No. 21-476

In the
Supreme Court of the United States

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

v.

AUBREY ELENIS, *et al.*,
Respondents.

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

BRIEF OF *AMICI CURIAE* INSTITUTE FOR FAITH AND FAMILY AND JEWISH COALITION FOR RELIGIOUS LIBERTY IN SUPPORT OF PETITIONERS

TAMI FITZGERALD
THE INSTITUTE FOR FAITH AND FAMILY
9650 Strickland Road
Suite 103-222
Raleigh, NC 27615
(980) 404-2880
tfitzgerald@ncvalues.org

DEBORAH J. DEWART
Counsel of Record
ATTORNEY AT LAW
111 Magnolia Lane
Hubert, NC 28539
(910) 326-4554
lawyerdeborah@outlook.com

Counsel for Amici Curiae

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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INTEREST OF *AMICI CURIAE*[1]

The Institute for Faith and Family ("IFF") is a North Carolina nonprofit corporation established to preserve and promote faith, family, and freedom by working in various arenas of public policy to protect constitutional liberties, including the right to live and work according to conscience and faith. See https://iffnc.com. The Jewish Coalition for Religious Liberty, along with IFF, seeks to advance a culture where human life is valued, religious liberty thrives, and marriage and families flourish.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Petitioner is a Christian website designer who respectfully serves many people, including the LGBT community, but she does not create messages that conflict with her faith. *303 Creative LLC v. Elenis*, 6 F.4th 1160, 1170 (2021). The Colorado Anti-Discrimination Act, Colo. Rev. Stat. § 24-34-601(2)(a) (CADA) requires her to either violate her religious faith or face crippling penalties that threaten to shutter her business. Petitioner believes marriage is the union of one man and one woman, but CADA's anti-discrimination provisions demand that she design websites for same-sex weddings if she offers services for opposite sex weddings. The First Amendment not

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[1] Counsel of record for all parties received notice at least 10 days prior to the due date of *amici*'s intention to file this brief, and the parties have consented. *Amici curiae* certify that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amici*, their members, or their counsel, has made a monetary contribution to its preparation or submission.

only protects expressive products, like the websites Petitioner designs, but the personal services required to create them. Creative professionals who run a business in accordance with their deeply held faith and conscience do not engage in arbitrary, invidious discrimination when they decline to create messages that offend their convictions. This Court should grant the Petition and reverse the Tenth Circuit ruling to prevent the use of anti-discrimination law as a weapon to snuff out protected expression, and to clarify the compelled speech doctrine in the context of creative services.

ARGUMENT

I. THE CONSTITUTION PROTECTS THE PERSONAL SERVICES REQUIRED TO CREATE PROTECTED EXPRESSION.

Cases involving creative professionals implicate personal services protected by the First Amendment because action is necessary to create expressive products—artwork, videos, photographs, websites. In *Brush & Nib Studio, LC v. City of Phoenix*, the Arizona Supreme Court rejected the argument that creating custom wedding invitations "purely involves conduct, without implicating speech." 448 P.3d 890, 905 (Ariz. 2019) ("*B&N*"). On the contrary, "[f]or such products, both the finished product *and the process of creating that product* are protected speech." *Id.* at 907 (emphasis added). Similarly, in *Telescope Media Grp. v. Lucero*, the creative activities "c[a]me together to produce finished videos that are media for the communication of ideas." 936 F.3d 740, 752 (8th Cir.

2018) ("*TMG*") (internal citations and quotation marks omitted).

A. The Tenth Circuit admits CADA is a content-based, viewpoint-based regulation of protected expression.

The circuit court admits that Petitioner's "creation of wedding websites is pure speech." *303 Creative,* 6 F.4th at 1176. Marriage itself is "often a particularly expressive event." *Id.*, quoting *Obergefell v. Hodges*, 576 U.S. 644, 657 (2015). Website design is protected expression that conveys a message, like photography and other artwork.[2] "[P]hotography is speech when the photographer's artistic talents are combined to tell a story about the beauty and joy of marriage." *Chelsey*

