NO. 19-1413

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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303 CREATIVE LLC, *et al.*,

Plaintiffs-Appellants,

v.

AUBREY ELENIS, *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Colorado
Case No. 16-cv-02372-MSK-CBS
The Honorable Marcia S. Krieger, presiding

BRIEF OF CATHOLICVOTE.ORG EDUCATION FUND AMICUS CURIAE IN SUPPORT OF APPELLANTS AND REVERSAL

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Amicus curiae is an independent, not-for-profit 501(c)(3) corporation under the law of Michigan; it has no parent corporation, and no publicly held company owns 10% or more of its stock.

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Interest of Amicus Curiae

CatholicVote.org ("CatholicVote") is a nonpartisan voter education program devoted to serving our country by supporting educational activities that promote an authentic understanding of ordered liberty and the common good. Given its educational mission and focus on the dignity of the person, CatholicVote is deeply concerned about the First Amendment issues implicated by *303 Creative LLC v. Elenis*, 385 F.Supp.3d 1147 (D. Colo. 2019). When public accommodations laws, like the Colorado Anti-Discrimination Act ("CADA"), are applied to the expression of businesses, religious liberty and freedom of speech are threatened. CatholicVote, therefore, comes forward to support the right of all citizens to (1) practice their art (and earn their living) in a manner that is consistent with their religious faith and (2) participate fully in ongoing discussions regarding important local and national issues, such as same-sex marriage. CatholicVote believes that its amicus brief provides this Court with an important perspective on the problems that attend the application of broad public accommodations laws to expression in the public sphere.[1]

[1] The parties have consented to the filing of this brief. As required by Federal Rule of Appellate Procedure 29(a)(4)(E), *amicus* states that no counsel for a party authored this brief in whole or in part, and no person other than the *amicus* and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

I. Argument

This case requires the Tenth Circuit to consider the intersection of public accommodations laws and the broad protection afforded speakers under the First Amendment. *See N.Y. Times Co. v. Sullivan,* 376 U.S. 254, 270 (1964) (describing how the First Amendment reflects the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open"). As the scope of public accommodations laws has grown—in terms of both the types of entities classified as public accommodations and the number of groups protected from discrimination—the possibility for conflict with First Amendment speech rights has increased. This case is a prime example. The district court denied First Amendment protection to 303 Creative's expression even though CADA both prevents Lorie Smith ("Smith") from posting her personal religious statement and prohibits her from creating custom-designed websites celebrating her Biblical view of marriage.

The lower court was wrong. While *Hurley* acknowledges that public accommodations laws generally are constitutional when applied to a business's conduct, it also holds that such laws must yield to the First Amendment when "the sponsors' speech itself [is taken] to be the public accommodation." *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557, 573 (1995). Using public accommodations laws in this way, "violates the fundamental rule of

protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." *Id*. When a State applies its public accommodations laws to a business's expression, the speaker retains the right "to shape its expression by speaking on one subject while remaining silent on another." *Id*. at 574; *Riley v. Nat'l Fed. of the Blind of N.C., Inc.*, 487 U.S. 781, 796-97 (1988) (confirming that a speaker has the right to determine "both what to say and what *not* to say").

As applied to 303 Creative's speech, CADA violates these fundamental First Amendment principles. The Communication Clause imposes a viewpoint-based speech restriction on Smith, preventing her from explaining her religious view in support of traditional marriage while allowing web designers who approve of same-sex marriage to discuss their opinions freely. Although the First Amendment generally precludes such viewpoint-based discrimination, the district court contended that CADA's speech restriction is constitutional under *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973). *See* 385 F.Supp.3d at 1158 (citing *Pittsburgh Press* for the proposition that "the government may engage in a content-based restriction to prohibit speech that proposes an illegal act or transaction"). According to the court, because the Accommodation Clause makes it illegal for 303 Creative to refuse to design custom wedding websites for same-sex couples, *Pittsburgh Press* permits Colorado to prohibit Smith's publishing

any statement indicating that she would refuse her creative services to same-sex couples. *Id*. Thus, the constitutionality of the Communication Clause depends on the constitutionality of the Accommodation Clause.

