected speech. This reframing is not grounded in the text of the statute or the practical realities of wedding-related commercial transactions. It is also contradicted by decades of precedent both from this Court and numerous other courts interpreting federal and state anti-discrimination statutes.

What petitioners are really asking for is a preferential religious exemption from neutral and generally applicable anti-discrimination laws under the guise of free speech, effectively giving religious business owners a personal veto over protected characteristics with which they disagree. Such a decision would seriously curtail the longstanding public policy in favor of eliminating pernicious discrimination in the public market. If Smith may lawfully refuse to create websites for same-sex weddings because she objects to the couples' sexual orientation, there is no obvious principle limiting that discrimination to the context of weddings or LGBTQ persons. That same religious exemption could be artfully pleaded to justify discrimination in many other contexts—for instance, an architect who believes she is communicating "God's design for the family" with each custom floorplan and so refuses to offer those same designs to same-sex or interracial couples because of her religious objection to their family structures; or a commercial photographer who refuses to take professional headshots of women because it would send a message contrary to his religious belief that a woman's place is in the home. Colorado should be able to enforce CADA in those situations and it should be able to enforce it here.

Petitioners' extreme position poses an added threat to religious believers like *amici*, because it would allow an orthodox or majoritarian religious view (one that disapproves of same-sex marriage) to trump a heterodox or minority religious view (one that affirms same-sex marriage), inviting religious discrimination and interreligious strife in the public market. Indeed, if this Court rules for petitioners, nothing would stop another artistic business from refusing to serve Seventh-day Adventists or Jews because the owner objects to their religious practice of worshipping on Saturday rather than Sunday. That cannot be the law.

LGBTQ persons should not have to suffer the indignity and material harm of being turned away from public accommodations because of their sexual orientation or creed. If everyone could poke each other's eyes for religious reasons, everyone would soon be blind.

ARGUMENT

I. Protecting LGBTQ Persons from Discrimination in Public Spaces Promotes Religious Freedom and Tolerance

This case implicates the religious freedom not only of petitioners, but also of LGBTQ persons and others who sincerely believe in the sanctity of same-sex marriage—a belief that is entitled to the same respect and consideration under the First Amendment.

This Court's religious-freedom jurisprudence reflects an abiding concern for the right of religious minorities to exercise their faith freely, even when their religious practices may be perceived as odd or

repugnant. See *Masterpiece Cakeshop, Ltd.* v. *Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1737 (2018) (*Masterpiece II*) (Gorsuch, J., concurring) ("It is in protecting unpopular religious beliefs that we prove this country's commitment to serving as a refuge for religious freedom."). These decisions also evince a consistent concern with the risk that orthodox or majoritarian religious beliefs are being favored over heterodox or minority religious beliefs. See *Thomas* v. *Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 715-716 (1981) ("[T]he guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect."); *Sherbert* v. *Verner*, 374 U.S. 398, 406 (1963) (noting that a burden on free exercise was "compounded by the religious discrimination" against a minority religious view).

In *Sherbert*, the Court held that South Carolina's unemployment compensation statute could not be applied so as to force a Seventh-day Adventist woman to choose between losing her unemployment benefits and accepting a job that required her to work on Saturdays, in violation of her right to worship. The Court found it particularly intolerable that South Carolina's law burdened the "Sabbatarian's religious liberty" while expressly permitting "the Sunday worshipper from having to make the kind of choice." 374 U.S. at 406. In *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), Amish parents were prosecuted for refusing to send their children to public schools after the eighth grade. The Court struck down the relevant statute, reasoning that it unconstitutionally interfered with the parents' religious practice. The Court noted, "[t]here can be no assumption that today's majority is 'right' and the Amish and others like them are 'wrong.'

A way of life that is odd or even erratic but interferes with no rights or interests of others is not to be condemned because it is different." *Id.* at 223-224.

Other decisions further emphasize the principle of religious neutrality underpinning the First Amendment's Religion Clauses. In *Church of Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, the Court invalidated city ordinances prohibiting ritual animal sacrifice, because they targeted a religious practice considered "abhorrent" while allowing other forms of animal killings. 508 U.S. 520, 546-547 (1993). The Court found it noteworthy that the ordinances prohibited killing animals for rituals by one religion (Santeria) but exempted "kosher slaughter," a method of killing animals for food consumption in another religion. *Id.* at 536.

In drafting the Religion Clauses, the Founders "knew the anguish, hardship and bitter strife that could come when zealous religious groups struggled with one another to obtain the Government's stamp of approval," so they aimed to foster interreligious tolerance. See *Engel* v. *Vitale*, 370 U.S. 421, 429 (1962); see also *Committee for Public Educ. & Religious Liberty* v. *Nyquist*, 413 U.S. 756, 795-796 (1973) ("[C]ompetition among religious sects for political and religious supremacy has occasioned considerable civil strife"). Indeed, this Court has often emphasized that American society's "traditions and constitutional underpinnings rest on and encourage diversity and pluralism in all areas" including religion. *Lynch* v. *Donnelly*, 465 U.S. 668, 677 (1984) ("Equally pervasive [in American history] is the evidence of accommodation of all faiths and all forms

of religious expression, and hostility toward none."); see also *Kennedy* v. *Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2416 (2022) ("The Constitution and the best of our traditions counsel mutual respect and tolerance, not censorship and suppression, for religious and nonreligious views alike."); *County of Allegheny* v. *ACLU*, 492 U.S. 573, 610 (1989) (explaining that "respect for religious pluralism" is "a respect commanded by the Constitution").

