NO. _____

IN THE

Supreme Court of the United States

303 CREATIVE LLC, A LIMITED LIABILITY COMPANY; LORIE SMITH,

Petitioners,

v.

AUBREY ELENIS; CHARLES GARCIA; AJAY MENON; MIGUEL RENE ELIAS; RICHARD LEWIS; KENDRA ANDERSON; SERGIO CORDOVA; JESSICA POCOCK; PHIL WEISER,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Artist Lorie Smith is a website designer who creates original, online content consistent with her faith. She plans to (1) design wedding websites promoting her understanding of marriage, and (2) post a statement explaining that she can only speak messages consistent with her faith. But the Colorado Anti-Discrimination Act (CADA) requires her to create custom websites celebrating same-sex marriage and prohibits her statement—even though Colorado stipulates that she "work[s] with all people regardless of … sexual orientation." App.53a, 184a.

The Tenth Circuit applied strict scrutiny and astonishingly concluded that the government may, based on content and viewpoint, *force* Lorie to convey messages that violate her religious beliefs and *restrict* her from explaining her faith. The court also upheld CADA under *Employment Division* v. *Smith*, 494 U.S. 872 (1990), even though CADA creates a "gerrymander" where secular artists can decline to speak but religious artists cannot, meaning the government can compel its approved messages. The questions presented are:

1. Whether applying a public-accommodation law to compel an artist to speak or stay silent, contrary to the artist's sincerely held religious beliefs, violates the Free Speech or Free Exercise Clauses of the First Amendment.

2. Whether a public-accommodation law that authorizes secular but not religious exemptions is generally applicable under *Smith*, and if so, whether this Court should overrule *Smith*.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE

Petitioner 303 Creative LLC is a single-member limited liability company owned by Petitioner Lorie Smith, a Colorado citizen. 303 Creative has no stock, and no parent or publicly held companies have any ownership interest in it.

Respondents are Aubrey Elenis, in her official capacity as Director of the Colorado Civil Rights Division; Sergio Raudel Cordova, Charles Garcia, Richard Lee Lewis Jr., Ajay Menon, Cherylin Peniston, and Meremy Ross, in their official capacities as members of the Colorado Civil Rights Commission; and Phil Weiser, in his official capacity as Attorney General for the State of Colorado.

LIST OF ALL PROCEEDINGS

U.S. Court of Appeals for the Tenth Circuit, No. 19-1413, *303 Creative LLC* v. *Elenis*, judgment entered July 26, 2021.

U.S. District Court for the District of Colorado, No. 1:16-cv-02372, final judgment entered September 26, 2019.

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STATEMENT OF JURISDICTION

The Tenth Circuit entered judgment on July 26, 2021. Lower courts had jurisdiction under 28 U.S.C. 1331 and 28 U.S.C. 1291. This Court has jurisdiction under 28 U.S.C. 1254(1).

PERTINENT CONSTITUTIONAL PROVISIONS AND STATUTES

The First Amendment to the United States Constitution provides, in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech." U.S. Const. amend I.

The Fourteenth Amendment to the United States Constitution provides, in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend XIV.

Relevant portions of the Colorado Anti-Discrimination Act appear at App.171a–172a.

INTRODUCTION

The Tenth Circuit below took the "remarkable" "stance that the government may force [an artist] to produce messages that violate her conscience." App.51a (Tymkovich, C.J., dissenting). What's more, the government may restrict speech based on content, even when that risks "excising certain ideas or viewpoints from the public dialogue." App.24a. Although dissenting Chief Judge Tymkovich was "loathe to reference Orwell, the majority's opinion endorses substantial government interference in matters of speech, religion, and conscience." App.51a. "It seems," he reflected, that "we have moved from 'live and let live' to 'you can't say that.'" App.51a–52a.

Lorie Smith is an artist and website designer who creates original content consistent with her faith. She plans to expand her business to design wedding websites that promote her understanding of marriage as between one man and one woman, and she would like to post an online statement explaining she can only speak messages that are consistent with her religious convictions. But Colorado's Anti-Discrimination Act (CADA) *requires* her to create websites celebrating same-sex marriage and *bans* her explanatory statement—even though Colorado officials stipulate that she works with anyone, regardless of sexual orientation. App.53a, 184a.

The Tenth Circuit agreed Lorie does not discriminate against LGBT persons and declines to create websites based solely on content. The Tenth Circuit also held that creating a wedding website is "speech" and recognized that CADA both compels and restricts speech based on content. That should have spelled the end of CADA's speech compulsion as applied to Lorie.

Instead, the Tenth Circuit adopted a novel, artists-are-monopolists theory and held that Colorado can "*force* [Lorie] to create custom websites that [she] otherwise would not" because CADA is narrowly tailored to the state's compelling interest in ensuring equal access *to Lorie's custom expression*. According to the lower court, Colorado has a compelling interest in ensuring access to websites created by Lorie. Further, the court held that Colorado may *prohibit* Lorie from publicizing her own understanding of marriage. As Chief Judge Tymkovich's dissent explained, this ruling is "unprecedented" and "staggering" in scope. App.80a. The decision empowers the government to force everyone to speak government-approved messages and "subverts our core understandings of the First Amendment." *Ibid.*

The decision also cements a three-way split over tensions between free speech and laws like CADA, pitting the Tenth Circuit and several state courts of last resort against the Eighth and Eleventh Circuits and the Arizona Supreme Court. At the same time, the opinion contradicts this Court's free-speech precedents, which have repeatedly declared as anathemas to the First Amendment all government attempts to compel speech, to regulate speech based on content, and to stamp out disfavored speech.

The Tenth Circuit's free-exercise analysis is also deeply flawed and creates a separate circuit split. The lower court upheld CADA despite the law's provision of secular but not religious exemptions, and despite agreeing that CADA restricts speech based on content, causing a viewpoint gerrymander. If such a law does not trigger strict scrutiny under *Employment Division* v. *Smith*, 494 U.S. 872 (1990), then *Smith* should be overturned.

Lorie seeks only to speak "in a manner consistent with [her] religious beliefs; [she] does not seek to impose those beliefs on anyone else." *Fulton* v. *City of Philadelphia*, 141 S. Ct. 1868, 1882 (2021). This Court's review is urgently needed to reaffirm that the government cannot compel artists to speak government-approved messages or enforce "content-based restriction[s]" on speech designed to "excis[e] certain ideas or viewpoints from the public dialogue." App.24a. The petition should be granted.

STATEMENT OF THE CASE

A. Lorie Smith and 303 Creative

Lorie Smith is a graphic artist, website designer, and sole owner of her design firm, 303 Creative. App.181a. Lorie developed her design talents in corporate America but wanted more freedom to promote issues she cares about—advancing small businesses, helping people, and supporting churches and nonprofits. App.180a–181a. She started her own website-design business. App.181a.

Lorie has largely realized her dream. She designs original, customized websites and graphics for her clients, App.181a, using words, pictures, or other media and her own unique, creative talents, App.21a. Lorie seeks to bring glory to God by creating unique expression that shares her religious beliefs, including her faith's view that marriage is between one man and woman, and she cannot create messages inconsistent with her Christian faith. App.179a–180a.

