No. 21-476

IN THE
Supreme Court of the United States

303 CREATIVE LLC, *ET AL.*,

Petitioners,

V.

AUBREY ELENIS, *ET AL.*,

Respondents.

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

BRIEF OF AMICUS CURIAE LIBERTY COUNSEL IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS[1]

Amicus, Liberty Counsel, is an international nonprofit legal organization that has been substantially involved in defense of First Amendment rights for over three decades. Liberty Counsel represented petitioners before this Court in *Shurtleff v. City of Boston*, 592 U.S. ___, 142 S. Ct. 1583 (2022), and obtained a unanimous opinion from this Court holding that Boston's censorship of the Christian flag represented unconstitutional viewpoint discrimination. 142 S. Ct. at 1593. Amicus also represented petitioners who obtained favorable judgment from this Court twice in *Harvest Rock Church v. Newsom*, 141 S. Ct. 1289 (2021) and *Harvest Rock Church v. Newsom*, 141 S. Ct. 889 (2020). The present case, like *Shurtleff*, involves significant questions about the scope of the government's ability to censor (or compel) constitutionally protected speech on the basis of content. Specifically, Amicus submits the instant brief to provide vital information demonstrating that the First Amendment mandates that government-imposed nondiscrimination provisions yield to constitutionally protected speech and artistic expression.

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[1] Counsel for a party did not author this Brief in whole or in part, and no such counsel or party made a monetary contribution to fund the preparation or submission of this Brief. No person or entity, other than Amicus Curiae or its counsel made a monetary contribution to the preparation and submission of this Brief. Petitioners and Respondents have filed blanket consents to the filing of Amicus Briefs in favor of either party or no party.

SUMMARY OF THE ARGUMENT

This case squarely pits the First Amendment's Free Speech guarantee against a state's interests in providing equal access to goods and services of a place of public accommodation when the goods or services sold constitute artistic expression. This case does not involve the question of whether artistic expression constitutes protected speech, because this Court has long held that artistic expression is protected as pure speech. This case also does not involve the question of whether a place of public accommodation can categorically deny services to individuals based on a protected status because the parties have stipulated that Petitioners do provide services to individuals regardless of their sexual orientation. Nor does this case involve the question of whether a government can compel orthodox positions in politics, nationalism, religion, or other matters of opinion, because that, too, is prohibited.

Rather, this case involves whether this Court will now carve out an exception to its Free Speech jurisprudence for speech related to matters a government entity deems sufficiently important – namely, speech related to sexual orientation or same-sex marriage. This Court should decline to create such an exception, recognizing that our First Amendment protects speech deemed offensive, noxious, or unenlightened. Indeed, as the Court recognized in *Obergefell v. Hodges*, "[t]he 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." 576 U.S. 644, 680 (2015) (emphasis added). The Tenth Circuit's decision below ignores this fundamental principle, opting – instead – to say that religious persons may espouse their faith in their business so long as they are not exceptional at their craft. (Pet.App. at 28a ("LGBT customers may be able to obtain wedding-website design services from other businesses; yet, LGBT consumers will never be able to obtain wedding-related services of the same quality and nature as those that Appellants offer.").) As the dissent below noted, the Tenth Circuit's rationale essentially "holds that the *more* unique a product, the more aggressively the government may regulate access to it—and thus the *less* First Amendment protection it has." (Pet.App. at 79a-80a (italics original).) This is absurd. No one would compare the elegant performance of a Julliard-trained ballet dancer with that of a stripper, but the First Amendment protects them both, despite the fact that the latter is not "high art, to say the least." *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 593 (1991) (White, J., dissenting). By the Tenth Circuit's rationale, however, the latter would be entitled to greater protection than the former because of the high quality and unique talent of the ballet dancer.

The decision below correctly concluded that the artistic expression in Petitioners' custom design websites is pure speech (Pet.App. at 20a), and that the Accommodation Clause of the Colorado Anti-

Discrimination Act (CADA) is a content-based restriction on speech. (*Id.* at 24a.). Nevertheless, the court upheld the constitutionality of the Accommodation Clause, finding it narrowly tailored to achieve Colorado's interest in ensuring equal access to publicly available goods and services. (*Id.* at 28a.) It reached that conclusion by declaring Petitioners' artistic expression to be a public accommodation that could be compelled to convey the government's message. (*Id.* at 26a.) Specifically, the court found that each artist creates unique works of art and, therefore, holds a monopoly on those unique services. (*Id.* at 29a.) And, because the artistic expression is, by definition, unique, any attempt to obtain those services by an alternate artist would necessarily be inferior. (*Id.*)

The court's decision rests on the faulty premises that artistic expression is itself a public accommodation; those services are inherently unique to each artist; 303 Creative has a monopoly on those unique services; and, therefore, the state's interest in ensuring full access to those unique services is even more important than when the services are not unique. (*Id.*) Thus, the court held that pursuant to the Accommodation Clause, Colorado could compel petitioners to create speech that violated Lorie Smith's conscience even after acknowledging that "'compelled speech is deeply suspect in our jurisprudence . . . given the unique harms it presents.'" (*Id.* at 31a.)

The Tenth Circuit's decision below "ushers forth a brave new world" where the government may

"compel[] both speech and silence" yet find its dictatorial pronouncements "constitutionally permissible." (Pet.App. 52a.) The Tenth Circuit's venture into constitutional cartography must be rejected for "[l]ong ago those who wrote our First Amendment charted a different course." *Ginzburg v. United States*, 383 U.S. 463, 498 (1966) (Stewart, J., dissenting).