These same values and motivations are at work in laws such as CADA that prohibit anti-LGBTQ discrimination in public accommodations. Although anti-LGBTQ beliefs have dominated religious discourse in the last decades, creating "the widely accepted misconception that most religions really are originally anti-LGBT, [they] have never held a monopoly within any tradition." Dag Øistein Endsjø, *The Other Way Around? How Freedom of Religion May Protect LGBT Rights*, 24 Int'l J. Human Rights 1681, 1684 (2020). In the case of *amici*, which includes LGBTQ Adventists, many of their members believe that variations in sexual orientation and gender identity are a feature of, not a glitch in, God's creation and that same-sex marriage, consistent with biblical teaching, is within God's design.[3]

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[3] Some LGBTQ Christians believe in waiting until marriage to have sex. See Eliel Cruz, *Waiting Until Marriage: Gay Christians Navigate Faith and Sexuality*, NBC News (Mar. 18, 2017), https://www.nbcnews.com/feature/nbc-out/waiting-until-marriage-gay-christians-navigate-faith-sexuality-n735071; Olga Khazan, *Gay, and Saving Herself for Marriage*, The Atlantic (Nov. 12, 2015), https://www.theatlantic.com/health/archive/2015/11/gay-waiting-for-marriage/414984/.

Amici are not alone in affirming same-sex marriage as a matter of religious belief. Several denominations in the United States celebrate and consecrate same-sex marriages as part of their religious practice. Prominent examples include the Episcopal Church; the Evangelical Lutheran Church in America; the Metropolitan Community Church; the Presbyterian Church USA; the Unitarian Universalist Association; the United Church of Christ; and the Conservative, Reconstructionist, and Reform branches of Judaism.[4] Several of these denominations have been celebrating same-sex unions since well before they were legally recognized.

Because popular opinion has recently aligned with LGBTQ-affirming religious beliefs, petitioners' brief creates the impression that they are part of an embattled religious minority. Not so. It is LGBTQ-affirming believers who are the religious minority. Their equally sincere beliefs on same-sex marriage remain at odds with the institutional positions of major denominations such as the Roman Catholic Church, Eastern Orthodox Christianity, the Southern Baptist Convention, the United Methodist Church, the Church of Jesus Christ of Latter-day Saints, and the Seventh-day Adventist Church, as well as Orthodox Judaism and most sects of Islam.[5] These

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[4] See Human Rights Campaign, *Faith Positions on Marriage Equality*, https://www.hrc.org/resources/positions-of-faith-on-same-sex-marriage (last visited Aug. 18, 2022).

[5] See *ibid*.

religious groups represent a majority of religious Americans.[6]

During the late nineteenth century and throughout most of the twentieth century, the religious majority's disapproval of homosexuality was frequently codified—to the detriment of not only LGBTQ persons, but also those who affirmed their identities and relationships as a matter of faith. In *Bowers* v. *Hardwick*, which upheld anti-sodomy laws, Justices recognized that those laws had origins in "Judeo-Christian moral and ethical standards." 478 U.S. 186, 196-197 (1986) (Burger, C.J., concurring); see also *id*. at 211-212 (Blackmun, J., dissenting).

Similarly, bans on same-sex marriage were often justified on the basis of religious orthodoxy. See Celine Abramschmitt, *The Same-Sex Marriage Prohibition: Religious Morality, Social Science, and the Establishment Clause*, 3 Fla. Int'l U. L. Rev. 113, 167-168 & n.408 (2007) (quoting congressional statements justifying the Defense of Marriage Act on the basis of religious doctrine); *In re Marriage Cases*, 49 Cal. Rptr. 3d 675, 747 & n.7 (Cal. Ct. App. 2006) (Kline, J., concurring in part and dissenting in part) (discussing prior case law rejecting same-sex marriage, and noting that their reasoning "rest[ed] upon a religious doctrine that * * * is not universally shared"), depublished by 149 P.3d 737 (Cal. 2006); *Baker* v. *Nelson*, 191 N.W.2d 185, 186 (1971) (deeming

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[6] See Pew Research Center, *2014 U.S. Religious Landscape Study*, https://www.pewresearch.org/religion/religious-landscape-study/ (last visited Aug. 18, 2022).

norm of opposite-sex marriage "as old as the book of Genesis").

As the public became more aware of the prevalence and ill effects of discrimination against LGBTQ persons, Colorado and roughly two dozen other states extended their anti-discrimination protections to sexual orientation. This Court's contemporary decisions have also recognized the civil rights of LGBTQ people. See *Bostock* v. *Clayton County*, 140 S. Ct. 1731 (2020) (holding that Title VII prohibits discrimination based on sexual orientation and gender identity); *Obergefell* v. *Hodges*, 576 U.S. 644, 656-657 (2015) (recognizing the constitutional right of same-sex couples to marry, noting that "[m]arriage is sacred to those who live by their religions"); *United States* v. *Windsor*, 570 U.S. 744 (2013) (invalidating discrimination against legally married same-sex couples under the Defense of Marriage Act); *Lawrence* v. *Texas*, 539 U.S. 558 (2003) (overruling *Bowers*); *Romer* v. *Evans*, 517 U.S. 620 (1996) (upholding anti-discrimination laws protecting LGBTQ people).