The fatal flaw in the district court's analysis is that it simply *assumes* that the Accommodation Clause is constitutional, *id*. at 1159, and, in so doing, begs the central question under *Pittsburgh Press*—whether "the [speech] restriction … is incidental to a *valid* limitation on economic activity." 413 U.S. at 389 (emphasis added). It is not. The Accommodation Clause puts a Hobson's choice to 303 Creative: either convey a message with which it disagrees (by designing and creating a website that celebrates the wedding of a same-sex couple) or remain silent and forego sending its desired message (through custom weddings sites supporting opposite-sex marriage). This CADA cannot do. *See Wooley v. Maynard*, 430 U.S. 705, 715 (1977) (holding that the government cannot compel speakers "to foster … an idea they find morally objectionable"); *Riley*, 487 U.S. at 796 (explaining that "in the context of protected speech, the difference [between compelled speech and compelled silence] is without constitutional significance").

Putting businesses that create custom-designed expression to this choice—create a government-mandated message or remain silent—violates the freedom of thought and mind that the First Amendment was meant to safeguard. *See Wooley*, 430 U.S. at 714 (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637

(1943)) ("The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'"). Consequently, the district court's analysis contravenes "the usual rule that governmental bodies may not prescribe the form or content of individual expression," *Cohen v. California*, 403 U.S. 15, 24 (1971), even when others might view "those choices of content" as "misguided, or even hurtful." *Hurley*, 515 U.S. at 574. And given that the Accommodation Clause is unconstitutional as applied to 303 Creative's expression, the Communication Clause's viewpoint-based restriction on Smith's religious views also violates the First Amendment.

Moreover, the district court's reliance on *Pittsburgh Press* is misplaced for another reason. Smith's proposed statement, which explains her religious motivation for creating only custom-designed websites that comport with her Biblical understanding of marriage, is not commercial advertising. Her statement does not propose a commercial transaction; rather, it conveys her religious views on an ongoing national issue—same-sex marriage. Thus, *Pittsburgh Press* provides no basis for silencing her expression.

A. The district court's reliance on *Pittsburgh Press* is inapposite because Colorado cannot restrict Smith's religious views on marriage if the Accommodation Clause violates her First Amendment rights, which it does.

Although the First Amendment states only that "Congress shall make no law … abridging the freedom of speech," U.S. CONST., Amend. I, the Supreme Court

has long held that it prevents the government from both restricting and compelling speech: "the right of freedom of thought protected by the First Amendment against state action, includes both the right to speak freely and the right to refrain from speaking." *Wooley*, 430 U.S. at 714; *Riley*, 487 U.S. at 796-97 ("[T]he First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say."). Consequently, "as a general matter, ... government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Ashcroft v. ACLU,* 535 U.S. 564, 573 (2002) (internal quotation marks omitted); *Barnette*, 319 U.S. at 642 ("[N]o 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."). The government also lacks the authority to compel speech because such compulsion similarly "invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." *Id*. at 642; *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994) (affirming that "[a]t the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence," and that any "[g]overnment action that … requires the utterance of a particular message favored by the Government[] contravenes this essential right").

The problem is CADA does both—it restricts and compels Smith's speech. The Communication Clause prohibits Smith from "publish[ing] … any written, electronic, or printed communication … that indicates that the full and equal enjoyment of the goods, services, facilities … of [303 Creative] will be refused, withheld from, or denied … because of … sexual orientation." C.R.S. 24-34-601(2); 385 F.Supp.3d at 1157 (stating that CADA "prohibits Ms. Smith from engaging in the very speech she wishes to engage in: posting her Statement"). The Accommodation Clause, in turn, compels Smith to convey a government-favored message by requiring her to create custom wedding websites for same-sex couples.

Because the government "'has no power to restrict expression because of its message, its ideas, its subject matter, or its content,'" content-based and viewpoint-based speech restrictions, like the Communication Clause here, "are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert*, 135 S.Ct. 2218, 2226 (2015) (quoting *Police Dept. of Chicago v. Mosley,* 408 U.S. 92, 95 (1972)). The district court sought to avoid this result by invoking *Pittsburgh Press* to support the proposition that "the government may engage in a content-based restriction to prohibit speech that proposes an illegal act or transaction." 385 F.Supp.3d at 1158. According to the court, because Colorado declared that all discrimination by public accommodations based on sexual orientation in the

provision of goods and services is illegal (whether or not it compels expression), Colorado also can restrict speech expressing the intent to engage in such discrimination. *Id*. at 1159. Thus, even though the Communications Clause imposes a viewpoint-based restriction on Smith's speech, it is allegedly constitutional because "'the restriction on advertising is incidental to a valid limitation on economic activity.'" *Id*. at 1158 (quoting *Pittsburgh Press*, 413 U.S. at 388-89).

