Case No. 19-1413

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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303 Creative LLC and **Lorie Smith**,

Plaintiff-Appellant

v.

Aubrey Elenis, et al.,

Defendants-Appellees

On appeal from the United States District Court
For the District of Colorado
The Honorable Chief Judge Marcia S. Krieger
Case No. 1:16-cv-02372-MSK-CBS

Brief of Amicus Curiae Professor Robert P. George In Support of Plaintiff-Appellant

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Compliance with Rule 29

As required by Federal Rule of Appellate Procedure 29(a)(2), your amicus states that all parties have consented to the filing of this brief.

Interest of the Amicus Curiae

Your amicus Robert P. George (B.A., Swarthmore College; J.D., M.T.S., Harvard University; D.Phil., B.C.L., D.C.L., and D.Litt. University of Oxford) is a legal philosopher and constitutional scholar who serves as the McCormick Professor of Jurisprudence at Princeton University. He has studied, written, and taught about religious liberty, human dignity, and First and Fourteenth Amendment jurisprudence for many years. His academic writings include *Making Men Moral: Civil Liberties and Public Morality*; *The Clash of Orthodoxies*; and *Conscience and Its Enemies*. Amicus has been or is involved in other litigation around similar questions and the panel's decision is therefore likely to impact his future public work.

Summary of Argument

Colorado claims that the government has a compelling interest in eliminating dignitary harms that might arise when someone declines to use his or her talents to communicate a message requested by another. Colorado insists for this reason that Lorie Smith must be coerced, if she tries to make a living as a website developer, into communicating a message that is antithetical to her religious commitments. Colorado maintains this position even under the withering glare of strict scrutiny and even though Smith's honoring the dictates of her conscience will not cause any material harm.

But Colorado's position runs afoul of Supreme Court precedent. The Court has held that the state has no legitimate interest, much less a compelling interest, in protecting individuals from the unpopular and possibly disquieting speech or ideas of their fellow citizens. To uphold Colorado's position would cut against decades of First Amendment caselaw and undermine a swath of civil liberties. Most troublingly, this Court would be telling Ms. Smith—with all the cultural authority of the judicial power of the United States—that choices central to *her* identity are not just mistaken, but bigoted.

Context is clarifying. Here, it reveals the gulf between the (1) the social meaning of Ms. Smith's practice of making websites for all *customers* but declining to make websites laden with certain *messages* and (2) the dignitary harms rightly blocked by antidiscrimination laws (such as those that target Jim Crow). Only the latter are accompanied by pernicious assumptions that hamper a group's social, political, or economic mobility by disparaging the group's competence, character, interests, or place in society.

Yet even if one *arguendo* views Ms. Smith's decision as conveying truly demeaning ideas, this would still not justify Colorado's coercing of her speech in order to contradict the message that her refusal would have sent. In every case where the Court was touting the dignitary benefits of antidiscrimination laws, the law's target was conduct such as the denial of housing to an African-American. States were not applying those laws to interfere with *expression*, as Colorado seeks to do here. In fact, the Court has not once but twice held that the First Amendment prevents the government from coercing expression even over the objection that doing so would reinforce demeaning ideas about people who identify as "LGBT." The Court reversed the lower courts on both cases on the ground that governments may not interfere with expression because they find it harmful or demeaning.

Argument

I. Colorado cannot cast aside First Amendment rights to prevent citizens from being exposed to offensive ideas.

A. Colorado cannot claim a legitimate interest in protecting citizens from ideas to which the citizens might have negative reactions.

Respondents would have this Court conclude under strict scrutiny that Colorado has a legitimate—indeed a compelling—interest in reducing citizens' distress at being confronted with moral or political ideas they find offensive. Such a holding would require the Court to ignore decades of settled caselaw. Indeed, Respondents are asking this Court to drive a nail through the "bedrock principle underlying the First Amendment, [which] is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414

(1989); *see also Snyder v. Phelps,* 562 U.S. 443, 458 (2011) (speech "cannot be restricted simply because it is upsetting or aroused contempt."); *Hurley v. Irish-Am Gay, Lesbian & Bisexual Grp. Of Boston*, 515 U.S. 557, 574 (1995) ("the point of all speech protection . . . is to shield . . . those choices of content that in someone's eyes are misguided or even hurtful.").

