No. 19-1413

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

303 CREATIVE LLC AND LORIE SMITH,

Plaintiffs-Appellants,

v.

AUBREY ELENIS, *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Colorado
Case No. 1:16-cv-02372, Hon. Marcia S. Krieger

BRIEF OF RELIGIOUS AND CIVIL-RIGHTS ORGANIZATIONS AS *AMICI CURIAE* SUPPORTING APPELLEES AND AFFIRMANCE

RICHARD B. KATSKEE
KENNETH D. UPTON, JR.
PATRICK GRUBEL

Americans United for Separation of Church and State

1310 L Street NW, Suite 200
Washington, DC 20005
Tel: (202) 466-3234
Fax: (202) 466-3353
katskee@au.org
upton@au.org
grubel@au.org

Counsel for Amici Curiae

CORPORATE DISCLOSURE STATEMENT

Amici are nonprofit organizations. They have no parent corporations, and no publicly held corporation owns any portion of any of them.

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IDENTITY AND INTERESTS OF *AMICI CURIAE*[1]

Amici curiae are religious and civil-rights organizations united in their commitments to religious freedom and to ensuring that LGBTQ persons, and all people, remain free from officially sanctioned discrimination. *Amici* share the firm belief that our Nation's fundamental promise of equal treatment should not be eroded through misuse of the language of religious liberty.

The *amici* are:

- Americans United for Separation of Church and State.
- ADL (Anti-Defamation League).
- Bend the Arc: A Jewish Partnership for Justice.
- Central Conference of American Rabbis.
- Global Justice Institute, Metropolitan Community Churches.
- Hadassah, the Women's Zionist Organization of America, Inc.
- Hindu American Foundation.
- Interfaith Alliance Foundation.
- Interfaith Alliance of Colorado
- Men of Reform Judaism.
- People For the American Way Foundation.
- Reconstructionist Rabbinical Association.
- Sikh Coalition.
- Women of Reform Judaism.
- Union for Reform Judaism.

[1] *Amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, or their counsel made a monetary contribution intended to fund the brief's preparation or submission. The parties have consented to the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Colorado Anti-Discrimination Act respects the equal rights and dignity of LGBTQ people by requiring that public accommodations treat all comers the same regardless of their sexual orientation. CADA "carries forward" Colorado's tradition, dating back nearly to the formation of the state, of protecting marginalized groups from the indignity and stigma of being denied equal participation in public life based on their identities. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1725 (2018).

The Religion Clauses work in tandem to safeguard religious freedom for all by avoiding both governmental favoritism for and antagonism toward religion. *See Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947). Yet in a Nation that is in part defined by its great respect for religious pluralism, the many and varied faiths and beliefs among the citizenry make it inevitable that secular laws—including the antidiscrimination law here—will at times offend some people's religious sensibilities. The Supreme Court's free-exercise jurisprudence accounts for this inevitability: While no religion or religious practice may be specially disfavored, there is no constitutional injury when a law that regulates conduct in a nondiscriminatory manner and for a valid secular purpose incidentally burdens some religious exercise. *See, e.g.*, *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 531–32

(1993). CADA adheres to these deeply rooted constitutional principles, and 303 has not experienced religiously hostile enforcement (or, indeed, any enforcement) of the Act. To the extent that 303's claim is premised on future unequal treatment because of its religious views, it is premature and nonjusticiable.

More than that, the Establishment Clause forbids granting 303 a religious exemption so that it can discriminate against same-sex couples. For when government makes third parties bear costs, burdens, or other harms associated with exempting religious exercise from a law, it impermissibly favors the benefited religion and its adherents over the rights, interests, and beliefs of the nonbeneficiaries. *See, e.g.*, *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709–10 (1985). The religious exemption sought by 303 would do exactly that, by elevating 303's religious views over the equal civil rights of LGBTQ people.

What is more, though 303 presents its legal challenge as a matter of preserving religious liberty, granting it the exemption that it demands would have quite the opposite effect. In addition to prohibiting sexual-orientation discrimination in public accommodations, CADA prohibits religious, racial, and other forms of invidious discrimination. The sweeping exemption for religiously motivated discrimination that 303 seeks so that it may deny equal service to same-sex couples would necessarily also permit businesses to deny

service to people of the "wrong" religion (or race, or sex, or any other characteristic protected by the Act). A ruling in 303's favor would therefore undermine, not strengthen, religious freedom by impairing the ability of the people of Colorado to live as equal members of the community regardless of faith or belief.

