No. 21-476

IN THE
Supreme Court of the United States

303 CREATIVE LLC, *ET AL.*, *Petitioners*,
v.
AUBREY ELENIS, *ET AL.*, *Respondents*.

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

Brief *Amicus Curiae* of Public Advocate of the United States, America's Future, Intercessors for America, Conservative Legal Defense and Education Fund, U.S. Constitutional Rights Legal Defense Fund, One Nation Under God Foundation, California Constitutional Rights Foundation, and Restoring Liberty Action Committee in Support of Petitioners

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTEREST OF THE *AMICI CURIAE*[1]

Public Advocate of the United States is a nonprofit social welfare organization, exempt from federal income tax under Internal Revenue Code ("IRC") section 501(c)(4). America's Future, Intercessors for America, Conservative Legal Defense and Education Fund, U.S. Constitutional Rights Legal Defense Fund, One Nation Under God Foundation, and California Constitutional Rights Foundation are nonprofit educational and legal organizations, exempt from federal income tax under IRC section 501(c)(3). Restoring Liberty Action Committee is an educational organization. *Amici* organizations were established, *inter alia*, for the purpose of participating in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law. Some of these *amici* filed an *amicus curiae* brief in this case at the petition stage on October 28, 2021. Brief *Amicus Curiae* of Public Advocate of the United States, *et al.,* in *303 Creative v. Elenis*, U.S. Supreme Court (Oct. 28, 2021).

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[1] It is hereby certified that counsel for Petitioners and for Respondents have consented to the filing of this brief; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

STATEMENT OF THE CASE

Petitioner Lorie Smith is the owner of a small business, Petitioner 303 Creative LLC, which offers website design services, and wants to expand her business to design custom websites for weddings. She wants to post a message on her website that says she will work only for traditional weddings by opposite-sex couples and not create such websites for same-sex couples. Appellants filed suit to enjoin Colorado from bringing an enforcement action for violating Colorado's public accommodations statute — the Colorado Anti-Discrimination Act ("CADA").

Appellants brought claims based on the Free Speech, Free Press, and Free Exercise clauses of the First Amendment, along with the Equal Protection and Due Process clauses of the Fourteenth Amendment. The district court considered claims against the CADA "Communications Clause" but denied standing to challenge its "Accommodations Clause" (Colo. Rev. Stat. § 24-34-601(2)(a). *See 303 Creative LLC v. Elenis*, 2017 U.S. Dist. LEXIS 203423 at *13 (D. Co. 2017). On July 26, 2021, a split panel of the Tenth Circuit affirmed the ruling of the district court. *303 Creative v. Elenis*, 6 F.4th 1160 (10th Cir. 2021) (hereinafter *"303 Creative*"), with Chief Judge Tymkovich dissenting.

On September 24, 2021, Petitioners filed their petition for certiorari, asserting claim under the Free Exercise Clause and the Free Speech Clause of the First Amendment, but this Court granted certiorari only on the Free Speech question.

SUMMARY OF ARGUMENT

This case presents the Court with another opportunity to review the Colorado law which empowers militant homosexual activists and their allies in government to destroy private businesses operated by Bible-believing Christians. It is the latest in a string of similar cases to come before this Court over the past six years involving an ongoing economic, political, and religious war waged against Christian businesses using weaponized "public accommodations" laws. Thus far, this Court has done nothing to protect Christians from this assault, other than requiring the Colorado Civil Rights Commission to rehear the case against Masterpiece Cakeshop and Jack Phillips because the Commission displayed express hostility to the religious beliefs of the Christian business.[2] (Some of these *amici* briefed that case in the Colorado Supreme Court and in this Court.[3])

This Court has declined to hear a number of earlier, similar challenges, where some of these *amici* filed briefs making arguments similar to those now

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[2] *See Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S. Ct. 1719, 1731 (2018).

[3] *Masterpiece Cakeshop v. Craig and Mullins*, Brief *Amicus Curiae* of U.S. Justice Foundation, *et al.,* Colorado Supreme Court (Oct. 23, 2015); *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, Brief *Amicus Curiae* of Public Advocate of the United States, *et al.,* U.S. Supreme Court (Sept. 7, 2017).

advanced.[4] Thus, this Court has never actually ruled on whether such public accommodations laws are permissible under the Free Exercise Clause. With the grant of certiorari limited to the Free Speech issue, it appears that this Court is poised to again ignore the Free Exercise issue, which these *amici* believe is the threshold, jurisdictional issue as to whether any federal or state government has the power assumed by CADA. While these *amici* support Petitioners' position as to the unconstitutionality of compelled speech, if the case is decided only by resolving the narrow Free Speech issue, even a victory will provide protection only to a small category of persons designated as "artists," while all other businesses must yield to participate in such ceremonies or risk destruction.