Under the district court's analysis, then, the constitutionality of the Communication Clause directly depends on the constitutionality of the Accommodation Clause. *See id*. at 1159 ("[T]he Communications Clause, although nominally content-based, nevertheless survives constitutional scrutiny (so long as the Accommodation Clause is constitutional….)."). Having made this connection, though, the district court never considered whether the Accommodation Clause actually is constitutional, *i.e.*, whether it violates 303 Creative's First Amendment rights. Instead, the court analyzed the Communication Clause within a constitutional vacuum of its own creation—simply "assum[ing] the constitutionality of the Accommodation Clause." *Id*. at 1153. Assuming this critical point (that the underlying compulsion is itself constitutional) not only is inconsistent with the reasoning in *Pittsburgh Press*, but also confers broad authority on Colorado to impose content-based and viewpoint-based speech restrictions on any expressive business subject to the Accommodation Clause.

In *Pittsburgh Press*, the Court upheld a city ordinance that precluded newspapers from listing employment advertisements in sex-designated columns. The Court concluded that the advertisements and the newspaper's headings were "classic examples of commercial speech." 413 U.S. at 385. But the commercial nature of the speech did not justify the content-based speech restriction; rather, the Court upheld the ordinance "because the discriminatory hirings proposed by the advertisements, and by their newspaper layout, were themselves illegal." *Virginia State Bd, of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 759 (1976). Just as "a newspaper constitutionally could be forbidden to publish a want ad proposing a sale of narcotics or soliciting prostitutes," the ordinance could ban "an overtly discriminatory want ad" that proposed "discriminat[ion] against women in … hiring decisions." *Pittsburgh Press*, 413 U.S. at 388.

Such speech restrictions are permissible under *Pittsburgh Press*, though, only "when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity." *Id*. at 389. The district court considered only the first requirement—that Colorado declared the underlying commercial activity (the withholding of goods and services based on sexual orientation) illegal. But *Pittsburgh Press* requires the government to satisfy both conjuncts: the government must declare the underlying commercial activity illegal, *and* any speech compulsion (or restriction) related to the limitation on economic

activity must be *valid*. This ensures that the courts, not the state legislatures, get to determine the constitutionality of the restriction on the underlying economic activity. *See Marbury v. Madison*, 5 U.S. 137 (1803). After all, if a State could simply make an activity illegal and then preclude speech related to that activity, it could restrict expression on an array of disfavored topics.

For example, consider a variation on *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974). Suppose Florida imposed a speech restriction on newspapers similar to CADA's Communication Clause in addition to adopting the right to reply statute "granting a political candidate a right to equal space to reply to criticism and attacks on his record by a newspaper." *Id*. at 243. Under these Florida laws, it would be "unlawful for a [newspaper] … directly or indirectly, to publish … any written, electronic, or printed communication, notice, or advertisement that indicates that the full and equal enjoyment of the [right to reply] … will be refused, withheld from, or denied [a candidate who has been attacked or criticized in the newspaper]." *303 Creative*, 385 F.Supp.3d at 1151. Suppose further that the newspaper believed the right to reply statute was unconstitutional, that no candidate had yet sought to publish a reply under the statute, and that the newspaper wanted to include a short message on its editorial page stating that it would retain exclusive editorial control over whether to publish the responses of any candidate that the newspaper's editorial board might criticize.