LEGAL ARGUMENT

I. THE FREE SPEECH CLAUSE PROHIBITS BOTH CENSORSHIP AND COMPELLED SPEECH.

"'If there is any fixed star in our constitutional constellation, it 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*.'" *Janus v. Am. Fed'n of State, Cnty., and Municipal Emps, Council 31*, 138 S. Ct. 2448, 2463 (2018) (emphasis in original) (quoting *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943)). This Court in *Janus* made very clear that the freedom of speech includes both the right to speak freely and the right to refrain from speaking at all. *Janus*, 138 S. Ct. at 2463. The Tenth Circuit's decision below effectively adds an exception to *Barnette* and *Janus* – the government cannot compel that which shall be orthodoxy unless it concerns matters related to sexual orientation or same-sex marriage.

History is replete with examples demonstrating the futility of government attempts to compel unity in belief – from the Roman efforts to eradicate Christianity because it conflicted with the Romans' paganistic beliefs; the Inquisition in its attempt to create religious unity; and the Siberian exiles in an effort to create Russian unity. *See Barnette*, 319 U.S. at 641. This Court reminded us in *Barnette* that "[t]hose who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard." *Id.* at 640 ("As first and moderate methods to attain unity have failed, those bent on its accomplishment must resort to an ever-increasing severity."). The First Amendment "was designed to avoid these ends by avoiding these beginnings." *Id.* at 641.

The ability to choose what to say or not to say is central to a free and self-governing people. *See, e.g., Knox v. Serv. Emps. Intern. Union, Local 1000*, 567 U.S. 298, 308 (2012) (noting the "close connection between our Nation's commitment to self-government and the rights protected by the First Amendment"); *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940) (the right to speak on matters deemed important to a person and that falsehoods may be exposed through education and discussion "is essential to free government"). This Court has explained that the central purpose of the Speech and Press Clauses was to assure a society in which "uninhibited, robust, and wide-open" public debate concerning matters of public interest would thrive,

"for only in such a society can a healthy representative democracy flourish." *Buckley v. Valeo*, 424 U.S. 1, 93, n. 127 (1976) (*per curiam*). When there are competing interests at stake, the balance struck when weighing interests that implicate the First Amendment requires the Court to give "breathing space" for the First Amendment to survive. *NAACP v. Button*, 371 U.S. 415, 433 (1963). As a result, "[b]road prophylactic rules in the area of free expression are suspect." *Id.*

It makes no constitutional difference that the government believes its "broad prophylactic rule" furthers an important interest. Rather than compel or silence speech, the government can advance its interests by promoting its own message. It cannot interfere with speech "for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 579 (1995). The purpose of the First Amendment is to prevent government "from assuming a guardianship of the public mind through regulating the press, speech, and religion." *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J, concurring).

"A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts. The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual

freedom of mind.'" *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). Indeed, "'[s]peech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express the thought that we hate." *Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017) (quoting *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting)).

Nor can government censor or compel speech in the name of societal progress. As Justice Kennedy wrote in his concurring opinion in *NIFLA*, "it is not forward thinking to force individuals to 'be an instrument for fostering public adherence to an ideological point of view [they] fin[d] unacceptable.'" *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2379 (2018) (Kennedy, J., concurring). When government seeks to compel speech, it needs an even more urgent ground than a law prohibiting speech. *See Janus*, 138 S. Ct. at 2464 (quoting *Barnette*, 319 U.S. at 633). Nor is the First Amendment protection limited to inconsequential matters. It is the "freedom to differ" on matters of significance that test the strength of the First Amendment protections. *Brush & Nib*, 448 P.3d 890, 896 (Az. 2019) (quoting *Barnette*, 319 U.S. at 642).

Finally, as discussed *infra*, Petitioners do not abandon their First Amendment rights because they chose to pursue their artistic passions in an economic enterprise. "The rights of free speech and free exercise, so precious to this nation since its

founding . . . protect the right of every American to express their beliefs in public. This includes the right to create and sell words, paintings, and art that express a person's sincere religious beliefs." *Brush & Nib,* 448 P.3d at 895.

In a case concluding that a wedding photographer could not be forced to provide her services for a same-sex wedding and could not be prohibited from making statements on her website informing prospective clients of her beliefs, the court explained the crux of the case: "'Is America wide enough both for you and a man whose words make your blood boil, who's standing center stage and advocating at the top of his lungs that which you would spend a lifetime opposing at the top of yours?'" *Chelsey Nelson Photography LLC v. Louisville/Jefferson Cnty. Metro Gov't*, 479 F. Supp. 3d 543, 548 (W.D. Ky. 2020) (quoting *The American President* (Columbia Pictures 1995)). The First Amendment answered that question affirmatively.

When this Court struck down a statute prohibiting the burning of the United States flag, it demonstrated how it can accommodate two opposing viewpoints. This Court explained the way to preserve the flag's unique role is not to punish those who disagree with the message of the flag but for the government to create its own message to persuade them of their error.

> To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the

> processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.

Texas v. Johnson, 491 US 397, 420 (1989). Colorado fails to heed this admonishment – as the price for doing business, Colorado seeks to silence those who disagree with the government's message and, even worse, compel citizens to speak the government's message.