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[2] *Regan v. Time, Inc.*, 468 U.S. 641, 648 (1984); *CNP*, 479 F.Supp. at 555 n. 93; *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952) (motion pictures); *Kaplan v. California*, 413 U.S. 115, 119-20 (1973) ("pictures, films, paintings, drawings, engravings"); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65-66 (1981) (motion pictures, music, dramatic works); *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 569 (1995) (art, music, literature); *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 790 (2011) (books, plays, films, video games); *ETW Corp. v. Jireh Publishing, Inc.*, 332 F.3d 915, 924 (6th. Cir. 2003) ("music, pictures, films, photographs, paintings, drawings, engravings, prints, sculptures"); *Cressman v. Thompson*, 798 F.3d 938, 952 (10th Cir. 2015) (paintings, drawings, original artwork); *White v. City of Sparks*, 500 F.3d 953, 955-56 (9th Cir. 2007) (original artwork); *Bery v. City of New York*, 97 F.3d 689, 694-96 (2d Cir. 1996) (same); *Piarowski v. Ill. Cmty. Coll. Dist. 515*, 759 F.2d 625, 628 (7th Cir. 1985) ("art for art's sake"); *Jucha v. City of North Chicago*, 63 F. Supp. 3d 820, 825 (N.D. Ill. 2014) ("There is no doubt that the First Amendment protects artistic expression."); *VIP Prods. LLC v. Jack Daniel's Props.*, 953 F.3d 1170, 1175 (9th Cir. 2020) (dog toy that communicates a humorous message).

Nelson Photography LLC v. Louisville/Jefferson County Metro Gov't, 479 F. Supp. 3d 543, 557 (W.D. Ky. 2020) ("*CNP*"). Custom videos are "a form of speech . . . entitled to First Amendment protection." *TMG*, 936 F.3d at 751. Like the creative professionals in *CNP* and *TMG*, Petitioner is engaged in protected expression.

The Tenth Circuit not only acknowledges that creative expression is involved, but also admits "the Accommodation Clause compels speech" and "works as a *content-based* restriction." *303 Creative*, 6 F.4th at 1178 (emphasis added). And because CADA's purpose is "to remedy a long and invidious history of discrimination based on sexual orientation" (*id*.), there is a "substantial risk of excising certain ideas or viewpoints from the public dialogue." *Id*., quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994). The court openly admits that "[*e*]*liminating such ideas is CADA's very purpose*." *303 Creative*, 6 F.4th at 1178 (emphasis added).

This is viewpoint discrimination on steroids—an "egregious form of content discrimination." *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995). As the dissent points out, "the *content* of the message determines the applicability of the statute and the *viewpoint* of the speaker determines the legality of the message," so "CADA is both content-and viewpoint-based." *303 Creative*, 6 F.4th at 1202 (Tymkovich, C.J., dissenting).

B. The action required to create expression is entitled to First Amendment protection.

"It goes without saying that artistic expression lies within . . . First Amendment protection." *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 602 (1998) (Souter, J., dissenting). So is the personal labor required to create it. CADA demands that Petitioner engage in personal services, using her creative talents, to design a message that conflicts with her deeply held religious convictions.

First Amendment protection extends to "creating, distributing, or consuming" speech. *Brown*, 564 U.S. at 792 n.1 (video games). The *TMG* plaintiffs did not merely "plant a video camera at the end of the aisle and press record"—they intended "to shoot, assemble, and edit the videos with the goal of expressing their own views about the sanctity of marriage." 936 F.3d at 751. Similar editing services are required to design a website. Acts necessary to create expression—writing, painting, or editing—cannot be disconnected from the finished product. As the Ninth Circuit explained, "we have never seriously questioned that the processes of writing words down on paper, painting a picture, and playing an instrument are purely expressive activities entitled to full First Amendment protection." *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1061-62 (9th Cir. 2010). Designing a website is like "[u]sing a camera to create a photograph" or "applying pen to paper to create a writing or applying brush to canvas to create a painting." *Ex parte Thompson*, 442 S.W.3d 325, 337 (Tex. Crim. App. 2014). *"[T]he process of*

creating the end product cannot reasonably be separated from the end product for First Amendment purposes." *Id*. (emphasis added).

Courts have applied these principles in favor of creative professionals. Producing wedding videos (*TMG*, 936 F.3d at 756) and designing wedding invitations (*B&N*, 448 P.3d at 910) are protected expression. The Phoenix Ordinance in *B&N* would have forced plaintiffs "to *personally* write, paint and create artwork celebrating a same-sex wedding . . . to design and create invitations that enable and facilitate the attendance of guests at a same-sex wedding." 448 P.3d at 922. In *Masterpiece Cakeshop Ltd. v. Colorado Human Rights Commission*, "[f]orcing Phillips to make custom wedding cakes for same-sex marriages requires him to . . . acknowledge that same-sex weddings are 'weddings' and suggest that they should be celebrated—the precise message he believes his faith forbids." 138 S. Ct. 1719, 1744 (2018) (Thomas, J., concurring in part and in the judgment).

