No. 21-476

In The Supreme Court of the United States

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

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* FIRST AMENDMENT SCHOLARS IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST OF AMICI CURIAE

Amici are legal scholars who have dedicated their professional and academic careers to the study of the First Amendment.[1] Amici are law school professors and professors of jurisprudence. Amici's scholarship includes the foundational principles of the Free Speech Clause. The names and associations of Amici are printed in an appendix following the conclusion of this brief.

INTRODUCTION

The Tenth Circuit acknowledged that Petitioners' website designs constitute "pure speech" that is "inherently expressive." App. 20a-21a. Before the Tenth Circuit, Colorado made clear that Colorado's Anti-Discrimination Act ("CADA") is intended to remedy an "invidious history of discrimination" based on sexual orientation. App. 23a-24a. As the Tenth Circuit recognized, this means that CADA's very purpose is to *eliminate* 303 Creative's and Ms. Smith's speech from the marketplace of ideas. App. 23a-24a.

Notwithstanding Colorado's and the Tenth Circuit's recognition of CADA's purpose—which

[1] No counsel for a party authored this brief in whole or in part, and no party, party's counsel, or any person other than amici curiae or their counsel contributed money intended to fund preparation or submission of this brief. This brief is filed with consent of the parties. All parties were given timely notice of amici's intent to file.

should spell doom for CADA—the Tenth Circuit lent its imprimatur to Colorado's censorship. In doing so, the Tenth made three errors.

First, it upheld a content-based speech statute that compels Petitioners to mouth messages about issues of public importance with which they disagree.

Second, in upholding Colorado's compulsive law, the Tenth Circuit minted an unusual and unusually dangerous new First Amendment principle: as expression *increases* in uniqueness, it enjoys ever *decreasing* First Amendment protection.

Third, the Tenth Circuit upheld Colorado's prohibition on speech that Petitioners do want to express.

The Tenth Circuit, therefore, now permits Colorado to compel Ms. Smith and 303 Creative to voice messages they do not want to say and prohibits them from saying what they do want to say.

Left uncorrected, the Tenth Circuit's ruling will remain binding precedent on all district courts within the circuit. Certiorari is warranted

BACKGROUND

As the Tenth Circuit described it, CADA "restricts a public accommodation's ability to refuse to provide services based on a customer's identity." App. 3a. There are two clauses at issue. *First*, CADA includes an Accommodation Clause, which prohibits

a public accommodation from refusing "the full and equal enjoyment" of services because of an individual or group's sexual orientation. *See id. Second*, CADA includes a Communications Clause, which prohibits a public accommodation from publishing any communication indicating "that the full and equal enjoyment of the . . . services . . .will be refused . . . because of sexual orientation." App. 3a-4a (alterations in original).

Petitioners are 303 Creative, LLC and Ms. Lorie Smith. Ms. Smith is the founder and sole-member owner of 303 Creative, LLC. App. 6a. Ms. Smith is "willing to work with all people" and is "generally willing to create graphics or websites for lesbian, gay, bisexual, or transgender ("LGBT") customers." *Id.*

Ms. Smith, however, "sincerely believes . . . that same-sex marriage conflicts with God's will." *Id.* In the future, Ms. Smith and 303 Creative LLC intend to offer "wedding websites that celebrate opposite-sex marriages but intend to refuse to create similar websites that celebrate same-sex marriage." *Id.*

The Tenth Circuit recognized that Ms. Smith's and 303 Creative's objection "is based on the message of the specific website . . . ." *Id.* Ms. Smith and 303 Creative will not create a website celebrating same-sex weddings, regardless of whether the "customer is the same-sex couple themselves, a heterosexual friend of the couple, or even a disinterested wedding planner requesting a mock-up." App. 6a. In fact, the Parties stipulated

that Petitioners "are willing to work with all people regardless of classifications such as race, creed, sexual orientation, and gender." App. 11a-12a. Ms. Smith and 303 Creative also intend to publish an explanatory statement stating that, due to Ms. Smith's religious convictions, she is unable to create websites "promoting and celebrating ideas or messages that violate [her] beliefs." App. 7a. This includes creating websites for "same-sex marriages or any other marriage that is not between one man and one woman." *Id*. To create such a website would "compromise [her] Christian witness and tell a story about marriage that contradicts God's true story of marriage—the very story He is calling [her] to promote." *Id*.