Colorado also cannot divide the offending ideas and the citizens' reactions to them for the purpose of attacking the latter. The Supreme Court recently held that "[g]iving offense is a viewpoint." *Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017). The Court has been quite clear that "[t]he emotive impact of speech on its audience is not a 'secondary effect'" but is within the speech itself. *Johnson*, 491 U.S. at 412. In a concurring opinion in *Matal*, Justice Kennedy warned against exactly this type of attempt to divide the speech from the reaction; he said the government "may not insulate a law from charges of viewpoint discrimination by tying censorship to the reaction . . . ." *Matal*, 137 S. Ct. at 1766 (Kennedy, J., concurring). Expression of extremely vile nature is protected, even when the speech is intended to be "hurtful," where the vile speech is targeted to occur at a solemn funeral, and in fact causes a reaction that the phrase "emotional distress" "fails to capture" the severity of its impact. *Snyder*, 562 U.S. at 456. These cases, especially *Snyder*, explicitly reject the notion that the government can deploy its coercive powers to reduce the harm associated with coming into contact with offensive ideas.

Merely calling the emotional harm a dignitary harm does not change the analysis. The Supreme Court has made clear that allowing governmental coercion in the name of

an "interest in protecting the dignity" of individuals reacting to protected expression would go against the "'longstanding refusal to [punish speech]'" because of its "adverse emotional impact." *Boos v. Barry*, 485 U.S. 312, 311 (1988) (quoting *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55 (1988)). This is the same reason that the use of regulations "encouraging racial tolerance" or preventing groups—even the most marginalized minorities—from "bombard[ment] with demeaning messages" would be to "strike[] at the very heart of the First Amendment." *Matal*, 137 S. Ct. at 1764. Those aims are not "substantial" interests, so they certainly are not compelling ones. *Id.* at 1764–65.

Colorado, under the Constitution, is not allowed to punish "expressive activity," for the purpose of protecting citizens' reactions to "ideas" Colorado has deemed offensive or demeaning. *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 385 (1992). Colorado cannot justify barring Ms. Smith from publishing the statement on her website or coercing her to make websites celebrating same-sex weddings on the ground that her doing so would be insulting to the dignity of a same-sex couple. *See id.* at 396 ("[D]isplaying special hostility towards the particular biases singled out . . . is precisely what the First Amendment forbids.").

Colorado can certainly try to persuade individuals who own website-design companies to create websites for same-sex marriages; to foster a view "by persuasion and example is not in question." But "[t]he problem is whether under our constitution compulsion here employed is a permissible means." *Johnson*, 491 U.S. at 418. If Colorado wishes to inculcate its own views about sexuality and marriage, the way to do

so "is not to punish those who feel differently about these matters. It is to persuade them that they are wrong." *Id.* at 419.

B. A ruling for Colorado would allow the state to trample civil liberties in the name of reducing negative reactions to ideas, but without even making a difference in whether citizens encounter such distress.

In a society featuring a multitude of religious traditions, plenty of core religious activities and speech will be offensive to certain groups. So allowing the state to curb First Amendment activity that offend others would reduce protections across the entire field of religion and speech—while a narrower ruling designed to curb liberty only in cases like Ms. Smith's would do almost nothing to reduce strife over speech in society, thus ensuring that the harm to Ms. Smith's interests was all for nothing.

The sort of distress that might be caused by Ms. Smith's refusal to design a website where doing so would violate her conscience can be caused by a wide range of spoken messages that our nation has a "profound . . . commitment" to protecting. *Snyder*, 562 U.S. at 452. It cannot be the case that there is a profound interest in allowing distress when it comes from spoken messages in certain contexts and a compelling interest in preventing the very same kind of distress when it comes from Ms. Smith's decision to post a notice on her website or refuse to create wedding websites for same-sex couples.

It would be incoherent to say that there is a constitutional right to say that God sent the 9/11 terrorists and IEDs in the Middle East as retribution against the United States on account of LGBT people, *see id.* at 448, but that Colorado has a compelling interest in preventing negative reactions to Ms. Smith's website statement and her

declining to use her skills to design websites for same-sex marriages or other forms of sexual partnership she regards as morally wrongful.

Core aspects of religious practice, worship, and proselytizing can send the message that others are wrong, causing them offense. In a country of many faiths with directly conflicting doctrines, religious freedom itself is inherently protective of offensive ideas to some. One hopes that Colorado would never attempt to ask the Court to restrict the right to proselytize or worship whenever such practice implies others are in the wrong. If the Court would not restrict such liberties, it does not do much to only protect the negative reactions to decisions like Ms. Smith's to not contravene her conscience. The benefit is so little, while the costs to the one coerced to contravene her conscience and to the "bedrock principle" of the First amendment, that "the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable," are grave. *Johnson*, 491 U.S. at 414.