Based on the district court's analysis, if the newspaper filed a pre-enforcement challenge alleging that Florida's communication clause violates the company's free speech and free press rights, the newspaper should lose. Given that no candidate "had actually asked [the newspaper] to [carry a response]," *id*. at 1157, the newspaper could not raise a compelled speech claim. If the court followed the district court's lead and assumed the constitutionality of the right to reply statute, then Florida's communication clause would be constitutional as "a content-based restriction [meant] to prohibit speech that proposes an illegal act or transaction." *Id*. at 1158. As *Tornillo* explained, however, Florida's right to reply statute is unconstitutional, *i.e.*, it is *not* "a valid limitation on economic activity." *Pittsburgh Press*, 413 U.S. at 388-89. In fact, as *Tornillo* emphasized, *Pittsburgh Press* "took pains to limit its holding within narrow bounds," 418 U.S. at 255, upholding the Pittsburgh ordinance only because it did not "authorize any restriction whatever, whether of content or layout, on stories or commentary originated by Pittsburgh Press, its columnists, or its contributors." 413 U.S. at 391.

Contrary to the district court's assumption in this case, the Accommodation Clause, like the right to reply statute in *Tornillo*, does restrict a speaker's "content" and "commentary." Accordingly, the lower court should not have assumed the constitutionality of the Accommodation Clause to justify the Communication Clause's speech restriction. *Tornillo*, 418 U.S. at 256 ("The Florida statute operates

as a command in the same sense as a statute or regulation forbidding appellant to publish specified matter."). In fact, any other result would jeopardize Smith's willingness to make any statement criticizing *Obergefell* or CADA (through an op-ed or a blog post) because such views might suggest to a reader (or judge) that Smith would refuse, withhold, or deny service to someone based on their sexual orientation. This, in turn, would chill Smith's speech, forcing her to "steer far wider of the unlawful zone" to avoid penalties under CADA. *Speiser v. Randall*, 357 U.S. 513, 526 (1958); *see also Tornillo*, 418 U.S. at 257 (quoting *Sullivan*, 376 U.S. at 279) ("Government-enforced right of access inescapably 'dampens the vigor and limits the variety of public debate.'").

B. Colorado's Accommodation Clause is an invalid restriction on 303 Creative's expression because its custom-designed wedding websites are fully protected speech under the First Amendment.

As *Hurley* makes clear, antidiscrimination laws may be "applied in a peculiar way"—*i.e.*, applied to the expressive content of a group or business—and that First Amendment protections are triggered under such circumstances. 515 U.S. at 572. If application of the Accommodation Clause "target[s] speech" or "discriminate[s] on the basis of its content," then "the statute ha[s] the effect of declaring the sponsors' speech itself to be the public accommodation." *Id*. at 573. In *Hurley*, the disagreement between GLIB and the parade organizers did not involve "the participation of openly gay, lesbian, or bisexual individuals in various units in the

parade." *Id*. at 572. No members of GLIB alleged that the parade organizers excluded homosexual individuals from marching as part of an approved parade group, and the organizers disclaimed any such intent to exclude. Similarly, 303 Creative stated that it "is willing to work will all people regardless of their race, religion, gender, and sexual orientation," although it "will decline any request to design, create, or promote content that: … promotes any conception of marriage other than marriage between one man and one woman." 385 F.Supp.3d at 1150-51 (internal punctuation omitted).

The problem in *Hurley* arose only when GLIB sought to participate in the parade organizers' speech activity by marching in the parade under its own banner. 515 U.S. at 572. Applying the Massachusetts law to the selection of participants forced the parade organizers "to alter the expressive content of their parade" and transferred authority over the message conveyed to "all those protected by the law who wished to join in with some expressive demonstration of their own." *Id*. at 573. Because the parade was expressive, the parade organizers had the right "to choose the content of [their] own message" and to "decide 'what not to say.'" *Id*. (quoting *Pacific Gas and Elec. Co. v. Public Utilities Comm'n of California*, 475 U.S. 1, 16 (1986)).

Given that "*all* speech inherently involves choices of what to say and what to leave unsaid," the Court's holding applies to all forms of expression, not just parades.

Pacific Gas, 475 U.S. at 11 (plurality opinion); *Hurley*, 515 U.S. at 569 (explaining that "the Constitution looks beyond written or spoken words as mediums of expression"); *Joseph Burstyn, Inc. v. Wilson,* 343 U.S. 495, 503 (1952) (confirming that "the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary" with the medium of communication used). When public accommodations laws, such as CADA, are applied to "the sponsors' speech itself," they violate the "fundamental rule" that the government cannot control "the choice of a speaker not to propound a particular point of view." 515 U.S. at 573. And this is true even if the speaker expresses views that private citizens (or even the courts) might think "are misguided, or even hurtful." *Id*. at 574.