Such state compulsion does a grave disservice to customers seeking custom creative services. Coercion produces a counterfeit. If an artist is repelled by the message he must create and forbidden to even disclose his viewpoint to potential customers, the finished product will probably be unsatisfactory. That is one reason courts are loathe to order specific performance as a remedy for breach of a contract for personal services—especially where artistic expression is required.[3] The New York Court of Chancery, declining

[3] *See, e.g., Hamblin v. Dinneford*, 2 Edw. Ch. 529, 533-534 (N.Y. 1835) (actor); *Lumley v. Wagner*, 42 Eng. Rep. 687 (1852) (singer);

to compel a singer's performance for an Italian opera, expressed concern about "what effect coercion might produce upon the defendant's singing, especially in the livelier airs; although the fear of imprisonment would unquestionably deepen his seriousness in the graver parts of the drama." *De Rivafinoli v. Corsetti*, 4 Paige Ch. 264, 270 (1833).

Right to remain silent. Like other speakers, creative professionals have the right to remain silent by declining to create expression. The First Circuit considered the case of a well-known actress who sued the Boston Symphony Orchestra for cancelling her scheduled appearance in the wake of protests about her political views. *Redgrave v. Boston Symphony Orchestra, Inc.*, 855 F.2d 888 (1st Cir. 1988). Actress Redgrave argued that the cancellation violated the Massachusetts Civil Rights Act (MCRA), which created a private cause of action for violations. *Redgrave*, 855 F.2d at 901. The Orchestra asserted "a right to be free from compelled expression," and the court agreed: "A distinguished line of cases has underscored a private party's right to refuse compelled expression." *Id.* at 905. The "typical reluctance" of courts "to force private citizens to act" (*id.*, citing *Lumley v. Wagner*, 42 Eng. Rep. 687, 693 (Ch. 1852)) "augments its constitutionally based concern for the integrity of the artist." *Id.* Since private expression is encouraged and

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Duff v. Russell, 14 N.Y.S. 134 (Super. Ct. 1891) (actress/singer); *Okeh Phonograph v. Armstrong*, 63 F.2d 636 (9th Cir. 1933) (jazz player); *Beverly Glen Music v. Warner Communications*, 178 Cal. App. 3d 1142, 1145 (1986) (singer) ("Denying someone his livelihood is a harsh remedy."). *See also* 5A Corbin, Contracts (1964) § 1204.

protected, the court saw "no reason why *less* protection should be provided where the artist refuses to perform; indeed, silence traditionally has been more sacrosanct than affirmative expression." *Id*. at 906. The Civil Rights Act could not lawfully foreclose the Orchestra's decision not to perform, because that decision was itself a constitutionally protected exercise of the right to be free of compelled speech. The same analysis applies here. The statutory rights of same-sex couples must be "measured against the [Petitioner's] constitutional right against the state" (*id*. at 904) to be free of compelled expression.

II. PETITIONER'S OPERATION OF HER WEBSITE DESIGN BUSINESS IN ACCORDANCE WITH HER MORAL AND RELIGIOUS CONSCIENCE IS NOT IRRATIONAL, INVIDIOUS, OR ARBITRARY.

Anti-discrimination laws, designed to provide a shield, are increasingly used as a sword to cut off expression. Petitioner's refusal to create expression is not irrational, invidious, or arbitrary. But CADA is used to snuff out her speech and religious liberty.

"Discrimination" needs a clear, consistent definition in this context. Declining to create or endorse a message does not constitute "discrimination." "[C]ourts must more clearly evaluate when public accommodation laws have actually been violated, as opposed to when the individual or business is simply refusing to endorse a particular message." James M. Gottry, Note, *Just Shoot Me: Public Accommodation Anti-Discrimination Laws Take Aim at First*

Amendment Freedom of Speech, 64 Vand. L. Rev. 961, 999 (2011). Like the wedding invitation designers in *B&N*, Petitioner does not seek "to employ the coercive apparatus of government to impose disabilities on others," but rather, the "right not to engage in speech that offends [her] deeply held religious beliefs . . . one of our nation's most cherished civil liberties." *B&N*, 448 P.3d at 929.

A. Early anti-discrimination laws were carefully crafted with narrow definitions of protected categories and the places regulated.

Anti-discrimination policies have ancient roots. The Massachusetts law at issue in *Hurley* was derived from the common law principle that innkeepers and others in public service could not refuse service without good reason. *Hurley*, 515 U.S. at 571. Anti-discrimination principles have expanded over the years to encompass more protected categories and places classified as "public accommodations." The potential encroachment on religious liberty has vastly expanded. Commentators have long recognized that the "conflict between the statutory rights of individuals against private acts of discrimination and the near universally-recognized right of free exercise of religion places a complex legal question involving competing societal values squarely before the courts." Jack S. Vaitayanonta, Note: *In State Legislatures We Trust? The "Compelling Interest" Presumption and Religious Free Exercise Challenges to State Civil Rights Laws*, 101 Colum. L. Rev. 886, 887 (2001).