C. Both Ms. Smith and the potential same-sex couples she would not make wedding websites for would have claim to a goal of avoiding distressing ideas for preservation of their dignity.

If Ms. Smith's policy would stigmatize LGBT customers, surely Colorado's coercion of Ms. Smith would stigmatize her. The Supreme Court has been clear that the ability to live by religious convictions is "essential in preserving . . . dignity." *Burwell v. Hobby Lobby*, 134 S. Ct. 2751, 2785 (2014) Kennedy, J., concurring); *see also Cohen v. California*, 403 U.S. 15, 24 (1971) (free expression honors "individual dignity . . . upon which our political system rests."). In particular, if Ms. Smith's statement and her declining to create same-sex wedding websites would convey to LGBT citizens that

something central to their identity is wrong, a ruling that prevented Ms. Smith from running her business and deploying her talents in accordance with her convictions would be guilty of the very same kind of harm—telling traditional Muslims, Orthodox Jews, and Christians that beliefs central to their identity are wrong and immoral. The undeniable reality that there are *two* sides to this coin favors freedom for all over coercion of Ms. Smith. The fact that Colorado has presented no evidence that same-sex couples would not have other website design agencies to go to for their wedding websites also counsels against coercing Ms. Smith. A declaratory judgment would be a step away from coercion and towards freedom.

II. Supreme Court precedent has acknowledged intangible dignitary benefits associated with eliminating discriminatory conduct, but in two cases it has rejected the coercion of speech for such benefit.

Since Ms. Smith's exercise will not have material harms—no one will lose access to resources, benefits, or services—the purpose of coercing her must be to fight harms, or putative harms, that are *intangible*. In this connection, some would cite the stated aim of the Civil Rights Act of 1964, which sought to "vindicate the 'depravation of personal dignity that surely accompanies denials of equal access to public establishments.'" *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250 (1964) (citation omitted). But while the Supreme Court has allowed state coercion in the antidiscrimination context, it has only allowed such coercion when the law involved not expression but conduct—like a motel's refusal to serve African Americans, *see id.*, or a civic organization's reliance on a "no women allowed" policy, *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625 (1984). In fact,

the Court explicitly recognized this distinction in *Hurley* when it said that antidiscrimination laws have not generally "target[ed] speech or discriminate[d] on the basis of its content." 515 U.S. at 572.

There are no examples of a case where the Supreme Court has allowed an antidiscrimination law to coerce or compel otherwise protected speech on the basis that such speech was offensive. The Jaycees in *Roberts* even went so far as to claim that compelling them to accept women would restrict their freedom of expressive association. The Court never conceded that it was such a burden on their expressive association rights; rather the Court held that the Jaycees had no showing that the law imposed "any serious burden[] on [their] freedom of expressive association." *Roberts.* at 623–24. So, *Roberts* could not be used as support for Colorado's claim of authority to use coercion to prevent dignitary harms associated with expression.

In both the cases at the Supreme Court that *did* involve expressive burdens designed to prevent dignitary harms alleged to flow from sexual-orientation discrimination, the Court found First Amendment violations. In both cases, the Court noted that ruling the other way would contravene their precedents that disallow punishing offensive speech because it is offensive. *See Boy Scouts v. Dale*, 530 U.S. 657, 657–59 (2000) (forbidding New Jersey to suppress expression that conveyed "oppos[ition]" to "homosexual conduct"); *Hurley*, 515 U.S. at 578–79 (holding that expression cannot be coerced by antidiscrimination laws to reduce "biases" against LGBT people). The Supreme Court has simply never approved the application of anti-discrimination laws to coerce speech on the ground that the state deemed the speech offensive.

III. Even if Colorado may sometimes compel speech to fight dignitary harms, there is a difference of kind between the social meaning of Ms. Smith's conscientious decision and the social harms addressed in other cases.

Even if this Court finds that governments may indeed fight dignitary harm by compelling certain forms of expression, that authority could not reasonably extend to Colorado's action here. The district court below grounds the government's authority to compel Ms. Smith's speech by reasoning that a conscientious decision by a faithful Christian to not contribute to the celebration of a same-sex wedding is analogous to a shopkeeper "post[ing] a 'WHITES ONLY' sign near the entrance to the business . . . ." 385 F. Supp. 3d 1147, 1163 (D. Colo 2019). Likewise, in its brief at the Supreme Court in the *Masterpiece* litigation, the Colorado Civil Rights Commission cites *Heart of Atlanta Motel* for the proposition that "[A]ppellant has 'no right' to select its guests as it sees fit, free from governmental regulation." These analogies fail because the *kind* of social effects at issue here are different in kind from those in *Heart of Atlanta* or the district court's vivid imagery of the "WHITES ONLY" sign.