Consequently, instead of assuming the constitutionality of the Accommodation Clause, the district court should have considered whether CADA threatened "[t]he principle of speaker's autonomy … in [this] case," *Hurley*, 515 U.S. at 580, by "restrict[ing Smith's] speech to certain topics or views or … forc[ing her] to respond to views that others may hold." *Pacific Gas*, 475 U.S. at 11 (plurality opinion). Because, as the Court's free speech cases demonstrate, Smith's custom-designed websites are inherently expressive, the Accommodation Clause violates these First Amendment principles. *See*, *e.g.*, *Packingham v. North Carolina*, 137 S.Ct. 1730, 1737 (2017) (quoting *Reno v. ACLU*, 521 U.S. 844, 870 (1997)) (explaining how social media "websites can provide perhaps the most powerful

mechanisms available to a private citizen to make his or her voice heard" by "allow[ing] a person with an internet connection to 'become a town crier with a voice that resonates farther than it could from any soapbox.'"); *Smith v. Plati*, 258 F.3d 1167, 1177 (10th Cir. 2001) ("[P]ublishing Netbuffs.com is undoubtedly an activity protected by the First Amendment."); *Rodriguez v. Maricopa Cty. Cmty. Coll. Dist.*, 605 F.3d 703, 710 (9th Cir. 2010) (holding that a professor's "website and emails were pure speech; they were the effective equivalent of standing on a soap box in a campus quadrangle and speaking to all within earshot").

When someone asks a website designer to create a custom-designed website for an upcoming wedding, the site provides family and friends with important information about the engagement, the wedding registry, and the date, time, and location of the wedding (all of which information falls within the ambit of the First Amendment). *Virginia Pharmacy*, 425 U.S. at 762 ("Purely factual matter of public interest may claim [First Amendment] protection."); *Riley*, 487 U.S. at 797-98 (describing how "compelled statements of opinion" and "compelled statements of 'fact'" both "burden[] protected speech"). But the wedding website does much more. Through the selection and placement of photographs, videos, and text, the sequencing of events, the choice of backdrops, the use of color schemes, and other such creative choices, 303 Creative celebrates the dignity and importance of the event and seeks to convey the personality of the couple. Moreover, Smith's websites

reflect her belief that God is "calling me to stand up for my faith, to explain His true story about marriage, and to use the talents and business He gave me to publicly proclaim and celebrate His design for marriage as a life-long union between one man and one woman." 385 F.Supp.3d at 1151. *See also Burstyn*, 343 U.S. at 501 (affording First Amendment protection to motion pictures because they "are a significant medium for the communication of ideas [that] may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression.").

Part of the creative process includes the selection of the expressive units that are interwoven to generate the story of each couple. Like the parade in *Hurley*, the websites Smith creates receive First Amendment protection even if she does not generate each photograph or font selected for the website. *Hurley*, 515 U.S. at 570 ("First Amendment protection [does not] require a speaker to generate, as an original matter, each item featured in the communication."); *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 751 (8th Cir. 2019) (holding that Minnesota's public accommodation law could not be applied to wedding videographers who "intend[ed] to shoot, assemble, and edit the videos with the goal of expressing their own views about the sanctity of marriage … [e]ven if their customers have some say over the finished product").

As this Court noted in *Cressman v. Thompson*, "[t]he concept of pure speech is fairly capacious" and covers an "expanding list" of expression, including "Arnold Schöenberg's atonal compositions, Lewis Carroll's nonsense verse, and Jackson Pollock's abstract paintings—regardless of their meaning, or lack thereof—[which] are 'unquestionably shielded' as expressions of the creators' perceptions and ideas." 798 F.3d 938, 952 (10th Cir. 2015) (quoting *Hurley*, 515 U.S. at 569). Smith conveys her "perceptions and ideas" relating to marriage in her statement as well as in and through her wedding websites:

> I have the privilege of telling the story of your love and commitment by designing a stunning website that promotes your special day and communicates a unique story about your wedding—from the tale of the engagement, to the excitement of the wedding day, to the beautiful life you are building together.