For years, Lorie has planned to expand into wedding websites in large part to "promot[e]" her "religious belief that God designed marriage as an institution between one man and one woman" and to

encourage couples to "commit to lifelong unity and devotion as man and wife." App.187a–188a. Lorie will customize each website to each wedding and will "'celebrate and promote the couple's wedding and unique love story' by combining custom text, graphics, and other media." App.187a. The custom wedding websites will "express approval and celebration of the couple's marriage, which is itself often a particularly expressive event." App.20a; App.66a (sample marriage website Lorie will create). And Lorie plans to use each website to tell the couple's story in a way that shares her religious beliefs about marriage. App.186a. Lorie has final editorial control over every website. App.183a.

Lorie is willing to create custom websites for anyone, including those who identify as LGBT, provided their message does not conflict with her religious views. App.184a. As Colorado stipulates, she does not discriminate against anyone. App.54a, 184a. She is "willing to work with all people regardless of … race, creed, sexual orientation, and gender." App.184a. But she cannot create websites that promote messages contrary to her faith, such as messages that condone violence or promote sexual immorality, abortion, or same-sex marriage. App.184a. Lorie respectfully refers such requests to other website designers. App.185a.

Lorie has written a webpage announcing her expansion into the wedding business and explaining her reasons for the content she can and cannot create. App.188a–189a. But under CADA, Lorie cannot post her statement or offer her wedding websites because Colorado considers it illegal. CA10 Appellees' Answer Br. 3, 50–57. Yet Lorie still received a request for a same-sex-wedding website. CA10 Aplt.App.2-260.

B. CADA's targeting of Lorie and other religious artists

Under CADA, 303 Creative is a "public accommodation," App.171a, that may not "directly or indirectly … refuse … because of … sexual orientation … the full and equal enjoyment of the … services … [of a] public accommodation…" Colo. Rev. Stat. 24-34-601(2)(a) ("Accommodation Clause"), App.171a–72a.

CADA also makes it unlawful to "publish … any … communication … that indicates that services … [of a] public accommodation will be refused … or that an individual's patronage or presence … is unwelcome, objectionable, unacceptable, or undesirable because of … sexual orientation..." Colo. Rev. Stat. 24-34-601(2)(a) ("Publications Clause"), App.172a.

The Colorado Civil Rights Commission and its investigative arm, the Civil Rights Division, enforce CADA. App.175a–176a. Anyone can file complaints with the Division, including each named Respondent. App.174a–175a. The Division investigates, and the Commission adjudicates. App.175a–176a. Individuals can also file state-court lawsuits. App.174a. CADA penalizes violators with fines up to $500, cease-and-desist orders, and burdensome reporting and re-education conditions. App.175a, 177a.

CADA has two exemptions relevant here. It exempts business practices that "restrict admission" "to individuals of one sex if such restriction has a bona fide relationship to the … services" of that "accommodation." Colo. Rev. Stat. 24-34-601(3) ("Bona Fide Relationship Clause"), App.172a. It also implicitly allows for "message-based refusals" for works a business will not create for "any customer." App.54a–55a, 91a (Tymkovich, C.J., dissenting).

Colorado broadly interprets and aggressively enforces CADA against those like Lorie, including cake artist Jack Phillips. *E.g.*, *Masterpiece Cakeshop, Ltd.* v. *Colo. Civ. Rts. Comm'n*, 138 S. Ct. 1719 (2018). So do Colorado private citizens and Colorado state courts. *E.g.*, *Scardina* v. *Masterpiece Cakeshop Inc.*, No. 19CV32214 (Colo. Dist. Ct. June 15, 2021) (holding Jack Phillips liable under CADA for declining to create a custom cake celebrating a gender transition, requested—coincidentally—the very same day certiorari was granted in the case that resulted in this Court's *Maseterpiece* decision).

C. Proceedings below

At the district court, Lorie sought a preliminary injunction and Colorado moved to dismiss. The court held the two motions and instructed Lorie to file for summary judgment, which she did based on stipulated facts. The district court then dismissed Lorie's Accommodation Clause challenge on standing and stayed the case until this Court decided *Masterpiece*. App.168a–170a. After *Masterpiece*, the district court granted summary judgment to Colorado on the Publications Clause. App.113a.

On appeal, the Tenth Circuit held that Lorie had standing to challenge both Clauses. The court also held that Lorie's wedding websites are "pure speech," and that "the result of the [Public] Accommodation Clause is that [Lorie is] forced to create custom websites [she] otherwise would not"—notwithstanding her sincere religious views on marriage. App.20a, 23a; *id.* at 22a (CADA compels Lorie "to create speech that celebrates same-sex marriages").

And "[b]ecause the Accommodation Clause compels speech in this case, it also works as a content-based restriction" that creates a "substantial risk of excising certain ideas or viewpoints from the public dialogue"—"[e]liminating such ideas is CADA's very purpose." App.23a–24a (cleaned up). Since CADA compels and restricts speech based on content, the court held that it must satisfy strict scrutiny. *Ibid.*

The majority said that CADA met this arduous test because Colorado had a compelling interest in ensuring access to Lorie's "*unique* services [which] are, by definition, unavailable elsewhere"—even while admitting that "LGBT consumers may be able to obtain wedding-website design services from other businesses." App.28a. The Tenth Circuit held that "for the same reason" Lorie's services are speech, they are "inherently not fungible," so the government may compel their provision. *Ibid.* And the court rejected Lorie's Publications Clause challenge, holding that her statement of beliefs expressed an intent to do what "the Accommodation Clause forbids and that the First Amendment does not protect." App.28a, 34a.

In its free-exercise analysis, the Tenth Circuit conceded that CADA contains exemptions, compels speech based on viewpoint, and creates a "pro-LGBT gerrymander" by requiring religious artists to celebrate same-sex marriage while allowing secular artists to decline to speak messages. App.40a. Yet the court still held CADA generally applicable—despite its message-based refusal exception—because none of the exemptions allowed conduct exactly like the religious conduct at issue, i.e., while the exception allows speakers to decline religious and other messages, none allow "secular-speakers" to decline requests celebrating same-sex marriage. App.41a.

Finally, the Tenth Circuit admitted that CADA allows public accommodations to deny access based on sex if doing so has a "bona fide relationship" to the accommodation's services. App.45a. But despite this Court's conclusion in *Fulton* v. *City of Philadelphia* that a "formal [exemption] mechanism" is problematic "regardless whether any exceptions have been given," 141 S. Ct. 1868, 1879 (2021), the court disregarded the exemption as not "entirely discretionary" and irrelevant without prior enforcement. App.45a.

In an acerbic dissent, Chief Judge Tymkovich recognized that the majority's opinion was "unprecedented." App.80a. He agreed that CADA compelled speech, restricted speech based on content and viewpoint, and triggered strict scrutiny, but he concluded that CADA flunked this test because "ensuring access to a *particular* person's unique, artistic product … is *not* a compelling state interest," App.77a, and because CADA compels and supresses Lorie's speech when "there are reasonable, practicable alternatives Colorado could implement to ensure market access while better protecting speech," App.78a.