Heart of Atlanta and its sister cases targeted the peculiar evil of Jim Crow; the systematic decision by white-owned businesses to contribute to a culture of racial subordination, rooted in a history of enslavement, lynching, and like evils, to deny African Americans social equality by refusing to transact with them commercially. This case, however, is about declining requests to communicate an endorsement of a particular message *regardless of who solicits this speech*. Ms. Smith welcomes the business of all Americans, pure and simple. She does not refuse to deal with people identifying as LGBT; she simply wishes to avoid creating websites that carry and express messages that

conflict with her religious commitments. These commitments may be idiosyncratic or even offensive to many of her fellow Coloradans, but they do not remotely resemble the sort of assumptions that underpinned Jim Crow and systematically inhibited the social, political, or economic advancement of African-Americans. Affirming Ms. Smith's expressive freedom would not just guard the First Amendment right of Americans to express unpopular ideas. It would be entirely consistent with Supreme Court caselaw decrying the sort of dignitary harms that the Civil Rights Act rightly sought to eviscerate.

A logical and historical chasm separates Ms. Smith's desired speech and Jim Crow-era policies. The Jim Crow laws and practices targeted by the Civil Rights Act sought to concretize cultural hierarchies in ways designed to restrict African-Americans' access to political, cultural, and economic power and hold them in positions of near servitude. Those practices rested on unfounded assumptions about racial differences in aptitude. Antidiscrimination laws most effectively promote dignity when they tackle these baleful assumptions. But there is a difference in kind between cultural assumptions that "reflect and reinforce" impediments to a group's social mobility, *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994), and the mere offensiveness that the First Amendment forbids the state to target, *see supra* I.A.

The ills embedded in Jim Crow-era actions and policies assumed, for instance, that African-Americans were incompetent, unreliable, less intelligent, and prone to vice. *See generally* 3 Bruce Ackerman, *We the People: The Civil Rights Revolution* (2014). But above all else, Jim Crow hinged on the belief that it was socially improper for African-

Americans to interact with whites on equal footing. This assumption didn't just legitimize other barriers to social mobility; it *was* the barrier to social progress.

No such dignitary harms exist here. Ms. Smith's convictions do not reinforce or rest on any assumptions about the abilities of LGBT persons or their capacity to contribute to society. Context brings this point fully to light. Ms. Smith serves LGBT patrons (note: Heart of Atlanta Hotel refused to serve African American patrons) and is willing to make for them or anyone else any type of website that does not express messages that she cannot in conscious participate in conveying. Indeed, there is *no content* that Ms. Smith would create for a heterosexual customer but not a homosexual customer. In stark contrast to the "WHITES ONLY" shopkeeper's stance toward the race of his patrons, Ms. Smith is indifferent to the sexual desires or even practices of her customers. She cares only that her talents and speech not be used to facilitate messages antithetical to her religious views. There is also a sharp contrast between Ms. Smith and a plaintiff who believes, for instance, that miscegenation is theologically impermissible. Such a plaintiff, regardless of his religious sincerity, is promulgating an idea that intrinsically compromises social mobility. It relies on and enhances the claim that racial groups should not mix with one another on terms of parity. But Ms. Smith's religious views and desired ambit of expression neither give effect to, nor rest on, any false supposition that it is improper for people identifying as LGBT to interact with others on equal terms.

Jim Crow and its related evils humiliated African-Americans by denying them equal access to the public square. This is categorically distinct from the pain one might feel at discovering that one's co-citizens in the public square oppose conduct one desires to

engage in or finds valuable. The first harm, reinforced by harmful assumptions that ramify into broader exclusion, must be avoided. Behind any denial of fair access to the public square rests a set of unfair assumptions about a group's competence or characteristics. But the second, which arises from competing and equally sincere visions of the highest good, is unavoidable in a pluralistic society, and quashing it would do immense harm in undermining basic civil liberties. Whatever material harms the law might have license to cure, its curative sweep does not, under our Constitution, extend to guaranteeing individuals a right not to be offended.