When the Tenth Circuit analyzed CADA's Accommodation Clause, the court recognized that Ms. Smith and 303 Creative's creation of wedding websites "is pure speech." App. 20a. This is because the website expresses "approval and celebration of the couple's marriage." *Id*. The court found that the "speech element is even clearer here than in *Hurley* [*v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.* 515 US 557 (1995)], because [Petitioners] actively create each website, rather than merely hosting customer-generated content on [Petitioners'] online platform." App. 21a. Further, the court rightly recognized that 303 Creative enjoys First Amendment protection even though it is a for-profit business. App.22a.

Next, the court acknowledged that the Accommodation Clause "'compels' [Petitioners] to create speech that celebrates same-sex marriages."

App. 22a. And because the Accommodation Clause compels speech, the court ruled that "it also works as a content-based restriction." App. 23a. This is because, under CADA, Ms. Smith and 303 Creative cannot "create websites celebrating opposite-sex marriages, unless they also agree to serve customers who request websites celebrating same-sex marriages." *Id*. CADA, according to the Tenth Circuit, is content-based because it is intended to "eliminat[e]" certain ideas and viewpoints from the public square. *Id*. 23a-24a.

Despite this Court's admonition that content-based speech laws will rarely survive constitutional challenge, *United States v. Playboy Ent. Grp.*, 529 U.S. 803, 818 (2000), and that "[v]iewpoint discrimination is . . . an egregious form of content discrimination," *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995), the Tenth Circuit nonetheless upheld CADA's Accommodation Clause. App.24a-32a. The court observed that CADA was enacted to serve Colorado's compelling interest in ensuring equal access to goods in the marketplace. App. 24a-25a. Although Petitioners are far from the only providers of web-design services, the court ruled that the Accommodation Clause was narrowly tailored because Ms. Smith and 303 Creative's services are not fungible and, therefore, "LGBT consumers will never be able to obtain wedding-related services of the same quality and nature as those that [Petitioners] offer." App. 28a. According to the Tenth Circuit, granting an exemption to Petitioners would "relegate LGBT consumers to an inferior market because [Petitioners'] *unique* services are, by definition, unavailable elsewhere."

App. 28a (emphasis in original). For that reason, the court concluded, there is no less intrusive way to achieve Colorado's interest. App. 28a.

As for the Communications Clause, the Tenth Circuit ruled that because Ms. Smith and 303 Creative's proposed speech promoted unlawful activity, "including unlawful discrimination," Colorado was right to prohibit it. App. 33a.

Certiorari is plainly warranted. This Court has recognized, in one of the most celebrated comments from a Supreme Court opinion, that the one fixed star in the constellation of the Constitution is that "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *W. Va. State Bd. Of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). Creating an inverse relationship between expressive ingenuity and constitutional security cannot be squared with this principle. Nor can the First Amendment's "fixed star" be squared with the Tenth Circuit's conclusion that, because Colorado has decreed Petitioners' desired speech illegal under CADA's Communication Clause, it is therefore unprotected under the First Amendment's Free Speech Clause. The First Amendment does not condone state limits on speech based upon such circular logic. Nor can the First Amendment's "fixed star" be squared with the Tenth Circuit's conclusion that CADA's Accommodation Clause can compel Petitioners to voice messages that they do not believe or wish to express.

Left to stand, Colorado law will continue to compel speech by those who would otherwise dissent from State orthodoxy, and Tenth Circuit jurisprudence will continue to turn strict scrutiny for purposes of the First Amendment completely upside down. App. 24a.

SUMMARY OF THE ARGUMENT

This brief advances four points.