Chief Judge Tymkovich also concluded that CADA violated Lorie's free-exercise rights. CADA allows secular but not religious artists to make "message-based refusals." App.91a. Colorado, he said, "presum[es] that Ms. Smith has discriminatory intent in her faith-based refusal while allowing other artists to refuse to convey messages contrary to their non-faith-based beliefs." App.92a–93a. "Colorado's treatment of Ms. Smith's religious beliefs must be rejected," he said. App.93a.

REASONS FOR GRANTING THE WRIT

The courts of appeal have now embraced three competing views over whether government may compel and restrict speech expressing certain views. The Tenth Circuit's decision deepens that entrenched conflict and flatly contradicts this Court's free-speech precedents six ways from Sunday.

The Tenth Circuit took the extreme position that the government may compel an artist—any artist—to create expressive content, even if that content violates her faith. The Oregon Court of Appeals largely agrees. These decisions conflict directly with the Eighth and Eleventh Circuits and the Arizona Supreme Court, all of which have held that the government may *not* compel speech in violation of a speaker's conscience. Other courts, including those in Colorado, New Mexico, and Washington, also bless the compulsion of creative content, but they do so by holding free-speech protections inapplicable, recharacterizing the creation of messages as mere conduct. This entrenched split cannot stand. It means that the First Amendment rights of artists depend on the state in which they live. And the decisions that give their imprimatur to governments who compel speech conflict starkly with this Court's decisions.

This Court should also grant certiorari to clarify *Smith* and hold that a law is not generally applicable when it authorizes secular but not religious exceptions. The decision below deepened a second circuit split and substantially narrowed *Fulton* by holding that the secular exemption must be nearly identical as the religious exemption requested. This Court should grant review on both questions presented.

I. The Tenth Circuit decision exacerbates a three-way split over free-speech defenses to public-accommodation laws.

In holding that a government may "compel speech," enforce "content-based restrictions" on speech that the government deems "unwelcoming," and "force[ ]" artists "to create custom websites they otherwise would not"—even where that speech conflicts with sincerely held religious beliefs—the Tenth Circuit deepened an existing conflict and disregarded this Court's free-speech precedents. Without correction, the decision will continue to erode essential free-speech protections and embolden government officials to punish speakers with whom they disagree.

A. The Tenth Circuit and Oregon Court of Appeals authorize compelled speech under heightened scrutiny.

The Tenth Circuit held that Lorie's wedding websites are "pure speech" because they "'celebrate and promote the couple's wedding and unique love story' by combining custom text, graphics, and other media." App.20a. The websites also "express approval and celebration of the couple's marriage, which is itself often a particularly expressive event." *Ibid.*

The Tenth Circuit recognized that CADA compels and limits speech in two ways. The Accommodation Clause "force[s] [Appellants] to create websites—and thus, speech—that they would otherwise refuse." App.22a–23a. And "it also works as a content-based restriction" aimed at "[e]liminating such ideas." App.23a–24a. As a result, Lorie may not "create websites celebrating opposite-sex marriages," unless she also creates messages "celebrating same-sex

marriages." App.23a. Because CADA both compels speech and operates as a content-based restriction, the Tenth Circuit held that it must satisfy strict scrutiny. So far, so good.

The Tenth Circuit then went off the rails, holding that CADA's speech compulsion and speech restriction somehow satisfy strict scrutiny. The court said that Colorado has a compelling interest in ensuring that marginalized groups have "access to the commercial marketplace." App.32a. And despite acknowledging that innumerable companies create custom wedding websites celebrating same-sex weddings, App.28a, the court held that CADA can compel speech because it is narrowly tailored to Colorado's interest in ensuring "equal access to publicly available goods and services." App.26a.

To get there, the court held that Lorie's expression is "unique" under the narrow-tailoring inquiry because the only person who makes websites that look like Lorie's is—Lorie herself. The Court then held that "[f]or the same reason that [Lorie's] custom and unique services are speech, those services are also inherently not fungible," so the government could forcibly compel their provision. App.28a.

The court's analysis likened custom art to a monopoly: "The product at issue is not merely 'custom-made wedding websites,' but rather 'custom-made wedding websites of the same quality and nature *as those made by [Lorie]*.'" App.29a (emphasis added). "In that market," the court continued, only Lorie's creative work exists. *Ibid.* Thus, Colorado's interest in "equal access" meant access to *Lorie's* personal voice, and there was no less intrusive way to provide access to Lorie's voice.

The Tenth Circuit's bizarre reasoning turns free-speech protections on their head. The more "unique" speech is, the more the government can compel it. App.30a n.5 ("To us, Appellants' services must either be unique for both [free-speech and strict-scrutiny] analyses, or fungible for both."). "[T]he scope of the majority's opinion is staggering," allowing the government to "regulate the messages communicated by *all* artists" App.80a (Tymkovich, C.J., dissenting).

In a similar case, the Oregon Court of Appeals upheld the government compulsion of a custom same-sex wedding cake under intermediate scrutiny. *Klein* v. *Or. Bureau of Labor & Indus.*, 410 P.3d 1051 (Or. Ct. App. 2017). The court acknowledged that free-speech concerns might exist but held that "any burden on … expressive activities is no greater than is essential to further Oregon's substantial interest in promoting the ability of its citizens to participate equally in the marketplace without regard to sexual orientation." *Id.* at 1065. Given the state's interest in preventing unequal treatment, the court would not permit any "special privilege" for free speech. *Id*. at 1074.

Thus, the Tenth Circuit became the second jurisdiction to hold that government efforts to compel creative speech on matters of conscience survive heightened scrutiny.

B. The Eighth and Eleventh Circuits and Arizona Supreme Court do not allow public-accommodation laws to compel or restrict speech under heightened scrutiny.

In *Telescope Media Group* v. *Lucero*, a case that the Tenth Circuit rightly understood to be "substantially similar" to this one, App.67a, the Eighth Circuit held that the government may *not* force a for-profit film studio to create films telling stories of same-sex marriages just because they create films celebrating opposite-sex marriages. 936 F.3d 740, 758–60 (8th Cir. 2019). That is because the government cannot compel a person "to talk about ... same-sex marriages" simply because she chooses "to talk about ... opposite-sex marriages." *Id.* at 753. To do so "is at odds with the 'cardinal constitutional command' against compelled speech." *Id.* at 752 (quoting *Janus* v. *Am. Fed'n of State, Cnty., & Mun. Emps., Council* 31, 138 S. Ct. 2448, 2463 (2018)). The compulsion also effects a content-based regulation because it "[m]andat[es] speech that a speaker would not otherwise make." *Id.* at 753 (quoting *Riley* v. *Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988)).

Like the Tenth Circuit, the Eighth Circuit applied strict scrutiny. But the Eighth Circuit reached the opposite result. It held that "regulating speech because it is discriminatory or offensive is *not* a compelling state interest." *Id.* at 755 (emphasis added). "Even antidiscrimination laws, as critically important as they are," the court concluded, "must yield to the Constitution." *Ibid.* If this were not so, the Eighth Circuit reasoned, the government could "force a Democratic speechwriter to provide the same services to a Republican," or "require a professional

entertainer to perform at rallies for both the Republican and Democratic candidates for the same office." *Id.* at 756.