II. ARTISTIC EXPRESSION IS PURE SPEECH THAT GREATLY SHAPED CULTURES.

A. Artistic Expression Is Pure Speech.

This Court has long held that artistic expression is pure speech fully protected by the First Amendment, even when the speaker is compensated for her artistic expression. The protected artistic expression includes, among other things, books, plays, films, and video games, music, painting, poetry, drawings, and engravings. *See Brown v. Enterm't Merchs. Ass'n*, 564 U.S. 786, 790 (2011);

Hurley, 515 U.S. at 569 (stating that music, painting, and poetry are examples of speech that are "unquestionably shielded" under the First Amendment); *Ward v. Rock Against Racism,* 491 U.S. 781, 790 (1989) ("Music, as a form of expression and communication, is protected under the First Amendment."); *Kaplan v. California*, 413 U.S. 115, 119-20 (1973) (stating that "pictures, films, paintings, drawings, and engravings" enjoy First Amendment protection). All forms of visual arts, with its wide range of ways to depict ideas and emotions are entitled to full First Amendment protection. *Bery v. City of New York,* 97 F.3d 689, 695 (2d Cir.1996). "There is no doubt that entertainment, as well as news, enjoys First Amendment protection." *Zacchini v. Scripps–Howard Broad. Co.,* 433 U.S. 562, 578 (1977).

Both the Ninth and Eleventh Circuit Courts of Appeal have held tattooing to constitute pure speech, not expressive conduct. *See Buerhle v. City of Key West*, 813 F.3d 973, 978 (11th Cir. 2015); *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1060 (9th Cir. 2010). Rejecting the argument that only the person wearing the tattoo communicates a message, the Eleventh Circuit explained that the First Amendment protects the artist who paints a piece just as surely as it protects the gallery owner who displays it, the buyer who purchases it, and the people who view it. It found that the Supreme Court has never "drawn a distinction between the process of creating a form of pure speech (such as writing or painting) and the product of these processes (the essay or the artwork) in terms of the First

Amendment protection afforded." *Id.* at 977 (quoting *Anderson*, 621 F.3d at 1061)); *see also Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.,* 502 U.S. 105, 116–18 (1991) (First Amendment protects both the act of writing content and the act of publishing it).

This Court, too, has noted that the First Amendment draws no distinction between the creation, the distribution, or the consumption of the speech at issue. *See, e.g.*, *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Comm.*, 138 S. Ct. 1719 (2018) (Thomas, J., concurring) ("'[I]t makes no difference' whether the government is regulating the 'creation, distribution, or consumption' of the speech." (quoting *Brown*, 564 U.S. at 792 n.1)). Indeed, "[t]he First Amendment protects actual photos, videos, and recordings, and for this protection to have meaning the Amendment must also protect the act of creating that material." *Fields v. City of Philadelphia*, 862 F.3d 353, 358 (3d Cir. 2017).

Lower courts have also specifically held photography to be pure speech. *See, e.g.*, *ETW Corp. v. Jireh Publ'g, Inc.,* 332 F.3d 915, 924 (6th Cir. 2003) ("The protection of the First Amendment is not limited to written or spoken words, but includes other mediums of expression, including music, pictures, films, photographs, paintings, drawings, engravings, prints, and sculptures."); *Ness v. City of Bloomington*, 11 F.4th 914, 923 (8th Cir. 2021) ("[W]e conclude that Ness's photography and video recording is speech."); *Animal Legal Def. Fund v.*

Kelly, 9 F.4th 1219, 1228 (10th Cir. 2021); *Askins v. U.S. Dep't of Homeland Security*, 899 F.3d 1035 (9th Cir. 2018). *See also Chelsey Nelson,* 479 F. Supp. 3d at 548 ("Her photography is art. Art is speech.").

More to the point, website creation and content is also pure speech. *See, e.g.*, *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017) ("websites can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard."); *Reno v. ALCU*, 521 U.S. 844 (1997).

In explaining its rationale for concluding that the parade organizers in *Hurley* were engaging in protected speech, this Court analogized the parade council, which approved participants for the parade, to the artistic expression of a composer: "like a composer, the Council selects the expressive units of the parade from potential participants, and though the score may not produce a particularized message, each contingent's expression in the Council's eyes comports with what merits celebration on that day." *Hurley*, 515 U.S. at 574. The parade council, like a composer, was conveying a message through the list of participants it approved.

And, the reason websites, photographs, tattoos, parades, and the like are pure speech is simple: "[i]f the creation of speech did not warrant protection under the First Amendment, the government could bypass the Constitution by 'simply proceeding upstream and damming the source of the speech." *Western Watersheds Project v.*

Michael, 869 F.3d 1189, 1196 (10th Cir. 2017) (quoting *Buehrle v. City of Key West*, 813 F.3d 973, 977 (11th Cir. 2015)).

The fact that expressive materials are sold as a service or good does not diminish the First Amendment protection. *See* *City of Lakewood v. Plain Dealer Publ'g Co.,* 486 U.S. 750, 756 n. 5 (1988) (involving a newspaper); *see also Time, Inc. v. Hill,* 385 U.S. 374, 397 (1967) (involving a magazine publisher). Protected speech does not lose its protection because the speaker is paid to speak. *See Riley v. National Fed'n of the Blind*, 487 U.S. 781, 801 (1988) (declaring unconstitutional the state's restrictions on professional fundraisers); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 711 (2014) (First Amendment protection not diminished by profit-seeking motive).