The Free Exercise Clause recognized and protected the distinction between the realm of government and the realm of God, which Jesus delineated: "Render therefore unto Caesar the things which are Caesar's; and unto God the things that are God's." *Matthew* 22:21. Not every area of life is subject to government

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[4] *See Stormans v. Wiesman*, Brief *Amicus Curiae* of Public Advocate of the United States, *et al.,* U.S. Supreme Court, No. 15-862 (Feb. 5, 2016) (where Justice Alito, Chief Justice Roberts, and Justice Thomas dissented from denial of certiorari (June 28, 2016)); *Klein v. Oregon Bureau of Labor and Industries*, Brief *Amicus Curiae* of Public Advocate of the United States, *et al.*, U.S. Supreme Court, No. 18-547 (Nov. 26, 2018) (where this Court in one sentence vacated judgment and remanded in light of *Masterpiece Cakeshop* (June 17, 2019). Another similar case where this Court has denied certiorari was *Arlene's Flowers, Inc. v. Washington*, U.S. Supreme Court, No. 19-333 (where this Court denied certiorari without a dissenting opinion (July 2, 2021).

control. Each American must be free to decide for himself as to whether he chooses to facilitate a same-sex "wedding" or not. The State has no authority to order such conduct. By refusing to grant certiorari on that issue, this Court teed up the easy issue of Free Speech, while declining to explain what it believes the law is on the threshold issue, which is Free Exercise of Religion.[5]

Although it is always difficult for *amici* to gain the attention of the Court on a matter not expressly urged by the parties, that would seem to be an important role for an *amicus* brief. While Petitioners are understandably focused on achieving a victory based on the Free Speech issue identified by the Court, these *amici* are able to view the case more broadly, as to its effect on non-artist Christian businesses, and now urge the Court to do so as well. While Christian website, floral, photographic, and cake artists may be granted a special exemption from state coercion into supporting same-sex weddings, that would leave wholly unprotected all other types of businesses with sincere religious objections, such as those which rent the facilities, rent the tables and china, print the wedding invitations, plan the weddings, arrange travel, set up the tables, and even those who rent the port-a-potties.[6]

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[5] *See Marbury v. Madison*, 5 U.S. 137, 177 (1803).

[6] During oral argument in *Masterpiece Cakeshop*, Petitioners repeatedly explained that only communicative "artists" could decline service to same-sex weddings, implying, if not expressly stating, that under Free Speech analysis, all other businesses could be coerced into service. Tr. pp. 10-19.

For themselves, and on behalf of such businesses, these *amici* respectfully urge this Court to order re-briefing to address the threshold, jurisdictional limits on government recognized in and protected by the Free Exercise Clause.

ARGUMENT

I. CADA EMPOWERS HOMOSEXUAL ACTIVISTS TO TARGET AND DESTROY CHRISTIAN BUSINESSES.

CADA is predicated on the state's assumption that it has the authority to elevate the interests of favored groups like homosexuals over the interests of disfavored groups like Christian businesses. CADA functions to coerce the latter to serve the former, running roughshod over the religious views and consciences of the Christians in business. That assumption has never been effectively challenged in, nor ruled upon by, this Court. Unless re-briefing is granted, that awesome power of the state will be assumed to exist, in violation of the Free Exercise Clause.

Allowing militant homosexuals to use the CADA weapon against Christians makes a mockery of the promise made by this Court in its *Obergefell* decision:

> [R]eligions, and **those who adhere to religious doctrines, may continue to advocate** with utmost, sincere conviction that, **by divine precepts, same-sex marriage should not be condoned**. The

> **First Amendment ensures** that **religious** organizations and **persons are given proper protection** as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered. [*Obergefell v. Hodges*, 576 U.S. 664, 679-80 (2015) (emphasis added).]

The statutory mechanism created by CADA to supposedly fight discrimination is itself discriminatory. It empowers militant homosexual activists to target and destroy Christians in business who want to do no more than make a living and provide for their families. Complaints based on supposed acts of discrimination are all, or virtually all, contrivances. Why would a same-sex couple want to hire a Christian website designer hostile to their "marriage" to design a website for the event? Would not the same-sex couple be more inclined to hire a business sympathetic to their "marriage"? Certainly in Colorado there are an abundance of businesses who would have no religious scruples to serve their "wedding ceremony." Clearly, CADA allows complaints to be filed not to ensure the availability of the services of a Christian business to homosexuals, but to achieve a moral transformation of society. Apparently, some homosexual activists want to move beyond gains achieved in *Obergefell* to shut the mouths of those who view their behavior as violating Biblical standards. Some may take pleasure in forcing Christians to participate in their unbiblical behavior, whether by capitulation to, or state directive issued under, CADA.

CADA empowers militant homosexual activists to survey and target Christian businesses, and then either can pass off the burden of investigating and prosecuting their claim to the Colorado Civil Rights Commission, or file suit themselves. In either case, it costs the activists nothing and they risk nothing, even with totally fraudulent or fabricated claims. On the other hand, the Christian businessmen and women must incur the often substantial expense of a defense, which alone could be ruinous for many, while also suffering the risk of an administrative fine,[7] and even being put out of business for following their religion and their conscience. It is tragic, but understandable, that when faced with this Hobson's choice many Christian businesses choose to yield to the state's coercive power rather than adhere to the clear teachings of natural law and the Bible.

Regardless of its purpose, CADA furnishes the politically powerful and highly favored class of homosexuals a weapon for militant activists to wield against their political and religious opponents — principally, Christians. For these persons, it is not enough that they be allowed to "marry" under this Court's egregiously wrong *Obergefell* decision; it seems essential that they avoid being made to feel guilty from the knowledge that some in their community believe they are violating God's ordinances, and seek to run their business based on those views. CADA empowers the homosexual activists to demand that

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[7] CADA empowers the Civil Rights Commission to assess a fine against the Christian business, bypassing the need to make its case before a jury. *See* Colo. Rev. Stat. § 24-34-602.