These laws and decisions have had the added effect of enhancing the religious liberty of minorities with LGBTQ-affirming beliefs, including churches that consecrate same-sex weddings, and protecting them from religious discrimination. This phenomenon has been recognized in recent human-rights literature:

> [N]ot only LGBT people who are religiously convinced of their own rights, but their non-LGBT fellow believers and even whole religious communities that support LGBT equality, can thus claim that *their* freedom of religion is breached

> by states accepting any form of LGBT ban or discrimination. Although those embracing the modern LGBT identity with a religious impetus may be deemed untraditional, this in no way weakens their right to be equally protected by freedom of religion as anyone else.

Endsjø, 24 Int'l J. Human Rights at 1685.

Despite great advances in the *legal* recognition and protection of LGBTQ rights, those opposed to same-sex marriage still dominate many religious institutions, even when many of their members may personally disagree with that view.[7] That institutional stance often results in stigmatization of, and sometimes outright discrimination against, LGBTQ members within their ranks, causing grave emotional distress and harm to many LGBTQ children who are born or brought into those spaces. See, *e.g.*, Stephen T. Russell and Jessica N. Fish, *Mental Health in Lesbian, Gay, Bisexual, and Transgender (LGBT) Youth*, 12 Ann. Rev. Clin. Psychol. 465, 472 (2016); Matthew J. L. Page et al., *The Role of Religion and Stress in Sexual Identity and*

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[7] See Pew Research Center, *2014 U.S. Religious Landscape Study – Views about same-sex marriage*, https://www.pewresearch.org/religion/religious-landscape-study/views-about-same-sex-marriage/ (last visited Aug. 18, 2022); see also, *e.g.*, Kristjan Archer & Justin McCarthy, *U.S. Catholics Have Backed Same-Sex Marriage Since 2011*, Gallup (Oct. 23, 2020), https://news.gallup.com/poll/322805/catholics-backed-sex-marriage-2011.aspx.

Mental Health Among LGB Youth, 23(4) J. Res. Adolesc. 1 (Dec. 2013).[8]

While it would never be appropriate for courts to intervene in a church's internal doctrinal disputes, states like Colorado have a compelling interest in minimizing these sorts of harms by prohibiting anti-LGBTQ discrimination in public spaces. See *Roberts* v. *U.S. Jaycees*, 468 U.S. 609, 625 (1984) (discussing state's interest in "protect[ing] the State's citizenry from a number of serious social and personal harms" by prohibiting sex discrimination); see also *Brown* v. *Bd. of Educ.*, 347 U.S. 483, 494 (1954) (discussing social and psychological harms of segregation in education). States also have a compelling interest in protecting the civil rights and religious freedom of people of faith that recognize and celebrate same-sex marriages, as it has done by prohibiting religious discrimination as well as anti-LGBTQ discrimination. See Colo. Rev. Stat. § 24-34-601(2)(a) (2022); see also *Jews for Jesus, Inc.* v. *Jewish Community Relations Council, Inc.*, 968 F.2d 286, 295 (2d Cir. 1992) (recognizing New York's "substantial, indeed compelling, interest in prohibiting racial and religious discrimination in obtaining public accommodations"); *Pines* v. *Tomson*, 206 Cal. Rptr. 866, 879 (Cal. Ct. App. 1984) (discussing California's compelling interest in eradicating religious discrimination).

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[8] For video clips of LGBTQ Adventists sharing their personal stories, see Daneen Akers and Stephen Eyer's video productions, *It Gets Better (for Adventists too)—Extended Version*, Vimeo (July 19, 2011), https://vimeo.com/26613330, and *Seventh-Gay Adventists – Teaser 2*, Vimeo (April 1, 2011), https://vimeo.com/21826395.

In sum, while the Tenth Circuit correctly identified "Colorado's interest in preventing both dignitary and material harms" to same-sex couples, Pet. App. 25a, state efforts to protect LGBTQ persons from discrimination may also be justified by a compelling interest in reducing the psychological harms of anti-LGBTQ discrimination and promoting mutual respect and interreligious tolerance.

II. CADA Does Not Infringe on Free Speech

A. CADA Prohibits Discriminatory Acts, Not Religious or Political Expression

CADA prohibits places of public accommodation like 303 Creative from refusing or denying equal access to goods and service to anyone because of a protected characteristic such as creed, race, sex or sexual orientation. Colo. Rev. Stat. § 24-34-601(2)(a). Smith claims that this accommodation provision, specifically the prohibition against discrimination based on sexual orientation, compels her to speak a message she does not endorse because it forces her to "celebrate" same-sex marriage in violation of her religious beliefs. Although the Tenth Circuit accepted that premise, that is not what CADA demands. Nor is that concern borne out by the practical realities of how wedding-related commercial transactions work.