First, CADA's language and purpose run counter to the original meaning of the Free Speech Clause of the First Amendment and this Court's First Amendment jurisprudence. The very purpose of the First Amendment is to remove the Government from the role of a censor, acting as a guardian of the public's minds. *See Riley v. Nat'l Fed'n of Blind*, 487 U.S. 781, 791 (1988). Instead, as James Madison recognized, the First Amendment promotes the opposite principle: "If we advert to the nature of Republican Government, we shall find that the censorial power is in the people over the government, and not in the government over the people." 4 Annals of Cong. 934 (1794).

Second, CADA is especially egregious because it specifically targets the content of speech and discriminates against the speaker based upon the speaker's viewpoint. *See Rosenberger*, 515 U.S. at 829.

Third, the First Amendment's guarantees are not diluted because the speaker receives compensation. *See Riley*, 487 U.S. at 801. The First

Amendment protects the free speech rights of corporations. "It is rudimentary that [Colorado] cannot exact as the price" of incorporating "the forfeiture of First Amendment rights." *Citizens United v. FEC*, 558 U.S. 310, 351 (2010). But CADA compels corporations and their individual members to craft and disseminate messages that are contrary to the speaker's belief and prohibits them from speaking what they do believe.

And *fourth*, by allowing Colorado to compel expression because that expression is unique (and uniquely in demand), the Tenth Circuit has fabricated a novel and shockingly dangerous new line of First Amendment jurisprudence. Custom expression, like that of Petitioners in this case, has more value (and should enjoy more First Amendment protection) *because* it is unique. In the Tenth Circuit's view, however, the more distinctive a speaker's expression, the more justification the State has for compelling that speaker to voice a State-approved message, so much so that the State can satisfy strict scrutiny if it forces the expression of an artist.

Because this rule has the potential to abrogate entirely First Amendment protection for any person who has the wherewithal to market a unique brand of artistic expression, the Court cannot allow it to remain in effect. This Court should therefore grant certiorari to correct the Tenth Circuit's egregious error. Left uncorrected, the district courts that comprise the Tenth Circuit are bound to apply the Tenth Circuit's flawed strict scrutiny analysis.

ARGUMENT

I. THE FIRST AMENDMENT EXISTS TO PROTECT UNPOPULAR SPEECH.

"Premised on a mistrust of governmental power," the First Amendment declares, in no uncertain terms, Congress shall make no law abridging the freedom of speech. *Citizens United*, 558 U.S. at 340; *see also* U.S. Const. amend. I.[2] Since the time of its ratification, the First Amendment has always stood as a bulwark against the government regulating "speech in ways that favor some viewpoints or ideas at the expense of others.'" *Matal v. Tam*, 137 S. Ct. 1744, 1757 (2017). Accordingly, the government has no power "to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). Nor is the Government empowered to insert itself into the marketplace of ideas and grant license to one side of the debate to fight freestyle, while "requiring the other to follow Marquis of Queensberry rules." *R. A. V. v. St. Paul*, 505 U.S. 377, 392 (1992). Further, the Government "must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger*, 515 U.S. at 829.

The Free Speech Clause, as an original matter, was ratified to prevent the Government from

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[2] The First Amendment's free speech guarantee applies to the states through the Fourteenth Amendment. *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015).

acting as a censor. The Framers were aware of the dangers posed to freedom of thought when the Government inserts itself as an arbiter of what ideas may and may not be disseminated. They envisioned a marketplace of ideas where all ideas could be discussed on their merits and permitted all persons the ability to form ideas and advocate for them freely.

By contrast, through CADA, Colorado has inserted itself into the marketplace of ideas. Acting not as an umpire calling balls and strikes, but rather as a censor, Colorado targets specific speech based on the content of the speaker's expression. Indeed, CADA exists for the express purpose of eliminating certain ideas from the marketplace. App. 23a-24a. This form of viewpoint discrimination is particularly egregious. *See Rosenberger*, 515 U.S. at 829.

On matters of great public importance, CADA compels Ms. Smith and 303 Creative to say what they do not want to say and prohibits them from saying what they do want to say. And the Tenth Circuit permits this because Petitioners' speech is unique. CADA is therefore precisely the type of law that the Framers sought to prohibit when crafting the Free Speech Clause.