303 Creative, 385 F.Supp.3d at 1151. Accordingly, custom-designed websites and the specific content choices involved in those designs *are* expression, and the government cannot use public accommodations laws to force businesses to create such expressive works for government-preferred customers. *Hurley*, 515 U.S. at 576 (finding protected self-expression where the speaker is "intimately connected with the communication advanced"); *TMG*, 936 F.3d at 752 (quoting *Burstyn*, 343 U.S. at 501) (concluding that the various actions and choices that go into wedding videography "come together to produce finished videos that are 'medi[a] for the communication of ideas'").

The Accommodation Clause, therefore, impermissibly infringes on Smith's "right … to hold a point of view different from the majority and to refuse to foster … an idea [she] find[s] morally objectionable." *Wooley*, 430 U.S. at 715. By requiring Smith to either create custom-designed websites for same-sex couples or not design any wedding websites, CADA infringes her right "to choose the content of [her] own message" as well as her right to "decide 'what not to say.'" *Hurley*, 515 U.S. at 573 (citation omitted). If the Accommodation Clause is applied to 303 Creative's expression, Smith must "becom[e] the courier for … [a] message with which [she] disagree[s,]" undermining her right to "refuse to foster … an idea [she] find[s] morally objectionable." *Wooley*, 430 U.S. at 717, 715.

In *Obergefell*, this Court surveyed the "ongoing dialogue" surrounding same-sex marriage and "emphasized that … 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." *Obergefell v. Hodges*, 135 S.Ct. 2584, 2597, 2607 (2015). Smith seeks to do just that—witness to her religious convictions by not promoting same-sex marriage in and through her expressive activity. *See 303 Creative*, 385 F.Supp.3d at 1151 ("These same religious convictions that motivate me also prevent me from creating websites promoting and celebrating ideas or messages that violate my beliefs."); *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S.Ct. 1719, 1728 (2018) ("[R]eligious and philosophical objections to

gay marriage are protected views and in some instances protected forms of expression."). The parade organizers in *Hurley* did the same—"clearly decid[ing] to exclude a message it did not like from the communication it chose to make," which was "enough to invoke its right as a private speaker to shape its expression by speaking on one subject while remaining silent on another." 515 U.S. at 574.

If upheld, the lower court's reasoning would empower States to "compel affirmance of a belief with which the speaker disagrees," whenever the speaker is a public accommodation. *Id*. at 573. A Christian website designer will be required to design a custom webpage celebrating a same-sex marriage, a Jewish choreographer will have to stage a dramatic Easter performance, a Catholic singer will be required to perform at a marriage of two divorcees, and a Muslim who operates an advertising agency will be unable to refuse to create a campaign for a liquor company. Additionally, States will be able to dictate the content of expressive works by writers, painters, musicians, and photographers who offer their services to the public. Yet requiring any of these individuals or businesses to convey messages with which they disagree "invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." *Barnette* 319 U.S. at 642; *Janus v. American Fed. of State, County, & Municipal Employees*, 138 S.Ct. 2448, 2464 (2018) (describing how compelled speech causes "additional damage" by "forcing free and independent individuals to endorse ideas they find

objectionable[, which] is always demeaning" and coerces speakers "into betraying their convictions").

Moreover, if a for-profit business does not want to speak or respond to a particular government-mandated message, a State cannot cure the First Amendment problem by presenting the business with an unconstitutional alternative: stop offering its creative works to anyone who wants to get married. *See Mullins v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 286 (Colo. App. 2015), overturned on other grounds, 138 S.Ct. 1719 (2018) (stating that, under CADA, Masterpiece must "sell wedding cakes to same-sex couples, but only if it wishes to serve heterosexual couples in the same manner"). On this view, silence is supposed to cure the CADA violation—303 Creative can avoid discriminating based on sexual orientation by ceasing to make custom wedding websites for any engaged couple.

The problem is that compelled silence also is unconstitutional: "There is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is without constitutional significance, for the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say." *Riley*, 487 U.S. at 796-97. Speech prohibitions, like speech compulsions, constitute content-based regulations of speech and are unconstitutional for the same reason—they prevent a speaker from determining the content of her desired message. *Hurley*, 515 U.S. at

557 ("Since *all* speech inherently involves choices of what to say and what to leave unsaid, one important manifestation of the principle of free speech is that one who chooses to speak may also decide what not to say.") (citations and internal quotation marks omitted); *Wooley*, 430 U.S. at 714 ("[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all."). Here, the Communication and Accommodation Clauses violate Smith's "right to speak freely" by precluding her from making her faith-based statement and by preventing her from celebrating opposite-sex marriages through her custom-designed websites.