Likewise, the Tenth Circuit acknowledged a split between its decision and *Brush & Nib Studio, LC* v. *City of Phoenix,* where the Arizona Supreme Court held that a public-accommodation law could not force an art studio to create custom wedding invitations or ban the studio's online statement of beliefs. 448 P.3d 890, 895 (Ariz. 2019). Since custom wedding invitations were "speech," requiring their creation for same-sex weddings would violate the "cardinal constitutional command" against compelled speech. *Id*. at 905 (quoting *Janus*, 138 S. Ct. at 2463). The court also held that the city's public-accommodation ordinance operated "as a content-based law" that "coerce[d]" individuals into "abandoning their convictions," and compelled them to communicate "celebratory messages" with which they disagree. *Id*. at 914.

Applying strict scrutiny, the Arizona Supreme Court rejected the argument that "a public accommodations law could justify compelling speech." *Id*. at 915 (citing *Hurley* v. *Irish-Am. Gay, Lesbian and Bisexual Grp. of Bos.*, 515 U.S. 557, 572–73 (1995)). There was no compelling state interest because "produc[ing] speakers free of … biases" is not a legitimate aim, but a "fatal objective." *Ibid.* (quoting *Hurley*, 515 U.S. at 578–79). The government "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." *Ibid.*

Nor was the public-accommodation law narrowly tailored, despite the court's conclusion that the compelled speech at issue was "unique," custom, and "unlike most commercial products and services sold by public accommodations." *Id.* at 916. Accord *e.g.*, *Chelsey Nelson Photography LLC* v. *Louisville/Jefferson Cnty. Metro Gov't*, 479 F. Supp. 3d 543, 559 (W.D. Ky. 2020) (J., Walker) (wedding photography is protected speech and no compelling interest requires artists "to modify the content of their expression").

Finally, the Eleventh Circuit adopted a similar no-compelled-speech rule when it accepted Amazon's free-speech defense against a Title II religious-discrimination claim. *Coral Ridge Ministries Media, Inc.* v. *Amazon.com, Inc.*, 6 F.4th 1247 (11th Cir. 2021). There, Amazon claimed to have excluded a religious group from its Amazon-Smile program (where Amazon redirects money from customer purchases to eligible organizations) because of the group's views. The Eleventh Circuit held that exclusionary choice to be expressive, and that forcing Amazon to fund groups it opposed would unconstitutionally compel Amazon's speech. *Id.* at 1255–56.

Indeed, the Eleventh Circuit did not even get to a strict-scrutiny analysis because it held that Title II's compulsion of speech did not further *any* equal-access interest since it "modif[ied] the content of [Amazon's] expression," something *Hurley* forbids. *Ibid.* In addition, the law's compulsion of a monetary donation violated the "bedrock principle" that "no person in this country may be compelled to subsidize speech by a third party that he or she does not wish to support." *Id.* at 1254 (quoting *Harris* v. *Quinn*, 573 U.S. 616, 656 (2014)).

C. Other courts allow public-accommodation laws to compel speech—as conduct.

Other state courts of last resort allow governments to force artists to speak contrary to their faith by holding that the First Amendment offers no protection at all, characterizing artistic creations as mere conduct.

In *Elane Photography, LLC* v. *Willock*, for instance, the New Mexico Supreme Court compelled a photographer to create same-sex wedding photographs under a public-accommodation law. 309 P.3d 53, 64–66 (N.M. 2013). The court held that "[w]hile photography may be expressive, the *operation of a photography business* is not." *Id.* at 68 (emphasis added). In this commercial context, "[r]easonable observers" would not "interpret" someone's "photographs as an endorsement of the photographed events." *Id.* at 69. In fact, the court denied that a compelled-speech violation *ever* arises "from the application of antidiscrimination laws to a for-profit public accommodation"—even ones that "involve speech or other expressive services." *Id.* at 65.

The Washington Supreme followed suit. It applied *Elane*'s logic to force florist Barronelle Stutzman to create custom floral arrangements celebrating same-sex weddings. *State* v. *Arlene's Flowers, Inc.*, 441 P.3d 1203, 1226 (Wash. 2019). Like *Elane*, *Arlene's* compartmentalized "expressive conduct and commercial activity." *Id.* at 1227 n.18. Barronelle could not rely on the First Amendment, said the court, because "her store is the kind of public accommodation that has traditionally been subject to antidiscrimination laws." *Id.* at 1226. After all, "an outside observer" would not know why paid speakers declined

to create speech, much less think "providing flowers for a wedding" would "constitute an endorsement" of anything. *Ibid.* And the for-profit nature of Arlene's Flowers was dispositive: "[c]ourts cannot be in the business of deciding which businesses are sufficiently artistic to warrant exemptions from antidiscrimination laws." *Id.* at 1228 (citing *Elane*, 309 P.3d at 71).

The Colorado Court of Appeals agreed (and the Colorado Supreme Court declined review), requiring Jack Phillips to create custom wedding cakes under CADA. *Craig* v. *Masterpiece Cakeshop, Inc.*, 370 P.3d 272 (Colo. Ct. App. 2015), overruled on other grounds, *Masterpiece Cakeshop, Ltd.* v. *Colo. Civ. Rts. Comm'n*, 138 S. Ct. 1719 (2018). Echoing *Elane* and *Arlene's*, the Colorado court reasoned that when "an entity charges for its goods and services," that "reduces the likelihood that a reasonable observer will believe that [the entity] supports the message expressed in its finished product." *Id.* at 287.

An artist's freedom to speak according to her conscience thus depends entirely on her jurisdiction. In the Tenth Circuit (Oklahoma, Kansas, New Mexico, Colorado, Wyoming, and Utah), governments can force artists to speak contrary to their faith even when the artist does not discriminate based on status. In Arizona and the Eighth Circuit (Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota), governments *cannot* compel artists to speak contrary to their faith. Meanwhile, artists' work in New Mexico, Oregon, and Washington is not even considered "speech" but is instead labeled conduct if offered for purchase. It is long overdue for this entrenched conflict to be resolved.

D. The Tenth Circuit's decision contradicts this Court's free-speech precedents.

The Tenth Circuit's strict scrutiny analysis of CADA takes a bulldozer to this Court's free-speech precedents.

Compelled Speech. This Court consistently rejects compelled speech under strict scrutiny. For good reason. When officials compel speech, they inflict a "demeaning" injury that violates a "cardinal constitutional command," *Janus*, 138 S. Ct. at 2463–64, "the fundamental rule of protection under the First Amendment," *Hurley*, 515 U.S. at 573, and the principle that lies "[a]t the heart of the First Amendment," which grounds our very "political system and cultural life." *Turner Broad. Sys., Inc.* v. *F.C.C.*, 512 U.S. 622, 641 (1994). "Governments must not be allowed to force persons to express a message contrary to their deepest convictions." *Nat'l Inst. of Family & Life Advocs.* v. *Becerra*, 138 S. Ct. 2361, 2379 (2018) (*NIFLA*) (Kennedy, J., concurring). To the contrary, "[c]ompelling individuals to mouth support for views they find objectionable" on "controversial public issues" should be "universally condemned." *Janus*, 138 S. Ct. at 2463–64.