A. The Original Meaning of The First Amendment's Free Speech Clause.

Blackstone's four volume magnum opus, Commentaries on the Laws of England, "constituted the preeminent authority on English law for the founding generation." *Alden v. Maine*, 527 U.S. 706,

715 (1999). The Framers relied heavily upon Blackstone for various provisions in the Constitution and state constitutions. *Obergefell v. Hodges*, 576 U.S. 644, 724-25 (2015) (Thomas, J., dissenting). Recognizing the limitations of prohibiting prior restraints only, the Framers of the First Amendment sought to broaden the protection of free speech.

In 16th and 17th century England, Parliament passed licensing laws "to contain the 'evils' of the printing press." *Thomas v. Chi. Park Dist.*, 534 U.S. 316, 320 (2002). These "licensing laws" were the "core abuse" to which the First Amendment was directed. *Id.* For example, the "Printing Act of 1662" prescribed, among other things, what could be printed. *Id.* Before publishing a book, the author was required to submit the text to a government official who had broad authority "to suppress works that he found to be heretical, seditious, schismatical, or offensive." *Id.* (internal citation and quotation marks omitted). Those authors who dared to publish a book without prior approval were punished. *Id.* Even though the English licensing regime ended before the 18th century began, Blackstone still "warned against the restrictive power of such a licenser—an administrative official who enjoyed unconfined authority to pass judgment on the content of speech." *Id.* (citing 4 W. Blackstone, Commentaries on the Laws of England 152 (1769)) (internal quotation marks omitted).

Two of the leading Framers of the Constitution, Thomas Jefferson and James Madison, both recognized the dangers of a government

inserting itself into the public square to "pass judgment on the content of speech." *Thomas*, 534 U.S. at 320 (stating that although the English licensing system expired before this Nation's founding, Blackstone still expressed alarm "against the restrictive power of such a licenser—an administrative official who enjoyed unconfined authority to pass judgment on the content of speech.") (internal quotation marks omitted). For that reason, James Madison recognized that the Constitution should enshrine a commitment to fostering a free exchange of ideas.

Thomas Jefferson considered it both "sinful" and "tyrannical" to compel an individual to pay for the dissemination of opinions with which the individual disagreed. *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2464 (2018) (citing A Bill for Establishing Religious Freedom, in 2 Papers of Thomas Jefferson 545 (J. Boyd ed. 1950). James Madison argued that the First Amendment granted a broad freedom of expression. In debates that followed the Whiskey Rebellion and the condemnation of "certain self-created societies" James Madison rose to the defense of free speech and associations. *See* David P. Currie, The Constitution In Congress, The Federalist Period 1789-1801, 190-91 (1997). In a December 4, 1794 letter to James Monroe, Madison rejected the idea that the Government could stifle speech. *Id*. at 191 n.141. Madison stated that it was an indefensible principle that:

> [T]he Govt. may stifle all censures on its misdoings; for if it be itself the

> Judge it will never allow any censures to be just, and if it can suppress censures flowing from one lawful source it may those flowing from any other—from the press and from individuals as well as from Societies.

Id. James Madison therefore recognized the necessity of the free flow of ideas and opinions. Madison stated that for a constitutional republic such as the United States to thrive, therefore, the country must encourage "a general intercourse of sentiments" through, among other things, the general circulation of newspapers.[3]

Accordingly, since 1791, the First Amendment has acted to prevent the Government from "proscribing speech . . . because of disapproval of the ideas expressed." *R. A. V.*, 505 U.S. at 382 (internal citations omitted).

B. This Court's Jurisprudence Confirms That The First Amendment Prohibits Governments From Seeking To Prohibit One Side Of The Debate From Speaking.