Christians either "bend their knee" to their same-sex "marriage," or risk their savings, their business, and their ability to make a living.

II. COLORADO'S LAW IS OUTSIDE THE TRADITION OF PUBLIC ACCOMMODATION AND ANTI-DISCRIMINATION LAWS.

To look for precedent for a state exercising the powers assumed in CADA, one would need to be look at one of two established doctrines — "public accommodations" laws regulating certain categories of businesses and prohibitions against certain types of discrimination. Colorado apparently views its authority to enact laws like CADA to be so well established as to not require re-examination. Respondents' Brief in Opposition at 16-19. Although both businesses and courts have assumed the constitutionality of such laws, there is no dispositive decision from this Court. Although some litigants have failed to assert their rights under the Free Exercise Clause, Petitioners did so here, and it was this Court's limited grant of certiorari that denied any review of Petitioners' Free Exercise claims. These *amici* believe it would be a grave mistake for this Court to decide the case without re-briefing on the Free Exercise Clause.

A. The Law of Public Accommodations.

The doctrine of public accommodations originated as a common law rule applicable only to inns in rural England narrowly designed to meet a specific need to protect travelers from highwaymen. In a 1906

treatise, Harvard Law Professor William J. Neale described the scope of the common law rule of "public accommodations." He explained that English common law allowed all businesses to decide with whom to do business, but to that general rule was engrafted a narrow exception for innkeepers. The rule imposed a special duty on those businesses offering rooms to the public to rent to serve all comers. The reason for the narrow exception is critical to understand — to protect travelers from the risk of attacks from highwaymen and robbers during the dark of night.[8] There are English cases which demonstrate that the innkeepers' duty was limited only to providing lodging, and did not even extend to having access to purchase food at a tavern associated with the inn.[9] From that doctrine developed similar common law obligations imposed on "common carriers" operating under government license, such as railroads.[10] Other than those few businesses, "proprietors or purely private enterprises were under no such obligation, the latter enjoying an **absolute power to serve whom they pleased**."[11]

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[8] W.J. Neale, The Law of Innkeepers and Hotels, sec. 15 (William J Nagel: 1906).

[9] *Id*. at sec. 15, 16. ("The innkeeper supplies all needs of a traveller. The innkeeper supplies all the entertainment which the weary traveller actually needs on his road; which in lowest terms is food, shelter and protection.... Thus a house which does not supply lodging is not an inn; and this rule excludes from among inns a restaurant or eating house."). *Id*. at sec. 15.

[10] *Id*. at sec. 343, 344.

[11] J.E.H. Sherry, The Laws of Innkeepers at 45 (Cornell Univ. Press: 1993) (citation omitted) (emphasis added).

Thus, almost all businesses had unbridled freedom to decide who they would serve.[12]

With CADA, Colorado has flipped the doctrine of "public accommodations" to apply limitlessly to govern "**any place of business engaged in any sales to the public and any place offering services**, facilities, privileges, advantages, or accommodations to the public." C.R.S. 24-34-601 (emphasis added). Additionally, CADA protects politically favored interest groups by banning discrimination based on: "sexual orientation, gender identity, [and] gender expression." *Id*. At common law, homosexual behavior was considered a "crime against nature" to be punished, rather than a requirement for entry into a legally protected class. *See* W. Blackstone, IV Commentaries on the Laws of England, Ch. 15, Prt IV, pp. 214-17. Thus, the common law of public accommodations certainly provides no precedential authority for a law like CADA.

This Court has yet to address the permissible scope of "public accommodations" laws. In 2014, this Court denied certiorari for a Petitioner in New Mexico who was forced against her religious objections to provide photography for a homosexual wedding.[13] In

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[12] Reflecting established legal principles, many businesses posted signs stating: "We reserve the right to refuse service to anyone." *See*, *e.g.*, M. Gunderson, "Businesses can refuse service to anyone. Even Sen. Lora Reinbold," *Anchorage Daily News* (Nov. 19, 2020).

[13] *See Elane Photography, LLC v. Willock*, 2014 U.S. LEXIS 2453 (2014).

2021, this Court denied certiorari to a florist in Washington State who was ordered against her religious objections to provide flowers for a homosexual wedding.[14] Only once, in 2018, this Court came close to addressing the limits of such laws in *Masterpiece Cakeshop*. But there the Court held only that the action against the Christian baker was impermissible because the Colorado Civil Rights Commission openly displayed "hostility" toward the Christian faith of Petitioner, and that:

> [Petitioner] was entitled to a **neutral decisionmaker** who would give full and fair consideration to his religious objection as he sought to assert it.... The outcome of cases like this **in other circumstances must await further elaboration** in the courts, all in the context of recognizing that these disputes must be **resolved with tolerance**, **without undue disrespect to sincere religious beliefs**, and without subjecting gay persons to indignities when they seek goods and services in an open market. [*Masterpiece Cakeshop* at 1732 (emphasis added).]

The case before the Court is one which has awaited, but has not yet received the "further elaboration" by this Court that Justice Kennedy promised.

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[14] *See Arlene's Flowers, Inc. v. Washington*, 2021 U.S. LEXIS 3574 (2021).