ARGUMENT

I. THE RELIGION CLAUSES NEITHER REQUIRE NOR ALLOW THE REQUESTED EXEMPTION.

The Religion Clauses of the First Amendment "mandate[ ] governmental neutrality between religion and religion, and between religion and nonreligion." *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 860 (2005) (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)). This neutrality principle prohibits government both from specially targeting religious conduct for worse treatment because it is religious (*Trinity Lutheran Church of Columbia v. Comer*, 137 S. Ct. 2012, 2019 (2017); *Lukumi*, 508 U.S. at 532–33, 542), and from granting religious exemptions from the law that empower conduct that harms others (*e.g.*, *Caldor*, 472 U.S. at 709). CADA stands on the firm constitutional ground between these two prohibitions; and 303 has suffered no unconstitutional discrimination because of its professed religious beliefs.

A. The Free Exercise Clause does not require the exemption.

The Free Exercise Clause protects against intentional suppression of religious conduct, but it does not "make the professed doctrines of religious belief superior to the law of the land," which would "in effect . . . permit every citizen to become a law unto himself." *Emp't Div. v. Smith*, 494 U.S. 872, 879 (1990) (quoting *Reynolds v. United States*, 98 U.S. 145, 166–67 (1879)). To protect against repression of religion without subverting the rule of law, the Supreme Court has provided for heightened scrutiny only when laws disfavor religion or religious practice *because of* its religious character. *See Lukumi*, 508 U.S. at 531–32, 542–43. Laws that incidentally burden religious conduct in service of legitimate governmental objectives and apply equally to nonreligious conduct, on the other hand, do not offend the Free Exercise Clause. *See, e.g.*, *id.* at 531; *Smith*, 494 U.S. at 878; *Bowen v. Roy*, 476 U.S. 693, 707–08 (1986); *Braunfeld v. Brown*, 366 U.S. 599, 606–07 (1961) (plurality opinion).

Though 303's complaint asserted both facial and as-applied free-exercise challenges to the antidiscrimination law, its opening brief appears not to question the law's facial validity. *See generally Sabri v. United States*, 541 U.S. 600, 609 (2004) (facial attack requires showing that "no application of the statute would be constitutional"). Nor could it: CADA does not target religion generally or any faith in particular for unequal treatment but instead

applies to all public accommodations without regard to religious affiliation, belief, or motivation.[2] And it more than satisfies the constitutional test because (i) it serves not just the requisite legitimate state interest but a *compelling* one, by prohibiting discrimination and its associated harmful effects (*see Roberts v. U.S. Jaycees*, 468 U.S. 609, 624 (1984) ("[E]liminating discrimination and assuring its citizens equal access to publicly available goods and services . . . plainly serves compelling state interests of the highest order.")); and (ii) it is not just rationally related but narrowly tailored to achieving that end, because prohibiting the discrimination sought to be eradicated "abridges no more [activity] than is necessary to accomplish that purpose" (*id.* at 628–29). Thus, the religious motivation behind 303's desire to deny wedding-related services to same-sex couples does not excuse 303 from the obligation, shared by all public accommodations, to comply with the law.

303's change in strategy on appeal to focus on the Commission's enforcement actions rather than CADA itself does not lead to a different result. To be sure, government cannot apply an otherwise-valid law in a way that displays impermissible religious animus; when it does, the subject of the animus may challenge that application on free-exercise grounds. *See*

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[2] 303 challenges what it regards as two distinct provisions of CADA—what it terms the accommodation and communication clauses. Appellants' Br. 8. Because the free-exercise analysis and result are the same regardless, *amici* address the Act as a whole.

Masterpiece, 138 S. Ct. at 1727–29, 1740; *Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144, 167 (3d Cir. 2002) (holding that city's order to remove Orthodox Jewish group's religious boundary marker from utility poles was based in religious animus). But 303 has not suffered any hostile treatment because of its religious beliefs. Indeed, it could not have: The Commission has taken *no* action regarding 303 other than to respond to this preemptive lawsuit. Whether some hypothetical future enforcement action against 303 might be impermissibly hostile to 303's religious beliefs is simply not a question that can or should be answered today.