Accordingly, this Court has recognized that the very purpose of the Bill of Rights generally, is "to

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[3] *See* JAMES MADISON, *PUBLIC OPINION*, NATIONAL GAZETTE (Dec. 19, 1791), https://founders.archives.gov/documents/Madison/01-14-02-0145; *see also* Jay Cost, *James Madison's Lessons on Free Speech*, NATIONAL REVIEW (Sept. 4, 2017, 8:00 AM), https://www.nationalreview.com/2017/09/ james-madison-free-speech-rights-must-be-absolute-nearly/.

withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *Barnette*, 319 U.S. at 638. As for the First Amendment specifically, this Court has recognized that the "very purpose of the First Amendment is to foreclose public authority from assuming guardianship of the public mind . . . " *Riley*, 487 U.S. at 791. The First Amendment prohibits the government, regardless of motive, from "substitute[ing] its judgment as to how best to speak for that of the speakers and listeners . . . ." *Id.* The First Amendment's guarantee is therefore most at risk "when the government seeks to control thought or to justify its laws for that impermissible end." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 253 (2002).

The Free Speech Clause of the First Amendment is therefore committed "to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270-71 (1964). The antithesis of this is the government using its authority to mandate uniformity of opinion. *Barnette*, 319 U.S. at 640-41. The Free Speech Clause "exists precisely so that opinions and judgments, including esthetic and moral judgments about art and literature, can be formed, tested, and expressed." *Playboy Ent. Grp.*, 529 U.S. at 818. Judgments, including moral judgments, "are for the

individual to make, not for the Government to decree . . . ." *Id.*

This Court has described the topics of sexual orientation and gender identity as "sensitive political topics" that are "undoubtedly matters of profound value and concern to the public." *Janus*, 138 S. Ct. at 2476 (internal citation and quotation marks omitted). Debate about these issues, therefore, "occupies the highest rung of the hierarchy of First Amendment values and merits special protection." *Id.* (internal citation and quotation marks omitted); *see also Obergefell*, 576 U.S. at 716 (Scalia, J., dissenting) ("Since there is no doubt whatever that the People never decided to prohibit the limitation of marriage to opposite-sex couples, *the public debate over same-sex marriage must be allowed to continue*.") (emphasis added).[4] Particularly egregious, therefore, are those laws that restrict speech "because of disagreement with the message [the speech] conveys." *Reed*, 576 U.S. at 164. When the Government decides to eliminate debate on an issue, App. 23a-24a, the Government tends to succeed only in closing minds. *Obergefell*, 576 U.S. at 710 (Roberts, C.J., dissenting).

This is why content-based speech restrictions rarely survive strict scrutiny. *Playboy Ent. Grp.*, 529

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[4] This case appears to test the *Obergefell* majority's assurance that people of faith may continue to "advocate" and "teach their views of marriage." *Obergefell*, 576 U.S. at 711 (Roberts, C.J., dissenting) (internal quotation marks omitted); *but see* App. 24a (eliminating certain ideas, particularly opposition to same-sex marriage, is the admitted purpose of CADA).

U.S. at 818. To permit content-based speech restrictions to survive would risk the uninhibited marketplace of ideas, risking instead regulations "that sought to shape our unique personalities or silence dissenting ideas." *Id*.

Accordingly, the very Polaris of this Nation's constellation of free speech jurisprudence is that "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Barnette*, 319 U.S. at 642. Compelling people to salute the flag and the pledge of allegiance, for example, invades the intellect and soul of individuals, an area the First Amendment "reserve[s] from all official control." *Id*. Compelling, therefore, "individuals to mouth support for views they find objectionable violates" this constitutional principle. *Janus*, 138 S. Ct. at 2463-64. Prohibiting speakers from speaking their desired message because it is contrary to the Government's desired message is also unconstitutional.

C. Colorado's Anti-Discrimination Act Violates The Free Speech Clauses' Fixed Star.

The Tenth Circuit rightly acknowledged that CADA's Accommodation Clause compels speech and is content based. App. 23a. The Tenth Circuit also acknowledged that the Communication Clause is also content based because it prohibits speech that "expresses an intent to deny service" on, here, religious grounds. App. 7a, 34a. CADA prohibits 303 Creative from making websites that celebrate

opposite-sex marriages if 303 Creative does not make websites that celebrate same-sex marriages. App. 23a. In fact, CADA "is intended to remedy a long and invidious history of discrimination based on sexual orientation." App. 23a-24a. Accordingly, there is a "substantial risk of excising certain ideas or viewpoints from the public dialogue." App. 24a (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994)). The Tenth Circuit then acknowledged that "[e]liminating such ideas is CADA's very purpose." App. 24a.