B. Laws Prohibiting Racial Discrimination.

When *Masterpiece Cakeshop* was argued before this Court, there were questions from the Court comparing the CADA with laws prohibiting racial discrimination, implying that since racial discrimination can be prohibited, so can discrimination against homosexual behavior. There is no historic justification for this position.

The common law doctrine of "public accommodations" was not touched by Congress until the 1875 Civil Rights Act, where Congress sought to make a small expansion to the common law definition of "public accommodations." The Civil Rights Act of 1875 provided that "all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement." 18 *Stat*. 335. The Act relied for constitutional authority on the Fourteenth Amendment and established criminal penalties for violations. In effect, Congress added "places of public amusement" to the historical understanding that the doctrine applied only to inns and public carriers.

This Court struck down the 1875 Act on a number of grounds, chiefly its holding that the Fourteenth Amendment was applicable only to states and not to private business owners. The Fourteenth Amendment, the Court held, "does not authorize Congress to create a code of municipal law for the regulation of private

rights." *United States v. Stanley* ("The Civil Rights Cases"), 109 U.S. 3, 11 (1883).

In striking the law down, this Court noted that all 50 states already had laws in place requiring service of all unobjectionable customers in two discrete contexts: "Innkeepers and public carriers, by the laws of all the States, so far as we are aware, are bound, to the extent of their facilities, to furnish proper accommodation to all unobjectionable persons who in good faith apply for them." *Stanley* at 25.

In 1964, Congress relied on the Commerce Clause to federalize a slightly expanded version of public accommodations when it enacted the 1964 Civil Rights Act "to promote the general welfare by eliminating discrimination based on race, color, religion, or national origin in ... public accommodations." H.R. Doc. No. 124, 88th Cong., 1st Sess., at 14. The constitutionality of that law was challenged, but the Warren Court sanctioned that statute under the Commerce Power.[15] The 1964 Act as originally passed, and as in effect today, expanded the rule to include two other categories of businesses: "[i] any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises ... [ii] any motion picture house, theater, concert hall, sports arena, stadium or

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[15] *Heart of Atlanta Motel v. United States,* 379 U.S. 241 (1964).

other place of exhibition or entertainment." Civil Rights Act of 1964, Pub. L. 88-352.[16]

Since 1964, numerous states have gone far beyond the Civil Rights Act in creating a vast array of businesses they now label as places of "public accommodations." In 2000, this Court upheld the right of the Boy Scouts of America to revoke the membership of a scoutmaster who had declared that he was a homosexual, despite a New Jersey public accommodation statute. *Boy Scouts of America v. Dale*, 530 U.S. 640, 662 (2000). Aside from *Dale*, instances of this Court imposing any limits on the ability of states to infringe on expressive or free exercise rights of citizens are exceedingly rare.[17]

The authority of government to prohibit discrimination based on "race" is not at issue here. Moreover, according to Scripture, there is only one "race" — the human race. God made from one man every nation. *See Acts* 17:26. God shows no partiality

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[16] Congress repeatedly refused to amend the 1964 Civil Rights Act to protect homosexuals, yet this Court amended it for them (to protect both homosexuals and so-called transgender persons) in another decision reached by admittedly taking the words "because of sex" completely out of context to reach a decision that was egregiously wrong from the moment it was issued. *See Bostock v. Clayton County*, 140 S. Ct. 1731 (2020).

[17] *See also, e.g., Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp.*, 515 U.S. 557 (1995) (this Court allowed a Catholic parade to restrict entry by a homosexual parade participant, because the participant's message was antithetical to the expressive beliefs of the parade organizers).

among men as men. *See Romans* 2:11; *Acts* 10:45; *James* 2:9. By contrast, separation from immoral behavior is commanded. ("Wherefore come out from among them, and be ye separate, saith the Lord, and touch not the unclean thing; and I will receive you....") (*2 Corinthians* 6:17).

Among the most curious arguments is Colorado's belief that homosexuals are a disfavored class which needs protection. *See* Petition Appendix at 25a. While some might believe that that argument might have had some credibility 20 years ago, a string of decisions by this Court have empowered homosexual activists and weakened Christian resistance to homosexuality. *See, e.g., Lawrence v. Texas,* 539 U.S. 558 (2003); *Obergefell v. Hodges*, 576 U.S. 644 (2015); *Bostock v. Clayton County*, *supra.* With these decisions having had great effect on the political landscape, the notion that homosexuals constitute some type of a politically powerless "discrete and insular minorit[y]"[18] who need protection from discrimination by the rest of society is

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[18] *See United States v. Carolene Products Co.*, 304 U.S. 144, 152, n.4 (1938) (where Justice Harlan Stone simply posed the question "whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."). *See also University of California v. Bakke*, 438 U.S. 265, 357 (1978) (describing categories of persons "subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."). Under these standards states are not entitled to provide special rights for homosexuals.

absurd. The very existence of modern public accommodation laws, and the zeal with which they are enforced, demonstrates that the truth is the opposite — Christian businesses are more the discrete and politically powerless community which is being preyed upon by militant homosexuals and their political and religious allies and supporters in government.[19]

It has become a decade-long drumbeat. Militant homosexual activists with a nearly unlimited array of professional options available team up with state agencies to impose destructive fines in the hundreds of thousands, license revocations, and business closures on Americans whose religious beliefs fail to fit the "politically correct" requirements. Business owners in Colorado, Washington, New Mexico, Iowa, New York, Kentucky, and other states have been targeted, and in some cases forced out of business.[20]

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[19] Chai Feldblum, nominated by President Barack Obama to the Equal Employment Opportunity Commission, famously declared that she sees "a conflict between religious liberty and sexual liberty, but in almost all cases, sexual liberty should win. I'm having a hard time coming up with any case in which religious liberty should win." M. Prince, "Mike Lee Blocked EEOC Nominee Who Believes Sexual Liberty Trumps The First Amendment," *Daily Caller* (Dec. 20, 2018).