In fact, this Court in *Burstyn* expressly rejected the argument that a large-scale motion picture entity loses its First Amendment protections. "That books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment." *Burstyn v. Wilson*, 343 U.S. 495, 501 (1952). Yet, that is precisely what CADA does – it declares the artistic expression to be a place of public accommodation and then asserts the authority to silence or compel speech because the speaker is selling her artistic expression.

Finally, this Court should reject any attempt to deconstruct artistic expression into the individual actions taken to make art. In *Telescope Media Group v. Lucero*, 936 F.3d 740 (8th Cir. 2019), the State of Minnesota argued that it was not regulating the speech of the videographers but their conduct. 936 F.3d at 752. In that case, the wedding videographers challenged a statute prohibiting sexual orientation discrimination in public accommodations, alleging that the state's requirement that they create same-sex wedding videos violated their First Amendment rights to free speech, expressive association, and free exercise of religion. *Id.* at 749. The court acknowledged that creating wedding videos necessarily involved several actions that individually might constitute conduct – "positioning a camera, setting up microphones, and clicking and dragging files on a computer screen" – but what was constitutionally significant was that the finished videos "are 'media for the communication of ideas.'" *Id.* at 752 (quoting *Burstyn*, 343 U.S. at 501).

In fact, the Eighth Circuit explained that to accept the argument that artistic expression be deconstructed into its component parts and treated merely as conduct would make all artistic expression subject to government control. *Id.* For example, the government could argue that "painting is not speech because it involves the physical movements of a brush. . . . that publishing a newspaper is conduct because it depends on the mechanical operation of a printing press. . . . [or] that a parade is conduct because it involves walking." *Id.* "Yet there is no question that the government cannot compel an

artist to paint, demand that editors of a newspaper publish a response piece, or require the organizers of a parade to allow everyone to participation." *Id.*

B. Artistic Expression Can Evoke Emotions, Be A Catalyst For Change, And Lay Bare One's Inner Thoughts And Desires.

Artistic expression tells a story, and "storytelling is speech." *See Chelsey Nelson*, 479 F. Supp. 3d at 558. In *Chelsey Nelson*, the court granted preliminary injunctive relief to a wedding photographer who challenged a county ordinance that, similar to CADA, would have required her to photograph same-sex weddings. *Id.* at 547. Reduced to its essence, the court held that the photographer was likely to succeed on the merits of her case because "photography is art;" "art is speech;" and the government cannot compel speech. *Id.* at 548.

"True, photography is wordless. But so too is refusing to salute the flag. Or marching in a parade." *Id.* Yet, even though a photo may contain no words, it nevertheless communicates messages. For example, photos convey "messages of humor, happiness, or beauty." *Id.* at 557. They also tell stories of tragedy: the Twin Towers engulfed in smoke, or the protestor in Tiananmen Square who stood in the path of military tanks, or a child running in the streets crying in pain from her Napalm burns. *Id.* "Sure, we could just read about them, but the photos trigger outrage in a way that words can't." *Id.* They invoke memories and even

communicate something about the photographer. "When we use our iPhone camera to capture a moment, we reveal something about ourselves. In the same way, when we crop, frame, and add filters, we make a great memory even better by focusing on what we want to emphasize and taking out what we don't." *Id.*

One scholar explained that artistic expression "can be understood as a form of political discourse . . . or as a vehicle to transcend the political." Frank Möller, *Politics and Art* 1 (2016). Art can even move people to change societal norms. *Id.* at 3. A brief survey of television, film, literature, painting, music, and dance demonstrates that artistic expression is pure speech that must be protected from censorship or compulsion, particularly when the message is an unpopular one.

In 1933, a federal district court in New York heard a case seeking to ban admission to the United States of a controversial book entitled "Ulysses." *U.S. v. One Book Entitled "Ulysses,"* 5 F. Supp. 182 (S.D.N.Y. 1933). The government argued that the book was obscene within the Tariff Act of 1930, and therefore could not be imported into the United States. The court found that in writing "Ulysses," the author experimented with a new literary genre, taking people of the lower middle class living in Dublin in 1904 and describing not only what they did every day but what they thought. *Id.* at 183. The author's efforts required him "to use certain words which are generally considered dirty words and has led at time to what many think is a too poignant

preoccupation with sex in the thoughts of the characters." *Id.* at 183.

The judge concluded that the words and themes used were a sincere and honest attempt to represent the Celtic people in the season of spring. *Id.* at 184. It did not matter whether one enjoyed the author's style and technique of writing or whether one found the material objectionable. *Id.* ("Whether one enjoys such a technique as Joyce uses is a matter of taste on which disagreement or argument is futile, but to subject that technique to the standards of some other technique seems to me to be little short of absurd.") Finding that the book did not constitute obscenity, the court refused to deny the book admission into the United States. *Id.* at 185.

Books have often stirred emotions, made political statements, or sought to influence culture. It is easy to see the messages conveyed by Ray Bradbury's *Fahrenheit 451* about the evils of book burnings and government censorship of ideas deemed harmful – both in Hitler's Germany and in the United States during the McCarthy Era. One need only read Bradbury's prose to understand the message: "[Fire's] real beauty is that it destroys responsibility and consequences. A problem gets too burdensome, then into the fire with it." Ray Bradbury, *Fahrenheit* 451 109 (Simon &Schuster 2012). Harper Lee's *To Kill a Mockingbird* continues to be one of the books most challenged in schools for the subjects it addresses and how it deals with them. *See, e.g.*, Becky Little, *Why To Kill a Mockingbird Keeps Getting Banned*, (Dec. 2019),

www.history.com/news/why-to-kill-a-mockingbirg-keeps-getting-banned.