To start, CADA's accommodation provision does not purport to regulate speech. In *Craig* v. *Masterpiece Cakeshop, Inc.*, the Colorado Court of Appeals explained that CADA does not preclude any business "from expressing its views on same-sex marriage—including its religious opposition to it." 370 P.3d 272, 288 (Colo. App. 2015) (*Masterpiece I*), rev'd on other

grounds, *Masterpiece II*, 138 S. Ct. 1719. Nowhere in CADA is there any requirement that public accommodations speak any particular message, so there is no conflict with the Free Speech Clause to resolve. See *Jennings* v. *Rodriguez*, 138 S. Ct. 830, 842 (2018). If an ambiguous statute could be interpreted so as to "raise serious constitutional problems," this Court "construe[s] the statute to avoid such problems" whenever possible. *New York* v. *United States*, 505 U.S. 144, 170 (1992) (citation omitted).

Smith is thus free to create websites using a design style inspired by her religious views, however she chooses to do so. She may include biblical quotes and religious imagery or motifs as part of her designs. And she may choose to offer designs only from her religious perspective. See Pet. Br. 6. In that sense, CADA does not suppress her freedom to speak messages extolling the virtues of heterosexual marriage, or conveying what in her view are the demerits of same-sex marriage. But Smith cannot categorically and preemptively deny equal access to those wedding websites to same-sex couples. See *Masterpiece II*, 138 S. Ct. at 1727.

This Court's decision in *Rumsfeld* v. *Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47 (2006) (*FAIR*), is on point. Congress had enacted the Solomon Amendment requiring colleges and universities receiving federal money to allow military recruiters onto their campuses and to send messages about their events through the schools' communication channels in the same manner as recruiters for other employers. This Court held that Congress's decision to require schools to grant military recruiters equal access to

school facilities was "simply not the same as forcing a student to pledge allegiance, or forcing a Jehovah's Witness to display the motto 'Live Free or Die.'" 547 U.S. at 62.

Other courts have similarly distinguished expressions of belief (which are protected by the First Amendment) from refusals to grant customers equal access to goods and services (which are not). Rejecting a compelled-speech argument almost identical to that raised by petitioners, the Washington Supreme Court reasoned that "[t]he decision to either provide or refuse to provide flowers for a wedding does not inherently express a message about that wedding." *State* v. *Arlene's Flowers, Inc.*, 441 P.3d 1203, 1226 (Wash. 2019). "[P]roviding flowers for a wedding between Muslims would not necessarily constitute an endorsement of Islam, nor would providing flowers for an atheist couple endorse atheism." *Ibid.* The New York Appellate Division similarly concluded that owners of a wedding venue were not compelled by New York's civil-rights statute "to endorse, espouse or promote same-sex marriages," and they "remain[ed] free to express whatever views they may have on the issue of same-sex marriage." *Gifford* v. *McCarthy*, 23 N.Y.S.3d 422, 432 (N.Y. App. Div. 2016). Thus, there was "no real likelihood that [they] would be perceived as endorsing the values or lifestyle of the individuals renting their facilities as opposed to merely complying with anti-discrimination laws." *Ibid.*

Smith's claim is distinguishable from that of the parade sponsors in *Hurley* v. *Irish-Am. Gay, Lesbian, & Bisexual Grp. of Boston*, 515 U.S. 557 (1995). There, the Court held that the state could not compel the

sponsors to include a "pride" float in their St. Patrick's Day parade because each float affected the "message conveyed" by the parade. 515 U.S. at 572. CADA does not compel Smith to include "pride weddings" on her curated webpage. Smith is only required to provide the same website designs to opposite- and same-sex couples alike. She does not have to feature or promote same-sex wedding websites, nor even make them accessible from 303 Creative's website. Nor is she forced to include her websites on someone else's curated webpage celebrating "pride weddings."

The Tenth Circuit confused this point by analogizing CADA to the Massachusetts state-court decision in *Hurley* that understood "the sponsors' speech itself to be the public accommodation." Pet. App. 22a (quoting 515 U.S. at 573). But this Court rejected that view in *Hurley*, holding that the problem was the state court's interpretation of the statute, not the statute itself. Instead of suggesting that public-accommodation laws compel speech, *Hurley* distinguished protected expression taking place in a public accommodation (*e.g.*, the messages conveyed by parade floats or the artistic expression on a website) from the unlawful conduct of discriminating against participants or customers based solely on a protected characteristic (*e.g.*, excluding marchers from the parade or denying same-sex couples design services because of their sexual orientation). See 515 U.S. at 572. Because CADA does not dictate the content of a customer's website, and since 303 Creative need not promote same-sex weddings on its own website, petitioners are not being compelled to alter their message simply because the customers happen to be a same-sex couple.

That a business owner's discriminatory act may be motivated by a religious belief does not transform the act into expressive conduct protected by the First Amendment. If a wedding vendor refuses to serve same-sex couples because of their sexual orientation, that is unlawful discrimination whether motivated by anti-LGBTQ animus or a sincere theological disagreement with same-sex marriage. See *R. A. V.* v. *City of St. Paul*, 505 U.S. 377, 389-390 (1992) ("[A]cts are not shielded from regulation merely because they express a discriminatory idea or philosophy."); *cf. Jews for Jesus, Inc.* v. *Jewish Community Relations Council, Inc.*, 590 N.E.2d 228, 231-232 (N.Y. 1992) (distinguishing doctrinal disagreements among religious groups from a religious group inducing businesses to discriminate against another religious group). To hold otherwise would wreak havoc by opening a back door to all sorts of discriminatory conduct—conduct that has been prohibited for decades by civil-rights laws that have been upheld by this Court.