Early anti-discrimination laws focused almost exclusively on eliminating the racial discrimination that plagued the nation for decades. *Just Shoot Me*, 64 Vand. L. Rev. 961, 965 (2011). Primary responsibility shifted to the states after this Court invalidated the Civil Rights Act of 1875. *The Civil Rights Cases*, 109 U.S. 3 (1883); *see Just Shoot Me,* 64 Vand. L. Rev. at 965 n. 7. Later federal attempts succeeded but again highlighted racial equality. The Civil Rights Act of 1964 "was enacted with a spirit of justice and equality in order to remove racial discrimination from certain facilities which are open to the general public." *Miller v. Amusement Enters., Inc.*, 394 F.2d 342, 352 (5th Cir. 1968); *see* Civil Rights Act of 1964, 42 U.S.C. § 2000a.

The vast expansion of categories and places has occurred with little analysis of the difference between race and newly protected classes—or as to how and when criteria may be legitimately related to a business decision. The Thirteenth, Fourteenth, and Fifteenth Amendments were added to the U.S. Constitution to remedy the nation's extraordinary problem of racial discrimination. These provisions cannot readily be transported into every other species of "discrimination," particularly when imposed on private citizens whose own rights may be trampled. It is one thing to impose nondiscrimination principles on the *state*—it is quite another to impose those same standards on private parties whose own liberties are at stake.

Early anti-discrimination laws narrowly defined "places of public accommodation" in terms of transient lodging, theaters, restaurants, and public entertainment venues. *Just Shoot Me*, 64 Vand. L. Rev.

961 at 966. But eventually these traditional "places" expanded beyond inns and trains to commercial entities and even membership associations—escalating the potential collision with First Amendment rights. *Boy Scouts v. Dale*, 530 U.S. 640, 657 (2000). Even today, federal law tracks common law rather than broadly sweeping in *any* establishment that offers *any* goods or services to the public. 42 U.S.C. § 2000a(b).

B. Action motivated by conscience or religious faith is not arbitrary, irrational, or unreasonable.

Discrimination is arbitrary where an entire class of persons is excluded because of irrelevant factors. Where widespread refusals deny an entire group access to basic public goods and services—lodging, food, transportation—protective measures are reasonable. This Court rightly upheld federal legislation passed to eradicate America's long history of racial discrimination. *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964). But it is hardly arbitrary to avoid promoting a cause for reasons of conscience. As protection expands to more places and people, so does the potential to employ anti-discrimination principles to suppress traditional viewpoints and impose social change on unwilling participants. Religious liberty is particularly susceptible to infringement, because "advocates of social change" are often intolerant "toward the teachings of traditional religion." Michael W. McConnell, *"God is Dead and We have Killed Him!" Freedom of Religion in the Post-Modern Age*, 1993 BYU L. Rev. 163, 187 (1993).

Labeling religiously motivated conduct as "discrimination" tends to exhibit constitutionally prohibited hostility toward religion rather than neutrality. *See, e.g., Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136, 142 (1987); *Thomas v. Review Bd. of Ind. Emp't*, 450 U.S. 707, 708 (1981). Here, CADA exhibits hostility toward religion by characterizing Petitioner's religiously motivated policies as unlawful "discrimination."

C. The state must guard the rights of *all* citizens, including those whose deep faith collides with the values of current legislative majorities.

The Constitution is an inclusive document protecting the life, liberty, religion, and viewpoint of all within its realm. Inclusion is a key rationale for anti-discrimination provisions. "The Constitution does not require a choice between gay rights and freedom of speech. It demands both." *CNP*, 479 F.Supp. at 549. But the liberty of all Americans will suffer irreparable harm if the government is granted power to coerce creative services that communicate its preferred message. "There is a reciprocity and universality to these rights of speech and conscience that give us all a direct stake in protecting them . . . ." *B&N*, 448 P.3d at 929. Non-discrimination principles should never be applied in a discriminatory, unequal manner that squelches First Amendment rights. Ironically, CADA creates an intolerable danger of *exclusion* for free speech and artistic expression. The state can easily use the law to punish persons who hold traditional marriage beliefs by *excluding* them from full

participation in public life. If applied to Petitioner, CADA would compel her to choose between her convictions and her livelihood, all because she refuses to sacrifice her conscience and faith on the altar of an agenda she cannot support.