IV. Precedent confirms that the kind of dignitary harms the Supreme Court has found to satisfy strict scrutiny are not present here.

A survey of the Supreme Court's antidiscrimination cases, from *Heart of Atlanta* to *Roberts*, reveals a specific understanding of what category of "dignity harm" can be arrested through legal coercion. These harms are the cultural norms that (1) deprive a group of social, economic, or political advancement by (2) maintaining unfounded ideas and assumptions about that group's capabilities, character, or proper place in the social hierarchy. For instance, in *Jaycees*, the Court decried gender discrimination which hampered the "wide participation [of women] in political, economic, and cultural life" by perpetuating "archaic and overbroad assumptions" about women's "needs and capacities." 468 U.S. at 625. The Court, by contrast, praised efforts by the state to remove "barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups. . . ." *Id.* at 626.

The Court's logic is clear. Malign assumptions about a group's basic capabilities and character are ripe targets for antidiscrimination law because they do not simply stir the pot; they handicap people from participating fully and fairly in the country's social, political, and economic life. If people think a particular group is less intelligent or less trustworthy, they'll be less likely to vote for or hire its members. So antidiscrimination laws rightly target pernicious assumptions about a group's capabilities, character, and role in society. But any such assumption is absent here. And, to repeat, Ms. Smith serves the group, including by making websites for them of every description except those that convey a message she cannot in conscience participate in promoting.

It is black-letter law that under First Amendment strict scrutiny, the courts must consider the *marginal* harms and benefits of granting or denying a particular kind of claim. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006). A particularized, context-bound inquiry here would show that curtailing Ms. Smith's First Amendment rights would, at most, reduce some people's discomfort at being confronted with an offensive idea in one particular context. But this is not a permissible public goal, much less one that can survive strict scrutiny.

Ms. Smith's business policy is clear. Any message she can in good conscience broadcast or assist in promoting is a message she will broadcast for any party, regardless of creed, race, gender, or sexual orientation. But there are some messages—those that conflict with her deeply-held religious commitments—which she will not convey for *anyone*. Affirming her right to resist coercion here does not "reflect and reinforce" the kinds of dignitary harms antidiscrimination laws are intended to rectify. *J.E.B.* 511 U.S.

at 141. Colorado might retort that, unlike in less enlightened times, it is no longer possible in the twenty-first century to hold views such as Smith's sans animus. But the growing marginalization of traditional religious views on sexuality only *strengthens* the claim of conscientious individuals such as Ms. Smith to First Amendment protection. *See, e.g.*, *Boy Scouts*, 530 U.S. at 660 ("indeed, it appears that homosexuality has gained greater societal acceptance . . . . But this is scarcely an argument for denying First Amendment protection to those who refuse to accept these views . . . . [T]he fact that an idea may be embraced and advocated by increasing numbers of people is all the more reason to protect the First Amendment rights of those who wish to voice a different view.").

Colorado's only remaining leg to stand on is that the government finds Ms. Smith's convictions offensive or prejudiced. But again, our law here is unequivocal: expression "cannot be restricted simply because it is upsetting or arouses contempt. . . ." *Snyder*, 562 U.S. at 458 (citations omitted). To justify coercion on the ground that the messages conveyed by Ms. Smith's decision not to create a certain set of wedding websites are "too harmful to be tolerated" would be a "startling and dangerous" proposition. *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 791-92 (2011). *See also R.A.V.*, 505 U.S. at 396 (pursuing the goal of suppressing "particular biases" in society through coercion "is precisely what the First Amendment forbids").

Conclusion

Colorado claims that its asserted interest in eliminating dignitary harms outweighs Smith's First Amendment rights. But the caselaw runs diametrically opposed to these

theories: governments have no legitimate interest in suppressing the expression of offensive ideas. *Johnson*, 491 U.S. at 414. They have no legitimate interest in guaranteeing everyone protection from the discomfort that these ideas might elicit. *Id*. at 412. They have no such interest even in the context of public accommodation laws, and even when those laws are intended to protect sexual minorities. *See Boy Scouts*, 530 U.S. at 657-58; *Hurley*, 515 U.S. at 572-73. Colorado's efforts to coerce Smith's expressive speech cannot stand.

For these reasons, the decision of the court below should be reversed.

Respectfully submitted,

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I hereby certify that on this 30th day of January, 2020, I filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit using the CM/ECF system, which will automatically serve electronic copies upon all counsel of record.

s/ Scott D. Goodwin

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Date: January 30, 2020

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