This Court has previously ruled that the test to determine if a law is content based is whether the law requires enforcement authorities "to examine the content of the message that is conveyed to determine whether a violation has occurred." *McCullen v. Coakley*, 573 U.S. 464, 479 (2014). In his dissent, Judge Tymkovich echoed this Court's test when describing CADA's Communication Clause as requiring:

> [A]n arbiter to—at the very least—read a challenged communication, . . . notice, or advertisement to determine whether it indicates that the full and equal enjoyment of the public accommodation will be refused, withheld from, or denied an individual.

App. 74a (Tymkovich, C.J., dissenting) (alterations in original) (quotation marks omitted) (quoting and citing Colo. Rev. Stat. § 24-34-601(2)(a)).

Despite acknowledging all of this, the Tenth Circuit majority still granted a green light to Colorado to continue its viewpoint discrimination. Unless corrected, Colorado is therefore permitted to prescribe what is orthodox for public discourse and therefore compelling people, such as 303 Creative, to mouth support for views they find objectionable. *Barnette*, 319 U.S. at 642; *Janus*, 138 S. Ct. at 2463-64; *Hurley v. Irish-American Gay, Lesbian and Bisexual Grp. of Bos.*, 515 U.S. 557, 579 (1995) (stating that speech restrictions that are "used to produce thoughts and statements acceptable to some groups or, indeed, all people, grates on the First Amendment, for it amounts to nothing less than a proposal to limit speech in the service of orthodox expression."). Colorado is also prescribing what is orthodox by prohibiting Ms. Smith and 303 Creative from voicing their civil dissent. Colorado's actions therefore place the Free Speech Clause's guarantee at risk. *Free Speech Coalition*, 535 U.S. at 253. This is a more "blatant" violation of the Free Speech Clause because CADA is aimed at the specific opinion of the speaker. *Reed*, 576 U.S. at 168.

Accordingly, to allow CADA's Accommodation Clause to stand would undercut the very purpose of the Free Speech Clause, namely, to "foreclose public authority from assuming guardianship of the public mind . . . ." *Riley*, 487 U.S. at 791. Allowing CADA's Accommodation Clause and Communication Clause to stand would risk allowing a regulation to remain that explicitly seeks "to shape our unique personalities [and] silence dissenting ideas." *Playboy Ent. Grp.*, 529 U.S. at 818.

If the First Amendment's Free Speech Clause "protects flag burning, funeral protests, and Nazi parades—despite the profound offense such spectacles cause" then surely too, the Free Speech Clause is intended to permit 303 Creative to *abstain* from "mouth[ing] support for views they find objectionable." *McCutcheon v. FEC*, 572 U.S. 185, 191 (2014); *Janus*, 138 S. Ct. at 2463-64. Stated differently, if the Free Speech Clause permits the despicable and vociferous public jeering of a loved one at their private funeral, *Snyder v. Phelps*, 562 U.S. 443, 460-61 (2011), then surely the Free Speech Clause permits Ms. Smith's civil and silent dissent within the privacy of her conscience.

II. THE GOVERNMENT CANNOT SURVIVE STRICT SCRUTINY WHEN IT TARGETS SPEECH.

Perhaps the most breathtaking portion of the Tenth Circuit's analysis is its conclusion that "enforcing CADA as to [Petitioners'] unique services is narrowly tailored to Colorado's interest in ensuring equal access to the commercial marketplace." App. 32a. It drew this conclusion even though it observed that Petitioners' "creation of wedding websites is pure speech." App. 20a.[5] And it did so even after observing that "[i]t is a 'fundamental rule of protection under the First

[5] *See also* App 21a (Majority Op.) ("[C]reating a website, (whether through words, pictures, or other media) implicates [Petitioners'] unique creative talents, and is thus inherently expressive.").