[20] *See, e.g.*, D. Bohon, "Christian Businesses Targeted Over Refusal to Serve Gay Weddings," *The New American* (Aug. 26, 2013); "NY photographer fights for freedom to create according to her beliefs," *Alliance Defending Freedom* (Jan. 12, 2022); Father M. Hodges, "Christian couple loses business for refusing to participate in gay 'wedding'," *LifeSiteNews* (June 25, 2015).

These sanctions authorized by these laws are classified as civil, but are often more severe than criminal penalties. Moreover, they provide no right to jury trial, as administrative agencies bring charges, make findings, and impose sentence.

Until the question of the limits of state power in public accommodations is addressed, states that so desire can and will continue to expand the concept of "public accommodations" to a point where militant homosexual activists can effectively drive any business owner with a religiously dissenting view completely from the marketplace, rendering "free exercise of religion" a true parchment barrier.

III. THE FREE EXERCISE CLAUSE ERECTED A JURISDICTIONAL BARRIER THAT PREVENTS COLORADO FROM REGULATING PETITIONERS' EXERCISE OF RELIGION.

A. The Free Exercise Clause Limits Government Power.

The First Amendment provides that "Congress shall make no law ... prohibiting the free exercise[] of religion." That Clause embodies James Madison's revolutionary vision that government would not just "tolerate" religion, but rather has no jurisdiction or authority over, or right to control, matters of religion, often described as encompassing matters of "conscience." In this case, whether a business chooses to facilitate what it views to be a perversion of a religious ceremony — a same-sex wedding — is

certainly well within this protected area, making the type of state coercion over matters of religion as authorized by CADA an unconstitutional and illegitimate exercise of arbitrary government power.

Unlike the early constitutions of certain states which provided only for government "tolerance" of religion,[21] Virginia adopted the "world's boldest ... experiment in religious freedom," based on the Madisonian notion which protects "**liberty of conscience**, for all."[22] As the Free Exercise Clause is the lineal descendant of the Virginia Declaration of Rights, Madison's role in developing that Declaration is critical to understanding how the Free Exercise Clause operates as a fixed jurisdictional limit on the powers of government.[23] According to Dr. Charles Hayes, author and Senior Fellow for Religious Liberty at the Freedom Forum Institute:

> [I]n 1776 ... at the convention called to declare Virginia's independence ... Madison

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[21] *See, e.g.*, Massachusetts Constitution, section XXVIII, R. Perry and J. Cooper, eds., Sources of Our Liberties, Revised ed. (American Bar Foundation: 1978).

[22] C. Haynes, "James Madison: Champion of the 'cause of conscience,'" *Washington Times* (Dec. 12, 2016) (emphasis added).

[23] While the Madisonian vision of limited government was radical, it was not without antecedent. Sir William Blackstone explained that at common law the state properly had jurisdiction only to make the rules governing "civil conduct," not the rules governing "moral conduct," much less "the rule[s] of faith." 1 W. Blackstone, Commentaries on the Laws of England 45 (Facs. Ed., Univ. of Chi: 1765).

> successfully called for an amendment to the venerable George Mason's draft of the Virginia Declaration of Rights, changing "**toleration in the exercise of religion**" to "**free exercise of religion**."
>
> With that small change in language, Virginia moved from toleration to full religious freedom — a precedent that would greatly influence the new nation's commitment to **free exercise** of religion under the First Amendment. **No longer would government have the power to decide** which groups to "tolerate" and what **conditions to place on the practice of their religion**. [C. Haynes, *supra* (emphasis added).]

B. "Religion" Defined.

In *Reynolds v. United States*, 98 U.S. 145 (1879), the Supreme Court traced the lineage of the Free Exercise Claus to the 1776 Virginia Declaration of Rights. *Id.* at 162-63. Because "'religion' is not defined in the Constitution," but was defined in the Virginia Declaration of Rights, the U.S. Supreme Court looked to that definition. *See id.* at 162-63. Section 16 of the Virginia Declaration of Rights defined religion to be "the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence." *See* Constitution of Virginia, Section 16, reprinted in Sources of Our Liberties at 312.

In the words of the *Reynolds* Court, "religion," as so defined, "was not within the cognizance of civil

government." *Reynolds* at 163. The Court further acknowledged that this **jurisdictional principle** was explained in James Madison's Memorial and Remonstrance, a document that Madison penned in June 1785 and circulated among members of the Virginia Assembly in support of Jefferson's Bill for Establishing Religious Freedom. Quoting from Section 16 of the 1776 Virginia Declaration, Madison proclaimed:

> Because we hold it for a fundamental and undeniable truth, "that **Religion** or **the duty which we owe to our Creator and the manner of discharging it**, can be directed only by **reason and conviction**, not by **force or violence**." [citation omitted]. The Religion then of every man must be left to the conviction and **conscience** of every man; and it is the right of every man to exercise it as these may dictate. [J. Madison, "Memorial and Remonstrance" to the Honorable the General Assembly of the Commonwealth of Virginia (June 20, 1785), reprinted in 5 The Founders' Constitution at 82 (item # 43) (P. Kurland & R. Lerner, eds., U. of Chi.: 1987) (emphasis added).]