Creating a constitutionally protected category of "religiously motivated discrimination" would thus seriously hinder the state's ability to pursue the valid and compelling legislative objective of preventing other forms of pernicious discrimination. If a business like 303 Creative could avoid commercial transactions that can be construed as communicating a message, the exception would threaten to swallow the rule. Nothing would stop a realtor from refusing to show houses to same-sex couples with children because she fears sending a message of approval in violation of her religious opposition to same-sex marriage and parenting, or for that matter from turning away

interracial couples from open houses because of her sincere belief that God did not intend people of different races to marry and live together.

That is not an abstract hypothetical. Religious justifications were once frequently used in opposition to the civil-rights laws of Reconstruction and the 1960s. Prominent examples include statements in the Congressional Record and federal courts. See William N. Eskridge Jr., *Noah's Curse: How Religion Often Conflates Status, Belief, and Conduct to Resist Antidiscrimination Norms*, 45 Ga. L. Rev. 657, 670, 675 (2011) (observing that some individuals argued that "it was a matter of *religious liberty* for devout southern whites (and many blacks) to remain separate from members of the other race," and discussing U.S. senator's biblical references in opposition to the Civil Rights Act of 1964); *Loving* v. *Virginia*, 388 U.S. 1, 3 (1967) (explaining that the trial court had relied on the belief that "Almighty God created the races * * * [and] placed them on separate continents" as a justification for anti-miscegenation laws); *Newman* v. *Piggie Park Enters., Inc.*, 256 F. Supp. 941, 945 (D.S.C. 1966) (refusing to "lend credence or support to" restaurant owner's position "that he has a constitutional right to refuse to serve members of the Negro race in his business establishments upon the ground that to do so would violate his sacred religious beliefs").

That petitioners do not refuse other types of websites to LGBTQ customers misses the point. Consider a business that offers custom invitations for various events to Jews and non-Jews alike but refuses to offer only custom wedding invitations to Jews,

whether motivated by ethno-religious prejudice or a sincere belief that God does not bless Jewish weddings. That would be discrimination against Jews. Smith's refusal to offer her custom wedding websites to same-sex couples is more akin to a company that provides custom websites for *quinceañeras*, but refuses to offer those same websites to evangelical Christians. If that is unlawful discrimination based on religion, so too is the refusal to offer the same wedding websites to same-sex couples unlawful discrimination based on sexual orientation and (as to *amici*) religion as well. There is no principled way to distinguish these forms of discrimination.

Furthermore, carrying out a commercial wedding transaction—whether artistic or not—is not an act of religious expression. Smith is a businesswoman. She is not clergy; she is not called upon to sanctify, bless or endorse any marital union. She is not a religious canvasser knocking on doors and handing out literature to spread her faith. See, *e.g.*, *Watchtower Bible & Tract Soc'y of N.Y., Inc.* v. *Vill. of Stratton*, 536 U.S. 150, 161-163 (2002). Her company sells website design services to the general public. It is not a certifying entity that issues a religious "seal of approval" for any wedding. In fact, CADA expressly exempts any "place that is principally used for religious purposes" from its definition of "places of public accommodation," Colo. Rev. Stat. § 24-34-601(1) (2022), and petitioners do not claim to qualify for that exemption.

While petitioners seem to rely on *Fulton* v. *City of Philadelphia*, that case involved the free exercise of religion, not free speech. And it did not involve a

public accommodation, but rather a religious charity that certified couples for adoption consistent with its affiliation with the Catholic Church. 141 S. Ct. 1868, 1881 (2021) (noting "incongruity" of "deeming a private religious foster agency a public accommodation" and noting "the uniquely selective nature of the certification process"). In other words, the Catholic charity was called upon to certify or "endorse" the adoption applications of same-sex parents. A commercial website designer plays no such role. As the Sixth Circuit has observed, "bare compliance with" civil-rights laws "does not amount to an endorsement of" any conduct. *E.E.O.C.* v. *R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 589-590 (6th Cir. 2018) (granting summary judgment for transgender employee fired by Christian funeral-home director); see also *Gay Rights Coal. of Georgetown Univ. Law Ctr.* v. *Georgetown Univ.*, 536 A.2d 1, 30 (D.C. 1987) (en banc) (distinguishing between granting gay student groups equal access to same facilities as other student groups and refusing official "University Recognition" consistent with the university's Catholic affiliation).

Nor is it fair to say that Smith is forced to "celebrate" same-sex marriage simply because she is required to provide her website designs to same-sex couples. True, website design is an expressive craft, but commercial wedding websites are created to communicate the plans, feelings, and beliefs *of the engaged couple*, not of the website's designer. It is the couple, not Smith, that is celebrating a wedding. Without having to provide a religious certification or endorsement, the act of selling website design services is not sufficiently bound up with Smith's religious

beliefs to amount to expressive conduct. See *Bd. of Trs.* v. *Fox*, 492 U.S. 469, 473-474 (1989) (rejecting claim that Tupperware parties are so intertwined with financial-responsibility message that mixed commercial and non-commercial speech should be treated as wholly non-commercial).