The Tenth Circuit did the opposite, forcing Lorie to "actively create" and publish online speech that violated her conscience. This slights what this Court has repeatedly declared sacred: "individual freedom of mind." *W. Va. Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 637 (1943). And it dims the most "fixed star in our constitutional constellation": government cannot compel citizens to speak against their conscience. *Id.* at 642.

The Tenth Circuit placed weight on the commercial nature of Lorie's website-design business. App.32a n.6. But "a speaker is no less a speaker because he or she is paid to speak." *Riley*, 487 U.S. at 801; cf. *NIFLA*, 138 S. Ct. at 2371–72 ("Speech is not unprotected merely because it is uttered by 'professionals.'"). And this position conflicts with decisions of the Second, Sixth, Eighth, Ninth, and Eleventh Circuits, all of which have granted full speech protection to visual art sold for profit. *Bery* v. *City of N.Y.*, 97 F.3d 689, 695, 697 (2d Cir. 1996); *ETW Corp.* v. *Jireh Publ'g, Inc.*, 332 F.3d 915, 918, 924 (6th Cir. 2003); *Telescope Media Group* v. *Lucero*, 936 F.3d 740, 751–52 (8th Cir. 2019); *White* v. *City of Sparks*, 500 F.3d 953, 957 (9th Cir. 2007); *Buehrle* v. *City of Key West*, 813 F.3d 973, 978 (11th Cir. 2015).

Idea suppression. This Court condemns governmental attempts to target certain ideas. "The government may not discriminate against speech based on the ideas or opinions it conveys." *Iancu* v. *Brunetti*, 139 S. Ct. 2294, 2299 (2019). Accord, *e.g.*, *Pac. Gas & Elec. Co.* v. *Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 12 (1986) (condemning utility commission's order because "it discriminates on the basis of the viewpoints of the selected speakers").

The Tenth Circuit admitted that CADA created "more than a 'substantial risk of excising certain ideas or viewpoints from the public dialogue.'" App.24a (cleaned up). The statute did so not just by compelling speech, but also by conditioning the expression of one view—"celebrating opposite-sex weddings"—on the proclamation of another—"celebrating same-sex weddings." App.23a.

But this Court repudiated a similar policy in *Miami Herald Publ'g Co.* v. *Tornillo*, that conditioned printing newspaper editorials on publishing those with opposing views. 418 U.S. 241 (1974). Under this policy, expressing one view "triggered an obligation to permit other speakers, with whom the newspaper disagreed, to use the newspaper's facilities to spread their own message." *Pac. Gas*, 475 U.S. at 10. And that in turn "inescapably 'dampens the vigor and limits the variety of public debate.'" *Ibid.* (cleaned up). Accord *Ariz. Free Enter. Club's Freedom Club PAC* v. *Bennett*, 564 U.S. 721, 742 (2011) (invalidating campaign-funding regulation for violating *Tornillo* triggering principle).

This is no trivial matter. By upholding a statute with the effect and "very purpose" to "[e]liminate such ideas" about marriage in favor of others, App.24a, the Tenth Circuit authorized the government to take sides in a heated cultural debate—all in the name of "produc[ing] a society free of [ ] biases." *Hurley*, 515 U.S. at 578. This result cannot satisfy strict scrutiny. After all, "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Buckley* v. *Valeo*, 424 U.S. 1, 48–49 (1976) (per curiam).

Relevant Market. The Tenth Circuit's conclusion that Lorie's expressive works amount to a "monopoly" cannot be squared with this Court's free-speech precedents or common sense.

The Tenth Circuit limited the relevant market to Lorie's works. App.29a. ("In that market, only Appellants exist."). But this Court considers "the relevant medium," not singular expressive works or individual artistic styles. *E.g.*, *Turner*, 512 U.S. at 656 (newspapers lacked national monopoly because of "competing publications"). The *Hurley* Court, for example, held that, while the unique "success of petitioners' parade makes it an enviable vehicle for the dissemination" of opposing views, "that fact, without more, would fall far short of supporting a claim that petitioners enjoy an abiding monopoly of access to spectators." 515 U.S. at 577–78.

The decision below also runs headlong into this Court's cases invalidating content-based attempts to compel *actual monopolies* to speak, such as *Tornillo*, 418 U.S. at 250–53 (local newspaper) and *Pac. Gas,* 475 U.S. at 17 n.14 (utility company). Accord, *e.g.*, *Turner*, 512 U.S. at 653–57 (upholding must-carry provisions against bottleneck monopolies because provisions were content neutral). And the decision leads to the upside-down rule that the more unique the speech, the greater the government's power to compel. App.28a ("[f]or the same reason that [Lorie's] custom and unique services are speech, those services are also inherently not fungible").

What do you call a rule that gives government officials the maximum power to compel speech based on the distinctiveness of the message? "[I]n a word, unprecedented." App.80a (Tymkovich, C.J., dissenting).

II. The Tenth Circuit's decision substantially narrows *Fulton* and underscores *Smith*'s inadequacies.

The Tenth Circuit's free-exercise analysis neuters *Fulton* and highlights *Smith*'s inadequacies.

The Tenth Circuit acknowledged that CADA contains exemptions, compels speech based on viewpoint, and creates a "pro-LGBT gerrymander" by requiring religious artists to celebrate same-sex marriage while allowing other artists to decline messages like "God is dead." App.38a, 40a. Yet the court upheld CADA as generally applicable under *Smith* because none of the exemptions allowed "secular-speakers" "to discriminate against LGBT consumers." App.41a. That decision exacerbates a (now) 4–3 split over the standard to determine when secular exemptions trigger strict scrutiny under the Free Exercise Clause.

The Sixth, Ninth, and Tenth Circuits require religious conduct to be almost exactly like exempted secular conduct for heightened scrutiny to apply. Meanwhile, the Second, Third, Fifth, and Eleventh Circuits apply strict scrutiny whenever the government exempts secular but not religious conduct that undermines the government's interests in a similar way. The four-circuit majority has it right. Religious liberty should not turn on the fortuity of religious plaintiffs finding secular doppelgangers.

A law that burdens religious exercise while allowing for exemptions for others is not generally applicable under *Smith*. *Fulton*, 141 S. Ct. at 1878. If the Tenth Circuit's analysis is correct, then *Fulton* means little, and this Court should overrule *Smith*.

A. The Tenth Circuit contradicts how four circuits assess statutes that allow exemptions yet burden religious exercise.

In *Fulton*, this Court reiterated that a law that burdens religion is not generally applicable under *Smith* "if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Fulton*, 141 S. Ct. at 1877 (citing *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 542–46 (1993)). Appropriately, the Second, Third, Fifth, and Eleventh Circuits identify a law's *general* interest, compare regulated religious conduct to exempted conduct, then ask whether the latter undermines the law's interest. *Cent. Rabbinical Cong. of U.S. & Canada* v. *N.Y. City Dep't of Health & Mental Hygiene*, 763 F.3d 183, 197 (2d Cir. 2014) (law banned Orthodox Jewish practice but not secular conduct posing same risks of viral infection); *Blackhawk* v. *Pennsylvania*, 381 F.3d 202, 211 (3d Cir. 2004) (Alito, J.) (fee provision applied to owning black bears but exempted circuses and zoos which equally undermined state's revenue and anti-captivity interests); *Islamic Ctr. of Miss., Inc.* v. *City of Starkville*, 840 F.2d 293, 299–303 (5th Cir. 1988) (zoning law exempted 25 churches but not Islamic center that risked same traffic concerns); *Midrash Sephardi, Inc.* v. *Town of Surfside*, 366 F.3d 1214, 1233–34 (11th Cir. 2004) (law banned churches but exempted others undermining "retail synergy").[1]

[1] The Eleventh Circuit analyzed this Religious Land Use and Institutionalized Persons Act issue under free-exercise precedents. *Midrash*, 366 F.3d at 1232–36.