The First Amendment protects a broad spectrum of expression, popular or not. Indeed, the increasing popularity of an idea makes it all the more essential to protect dissenting voices. *Dale*, 530 U.S. at 660. Censorship spells death for a free society. "Once used to stifle the thoughts that we hate...it can stifle the ideas we love." *Gay Alliance of Students v. Matthews*, 544 F.2d 162, 167-168 (4th Cir. 1976). First Amendment freedoms "must be accorded to the ideas we hate or sooner or later they will be denied to the ideas we cherish." *Communist Party v. SACB,* 367 U.S. 1, 137 (1961) (Black, J., dissenting).

Proponents of LGBT rights have accomplished dramatic social and political transformation in just a few years by exercising their rights to free speech, press, association, and the political process generally. Their "progress depended on the First Amendment's protection of expressive conduct that was once far less popular than it is today, from marching in pride parades to flying rainbow flags." *CNP*, 479 F.Supp. at 564. These changes were possible because the Constitution guards free expression and facilitates advocacy of new ideas. But advocates are not entitled to demand for themselves what they would deny to others—otherwise, the constitutional foundation crumbles and all Americans suffer. One group's

aggressive assertion of rights can erode protection for others.

Although LGBT citizens "cannot be treated as social outcasts or as inferior in dignity and worth" (*Masterpiece Cakeshop*, 138 S. Ct. at 1727), people of faith "are members of the community too." *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246, 2277 (2020) (Gorsuch, J. concurring). "[U]nder our Constitution, the government can't force them to . . . create an artistic expression that celebrates a marriage that their conscience doesn't condone." *CNP*, 479 F.Supp. at 548-549 (citations omitted).

The irony and implications have been recognized in prior cases. In *Masterpiece Cakeshop*, Colorado law "afforded storekeepers some latitude to decline to create specific messages the storekeeper considered offensive," e.g., a Denver bakery that refused a Christian customer's request to create two bible-shaped cakes inscribed with messages about the sinfulness of homosexuality. *Jack v. Azucar Bakery*, Charge No. P20140069X, at 2 (Colo. Civil Rights Div. Mar. 25, 2015), *available at* http://perma.cc/5K6D-VV8U. *Masterpiece Cakeshop*, 138 S. Ct. at 1728. Properly applied, anti-discrimination law could not force a gay calligrapher to "create a program for a church that preached against same-sex marriage" or compel Michelangelo, if he were alive today, "to paint a chapel ceiling in a way he deemed blasphemous"—although he could be required to sell completed sculptures free of discrimination. *B&N*, 448 P.3d at 929. As the Tenth Circuit dissent observed, Colorado could "wield CADA as a sword" and require "an unwilling Muslim movie

director to make a film with a Zionist message" or force "an atheist muralist to accept a commission celebrating Evangelical zeal." *303 Creative LLC*, 6 F.4th at 1199 (Tymkovich, C.J., dissenting).

The implications of anti-discrimination law are particularly striking where political affiliation is (or is not) a protected category.[4] In Michigan, a conservative consulting firm sued the City of Ann Arbor for outlawing discrimination based on political beliefs, forcing them to advocate views that contradict their principles.[5] In New York, bars may throw out Trump supporters because the law does not protect against political discrimination[6] and renters seeking roommates can advertise they do not want Trump

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[4] *See, e.g.*, a current District of Columbia statute that prohibits discrimination based not only on race or color, but also "religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, familial status, family responsibilities, genetic information, disability, matriculation, political affiliation, source of income, or place of residence or business of any individual." D.C. Code § 2-1402.31(a). The D.C. Office of Human Rights lists 21 protected traits applicable to housing, employment, public accommodations, and educational institutions. https://ohr.dc.gov/protectedtraits.

[5] *ThinkRight Strategies v. City of Ann Arbor*, Case 2:19-cv-12233-DML-RSW (E.D. Mich. 2019). There was a stipulated dismissal in 2019 because the firm did not come within the definition of "public accommodation."

[6] https://nypost.com/2018/04/25/judge-bars-are-allowed-to-throw-out-trump-supporters/

supporters.[7] But in Seattle, where political beliefs are protected, a gym may lawfully ban a white supremacist.[8] The Eighth Circuit observed that if Minnesota's application of its law were correct, it could "require a Muslim tattoo artist to inscribe 'My religion is the only true religion' on the body of a Christian" if the artist "would do the same for a fellow Muslim" or "force a Democratic speechwriter to provide the same services to a Republican." *TMG*, 936 F.3d at 756.