Arthur Miller wrote *The Crucible* in 1953 responding in large part to the threat to civil liberties presented by those attempting to uncover communists in America. Realizing he could not write directly on the topic, he used the Salem witch trials as the backdrop to sound the alarm. As the film was being made in the mid-1990s, Mr. Miller explained that "so many practices of the Salem trials were similar to those employed by the congressional committees . . . ." Arthur Miller, *Why I Wrote "The Crucible,"* The New Yorker (Oct. 13, 1986), https://www.newyorker.com/magazine/1996/10/21/why-i-wrote-the-crucible.

The sole purpose of some publications is to convey a message through satire; yet such speech also is fully protected pure speech regardless of whether the government appreciates the underlying message contained in the satire. *The Babylon Bee*, for example, describes itself as writing satire about "Christian stuff, political stuff, and everyday life." https://babylonbee.com/about. *The Onion* has been publishing satirical pieces on current events for more than thirty years. Though, true to itself, *The Onion* claims to have "humble beginnings" dating back to 1756 and "a daily readership of 4.3 trillion," making it "the single most powerful and influential organization in human history." *See* The Onion, *About The Onion*, https://www.theonion.com/about. And, the entire purpose behind *The Onion* is to "publish[] parodies of real news stories," *Levesque v.*

Doocy, 560 F.3d 82, 86 n.1 (1st Cir. 2009), and "thrive[] on making deliberate false statements of fact . . . invit[ing] attention to and comment about issues of public importance." *United States v. Alvarez*, 617 F.3d 1198, 1213 (9th Cir. 2010).

Although one does not generally think about the pure speech status of theatrical productions, plays and musicals do much more than just entertain; they convey a message – some more thought-provoking than others. Michael Frayn's "Copenhagen," for example, is a fictional account of an actual meeting during World War II, in which two physicists share heated words and profound thoughts about the controversial development of the atom bomb. One of the men is a scientist who is attempting to harness the power of the atom for use by Germany, and the other scientist speaks from the perspective of a Danish citizen whose country has been taken over by the Third Reich. Wade Bradford, *"Copenhagen" by Michael Frayn is Both Fact and Fiction.* Thought Co. (Dec. 2019), https://www.thoughtco.com/copenhagen-bymichael-frayn-2713671.

Henrik Ibsen's "A Doll's House," written in 1879, was described as "shocking" for its time because it presented a story of "a woman seriously considering her own personal fulfillment in contrast to her wifely and motherly duties." American Players Theatre, *A Doll's House*, https://americanplayers.org plays/a-dolls-house. The ending, with the wife leaving her husband and children, was considered so shocking that Ibsen was

forced to provide an alternative ending for some venues. *Id.*

"The Laramie Project" is a play written by Moisés Kaufman and Members of the Tectonic Theater Project about the brutal kidnapping and murder of Matthew Shepperd in Laramie, Wyoming. The authors conducted more than 200 interviews in Laramie to write the story told in the play. The work is described as "explor[ing] the depths to which humanity can sink and the heights of compassion of which we are capable." *See* Dramatist Play Service, *The Laramie Project* https://www.dramatists.com/cgibin/db/single.asp?key=2955.

The play "Kindertransport," written by Diane Samuels, is a fictionalized account of an actual British rescue mission that took place at the beginning of WWII. The Kindertransport relocated 10,000 Jewish children from various countries and placed them in British foster homes. The story focuses on a nine-year old German girl named Eva who was sent away by her Jewish parents in the hopes of keeping her safe as the parents stayed behind to face German occupation. The play "depicts the agony of separating a child from her parents and wrestles with the consequences of that choice, an act of sacrifice that also wreaks devastating results." *See* StageAgent, *Kindertransport* https://stageagent.com/shows/play/3586/kindertransport.

As the plot summary of William Shakespeare's "Taming of the Shrew" reveals, it is filled with messages that are understood as offensive and harmful in today's culture. To claim the dowery of Baptista's shrewish older daughter Katherine, Petruccio marries her and sets about to make her an obedient wife. He physically abuses her and deprives her of food and rest until she is broken to his will. Shakespeare Birthplace Trust, *Taming of the Shrew*, https://www.shakespeare.org.uk/exploreshakespeare/shakespedia/shakespeares-plays/taming-of-the-shrew/.

Even though filled with song and dance, musicals, as plays, often express societal or political messages. Set in the 1920s and based on real-life murders and trials, "*Chicago* is a dazzling and satirical look at fame, justice, and the media." StageAgent,*Chicago*,https://stageagent.com/shows/musical/1091/Chicago. The musical tells the story of Roxie Hart, a wannabe vaudevillian star who murders her lover and is arrested, despite her attempts to convince her pushover husband, Amos, to lie for her. In the Cook County Jail, she meets her hero, the famed double-murderess and nightclub performer Velma Kelly. When both acquire the same lawyer, the greedy and lustful superstar, Billy Flynn, the two women vie for the spotlight with reporters. *Id.*

Victor Hugo's 1862 novel is brought to life in the musical "Les Misérables." Set in the backdrop of Nineteenth-century France and the aftermath of the French Revolution, the musical tells the story of

Jean Valjean, a man convicted for stealing a loaf of bread, who escapes from prison, and "spends a lifetime seeking redemption." StageAgent, *Les Miserables*,https://stageagent.com/shows/musical/774/lesmiserables. It is filled with messages on the ways society treats the poor, the vast financial disparity between the rich and poor, and what it means to pursue justice.