In conflict, the Tenth Circuit follows the approach of the Sixth and Ninth Circuits, which fine-tune the state's "interest dial" so that government can conveniently ignore some secular exemptions. For example, in *Stormans, Inc.* v. *Wiesman*, the Ninth Circuit upheld a rule forcing pharmacists to stock and deliver emergency contraception. 794 F.3d 1064, 1071–75 (9th Cir. 2015). Although that rule allowed opt-outs for things like pharmacist non-expertise and many other non-religious objections, the Ninth Circuit discounted those as "allow[ing] pharmacies to operate in *the normal course* of business." *Id.* at 1080 (emphasis added). Thus, the Ninth Circuit could ignore those exemptions in its free-exercise analysis.

Similarly, in *Resurrection School* v. *Hertel*, the Sixth Circuit upheld a religious-school COVID-19 masking requirement. __ F.4th __, 2021 WL 3721475 (6th Cir. 2021). Although the requirement included many non-school exemptions, the panel held that the only necessary comparator was non-religious schools. *Id.* at *12–13.[2]

Now consider how the Tenth Circuit analyzed CADA's two exemptions: (1) an unwritten yet "formal" exemption, *Fulton*, 141 S. Ct. at 1878, that some

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[2] *Resurrection School* conflicts with another Sixth Circuit panel holding that analogous conduct depends not on "similar forms of activity" but, as in *Fulton*, the state's interest for "its restrictions." *Monclova Christian Acad.* v. *Toledo-Lucas Cnty. Health Dep't*, 984 F.3d 477, 479–482 (6th Cir. 2020). The Seventh Circuit candidly admitted its confusion: "[i]t is difficult … to know the most appropriate comparisons for evaluating restrictions on religious activities." *Cassell* v. *Snyders*, 990 F.3d 539, 550 (7th Cir. 2021) (distinguishing comparators used less than a year prior in *Elim Romanian Pentecostal Church* v. *Pritzker*, 962 F.3d 341 (7th Cir. 2020)).

public accommodations can make "message-based refusals," declining to create works containing messages they will not create for "any customers," App.54a–55a, 91a (Tymkovich, C.J., dissenting), and (2) CADA's Bona Fide Relationship Clause, which allows certain public accommodations to "restrict admission … to individuals of one sex." Colo. Rev. Stat. 24-34-601(3), App.172a.

Message-Based Exemption. As the Tenth Circuit recognized, CADA's message-based exemption creates "content-based restrictions on speech." App.40a. Under that exemption, an artist that declines to speak a particular message for anyone is exempt. Such "message-based refusals do not violate CADA" because they "are unrelated to class-status." App.42a. Thus, the lower court recognized that "a business is not required to design a website proclaiming 'God is Dead' if it would decline such a design for any customer." App.38a. Nor must a business create works containing "offensive speech." App.26a; *Craig*, 370 P.3d at 282 n.8.

At the same time, the court held that Lorie "*must* design a website celebrating same-sex marriage, even though [she] would decline such a design for any customer." App.38a (emphasis added). Under that theory, a singer who sang a wedding song for an opposite-sex wedding two decades ago can be compelled to sing it for a same-sex wedding today. The Tenth Circuit acknowledged this anomalous result was viewpoint discrimination; CADA operates as a "content-based restriction[ ] on speech." App.40a. The court understood the resultant "pro-LGBT gerrymander" to be "inevitable" given CADA's purpose of protecting "the dignitary or material interests of LGBT consumers." *Ibid.*

Despite all that, the Tenth Circuit held that CADA is generally applicable for two reasons. First, the court said that CADA's message-based exemption was a defense rather than an exception. App.42a. But either way, the Tenth Circuit should have compared regulated religious messages to exempted secular message-based refusals and asked whether the latter undermines CADA's interests. They do.

Second, the Tenth Circuit justified CADA's content-based speech restrictions by "adjusting the" interest "dials *just right*." *Masterpiece*, 138 S. Ct. at 1739 (Gorsuch, J., concurring). The court defined CADA's purpose narrowly: protecting only "the dignitary or material interests of LGBT consumers," App.40a; the court thus required Lorie to identify differently treated secular comparators *who do not celebrate same-sex marriage*. That way, the court could say that CADA does not "permit secular conduct that undermines the government's asserted interests *in a similar way*" because Colorado does not allow "secularly-motivated objections" to speaking LGBT messages, App.40a–41a, even though Colorado allows secularly motivated objections to *religious* messages.

The problem is that the latter exemptions undermine Colorado's general goal—stopping differential treatment of each protected classification, including religion—in a "similar way." *Fulton*, 141 S. Ct. at 1877 (citing *Lukumi*, 508 U.S. at 542–46). By allowing a secular speaker to refuse to speak "Jesus loves me" while forcing Lorie to speak messages that violate her conscience, CADA unconstitutionally plays favorites. *Tandon* v. *Newsom*, 141 S. Ct. 1294, 1296 (2021) (per curiam) ("It is no answer that a State treats some comparable secular businesses or other activities as poorly as … religious exercise.").

The Bona Fide Relationship Clause. CADA's second exemption, the Bona Fide Relationship Clause, allows sex-based restrictions. Under that Clause, public accommodations can "restrict admission … to individuals of one sex" when the "restriction has a bona fide relationship" to the accommodation's "goods, services, [or] facilities." Colo. Rev. Stat. 24-34-601(3), App.172a. For example, if a Colorado women's club provides events only for women, then the club can exclude male patrons.

The Tenth Circuit excused this written, statutory exemption as somehow "promot[ing] open commerce" and thus irrelevant on a "pre-enforcement record." App.28a n.4, 45a. But the court did not explain why exempting some status discrimination "promote[s] open commerce" while exempting Lorie's religious expression would not. Nor does this problem go away on a "pre-enforcement record." This "formal [exemption] mechanism" is problematic "regardless whether any exceptions have been given." *Fulton*, 141 S. Ct. at 1879.

Without general applicability, laws make a "value judgment," allowing governments to favor secular motivation over religious ones. *Fraternal Ord. of Police Newark Lodge No. 12* v. *City of Newark*, 170 F.3d 359, 366 (3d Cir. 1999) (Alito, J.). And that's exactly what CADA does here. For example, CADA allows cake artists to decline writing religious verses on a client's custom cake. *Masterpiece*, 138 S. Ct. at 1730. CADA also allows clubs or other special organizations to exclude based on sex, while brooking no accommodation for a religious artist who can only speak messages consistent with her faith. *Fulton* forbids that favoritism.