Still, for the avoidance of doubt, the Colorado Court of Appeals has explained that a business whose owner opposes same-sex marriage is free to "post[ ] a disclaimer in the store or on the Internet indicating that the provision of its services does not constitute an endorsement or approval of" same-sex marriage—a message that "would likely have the effect of disassociating [the business] from its customers' conduct." *Masterpiece I*, 370 P.3d at 288; see also *Hurley*, 515 U.S. at 576-577, 580 (noting that shopping center owner in *Pruneyard Shopping Ctr.* v. *Robins*, 447 U.S. 74, 87 (1980), could "expressly disavow any connection with the message" of speakers and hand billers at his center); *Elane Photography, LLC* v. *Willock*, 309 P.3d 53, 70 (N.M. 2013) (upholding a statute similar to CADA and stating that wedding photographers could "post a disclaimer on their website or in their studio advertising that they oppose same-sex marriage but that they comply with applicable antidiscrimination laws"). In short, providing the same wedding websites to opposite- and same-sex couples does not send any message about the designer's religious beliefs.[9]

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[9] Contrary to petitioners' characterization, see Pet. Br. 37, 39, 47-48, denying weddings websites to same-sex couples is discrimination based on status (sexual orientation), not "message." A person marries someone of the same sex *because of*

Practically speaking, perhaps no same-sex couple would seek Smith's services after seeing her designs, opting instead for another designer better suited to tell their story (assuming the market offers such options). After all, it is unlikely that a same-sex couple would want their wedding website designed by someone so repelled by the whole undertaking that she would see the need to disavow it publicly. See Andrew Koppelman, *A Free Speech Response to the Gay Rights/Religious Liberty Conflict*, 110 Nw. U. L. Rev. 1125, 1138 (2016); Andrew Koppelman, *A Zombie in the Supreme Court: The* Elane Photography *Cert Denial*, 7 Ala. C.R. & C.L. L. Rev. 77, 90 (2015). But the point is that CADA leaves that choice up to the customer. A customer who wants a realist portrait would not hire an impressionist painter, lest he find his face unrecognizable in the brushstrokes.

In this way, anti-discrimination laws such as CADA empower consumer choice in the marketplace, ensuring that LGBTQ customers will not be subject to the pervasive indignities and material harm once faced by persons belonging to racial, ethnic, or religious minorities who sought a meal or a hotel room only to be turned away because of the color of their skin, their cultural customs, or religious beliefs. By requiring businesses to transact with customers regardless of protected characteristics, laws such as CADA create opportunities for commercial interaction and exchange, which may encourage greater

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their sexual orientation; a heterosexual person would have no *bona fide* reason to marry someone of the same sex. And a heterosexual couple would never need to purchase a "same-sex wedding website" if not for use by a same-sex couple.

understanding and mutual respect for different beliefs and identities.

B. CADA Regulates Transactional Speech, Not Expressions of Belief

Because CADA's accommodation provision is consistent with free speech, Colorado may also lawfully prohibit signs announcing that service will be refused to same-sex couples. Specifically, CADA prohibits publishing messages indicating that equal access to goods and services will be denied to anyone, or that any person is unwelcome, because of their sexual orientation or other protected characteristics. Colo. Rev. Stat. § 24-34-601(2)(a). The Colorado Court of Appeals interpreted this communication provision in *Masterpiece I* and concluded that a baker could post a message disavowing any suggestion or implication that he supported same-sex marriage. 370 P.3d at 288. However, he could not post a sign announcing that service would be denied to same-sex couples.

In *FAIR,* this Court acknowledged that, although the federal prohibition on race discrimination in employment "will require an employer to take down a sign reading 'White Applicants Only'," this "hardly means that the law should be analyzed as one regulating the employer's speech rather than conduct." 547 U.S. at 62; *see also R. A. V.*, 505 U.S. at 389-390 (noting that words can violate anti-discrimination laws). There is no question that words themselves can amount to unlawful discriminatory conduct. Sexual harassment and sex discrimination are often accomplished through words alone, yet this Court has upheld Congress's authority to prohibit such conduct in the workplace. See, *e.g.*, *Harris* v.

Forklift Sys., Inc., 510 U.S. 17, 19-20 (1993) (recounting alleged gender-based insults and sexual innuendos in Title VII suit). The analogy is apt, because as this Court has observed, "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex." *Bostock*, 140 S. Ct. at 1741.

In this case, Smith wishes to post a Proposed Statement on her website including the following:

> I firmly believe that God is calling me to this work. Why? I am personally convicted that He wants me—during these uncertain times for those who believe in biblical marriage—to shine His light and not stay silent. He is calling me to stand up for my faith, to explain His true story about marriage, and to use the talents and business He gave me to publicly proclaim and celebrate His design for marriage as a life-long union between one man and one woman. * * * So I will not be able to create websites for same-sex marriages or any other marriage that is not between one man and one woman.

Pet. App. 116a.