D. The government's compelling interest—and responsibility—is to safeguard the rights guaranteed by the Constitution

A law like CADA that commands "involuntary affirmation" demands "even more immediate and urgent grounds than a law demanding silence." *Janus v. American Fed. of State, County, and Municipal Employees, Council 31*, 138 S. Ct. 2448, 2464 (2018), citing *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 633 (1943) (internal quotation marks omitted). But the government's most compelling interest is to preserve the constitutional rights of all citizens, including—or perhaps especially—those who reject the prevailing state orthodoxy. "[T]he same Constitution held by *Obergefell* to guarantee the right of same-sex couples to marry also protects religious and philosophical objections to same-sex marriage." *CNP*,

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[7] https://www.nytimes.com/2017/02/10/us/politics/roommates-trump-supporters.html

[8] https://crosscut.com/2018/02/a-gym-banned-a-white-nationalist-but-seattle-law-is-on-his-side

479 F.Supp. at 563, citing *Obergefell*, 135 S. Ct. at 2605; *United States v. Windsor*, 570 U.S. 774, 775 (2013); *Masterpiece Cakeshop*, 138 S. Ct. at 1727.

In *TMG*, Minnesota alleged an "important governmental interest—preventing discrimination" by ensuring that all its citizens were "entitled to full and equal enjoyment of public accommodations and services." 936 P.3d at 749, 754. "[M]ost applications of antidiscrimination laws . . . are constitutional," and a ruling in favor of a creative professional "is not a license to discriminate." *CNP*, 479 F.Supp. at 564. But legislators and courts must beware of "peculiar" applications that require speakers "to alter the[ir] expressive content." *TMG*, 936 P.3d at 755, citing *Hurley*, 515 U.S. at 572-573. Where the government's apparent interest is "simply to require speakers to modify the content of their expression" to align with a preferred message, that interest is "not compelling." *CNP*, 479 F.Supp. at 559.

The state's interest in preventing discriminatory conduct does not trump the Constitution. The Arizona Supreme Court found that the state's interest in ensuring equal access to publicly available goods and services did not "justify compelling Plaintiffs' speech by commandeering their creation of custom wedding invitations, each of which expresses a celebratory message, as the means of eradicating society of biases." *B&N*, 448 P.3d at 914-915. "While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened

either purpose may strike the government." *Hurley*, 515 U.S. at 579; *see B&N,* 448 P.3d at 915; *TMG*, 936 F.3d at 755. Even if the state could craft a narrowly tailored law to accomplish its legitimate interest, "it might still lose" in cases "where it is attempting to compel religious speech at the core of the First Amendment." *CNP*, 479 F.Supp. at 559.

III. CADA IS NOT RELIGIOUSLY NEUTRAL. THE LAW COMPELS EXPRESSION THAT CONFLICTS WITH PETITIONER'S RELIGIOUS CONVICTIONS AND CONSCIENCE.

There is nothing "religiously neutral" about a law that deliberately restrains (or compels) expression about a religious institution like marriage. CADA stifles *religious speech*, which is not only "as fully protected . . . as secular private expression," but historically, "government suppression of speech has so commonly been directed *precisely* at religious speech that a free-speech clause without religion would be Hamlet without the prince." *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995) (internal citations omitted).

This case implicates two core liberties – speech and religion. Like the wedding invitation designers in *B&N*, Petitioner uses her creative skills to express a message about marriage consistent with her faith. 448 P.3d at 917. The video producers in *TMG* wanted to "affect the cultural narrative regarding marriage" through films that portrayed "their view of marriage as a 'sacrificial covenant between one man and one woman.'" 936 F.3d at 748. Minnesota's anti-discrimination law

"burden[ed] their *religiously* motivated *speech*" about marriage and reinforced their free speech claims. *Id*. at 759 (emphasis added). CADA imposes similar burdens on Petitioner.