B. If the Tenth Circuit correctly applied *Fulton*, then this Court should overrule *Smith*.

The Tenth Circuit upheld a law that targets religious speech and gives the government a marketplace monopoly over marriage views. If *Fulton* allows this, it is time for this Court to overrule *Smith*.

Despite this Court's unanimous decision in *Fulton*, the court below upheld a gerrymandered regime and an admittedly content-based restriction on speech. That ruling allows Colorado to force Lorie to celebrate same-sex marriages in violation of her faith—all while allowing secular artists to decline to promote religious messages and other businesses to discriminate based on sex.

This cannot be the outcome *Smith* envisioned when it articulated its rule for neutral and generally applicable laws. *Employment Div.* v. *Smith*, 494 U. 872, 882 (1990) (noting long-standing precedents against compelling religious adherents to speak); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1467-68 (1990) (explaining historical protections for religious objections to compelled oaths). If courts cannot apply *Smith* correctly on this record, then religious adherents have little hope. This failure underscores that *Smith* is "unworkable in practice." *Fulton*, 141 S. Ct. at 1926 (Gorsuch, J., concurring); *id*. at 1917–22 (Alito, J., concurring).

Smith's flaws are well-documented. *E.g.*, *Fulton*, 141 S. Ct. at 1882 (Barrett, J., concurring) ("[T]he textual and structural arguments against *Smith* are … compelling."); *id.* at 1883–1926 (Alito, J., concurring) (outlining historical, practical, and precedential objections). And this case offers an excellent chance to answer questions about what test should replace *Smith*, whether the Free Exercise's Clause text distinguishes between religious organizations and religiously motivated individuals and businesses, what forms of scrutiny should apply, and so on. This Court should reconsider *Smith*.

III. This case raises exceptionally important issues about free speech and religious liberty.

Public-accommodation laws and the First Amendment can be harmonized. But the Tenth Circuit's decision places them in untenable tension, emboldening officials to regulate speech based on its favored viewpoint, to enforce content-based speech restrictions, to eliminate dissenting opinions from the public square, and to compel speech in violation of conscience.

Public-accommodation laws now cover everything from non-profits, *Boy Scouts of Am.* v. *Dale*, 530 U.S. 640, 653 (2000), to newspapers, *World Peace Movement of Am.* v. *Newspaper Agency Corp.*, 879 P.2d 253, 257 (Utah 1994), to websites, *Jian Zhang* v. *Baidu.com Inc.*, 10 F. Supp. 3d 433, 435 (S.D.N.Y. 2014), such as an Etsy website where an individual markets her homemade, custom art. Such laws now ban sexual-orientation or gender-identity discrimination in 22 states and around 330 municipalities, with some jurisdictions interpreting sex discrimination to

cover these traits.[3] Some public-accommodation laws make everything from student status to political beliefs a protected classification. *E.g.*, Madison, Wisc. Code of Ordinances 39.03. And 19 state public-accommodation laws could easily ban someone's viewpoints or beliefs that may touch on a protected classification.[4]

The expanded scope of public-accommodation laws without First Amendment protections has produced conflict. For the last decade, Jack Phillips has faced lawsuit after lawsuit based on his refusal to create art that violated his conscience. After prevailing before this Court in *Masterpiece Cakeshop,* 138 S. Ct. 1719, he was sued for respectfully declining to create a custom cake celebrating a gender transition. He just lost his trial.[5] Barronelle Stutzman of Arlene's Flowers faces potential million-dollar-attorney-fee payments and losing all that she has.[6] The Elane Photography owners paid fines, faced "death threats," and eventually closed their studio.[7]

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[3] *Nondiscrimination Laws*, Movement Advancement Project, https://bit.ly/37PAjvA (last visited Aug. 16, 2021); *Local Nondiscrimination Ordinances*, Movement Advancement Project, https://bit.ly/3jWjl4k (last visited Aug. 16, 2021).

[4] Br. for Mass. et al. as Amici Curiae in Support of Defs. at 9 n.5, *303 Creative LLC* v. *Elenis*, No. 19-1413 (10th Cir. Apr. 29, 2020).

[5] *Scardina* v. *Masterpiece Cakeshop Inc.*, No. 19CV32214 (Colo. Dist. Ct. June 15, 2021).

[6] Pet. for Reh'g at 11, *Arlene's Flowers, Inc.* v. *Washington*, No. 19-333 (U.S. July 27, 2021).

[7] *Willock* v. *Elane Photography, LLC*, HRD No. 06-12-20-0685, at 20 (H.R. Comm'n of N.M. Apr. 9, 2008), https://bit.ly/3AEt6e3;

Oregon officials fined the owners of a cakeshop $135,000 for declining to create same-sex wedding cakes and tried to punish them for talking to the media.[8] The shop eventually closed.[9] Meanwhile, a Kentucky printer litigated for seven years after declining to print shirts promoting a gay pride parade, only to see the state supreme court dismiss the case on a technicality. *Lexington-Fayette Urb. Cnty. Hum. Rts. Comm'n* v. *Hands On Originals*, 592 S.W.3d 291, 294–95 (Ky. 2019). A California cakeshop was sued for declining to create custom cakes celebrating same-sex weddings. *Dep't of Fair Emp. and Hous.* v. *Miller*, No. BCV-17-102855, 2018 WL 747835, at *1 (Cal. Super. Feb. 05, 2018). A pro-life photographer needed litigation to confirm she could decline promotional photographs for Planned Parenthood.[10] And a family farm, ousted from an East Lansing farmer's market for posting its Catholic beliefs about marriage on Facebook, has endured four years of litigation and a recently concluded bench trial without yet knowing the scope of its First Amendment rights. *Country Mill Farms, LLC* v. *City of E. Lansing*, 280 F. Supp. 3d 1029, 1041–42 (W.D. Mich. 2017).

Richard Wolf, *Same-sex marriage foes stick together despite long odds*, USA Today (Nov. 15, 2017), https://bit.ly/3m2czwk.

[8] *Klein*, 410 P.3d at 1080-87.

[9] *Sweet Cakes by Melissa announces closure*, KGW8, https://bit.ly/2UHMANk (last updated Oct. 6, 2016).

[10] Compl., *Amy Lynn Photography Studio, LLC* v. *City of Madison*, No. 17-cv-000555 (Dane Cnty. Cir. Ct. Mar. 7, 2017), https://bit.ly/3yNS229.

In this toxic legal climate, nearly anyone involved with religious ceremonies faces realistic threats of prosecution for speaking consistently with their religious faith under laws that impose jailtime and up to $100,000 fines.[11]

Public-accommodation laws have harmed those with differing views, too. Someone targeted a lesbian cakebaker in Detroit, asking for a cake saying, "Homosexual acts are gravely evil."[12] And a progressive bar association had to litigate whether it could decline to publish a pro-Israeli advertisement. *Athenaeum* v. *Nat'l Lawyers Guild, Inc.*, No. 653668/16, 2018 WL 1172597 (N.Y. Sup. Ct. Mar. 06, 2018).