Four months later, the Virginia General Assembly enacted into law Thomas Jefferson's "Act for Establishing Religious Freedom," the preamble of which, the *Reynolds* Court explained, affirmed this same **jurisdictional principle**. *See Reynolds* at 163. The Act's preamble read:

> Whereas Almighty God hath created the mind free; that **all attempts to influence it by temporal punishments or burthens, or by civil incapacitations**, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the Holy author of our religion, who being Lord both of body and mind, yet chose not to propagate it by coercions on either, as was in his Almighty power to do; that the **impious presumption of legislators and rulers**, civil as well as ecclesiastical, who being themselves but fallible and uninspired men, have assumed dominion over the faith of others, setting up their own opinions and modes of thinking as the only true and infallible, and as such endeavouring to impose them on others, hath established and maintained **false religions** over the greatest part of the world, and through all time.... [Act for Establishing Religious Freedom (Oct. 31, 1785), reprinted in 5 The Founders' Constitution at 84 (item # 44) (emphasis added).]

C. Free Exercise of "Religion."

The 1776 Virginia Declaration not only defined "religion," but also secured its "free exercise," that is, its exercise free from any and all claims of civil jurisdiction. And the choice of language could not have been more deliberate. As originally drafted by George Mason, Section 16 of that Virginia Declaration read, as follows:

> That as Religion, or the Duty which we owe to our divine and omnipotent Creator, and the Manner of discharging it, can be governed only by Reason and Conviction, not by Force or Violence, and therefore that all Men should enjoy the fullest **Toleration** in the **Exercise of Religion**, according to the Dictates of Conscience, unpunished and unrestrained by the Magistrate **unless**, under Colour of Religion, any Man disturb the Peace, the Happiness, or Safety of Society, or of Individuals.... [Virginia Declaration of Rights, First Draft (May 20-26, 1776) (emphasis added).[24]]

James Madison objected to the provision "'that all men should enjoy the fullest toleration in the exercise of religion'"[25]:

> Madison wanted to move beyond the tradition of religious toleration introduced by John Locke and the English Toleration Act of 1689.... So the twenty-five-year-old delegate from Orange County to Virginia's constitutional convention put forward these words: "All men are equally entitled to the free exercise of religion." [*Id.* at 31.]

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[24] *See* https://gunstonhall.org/learn/george-mason/virginia-declaration-of-rights/virginia-declaration-of-rights-first-draft/.

[25] *See* Constitutional Debates on Freedom of Religion, p. 31 (J. Patrick & G. Long, eds., Greenwood Press: 1999).

"Madison's proposal ... was approved." *Id*. Thus, Section 16 as adopted by the convention read, in pertinent part, "and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience," **removing any and all reference to any and all exceptions** for the peace, happiness, or safety of the larger society as determined by any civil magistrate.

Nine years later, in his 1785 Memorial and Remonstrance, Madison painstakingly explained the absolute principle upon which the free exercise of religion rests. The right "is unalienable ... because what is here a right towards men, is a duty towards the Creator"[26]:

> It is the **duty** of every man to render **to the Creator** such homage and such only as he believes to be acceptable to him. This duty is **precedent, both in order of time and in degree of obligation, to the claims of Civil Society**.... We maintain therefore that in matters of Religion, no man's right is abridged by the institution of **Civil Society** and that **Religion is wholly exempt from its cognizance**. [*Id.* (emphasis added.)]

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[26] "Memorial and Remonstrance," 5 The Founders' Constitution at 82.

D. Free Exercise Restricted and Then Revived.

For 170 years after the ratification of the Bill of Rights, Madison's jurisdictional principle went unchallenged.[27] In 1963, however, the U.S. Supreme Court departed from that tradition, reducing the free exercise guarantee as if it were a mere rule of religious toleration, limiting the jurisdictional principle to only those cases involving "religious belief," and subjecting laws impacting "religious practices" to a balancing test to determine whether the law could be justified as protecting the health, safety, and welfare of the civil society.[28] That atextual experiment came to an end in 1990 when the Court refused to limit the free exercise guarantee to just religious belief and profession, stating:

> [T]he "exercise of religion" often involves not only belief and profession but the **performance of (or abstention from) physical acts**: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation. [*Employment Division v.*

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[27] *See* H. Titus, "The Free Exercise Clause: Past, Present and Future," 6 REGENT L. REV. 7, 10-15 (1995).

[28] *Id.* at 15-22. *See Sherbert v. Verner*, 374 U.S. 398 (1963).

> *Smith*, 494 U.S. 872, 877 (1990) (emphasis added).[29]]

Having rejected tolerance as the governing principle of the free exercise guarantee, the *Smith* Court rejected the belief/practice dichotomy, returning the Court to the text's jurisdictional principle. While the state had no jurisdiction to regulate "religion," the free exercise guarantee did not "excuse ... compliance" with an "otherwise valid law prohibiting conduct that the State is free to regulate." *Smith* at 878-79.