The only language in the Proposed Statement that violates CADA's communication provision is the last sentence, because the statement "I will not be able to create websites for same-sex marriages * * *" announces petitioners' refusal to offer services to same-sex couples in violation of CADA's

accommodation provision. Like a party's statement "I accept" amid contract negotiations, the language "I will not be able to create" is "transactional speech"—an act of legal significance—not merely an expression of belief. See Jane R. Bambauer, *The Relationships Between Speech and Conduct*, 49 U.C. Davis L. Rev. 1941, 1942 (2016) (using "We Do Not Serve Gays" as an example of "transactional speech," *i.e.*, "an attempt to avoid an obligatory transaction").

If states may prohibit the sign "White Applicants Only," as Congress did in 1964, they may also prohibit the sign "Heterosexual Couples Only." Again, "it has never been deemed an abridgment of freedom of speech or of the press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *FAIR*, 547 U.S. at 61-62 (quoting *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)). Indeed, the law has identified "many types of speech to which free speech law is not salient, such as perjury, price-fixing, conspiracy, and many other things that can be done with words." Koppelman, 7 Ala. C.R. & C.L. L. Rev. at 85.

In decades past, the so-called "Green Book" advised Black Americans where they could travel and seek accommodations safe from discrimination and stigmatization.[10] To this day, Black and LGBTQ travelers continue to consult websites and books that

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[10] See J. Freedom du Lac, *Guidebook That Aided Black Travelers During Segregation Reveals Vastly Different D.C.*, Wash. Post (Sept. 12, 2010), https://www.washingtonpost.com/wp-dyn/content/article/2010/09/11/AR2010091105358.html.

provide similar advice to avoid the indignities and costs of being turned away at the door.[11] CADA, like other civil-rights laws, is intended to open the marketplace to all, regardless of historical prejudices or sincere beliefs, so that Coloradans and their guests need not navigate a complex network of businesses that discriminate in one way or another—a "Whites Only" hotel next to a "No Trans-Women" designer-clothing store, across the street from a Jewish deli refusing to cater Jews for Jesus events, and so on.

There are real social and economic costs from facing this visual litter when walking down the street or searching the internet for goods and services. CADA seeks to prevent those dignitary and material harms. "Discrimination 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." *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 291-292 (1964) (Goldberg, J., concurring); see also *Arlene's Flowers,* 441 P.3d at 1214-1215 (discussing risk of "community-wide stigma inconsistent with the history and dynamics of civil rights laws" if "all purveyors of goods and services who object to gay marriages for moral and religious reasons" could announce refusal of service).

Smith can post the rest of her Proposed Statement, because language that merely expresses her religious

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[11] See Alexandra Gillespie, *New Digital Tools Are Helping Travelers Avoid Discrimination*, Nat'l Geographic (Jan. 31, 2022), https://www.nationalgeographic.com/travel/article/new-digital-tools-are-helping-travelers-avoid-discrimination.

views about same-sex marriage does not violate CADA. In practical terms, such a statement "would probably suffice to keep most gay people away." Koppelman, 110 Nw. U. L. Rev. at 1138. And Smith might never be hired to create a website for a same-sex wedding.

In sum, because CADA prohibits only the act of denying same-sex couples equal access to website design services, and does not regulate the designer's artistic expression, the statute does not impermissibly compel or suppress protected speech.

III. Free Speech Should Not Be Used to Create a Preferential Religious Exemption from Neutral and Generally Applicable Anti-Discrimination Laws

Ultimately, petitioners are asking this Court to grant businesses a preferential exemption from a neutral and generally applicable law based on the owners' religious views. That relief is foreclosed under the Free Exercise Clause and should not be shoehorned into the Free Speech Clause.

This Court has consistently rejected religion-based preferential exemptions from neutral and generally applicable laws. See *Emp't Div.* v. *Smith*, 494 U.S. 872, 879-880 (1990). "When 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." *United States* v. *Lee*, 455 U.S. 252, 261 (1982) (refusing to exempt Amish employer from Social Security tax). In

Christian Legal Soc'y Chapter of Univ. of Cal. v. *Martinez*, this Court held that a religious student organization that wished not to admit gay members had to choose, as did "all other student organizations," "between welcoming all students and forgoing the benefits of official recognition." 561 U.S. 661, 669 (2010). The student group's constitutional claims were unavailing because it was seeking "not parity with other organizations, but a preferential exemption from" a law school's policy. *Ibid*. The Internal Revenue Service may also constitutionally deny tax-exempt status to a religious university that discriminates against interracial couples in contravention of the public policy against race discrimination, even if the school's policies reflect the university's sincerely held religious beliefs. See *Bob Jones Univ.* v. *United States*, 461 U.S. 574, 580-582, 604 & n.30 (1983).[12]

Colorado (and Coloradans) should similarly be able to condition the privilege of doing business in the state on complying with neutral and generally applicable anti-discrimination laws. See *Gay Rights Coal.*, 536 A.2d at 37, 39 (university's free-exercise rights did not allow it to deny benefits to student groups based on sexual orientation); *State ex rel. McClure* v. *Sports & Health Club, Inc.*, 370 N.W.2d 844, 853 n.16 (Minn. 1985) (Free Exercise Clause does not permit health clubs to apply membership criteria based on marital status and religion). Smith's faith should not exempt her or her company from complying with the same anti-discrimination laws as everyone else. See, *e.g.*,

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[12] This Court's decision in *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), construed the Religious Freedom Restoration Act, not the First Amendment.