The musical "1776" tells the story of the writing and signing of the Declaration of Independence. A key focus of the musical is the compromises made by John Adams and others in trying to persuade the state delegates to sign the Declaration and form a new nation. Notably, the musical focuses on the debates that took place over the issue of ending slavery and treating all people, regardless of color, as equal human beings. *1776*, Experience The a.r.t., https://americanrepertorytheater.org/showsevents/%201776-revival/. The musical "Evita" is about Eva Peron, who rose to power in Argentina. https://broadwaymusicalhome.com/shows/evita.htm It depicts the ruthless steps she took to become the most powerful woman in Argentina only later to question whether she pursued the right path.

Screenwriters often use fictional films to comment on controversial world events and social norms. The 1962 film, "the Manchurian Candidate," is described as a Cold War thriller that was released during the Cuban Missile Crisis. Lee Pfeiffer, *The Manchurian Candidate*, Britannica, https://www.britannica.com/topic/The-Manchurian-

Candidate-film-1962. In the film, a platoon of U.S. soldiers is captured during the Korean War and brainwashed by communists. After they are sent back to the United States, one of the men is ordered by his handler (who happens to be his mother) to kill the presidential nominee, leaving the Manchurian Candidate, who is a secret communist, in line to become president.

Other films, even incredibly popular ones, have been criticized for lack of ethnic diversity. For example, Lin Manuel-Miranda, creator of the hit-musical "Hamilton," recently apologized publicly for the lack of Black Latino main characters in his film "In the Heights." Theresa Braine, *Lin Manuel-Miranda apologizes for lack of color diversity in "In The Heights" after criticism*, N.Y. Daily News (June 15, 2021), https://www.nydailynews.com/snyde/ny-lin-manuel-miranda-apology-heights-lacks-diversity-color-202.

Recent films were even produced about sitting and former Supreme Court justices, neither without critics about their content. The film "Created Equal" provides a first-hand account of the life story of Justice Clarence Thomas. In 2018, two films were released about the late Justice Ruth Bader Ginsberg. The documentary "RBG" includes interviews with the late Justice as well as family members and scholars. "On the Basis of Sex," is a dramatization of Justice Ginsberg's life as a law student, mother, and young attorney.

Music also constitutes pure speech. Indeed,

"[m]usic is one of the oldest forms of human expression." *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989). Music can trigger memories, evoke emotions, and cause societal upheaval. In an instant, a song can whisk us to the past and stir memories, both because of the song's lyrics and also because we connect the song to events from our past. Classical music, although wholly instrumental, can evoke emotional responses – from the scores written by composer John Williams, to Beethoven's symphonies, or Rachmaninoff's piano concertos. And very little needs to be said about the controversies that music has generated since time immemorial. "From Plato's discourse in the Republic to the totalitarian state in our times, rulers have known its capacity to appeal to the intellect and to the emotions, and have censored musical composition to serve the needs of the state." *Ward*, 491 U.S. at 790. Music has created its fare share of modern controversy as well, including debates about the social utility of rap music, the perceived vulgarity of Elvis' hip movements, or the backlash to The Beatles after lead singer John Lennon shared his then-unconventional views about Christianity. Richard Havers, *The Beatles' "Yesterday" EP That Coincided With Controversy*, udiscovermusic.com (March 26, 2022), https://www.udiscovermusic.com/stories/the-beatles-ep-that-coincided-with-controversy/.

Music is not the only artform that challenged social norms – television has long been on the forefront of societal firsts. For example, "Ellen" aired in 1994 and starred Ellen DeGeneres as one of the first gay leading characters. *Controversial "coming*

out" episode of Ellen airs, History.com (Apr. 30, 1997), https://www.history.com/this-day-in-history/coming-out-episode-of-ellen. In 1968, just one year after this Court's decision in *Loving v. Virginia,* 388 U.S. 1 (1967), "Star Trek" aired the first interracial kiss on television. Matthew Delmont, *Fifty Years Ago, "Star Trek" Aired TV's First Interracial Kiss*, Smithsonian Magazine (Sept. 5, 2018), https://www.smithsonianmag.com/arts-culture/fifty-years-ago-star-trek-aired-tvs-first-interracial-kiss-180970204/.

The title of a Time Magazine article about the controversial sitcom "All in the Family" summed up the show's influence: *How a Foul-Mouthed Bigot Named Archie Bunker Charmed – and Changed – America*. Daniel S. Levy, Time Magazine (Feb. 9, 2021), https://time.com/5932112/all-in-the-family-anniversary/. The producers even provided a disclaimer in advance of the first episode, stating that the show planned to throw "a humorous spotlight on our frailties, prejudices, and concerns." *Id*.

Like classical music, even when paintings contain no words, they convey messages. Michelangelo's paintings on the ceiling in the Sistine Chapel are known worldwide. The ceiling includes images depicting nine scenes from the book of Genesis, which were commissioned by Pope Julius II. Christine Zappella, *Ceiling of the Sistine Chapel*, smarthistory,https://smarthistory.org/michelangelo-ceiling-of-the-sistine-chapel/ (including a diagram explaining all parts of the chapel). Although people

may draw different meaning from the paintings, they undisputedly are protected speech under this Court's jurisprudence.