Whether the state is free to regulate particular conduct is, then, determined by the original definition of "religion" in the free exercise guarantee itself. This is the teaching of the original First Amendment text as illuminated by the express definition of "religion" of its Virginia forerunner. And this, in turn, is the lesson of the Supreme Court in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012).

In *Hosanna-Tabor,* the Court rejected the EEOC's argument that the Americans with Disabilities Act's prohibition of employer retaliation against employees filing a grievance under the Act was immune from a free exercise challenge because it was a "neutral law of general applicability." *See id.* at 190. It did so on the ground that the internal governance of a church body, including the hiring and firing of ministers, is **outside the jurisdiction** of the federal government. The

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[29] *See also* Titus, "The Free Exercise Clause" at 22-23.

Court relied upon ecclesiastical history to establish that the free exercise guarantee grew out of a jurisdictional conflict between parishioners and the English monarchy over church self-government. *Id*. at 182-84. "[T]he Religion Clauses," Chief Justice Roberts wrote, "ensured that the new Federal Government — unlike the English Crown — would have no role in filling ecclesiastical offices" — citing in support none other than James Madison, who the Chief Justice reminded was "'the leading architect of the religion clauses of the First Amendment.'" *Id*. at 172, 184.

As its chief architect, it was Madison, along with Jefferson, who understood that the First Amendment erected a **jurisdictional barrier** between matters that belonged to church government and matters that belonged to **civil government** of the state, the latter having absolutely **no jurisdiction over duties owed to the Creator** which, by nature, are enforceable only "by reason and conviction."

As Robert Louis Wilken, William R. Kenan Professor Emeritus of the History of Christianity at the University of Virginia, more recently has observed:

> **Religious freedom** rests on a simple truth: religious **faith** is an inward disposition of the mind and heart and for that reason **cannot be coerced by external force**. This truth was stated for the first time by Tertullian of Carthage, a Christian writer who lived in North Africa in the early third century. **Tertullian** said ... "**It is not part of religion**

> **to coerce religious practice**, for it is by **choice not coercion** that we should be led to religion." [Robert Louis Wilken, Liberty in the Things of God: The Christian Origins of Religious Freedom (Yale University Press: 2019) at 1 (emphasis added).]

E. A Biblical Understanding of Matters of Conscience.

All persons have an innate sense of right or wrong because, according to Scripture, they have the words of the law "written in their hearts, their **conscience** also bearing witness." *Romans* 2:15 (emphasis added). Regarding matters of conscience, man has a choice how to respond. He can either accept the law of God, particularly as written in the Ten Commandments, or he can reject the law of God, becoming a law unto himself. Those who reject the law of God are described as alternatively "accusing or else excusing" them. *Id*. In other words, those who deny the law of God and redefine for themselves right from wrong, often accuse those responding to God's law of "imposing their religious views upon others." However, those who reject God's laws are following their faith, their belief system, sometimes called Secular Humanism, which is every bit as much a religion as Christianity.[30] CADA empowers them to impose their faith on Christians.

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[30] *See Torcaso v. Watkins*, 367 U.S. 488, 495, n.11 (1961) ("Among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others.").

The Colorado legislature, at the insistence of homosexual activists, is not content with merely sanctioning same-sex marriage. In enacting CADA, Colorado seeks to punish or silence those who, based on their religious conviction, believe that same sex marriage is sinful and a perversion of God's command. *Romans* 1:27. Those who believe that Scripture requires them to refrain from actions that countenance the sinful conduct of others are coerced by CADA into choosing between violating their religious conviction and suffering punishment under CADA that would result in substantial injury to their business.

The Bible teaches that "men loved darkness rather than light, because their deeds were evil." *John* 3:19. Even a silent witness against homosexual marriage is a source of light that presents a reproach. The government should not empower militant homosexuals to snuff out that light from Christian businesses by calling "evil good, and good evil." *Isaiah* 5:20.

CADA empowers homosexual activists to seek out and provoke a confrontation with Christian businesses by demanding service and filing potentially ruinous complaints reflecting animus toward Christian businesses. In *Masterpiece*, that animus against Christians by Colorado Civil Rights Commission was manifest.[31] By contrast, as in *Masterpiece Cakeshop*,

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[31] The Colorado Civil Rights Division has no problem finding that a bakery's refusal to decorate a cake with an "anti-gay" message did not violate the rights of the person ordering the cake. See S. Paulson, "Colorado officials say anti-gay cake refusal did not violate rights," *The Gazette* (Apr. 5, 2015).

the record below reflects no animus by Petitioners toward any homosexuals. Militant homosexuals may consider themselves victims of Christian businesses, while in truth they are the victimizers, seeking to use state law to punish the Christian business for having a different moral code than they do.

Homosexual activists once only demanded the right to marry. Now the most militant have moved on to use laws like CADA to require Christians to participate in what the Christians view as a perversion of the marriage ceremony which God designed to be between only one man and one woman. *See Genesis* 2:24 ("Therefore shall a man leave his father and his mother, and shall cleave unto his wife; and they shall be one flesh."). *See also Matthew* 19:5; *Mark* 10:7; and *Ephesians* 5:31. Those Christian businesses which desire to live within the law of God do not seek to deprive others of their God-given rights such as the right to work, to take care of one's family, or to acquire property, but that is exactly what the militant homosexual activists seek to take away from Christian businesses.