Harris Funeral Homes, 884 F.3d at 595-597 (Christian supervisor was liable for terminating transgender employee); *Campos* v. *City of Blue Springs*, 289 F.3d 546, 549-550 (8th Cir. 2002) (supervisor was liable for religious discrimination against non-Christian employee).

Where a business would not be entitled to a religious exemption under the Free Exercise Clause, it should not be able to obtain the same relief under the guise of free speech.[13] That would only generate unnecessary confusion as to which businesses qualify and which do not. As the New Mexico Supreme Court explained in evaluating similar arguments by a wedding photographer:

> We decline to draw the line between "creative" or "expressive" professions and all others. While individuals in such professions undoubtedly engage in speech, and *sometimes even create speech for others as part of their services*, there is no precedent to suggest that First Amendment protections allow such individuals or businesses to violate antidiscrimination laws. The wedding industry in particular employs a variety of professionals who offer their services to the public and whose work involves

[13] *Hurley* is not to the contrary, because the Court did not grant a preferential exemption to Massachusetts's public-accommodations law. Instead, it held that marchers could not force the parade sponsors to alter the parade's overall message, but recognized that parade sponsors did not (and could not) bar LGBTQ persons from joining the parade. 515 U.S. at 572-573.

> significant skills and creativity. * * * Courts cannot be in the business of deciding which businesses are sufficiently artistic to warrant exemptions from antidiscrimination laws.

Elane Photography, 309 P.3d at 71 (emphasis added).

Roughly half the states prohibit discrimination in public accommodations on the basis of sexual orientation or gender identity. Of the forty-five states with some form of anti-discrimination laws for public accommodations, twenty-two include provisions that bar statements refusing service on the basis of a protected status, or indicating that such identities are unwelcome. Most of these provisions closely mirror CADA's language. Creating a religion-based preferential exemption from CADA would jeopardize the anti-discrimination statutes of almost half the states and decades of civil-rights jurisprudence. Moreover, "carving out exceptions from civil rights laws for religious groups elevates some rights over others and diminishes the equal standing of some in our society."[14]

Fundamentally, CADA is the expression of Coloradans' willingness to accept the subjective inconvenience of "having to perform ordinary parts of one's public services for people with whom you disagree in beliefs" in exchange for avoiding the

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[14] U.S. Commission on Civil Rights, *Peaceful Coexistence: Reconciling Nondiscrimination Principles with Civil Liberties* (Sept. 2016), https://www.usccr.gov/files/pubs/docs/Peaceful-Coexistence-09-07-16.PDF.

constant risk of "being denied goods and services because of others not accepting your religious practices"—for instance, by guaranteeing equal access to goods and services for anyone who exercises their legal right to celebrate a marriage consistent with their beliefs. Endsjø, 24 Int'l J. Human Rights at 1693.

There is no real risk of CADA infringing on the rights of religious organizations or their adherents. CADA does not force anyone to enter into a marriage that violates their conscience or to bless a wedding contrary to their religious beliefs. CADA prohibits discrimination by businesses, while allowing a freer hand to places of worship and religious charities. See, *e.g.*, Colo. Rev. Stat. § 24-34-601(1) (exempting places "principally used for religious purposes"). This Court should not allow a commercial enterprise that is open to the general public, and does not claim a predominantly religious purpose, to use its owner's personal views as the basis for creating a preferential exemption from anti-discrimination laws. Such a rule would seriously undermine legitimate state interests and the civil rights of millions, for no obvious benefit.

CONCLUSION

For these reasons, the Court should affirm the Tenth Circuit's judgment.

Respectfully submitted,

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AUGUST 2022

APPENDIX

APPENDIX:
LIST OF *AMICI*

Organizations

Adventist Forum
https://spectrummagazine.org/about

Seventh-day Adventist Kinship International, Inc.
https://www.sdakinship.org/en/about

Individuals

James Boyle
President and Chief Executive Officer, Centura Health (ret.) and former Chief Executive Officer, Shawnee Mission Medical Center

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Former Professor and Director of the Master of Arts degree in Clinical and Biomedical Ethics at a Seventh-day Adventist university

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Stephen Chavez
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Lillian Rosa Correa
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Larry A. Mitchell, Th.D.
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Bryan Ness, Ph.D.
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Robert N. Randall, D.Min.
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Richard Rawson
Former hospital Chief Executive Officer with Adventist Health and Loma Linda University Health

Alan J. Rice
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Robert J. Robinson
Adjunct Faculty, Pacific Union College

Charles Sandefur
Seventh-day Adventist Pastor (ret.); former Field Secretary, General Conference of Seventh-day Adventists and former President, Adventist Development and Relief Agency (ADRA)

Wayne Malcolm Schafer, QC
Former Adjunct Professor, Burman University

A. Gregory Schneider
Professor Emeritus of Religion and Social Science, Pacific Union College

Mitchell A. Tyner
Associate General Counsel, General Conference of Seventh-day Adventists (ret.)

Rita J. Waterman
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