Amendment, that a speaker has the autonomy to choose the content of his own message.'" App. 19a-20a. (quoting *Hurley*, 515 U.S. at 573 and citing *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 61 (2006)). Finally, the court drew this conclusion even while acknowledging that the law at issue "works as a content-based restriction." *Id.* at 23a (citing *Nat'l Inst. of Family and Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2371 (2018)).[6]

Because CADA's application to Petitioners' business forecloses *only* her chosen perspective on the question of marriage (rather than all marriage-related speech), Colorado's law extends beyond mere content-based discrimination into viewpoint discrimination. Lest there be any doubt, this Court's jurisprudence "make[s] it perfectly clear that discrimination against religious, as opposed to secular, expression is viewpoint discrimination." *Nurre v. Whitehead*, 559 U.S. 1025, 1028 (2010) (citing *Good News Club v. Milford Central School*, 533 U.S. 98, 106, 107 (2001)). And because viewpoint discrimination is, according to this Court, "an egregious form of content discrimination," *Rosenberger*, 515 U.S. at 829, it brings with it heightened constitutional skepticism.

"'The First Amendment *forbids* the government to regulate speech in ways that favor

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[6] *See also* App. 24a (Majority Op.) ("[T]here is more than a 'substantial risk of excising certain ideas or viewpoints from the public dialogue. . . . Eliminating such ideas is CADA's very purpose." (quoting *Turner Broad. Sys., Inc.*, 512 U.S. at 642).

some viewpoints or ideas at the expense of others.'" *Matal*, 137 S. Ct. at 1757 (emphasis added) (cleaned up) (quoting *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993). Colorado, however, has taken it a step further here—it has not only forbidden Petitioners from expressing their viewpoint regarding marriage through CADA's Communication Clause, but has also, through CADA's Accommodation Clause, compelled Petitioners to express a viewpoint that is entirely at odds with their sincerely held religious beliefs. It is hard to conceive of a situation more anathema to the First Amendment's protections than the one at issue in this case. For this reason alone, the Tenth Circuit's opinion is fatally flawed.

III. THE FIRST AMENDMENT DOES NOT LOSE ITS FORCE BECAUSE THE SPEAKER IS RECEIVING COMPENSATION.

None of the foregoing analysis is affected by the fact that Petitioners are members of the economic marketplace (rather than participants solely in the marketplace of ideas). Indeed, this Court has foreclosed any suggestion that receiving recompense for expressing a viewpoint means that the expression of that viewpoint receives no (or less) First Amendment protection. On the contrary, "it is well settled that a speaker's rights are not lost merely because compensation is received; a speaker is no less a speaker because he or she is paid to speak." *Riley*, 487 U.S. at 801. Furthermore, it is also "rudimentary" in First Amendment jurisprudence that a state cannot compel the

forfeiture of a speaker's free speech rights as a price for doing business in the state. *See Citizens United*, 558 U.S. at 351.

The Tenth Circuit, to its credit, gave lip service to this principle. It noted that "a profit motive" does not "transform [Petitioners'] speech into commercial conduct," a point advanced in the court below by Respondent. *See* App. 22a. Rather, "[t]he First Amendment's protections against compelled speech are "enjoyed by business corporations generally and by ordinary people engaged in unsophisticated expression as well as by professional publishers." *Id.* (quoting *Hurley*, 515 U.S. at 574).

Notwithstanding its recitation of this principle, the court below essentially gave Petitioners' speech short constitutional shrift because she is an economic market participant. As pointed out by Chief Judge Tymkovich in dissent, "[a]lthough the majority acknowledges that "the commercial nature of [Petitioners'] business does not diminish [their] speech interest, . . . the opinion then states that this same commercial nature allows Colorado to regulate it." App. 77a n.8 (Tymkovich, C.J., dissenting). In other words, the majority pointed to Colorado's "purportedly compelling interest in providing market access to [Petitioners'] website designs" and concluded that compelling her into expression that violates her sincerely held religious beliefs was the least restrictive way of animating this "purportedly compelling interest." *Id*.