Public-accommodation laws have also threatened the First Amendment rights of churches,[13] homeless

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[11] *Telescope Media*, 936 F.3d at 747, 750 (videographers); *Brush & Nib*, 448 P.3d at 914 (calligraphers); Compl., *Emilee Carpenter, LLC* v. *James*, No. 6:21-cv-06303 (W.D.N.Y. Apr. 6, 2021) (photographer), https://bit.ly/3k1Vy2D; Compl., *Covenant Weddings LLC* v. *Cuyahoga Cnty.*, No. 1:20-cv-01622 (N.D. Ohio July 22, 2020) (officiant), https://bit.ly/3k2bHoO; Compl., *Knapp* v. *City of Coeur D'Alene*, No. 2:14-cv-00441 (D. Idaho Oct. 17, 2014) (ministers), https://bit.ly/3yU06hN.

[12] Sue Selasky, *Lesbian baker in Detroit got homophobic cake order: Why she made it anyway*, Detroit Free Press (Aug. 13, 2020), perma.cc/JS53-APD3.

[13] Compl., *Fort Des Moines Church of Christ* v. *Jackson*, No. 4:16-cv-00403 (S.D. Iowa July 4, 2016), https://bit.ly/3g6FWda; Compl., *Horizon Christian Fellowship* v. *Williamson*, No. 16-cv-12034 (D. Mass. Oct. 11, 2016), https://bit.ly/3lZzhFx; Compl., *Calvary Rd. Baptist Church* v. *Herring*, No. CL20006499 (Va. Cir. Ct. Loudon Cnty. Sept. 28, 2020), https://bit.ly/2Uedlea.

shelters,[14] Catholic schools,[15] Catholic hospitals,[16] gay-softball leagues,[17] and even beauty pageants.[18]

The decision here sanctions government-compelled speech and religious participation in all these situations and much more. As the dissent explains, the idea that someone's unique expression justifies compelling speech "leads to absurd results"—from forcing a "Muslim movie director to make a film with a Zionist message" to "requiring an atheist muralist to accept a commission celebrating Evangelical zeal." App.69a, 79a (Tymkovich, C.J., dissenting). Accord, *e.g.*, *Telescope Media*, 936 F.3d at 756 (public-accommodation laws can easily make political belief a protected trait and compel more speech). Under this theory, our greatest American artists like Georgia O'Keefe, Elvis Presley, and Ernest Hemingway would have the fewest First Amendment protections.

And though the Tenth Circuit purportedly limited its artists-are-monopolists theory to paid artists, laws like CADA often apply to non-profits. *Creek Red Nation, LLC* v. *Jeffco Midget Football Ass'n, Inc.*, 175 F. Supp. 3d 1290, 1296–98 (D. Colo. 2016) (applying CADA to nonprofit). And non-profits offer unique

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[14] Compl., *The Downtown Soup Kitchen* v. *Mun. of Anchorage*, No.3:21-cv-155 (D. Alaska July 1, 2021), https://bit.ly/3CP91Dw.

[15] Compl., *The Lyceum* v. *City of S. Euclid*, No. 1:19-cv-00731 (N.D. Ohio Apr. 3, 2019).

[16] Pet. for Writ of Cert., *Dignity Health* v. *Minton*, No. 20-1135 (U.S. Mar. 13, 2020).

[17] *Apilado* v. *N. Am. Gay Amateur Athletic All.*, 792 F. Supp. 2d 1151, 1157-60 (W.D. Wash. 2011).

[18] *Green* v. *Miss United States of Am., LLC*, No. 3:19-CV-02048-MO, 2021 WL 1318665, at *1 (D. Or. Apr. 8, 2021).

expressive services too. See Tr. of Oral Arg. at 47–50, *Masterpiece*, 138 S. Ct. 1719 (2018) (No. 16-111), https://bit.ly/3xI32g9 (asking whether CADA could force Catholic Legal Services to take pro bono same-sex-marriage cases).

The court's monopoly rationale also extends well beyond the public-accommodation context. If governments can compel speech whenever artists convey unique expression, they have a blank check to compel not just every commissioned artist, small business, and nonprofit that speaks, but to "regulate the editorial decisions of Facebook and Google, of MSNBC and Fox, of NYTimes.com and WSJ.com, of YouTube and Twitter"—entities much more like monopolies than Lorie. *U.S. Telecom Ass'n* v. *F.C.C.*, 855 F.3d 381, 433 (D.C. Cir. 2017) (per curiam) (Kavanaugh, J., dissenting from denial of reh'g en banc).

The decision below allows officials to compel speech in violation of religious conviction, to regulate speech based on content, and to enact laws that create a "substantial risk of excising certain ideas or viewpoints from the public dialogue" and have "[e]liminating such ideas [as their] very purpose." App.24a (cleaned-up). And this is not just hypothetical. As the above examples illustrate, government attempts to eliminate certain ideas from the public square are happening right now, with alarming frequency.

IV. This case is an ideal vehicle to resolve the questions presented.

This case offers an ideal vehicle to answer critical free-speech and free-exercise questions that "will keep coming until the Court … suppl[ies] an answer." *Fulton*, 141 S. Ct. at 1931 (Gorsuch, J., concurring).

To begin, Lorie has wanted to enter the wedding-website industry for years and has lost opportunities to create and speak because of how Colorado interprets CADA. She has already received a request to create a website celebrating a same-sex wedding, and Colorado continues to threaten prosecution. No one disputes "the extent" to which Lorie will decline to speak in violation of her faith, nor are there any missing "details" that "might make a difference." *Masterpiece*, 138 S. Ct. at 1723.

Next, it's undisputed that Lorie's wedding websites are "expressive in nature" and "celebrate and promote the couple's wedding and unique love story," and that CADA compels those websites and bans her explanatory statement yet exempts certain secular artists. App.187a. It's undisputed that Lorie does not discriminate based on protected-class status; she simply declines to create certain messages for anyone. And it's undisputed that other firms design wedding websites.[19]

Further, the Tenth Circuit's conclusion that a government may compel speech in violation of conscience—and the more unique speech is, the more interest the government has in compelling it—is

[19] There are more than 77,000 website-design firms in the United States. *Web Design Services in the US*, IBISWorld (September 28, 2020), https://bit.ly/3lJ87RC.

shocking. An artist's right to refrain from speaking contrary to her conscience depends on where she lives. In the Tenth Circuit's half-dozen states, as well as New Mexico, Oregon, and Washington, the government can force artists to speak contrary to their faith; in the Eighth Circuit's seven states and Arizona, the opposite is true.

What's more, the Tenth Circuit's narrow interpretation of *Fulton* establishes a blueprint for future litigants. The lower courts are in disarray over when a secular exception triggers heightened scrutiny, and the decision below will only embolden government officials and courts to afford fewer First Amendment protections to religious adherents.

The constitutional issues here have sufficiently percolated. Lawyers, law professors, litigants, and lower courts have already analyzed many cases like this one. And this Court was prepared to rule on them in *Masterpiece* more than three years ago. Delay might produce more opinions, articles, and victims, but not more insights.

The promises of free speech and free exercise that the First Amendment enshrines ensure the survival of our pluralistic society. There is a clear path where government can protect the rights of all citizens, recognizing the sharp line between status discrimination on the one hand, and message-based or participation declinations on the other. But until this Court does so, government officials will continue to harm those with opposing views, activists will continue to file (and re-file) cases designed to target those with deeply held religious beliefs, and courts will continue to face harassing litigation that lasts years on end. Certiorari is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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