Those who "excuse themselves" by redefining homosexuality as good, now seek to prevent others from having a different morality. They seek to force the Christian businesses to choose between: (i) violating their conscience by participating in a perverse religious ceremony that they believe to be sinful; or (ii) suffer the pain of having Colorado rob them of their God-given rights to operate their businesses, to acquire possessions, to earn a living, etc. Thus, homosexual activists accuse Christians of

"imposing their religious views," but it is clear that it is they who are imposing their own religious views (*i.e.,* their belief system) on others.

For the secular elites, objections to their efforts to impose their faith and morality on the American people based on constitutional barriers generally have fallen on deaf ears. The spirit of the age is that the State should not be constrained by mere parchment barriers from doing its will, for the presumed greater good. As historian and ethicist Professor Herbert Schlossberg explained:

> so "normal" do [the nation-state's] vast powers seem, that to read a document that seeks to limit severely the scope of those powers — even so recent a one as the Constitution of the United States — evokes a sense of great antiquity and strangeness. [H. Schlossberg, Idols for Destruction (Crossway Books: 1990) at 177.]

The notion that Americans must bow their knee to a government decision on matters of faith, morals, and religion is a manifestation of the Hegelian view that "The State is the Divine Idea as it exists on earth.... We must therefore worship the State as the manifestation of the Divine on earth."[32] Schlossberg observed that, while few would associate themselves with Hegel's statement, many "advocate actions that can be logical inferences only from such a position. For

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[32] Hegel, as quoted in Schlossberg at 178.

them, the state is the only savior we can expect on earth.... The state ... has replaced God." Schlossberg at 178-79. Schlossburg concludes that "[l]aws are always theologically based, whether or not they are so acknowledged." Schlossburg at 47. And, when laws are based on sentiments and right social purpose cut adrift from Christian presuppositions, the result is "moral inversion." Schlossberg at 181.

It is worth considering where robust enforcement of laws like CADA will lead. Those who believe in an all-powerful state and a leftist ideology are systematically fashioning "politically correct" rules according to which no Bible-believing Christian will be able to own a business or practice a profession without subordinating his personal faith to the secular faith of the elites — precisely what the Free Exercise Clause forbids.

Christians are warned in Scripture that, as they follow their conscience, informed by an indwelling Holy Spirit, the world will resist them. "Having a good conscience; that, whereas they speak evil of you, as of evildoers, they may be ashamed that falsely accuse your good conversation in Christ." *1 Peter* 3:16. Thus, while no government can, or should, stop the world speaking evil of Christians who swim against the tide of this world (*see I John* 5:19), the Free Exercise Clause protects Christians, and all others, against exercises of government power, in matters of religion and conscience.

IV. THE COURT SHOULD EXPAND THE QUESTIONS PRESENTED TO INCLUDE THE FREE EXERCISE CLAUSE AND ORDER REBRIEFING.

The Petitioners asked the Court to decide "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." Pet. Cert. at i (emphasis added). When the Court granted the petition, it eliminated the Free Exercise issue, granting review on only the following question:

> Whether applying a public-accommodation law to compel an artist to speak or stay silent violates the **Free Speech Clause** of the First Amendment. [Emphasis added.]

Having eliminated the key threshold issue in the case, the Court has deprived the parties of the opportunity to brief that issue, apparently intending to decide this case without even considering its application here.

While these *amici* cannot identify a prior case in which this Court ordered rebriefing on an issue it previously excluded in a grant of certiorari, it has ordered supplemental briefs even after argument occurred. In *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), the Court heard oral argument on March 24, 2009, and three months later, on June 29, 2009, "restored" the case "to the calendar for reargument." At that time, the parties were

directed to file supplemental briefs addressing whether certain of this Court's precedents should be overruled. There, the Court realized it could not address the as-applied challenge without resolving the facial challenge. "It is not judicial restraint to accept an unsound, narrow argument just so the Court can avoid another argument with broader implications." *Id*. at 329. In a different context, that rule applies here.

Petitioners here argued the Free Exercise Clause below and in their Petition for Certiorari, so these issues have been preserved. It was this Court's choice to narrow the question presented which prevented its own consideration of this important threshold issue, and this omission would not "serve the development of a sound or fully protective [First] Amendment jurisprudence." *Carpenter v. United States*, 138 S. Ct. 2206, 2272 (2018) (Gorsuch, J., dissenting).

Here, the petitioners did litigate the Free Exercise issue, and these *amici* believe that it was a failure of the Court to improvidently reject that threshold claim. Accordingly, these *amici* urge the Court to order re-briefing on the Free Exercise issue, so it can consider the permissible scope of these public accommodations laws in the context of what "Free Exercise" meant when the Constitution was drafted and ratified, to preserve the Constitution's careful protection of the free exercise of religion.

CONCLUSION

For the reasons stated *supra*, these *amici* believe the Court should not decide this case only based on Free Speech grounds, but rather primarily on Free Exercise grounds. To that end, the Court should order re-briefing on whether the Free Exercise Clause prevents government coercion into the realm of "Religion" which James Madison deemed subject only to the rule of "reason and conviction" only, not "violence or compulsion" and imposition of "penalties"[33] as Colorado wrongly threatens to do.

Respectfully submitted,

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[33] J. Madison, "Madison's Amendments to the Declaration of Rights, May 29 - June 12, 1776," *National Archives*.

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