Painter Marc Chagall, "the quintessential Jewish artist of the 20th century, and one of the foremost visual interpreters of the Bible," https://glencairnmuseum.org/newsletter/april-2015-marc-chagall-and-the-bible.html, has explained that the "Bible is like an echo of nature and this secret I have tried to transmit." *Id.* His *La Bible* project spanned more than two decades and included 105 etchings in the series. *Id.* As with any pictorial depiction of a literary piece, observers will draw different meaning from the paintings and see the works of art from their unique perspective.

It is not the content of the message that makes artistic expression protected speech – but the very fact of expression itself. Indeed, the more controversial the message, the more important it is that the First Amendment's protections apply. "[I]n public debate, we must tolerate insulting, and even outrageous, speech in order to provide breathing space to the freedoms protected by the First Amendment," *Boos v. Barry*, 485 U.S. 312, 322 (1988), for "[a]s a Nation we have charted a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate." *Snyder v. Phelps*, 562 U.S. 443, 461 (2011). Petitioners' creative expression in designing custom websites is no less protected than these various books, music, paintings, films, theatrical productions, or television shows. Despite their

critics or unpopularity, the First Amendment protects the free speech rights of artists, unless their speech falls into one the narrowly prescribed categories of "unprotected speech." Petitioners' speech undisputedly does not constitute unprotected speech.

III. CADA IMPERMISSIBLY RESTRICTS AND COMPELS PROTECTED SPEECH ON THE BASIS OF CONTENT.

The Tenth Circuit in this case properly concluded that "creating a website (whether through words, pictures, or other media) implicates Petitioners' unique creative talents, and is thus inherently expressive." (Pet.App. 21a.) Similarly, the court in *Chelsey Nelson* properly held that a wedding photographer engages in protected pure speech, and the court in *Telescope* correctly held that a wedding videographer engages in protected pure speech. *Telescope*, 936 F.3d at 751; *Chelsey Nelson*, 479 F. Supp. 3d at 548. These holdings are consistent with this Court's precedent that music, paintings, films, books, literature, and etchings are artistic expression constituting pure speech. *See supra* part II. *Cf. Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1742 (2018) (Thomas, J., concurring) (the act of "creating and designing custom wedding cakes is expressive").

After properly concluding that the custom website designs constitute pure speech, the Tenth Circuit also relied on this Court's precedent to correctly conclude that Petitioners' speech does not

lose its First Amendment protections simply because they engage in it for a profit. (Pet.App. 22a ("Nor does a profit motive transform Appellants' speech into 'commercial conduct'") (citing *Hurley*, *Miami Herald Pub. Co. v. Tornillo,* 418 U.S. 241, 248 (1974), and *Pac. Gas and Elec. Co. v. Pub. Utilities Comm'n of Cal.*, 475 U.S. 1, 9 (1986)).)

The Tenth Circuit acknowledged that the CADA Accommodation Clause compelled Petitioners to create speech celebrating same-sex marriage that they would otherwise refuse. Concluding that Colorado's argument was "foreclosed by *Hurley,*" the court rejected the state's argument that CADA only regulated how Petitioners picked their customers and did not regulate Petitioners. (Pet.App. at 22a-23a.)

Relying on this Court's recent opinion in *NIFLA*, the Tenth Circuit correctly concluded that CADA is a content-based restriction. (*Id.*) Specifically, Petitioners cannot create websites celebrating opposite-sex marriages unless they agree to create websites celebrating same-sex marriages. The very purpose of CADA demonstrates that the statute is content-based – that it intended to remedy a history of discrimination based on sexual orientation and, therefore, is seeking to eliminate ideas in conflict with the statute's purpose. As a result, "there is more than a 'substantial risk of exercising certain ideas or viewpoints from the public dialogue.'" (*Id.* at 24a (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994)).) Eliminating discriminatory bias is

a "'decidedly fatal objective' in light of a Free Speech challenge." (*Id.* (quoting *Hurley*, 515 U.S. at 579)).

Though it correctly determined strict scrutiny applied, the Tenth Circuit erred in applying it. In fact, as the dissent noted, the Tenth Circuit "ushers forth a brave new world" where government may "compel[] both speech and silence—yet find[] [its] intrusion constitutionally permissible." (Pet.App. 52a.) The Tenth Circuit's decision below errs for several reasons. First, it incorrectly conflated a refusal to create speech supporting same-sex marriages with a refusal to serve customers based on their sexual orientation. Second, it incorrectly concluded that CADA is narrowly tailored to ensure equal access to publicly available goods and services, when, in reality, CADA targets speech and seeks to conscript Petitioners' artistic expression. Third, it incorrectly characterized Petitioners as having a monopoly on the unique website designs created by Petitioners, which therefore must be made available to all.