Furthermore, acknowledging that the First Amendment protects 303 Creative's expression does not "undermine all of the protections provided by antidiscrimination laws." *Elane Photography, L.L.C. v. Willock*, 309 P.3d 53, 72 (N.M. 2013). If a business provides non-expressive goods or services to the public, the First Amendment may not shelter the sale of such goods or services because compelled access would not interfere with any message the business sought to communicate. To qualify for First Amendment protection, a public accommodation must (1) offer goods or services involving expression or expressive activity, (2) engage in speech that an antidiscrimination law interferes with (or wish to refrain from sending a message mandated by the law), and (3) be willing to lose business from the specific customers who are refused service as well as from others who no

longer wish to support the business given its views relating to members of a protected class. Each of these considerations limits the number of businesses that could—or would—object to public accommodations laws on First Amendment grounds. Although some businesses are involved in expressive activities, many more are not. And for every business that decides not to engage in expression related to members of a protected class, many more will. *See*, *e.g.*, *Washington v. Arlene's Flowers, Inc.*, 389 P.3d 543, 549 (Wash. 2017), judgment vacated, 138 S.Ct. 2671 (2018) (noting that the florist gave the respondent "the name of other florists who might be willing to serve him" and that "a handful of florists offered to provide their wedding flowers free of charge").

The relatively few First Amendment challenges to public accommodations laws that have been working their way through the courts bear this out. Although some web designers, bakers, photographers, and florists may challenge public accommodations laws, thousands more of these businesses have not. In this way, the marketplace of ideas is self-regulating. Free speech protection from antidiscrimination laws is limited only to those who engage in expression and object to promulgating a particular government-mandated message, which ensures that members of protected classes have ready access to the type of expressive goods and services protected by the First Amendment. In the rare situation where there is no such access, the government may be able to satisfy strict scrutiny. Absent that

showing, however, the fact that some—or even many—individuals find the refusal to create expression for members of a protected class wrong or misguided does not obviate the protection of the First Amendment. Rather, as the Court concluded in *Hurley*, these objections confirm the need for such protection: "While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." 515 U.S. at 579.

As a result, when applied to a business's expression, CADA favors "certain preferred speakers … taking the right to speak from some and giving it to others." *Citizens United v. FEC*, 558 U.S. 310, 340 (2010). In so doing, "the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice." *Id*. at 340-41. Under CADA, Smith loses her right to promote traditional marriage through her creative works and, instead, is required to endorse same-sex marriage (through the creation of a custom website) or to get out of the wedding website business altogether.

None of the Court's free speech cases justify this result. Rather, these cases compel the opposite conclusion because, as *Dale* reminds us, the First Amendment protects the "freedom to think as you will and to speak as you think" and "eschew[s] silence coerced by law—the argument of force in worst form." *Boy Scouts of*

America v. Dale, 530 U.S. 640, 660-61 (2000) (quoting *Whitney v. California*, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring)).

C. Smith's statement regarding her religious views on marriage is not commercial speech and, therefore, cannot be prohibited under *Pittsburgh Press* as a restriction on commercial advertising that is incidental to a valid limitation on economic activity.

In *Pittsburgh Press*, the Court held that the government could preclude the newspaper's speech only because the underlying commercial activity (gender-based discrimination in hiring) "is illegal and *the restriction on advertising* is incidental to a *valid* limitation on economic activity." 413 U.S. at 389 (emphasis added). Central to the Court's holding was the Court's recognition that the newspaper's sex-designated headings for classified employment ads were part of the advertisements: "The combination, which conveys essentially the same message as an overtly discriminatory want ad, is in practical effect an integrated commercial statement." *Id*. at 388. Thus, the restriction was permissible because (1) the newspaper's headings were part of a commercial advertisement of illegal activity and (2) given that the limitation was on purely commercial speech, it did not infringe on any decision of the newspaper regarding its content or design:

> Nor, *a fortiori*, does our decision authorize any restriction whatever, whether of content or layout, on stories or commentary originated by Pittsburgh Press, its columnists, or its contributors. On the contrary, we reaffirm unequivocally the protection afforded to editorial judgment and to the free expression of views on these and other issues, however controversial.