This was error, and it provides additional grounds for a certiorari grant in this case.

IV. ALLOWING THE STATE TO COMPEL CUSTOM EXPRESSION *BECAUSE* THE EXPRESSION IS UNIQUE IS DANGEROUS AND ANATHEMA TO THE FIRST AMENDMENT.

The rationale relied on by the Tenth Circuit is not merely constitutionally erroneous; it is dangerous. In the court's view, if an expressive service is unique, celebrated, or imbued with distinctive artistic talent, it enjoys *less* First Amendment protection. This perverse conclusion is based on the premise that (1) the creativity driving the expression effectively creates a "monopoly" and that (2) the government has an especially compelling interest in ensuring access to the services of the "monopoly." "Taken to its logical end, the government could regulate the messages communicated by *all* artists, forcing them to promote messages approved by the government in the name of 'ensuring access to the commercial marketplace.'" App. 80a (Tymkovich, C.J., dissenting) (emphasis in orginal).

In effect, this conclusion strips away First Amendment protection from all artistic expression that happens to be offered for sale. This doctrine, if permitted to stand, would sending chilling reverberations throughout the community of artists who market their expression. And because this effect violates an unbroken line of this Court's precedent

(*see, e.g.*, *Hurley*, 515 U.S. at 574, *Riley*, 487 U.S. at 801, *Sullivan*, 376 U.S. at 265-66), certiorari is all the more warranted.

Although in some circumstances, not present here, this Court's jurisprudence recognizes that a state has a compelling interest in guaranteeing that its citizens have "equal access to publicly available goods," *Roberts v. United States Jaycees*, 468 U.S., 609, 624 (1984), this equal-access principle has never been used as the First Amendment cudgel that the Tenth Circuit employed here. The First Amendment exists to make sure that the state may not use the machinery of government to compel uniformity of opinion. *See Barnette*, 319 U.S. at 640-41. To permit a state untrammeled access within the marketplace of ideas would grant the power to regulate and silence those views that the state disapproves. App. 80a (Tymkovich, C.J., dissenting). Applying state public accommodation laws to a speaker's message and expressive conduct as "a means to produce speakers free of . . . biases . . . is a decidedly fatal objective." *Hurley*, 515 U.S. at 579.

Thus, this Court does not permit state antidiscrimination laws that "distinguish between prohibited and permitted activity on the basis of viewpoint." *Roberts*, 468 U.S. at 623; *see also Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987) (upholding public accommodation law because it makes "no distinctions on the basis of the organization's viewpoint."); *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 659 (2000) (declaring unconstitutional New Jersey's public accommodations law that required the boy

scouts to accept a scoutmaster that would "significantly burden the organization's right to oppose or disfavor homosexual conduct.").

This case is a paradigm for what may happen when a court warps these principles. Petitioners have dedicated their time, effort, and artistic talent to creating unique expressive products for sale. Their efforts have paid off (both monetarily and artistically), and their exceptional products are in demand. They also are compelled by their faith to say, and to not say, certain things while participating in their craft. The First Amendment, and this Court's jurisprudence, afford Petitioners the space to create expression and market it while at the same time adhering to their faith. The Tenth Circuit has adopted an irrational (and breathtakingly dangerous) principle that, the more talented and recognizable the artist, the less the First Amendment protects their expression, permitting the state to compel speech the speaker disapproves and prohibiting speech that the speaker does approve. Under this view, then, a modern-day Michelangelo, after painting the Sistine Chapel, could later be forced to service a church loyal to Martin Luther. To state this conclusion proves why this Court's review of the lower court's decision is critically important.

CONCLUSION

To protect the First Amendment's free speech guarantee that debate about issues of public concern shall be robust, this Court should grant certiorari. The First Amendment cannot sanction CADA's

mandate that speakers mouth support for public positions the speaker disapproves while prohibiting the speaker from voicing civil dissent.

Respectfully submitted,

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