A. The conflict between anti-discrimination law and faith is not only foreseeable but inevitable.

Anti-discrimination laws covering sexual orientation are increasingly weaponized to target *religious* convictions about marriage. A head-on collision is unavoidable. The Sixth Circuit warned about the dangers of failing to apply an anti-discrimination policy "in an even-handed, much less a faith-neutral, manner." *Ward v. Polite*, 667 F.3d 727, 739 (6th Cir. 2012). Where a policy protects a category defined by conduct that many religious traditions consider sinful, faith-neutral application is virtually impossible. People of faith will inevitably challenge laws forcing them to abandon their core religious convictions about marriage. The government's failure to foresee these religious conflicts parallels the "reckless disregard" standard used in other contexts. Even where the law does not explicitly target religion on its face—or where government officials successfully conceal their hostility—there is a "reckless disregard" for the obvious, inevitable conflicts that will arise. Dissenting Justices in *Obergefell* sent a clarion call about the coming collision. Because marriage is not strictly a governmental institution but also a religious institution, it is "all but inevitable that the two will come into conflict." *Obergefell*, 135 S. Ct. at 2638 (Thomas, J., dissenting). And yet the viewpoint of "good

and decent people [who] oppose same-sex marriage as a tenet of faith" is protected and "actually spelled out" in the First Amendment—"unlike the right imagined by the majority." *Id.* at 2625 (Roberts, C.J., dissenting).

Marriage is a deeply personal matter that intersects religious beliefs, speech, and action. *See Turner v. Safley*, 482 U.S. 78, 96 (1987) ("[M]any religions recognize marriage as having spiritual significance …."). Free exercise embraces not only the freedom to believe but also "the right to express those beliefs and to establish one's religious (or nonreligious) self-definition in the political, civic, and economic life of our larger community." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 736-737 (2014) (Kennedy, J., concurring). One of the reasons this nation is "so open, so tolerant, and so free is that no person may be restricted or demeaned by government" for exercising religious liberty. *Id.* at 739 (2014) (Kennedy, J., concurring). As the Sixth Circuit observed, "tolerance is a two-way street." *Ward v. Polite*, 667 F.3d at 735. This Court's redefinition of marriage does not grant same-sex couples a corollary right to coerce an unwilling business owner to celebrate with them. CADA operates to "vilify" creative professionals "unwilling to assent to the new orthodoxy." *Obergefell*, 576 U.S. at 741 (Alito, J., dissenting). Colorado discards this Court's concern about stigma and "put[s] the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied." *Id.* at 672.

B. CADA attacks liberty of thought and conscience.

The victory for freedom of thought recorded in the Bill of Rights recognizes that in the domain of conscience there is a moral power higher than the State. *Girouard v. United States,* 328 U.S. 61, 68 (1946). Religious liberty is closely correlated with the liberty of conscience that underlies the Establishment Clause and the unique taxpayer standing rules developed in *Flast v. Cohen*, 392 U.S. 83 (1968): "[T]he Framers' generation worried that conscience would be violated if citizens were required to pay taxes to support religious institutions with whose beliefs they disagreed." *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 141 (2011), quoting Feldman, *Intellectual Origins of the Establishment Clause*, 77 N. Y. U. L. Rev. 346, 351 (2002). An equivalent principle applies here. Colorado requires Petitioner to violate her conscience by creating messages and celebrating events she believes are immoral. This is as great a frontal assault on conscience as the Establishment Clause evil of compelling citizens to financially support beliefs they do not hold.

Petitioner wishes to conduct her business with integrity, setting company policies consistent with her conscience, moral values, and faith. Not everyone shares those values but cutting conscience out of commerce is a frightening prospect for business owners, employees, and customers. Customers expect businesses to operate with honesty and integrity. CADA compels Petitioner to hide her convictions. No American should ever have to choose between

allegiance to the state and faithfulness to God just to remain in business. Conscientious objector claims are "very close to the core of religious liberty." Nora O'Callaghan, *Lessons From Pharaoh and the Hebrew Midwives: Conscientious Objection to State Mandates as a Free Exercise Right*, 39 Creighton L. Rev. 561, 565, 611, 615-616 (2006). "No person can be punished for entertaining or professing religious beliefs or disbeliefs . . . ." *Everson v. Bd. of Educ. of Ewing*, 330 U.S. 1, 15-16 (1947). The government may not "exclude[] a person from a profession or punish[] him solely . . . because he holds certain beliefs." *Baird v. State Bar of Arizona*, 401 U.S. 1, 6 (1971); *see also Keyishian v. Bd. of Regents*, 385 U.S. 589, 607 (1967) (professor).

This Court has a "duty to guard and respect that sphere of inviolable conscience and belief which is the mark of a free people." *Lee v. Weisman*, 505 U.S. 577, 592 (1992). The Framers intentionally protected "the integrity of individual conscience in religious matters." *McCreary County, KY v. ACLU*, 545 U.S. 844, 876 (2005). Rights of free speech and religion "are not limited to soft murmurings behind the doors of a person's home or church, or private conversations with like-minded friends and family." *B&N*, 448 P.3d at 895. On the contrary, the Constitution guarantees the right to free expression in the public square, including "the right to create and sell words, paintings, and art that express a person's sincere religious beliefs." *Id*.