Id. at 391. Consequently, *Pittsburgh Press* applies at most to restrictions on "classic examples of commercial speech" that advertise an illegal transaction, not restrictions on otherwise protected speech. *Id*. at 385; *Virginia Pharmacy*, 425 U.S. at 759 (recognizing that *Pittsburgh Press* applies only to restrictions on commercial speech proposing actions that "were themselves illegal"); *Harris v. Quinn*, 573 U.S. 616, 648 (2014) ("[D]efin[ing] commercial speech as 'speech that does no more than propose a commercial transaction.'") (citation omitted).

Contrary to the district court's suggestion, Smith's proposed statement is *not* commercial speech. As the Court confirmed in *Pittsburgh Press*, "[t]he critical feature of the advertisement in *Valentine v Chrestensen* was that … it did no more than propose a commercial transaction, the sale of admission to a submarine." 413 U.S. at 385. The Court contrasted the newspaper's classified ads with the advertisement in *Sullivan*, which was not "commercial" and, therefore, received broad First Amendment protection. Instead of proposing a specific commercial transaction, the New York Times ad "communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern." 376 U.S. at 266. Smith's proposed statement does the same thing. It communicates information about her business and testifies to her views on an issue of public interest and concern—the ongoing discussion and debate

regarding same-sex marriage. *See Obergefell*, 135 S.Ct. at 2597, 2607 (confirming the right of "those who adhere to religious doctrines, [to] continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned"). Because such a position statement is not "commercial advertising" under *Sullivan* and *Harris*, it cannot be restricted under *Pittsburgh Press*. In addition, *Riley*, instructs that even if some portion of Smith's statement could be viewed "in the abstract" as "commercial," Colorado still could not restrict her message because "it is inextricably intertwined with otherwise fully protected speech." 487 U.S. at 796.

Moreover, even assuming *arguendo* that Smith's speech is commercial advertising—which it is not—subsequent cases have narrowed the class of purely commercial speech and have at most permitted the government to compel advertisers to include certain truthful, factual information in their communications. The Court has not allowed the government to *prohibit* commercially-tinged speech on matters of public concern. As *Hurley* explains, while "the State may at times 'prescribe what shall be orthodox in commercial advertising,'" it may do so only "by requiring the dissemination of 'purely factual and uncontroversial information.'" 515 U.S. at 573 (quoting *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985)). "[O]utside that context" of mandating factual disclosures in purely commercial advertising, the government "may not compel affirmance of a belief with which the

speaker disagrees" or violate the right of "a private speaker to shape its expression by speaking on one subject while remaining silent on another." *Id*. at 573-74. Thus, Colorado cannot rely on *Pittsburgh Press* to restrict Smith's views on marriage because her expression is not commercial speech.

II. Conclusion

As this Court acknowledged in *Cohen*, the "constitutional right of free expression is powerful medicine" in our diverse and populous society. 403 U.S. at 24. The First Amendment provides broad speech protection for all—individuals, associations, and businesses—to:

> remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.

Id. That choice of content, "be it of the popular variety or not," is directly undermined when public accommodations laws are applied to require individuals or businesses either to speak the government's desired message or to remain silent. *Dale*, 530 U.S. at 660. This Court, therefore, should hold that the First Amendment protects 303 Creative's expression and that, consistent with *Hurley*, CADA cannot interfere with Smith's ability to choose the content of her own message.

Respectfully submitted this 29th day of January, 2020,

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III. Certificate of Compliance

(1) This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because this brief contains 6,459 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

(2) This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word with a 14-point Times New Roman font.

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IV. Certificate of Digital Submission and Privacy Redactions

I hereby certify that with respect to the foregoing:

(1) All required privacy redactions have been made in accordance with 10th Cir.R. 25.5;

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V. Certificate of Service

I HEREBY CERTIFY that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system on January 29, 2020, which will automatically send notification to the counsel of record for the parties.

Dated: January 29, 2020

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