Turning preliminarily to Colorado's compelling interest. The Tenth Circuit rightfully rejected Colorado's argument that its interests in protecting against dignitary harms based on sexual orientation discrimination was sufficiently compelling to survive strict scrutiny. (Pet.App. 26a.) Although the Tenth Circuit relied on this Court's precedent to conclude that the government cannot protect dignitary harms of some citizens by silencing or compelling speech of other citizens, it did not acknowledge that compelled speech has itself been

characterized as a dignitary harm. *See Janus*, 138 S. Ct. at 2464 (it is "always demeaning" to force free and independent individuals to endorse ideas they find objectionable). *But see Obergefell v. Hodges*, 135 S. Ct. 2584, 2639 (Thomas, J., dissenting) (despite the Supreme Court's continued use of "dignity" and "autonomy" to justify protection of newfound rights under the Constitution, pointing out the truth that human dignity is bestowed by our Creator, not government).

Turning to the first error. The parties stipulated that Petitioners are willing to serve all customers regardless of sexual orientation. (Pet.App. 12a), but the court held that a decision to deny a custom website for a same-sex wedding is "'inextricably bound up with' the couple's sexual orientation." (*Id.* at 13a (quoting *Bostock v. Clayton Cnty., Ga.*, 140 S. Ct. 1731, 1742 (2020).) This conclusion ignores the fact that Petitioners object to using their creative talents to create a message endorsing same-sex marriage but will serve all customers regardless of their sexual orientation. Thus, if the bride's mother and father sought to hire Petitioners to create a website celebrating their daughter's impending marriage to her same-sex partner, Petitioners would refuse to create the custom website because of the same-sex wedding, not because of the sexual orientation of the bride's parents – the two people who requested access to Petitioners' goods and services.

As to the second error, the dissent pointed out the majority offered no legal support for its

conclusion that ensuring access to a particular person's unique artistic talents is a compelling government interest. (Pet.App. 77a-78a.) And, even if there were such a compelling interest, it is not narrowly tailored. CADA is "overinclusive, intruding into protected speech both by compelling it and by suppressing it . . . ." (*Id.* at 78a.) Chief Judge Tymkovich explained that Colorado could pursue other alternatives to achieve its interests. It could codify message-based exceptions to CADA to protect the First Amendment rights of artists. Or it could exempt from CADA artists who create expressive speech for weddings, thereby placing those businesses beyond the reach of CADA. Instead, the Tenth Circuit reached the conclusion that the government can compel speech, contrary to this Court's jurisprudence, and that doing so is the most narrowly tailored way of achieving the state's interests in nondiscrimination.

Finally, as to the third error, the Tenth Circuit neutered First Amendment protections when it concluded that Petitioners held a monopoly on their unique expressive speech and that the government had a duty to ensure everyone had access to that speech. The court explained that because of the "unique nature" of Petitioners' custom website services, Petitioners were in a market of one and that all other custom website services would be "inferior" since they could not be identical to Petitioners' services. (Pet.App. 28a.) The dissent pointed out that the majority's reasoning would lead to "absurd results." (*Id.* at 79a.) Significantly, the majority decision used the very quality that gives art

its value – "its expressive and singular nature" – to lessen First Amendment protections for the speech. Thus, the more unique the artistic expression, the more authority the state has to conscript your services to convey state-approved messages. Following that logic, Rembrandt, Picasso, and Van Gogh, if they lived in modern America, could be compelled to paint state-sponsored messages against their will because their artistic creations are so unique.

> After all, if speech can be regulated by the government solely by reason of its novelty, nothing unique would be worth saying. And because essentially all artwork is inherently "not fungible," the scope of the majority's opinion is staggering. 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."

(Pet.App. 80a (emphasis in original) (citations omitted).

The dissent below raises a frightening look of what the future holds if CADA and similar statutes across the country are allowed to stand. If artistic expression can be compelled or silenced by the government because it conflicts with the state's interests in promoting non-discrimination, we could

soon find ourselves living in a dystopian reality. Given the broad scope of public accommodations laws, which include movie theaters, bookstores, and coffee shops, governments could prohibit those places of public accommodations from airing films, selling books, hanging up posters about community townhalls, or displaying artwork if the government believed the artistic expression conveyed the message that some were not welcome on the premises. Even more to the point, the government could compel film makers, songwriters, musicians, painters, composers, authors, speech writers, photographers, and playwrights, to create artistic expression that conveys a state-approved message or cease doing business.

Unless this Court reverses the decision below and affirms foundational First Amendment protections for speech some find distasteful, that future dystopian society will be America's reality. Petitioners cannot be compelled to speak or prohibited from speaking because the state disagrees with her views any more than the state could force Composer John Williams (who scored the *Star Wars* films, *Jurassic Park*, *Schindler's List*, and so much more) to compose works of art for films he finds morally, politically, or philosophically objectionable. Ballet dancer Misty Copeland, who made history as the first African American female principal dancer with the American Ballet Theatre, could not be forced to perform in a piece that supported continued racial discrimination. This case is no different.

Petitioners engage in protected pure speech when they create custom websites. The state cannot compel Petitioners to create speech and cannot silence speech because the state deems their speech unacceptable. The Constitution protects their First Amendment rights to speak or refrain from speaking except in the most limited exceptions – none of which are applicable here. Although offensive to Colorado, Petitioners' speech does not constitute obscenity, fighting words, or a clear and present danger. As a result, Petitioners' artistic expression is pure speech protected by the Constitution and cannot be infringed based on the state's interest in ensuring equal access to the goods and services of a place of public accommodation. Potential clients of 303 Creative, regardless of sexual orientation, can retain Petitioners' services, but they cannot conscript Petitioners' artistic expression to convey a state-approved message.

CONCLUSION

This Court should reverse the decision below.

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