IV. CADA CRUSHES DISSENT, CREATING INTOLERANCE, UNIFORMITY, EXCLUSION, AND INEQUALITY.

Many believe that anti-discrimination laws like CADA are necessary to achieve *tolerance, diversity, inclusion,* and *equality* for the LGBT community. Properly understood and applied, these values facilitate life in a free society and protect the rights of all Americans. But instead of eradicating invidious discrimination, CADA creates it—crushing dissent and promoting *intolerance, uniformity, exclusion,* and *inequality*. CADA destroys diversity by demanding uniformity of thought, belief, speech, and action concerning the nature of marriage, silencing one side of this hotly contested issue. Colorado cements intolerance into state law. The result is an unconscionable inequality where people who hold traditional marriage beliefs are excluded from offering creative services to the public. CADA imposes a burden even more onerous than the compelled speech in *Wooley v. Maynard*, 430 U.S. 705 (1977). In *Wooley*, the *state* designed and created the license plate its citizens had to display. Here, *Petitioner* must design and create expression that communicates a celebratory message she believes is false. This is anathema to the First Amendment. "Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning." *Janus*, 138 S. Ct. at 2464. The Tenth Circuit's decision is the "worst of all" possible speech violations—"a viewpoint-based compulsion to speak on politics or religion." *CNP*, 479 F.Supp. at 555.

Obergefell has led to brazen efforts to coerce uniformity of thought and punish dissenting views. Colorado contravenes "[t]he very purpose of the First Amendment . . . to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion." *Thomas v. Collins,* 323 U.S. 516, 545 (1945) (Jackson, J., concurring). This is dangerous to a free society where the government must respect a wide range of diverse viewpoints "Struggles to coerce uniformity" of thought are ultimately futile, "achiev[ing] only the unanimity of the graveyard." *Barnette*, 319 U.S. at 640, 641.

The freedom of thought that undergirds the First Amendment merits "unqualified attachment." *Schneiderman v. United States*, 320 U.S. 118, 144 (1943). In this context, the distinction between compelled speech and compelled silence is "without constitutional significance." *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988). These complementary rights are components of "individual freedom of mind." *Barnette*, 319 U.S. at 637. Freedom of thought "is the matrix, the indispensable condition, of nearly every other form of freedom." *Palko v. Connecticut*, 302 U.S. 319, 326-27 (1937)), *overruled on other grounds by Benton v. Maryland*, 395 U.S. 784 (1969). Like many past cases, this case implicates a state law that "forces an individual . . . to be an instrument for fostering public adherence to an ideological point of view [s]he finds unacceptable." *Wooley*, 430 U.S. at 715; *B&N*, 448 P.3d at 904-905. The ideological coercion of public opinion "is not forward thinking." *Nat'l Inst. of Family & Life*

Advocates v. Becerra, 138 S. Ct. 2361, 2379 (2018) (Kennedy, J., concurring).

Compelled speech is even more damaging than compelled silence because it coerces "free and independent" individuals "into betraying their convictions." *B&N*, 448 P.3d at 924, quoting *Janus*, 138 S. Ct. at 2464. In recent cases with issues comparable to this Petition, the Eighth Circuit, the Arizona Supreme Court, and a United States District Court in Kentucky have all supported creative professionals: *TMG*, 936 F.3d at 752-53 (wedding videos); *B&N*, 448 P.3d at 914 (wedding invitations); *CNP*, 479 F.Supp. at 558 (photography). The Arizona Supreme Court cited Justice Jackson's warning in *Barnette* about the ultimate futility of "government efforts to compel uniformity of beliefs and ideas." *B&N*, 448 P.3d at 896-897. "Those who begin coercive elimination of dissent soon find themselves exterminating dissenters." *Barnette*, 319 U.S. at 641. "It appears that the path to 'coercive elimination of dissent' is steep—and short." *303 Creative*, 6 F.4th at 1200 (Tymkovich, C.J., dissenting), quoting *Barnette*, 319 U.S. at 641.

CONCLUSION

This Court should grant the Petition and reverse the Tenth Circuit ruling.

Respectfully submitted,

TAMI FITZGERALD
THE INSTITUTE FOR FAITH AND FAMILY
9650 Strickland Road
Suite 103-222
Raleigh, NC 27615
(980) 404-2880
tfitzgerald@ncvalues.org

DEBORAH J. DEWART
Counsel of Record
ATTORNEY AT LAW
111 Magnolia Lane
Hubert, NC 28539
(910) 326-4554
lawyerdeborah@outlook.com

Counsel for Amici Curiae