1. The Commission has not treated 303 with religious animus.

The Free Exercise Clause prohibits laws that "infringe upon or restrict practices *because of* their religious motivation." *Lukumi*, 508 U.S. at 533 (emphasis added). In *Masterpiece*, therefore, the Supreme Court underscored that government must act impartially toward religion not just in passing laws but also in enforcing them. 138 S. Ct. at 1731. On appeal, 303 effectively contends that because the Commission failed to give sufficiently neutral consideration to the religious objection in *Masterpiece*, subsequent enforcement of CADA against different businesses will necessarily be tainted with the same religious animus. *See* Appellants' Br. 46 (alleging that Commission's actions in *Masterpiece* show that Commission would be hostile

toward 303). But again, CADA itself does not disfavor religion because it makes no distinction between religiously and non-religiously motivated discrimination; the Commission has resolved to discharge its duties in a respectful and impartial manner (Appellees' Br. 62); and 303 has not been the subject of *any* action by the Commission, religiously hostile or otherwise. That a single, separate, past adjudication by the Commission may have been non-neutral toward religion is irrelevant here, when the Commission has done nothing relating to 303.

In *Masterpiece*, the Supreme Court laid out a fact-intensive procedural-neutrality standard that requires the existence of an actual enforcement action: Its analysis looked to the "consideration," "treatment," and "adjudication" of the bakery's individual case, and its holding turned on specific statements made by commissioners in the course of public hearings convened to adjudicate that case. *See* 138 S. Ct. at 1729–30. The *Masterpiece* decision does not question the constitutionality of CADA itself. *Id.* at 1728 ("It is unexceptional that Colorado can protect gay persons."). Nor does it say anything about the constitutionality of future enforcement actions. Rather, the decision recognizes that adjudication of later disputes will require "further elaboration" to ensure that each is resolved in a constitutionally

satisfactory way. *See id.* at 1732.[3] 303 cannot recycle another business's deprivation of procedural neutrality to create its own pre-enforcement free-exercise injury.

2. The Colorado Anti-Discrimination Act treats religiously and non-religiously motivated discrimination equally.

The Free Exercise Clause also forbids laws that, "in pursuit of legitimate interests, . . . in a selective manner impose burdens only on conduct motivated by religious belief." *Lukumi*, 508 U.S. at 543. That is, government cannot prohibit religious conduct while ignoring significant nonreligious conduct that is equally detrimental to the underlying state interests. *See id.* at 543–44 (explaining that city ordinances ostensibly aimed at animal cruelty restricted only religious animal sacrifice and not comparable nonreligious activity).

CADA aims to end discrimination on the basis of certain protected characteristics in public accommodations; and it achieves that goal by prohibiting all public accommodations from discriminating on those grounds. The law applies uniformly, regardless of a business's beliefs, motivations, or

[3] 303's insistence that the Commission must publicly "cure" the defect in the *Masterpiece* adjudication before undertaking any new enforcement actions (Appellants' Br. 46) is without merit. For the Supreme Court has already done that. Far from addressing the motivations behind discrete governmental actions, the other authority on which 303 purports to rely governs purging *permanent monuments* of their original unconstitutional religious character. *Felix v. City of Bloomfield*, 841 F.3d 848, 863 (10th Cir. 2016).

religious or nonreligious affiliations. 303 appears to accept this reality on appeal, redirecting its efforts to an imagined Commission "policy" of enforcing the Act against religiously motivated discrimination only. There is nothing in the record to support that accusation.

To demonstrate the existence of this purported policy, 303 points to only a single other fact pattern (presented in three identical complaints by the same complainant) in which the Commission supposedly turned a blind eye to non-religiously motivated discrimination. But those three instances, noted in *Masterpiece*, did not involve violations of the Act. There, the complainant asked bakeries to make cakes bearing religious messages expressing opposition to same-sex couples, including one reading "Homosexuality is a detestable sin. Leviticus 18:2." *Masterpiece*, 138 S. Ct. at 1749 (Ginsburg, J., dissenting) (quoting record on appeal). The bakeries declined to make the cakes not because of the complainant's religion (which would have been forbidden by the Act) or the religious basis for the anti-LGBT messages, but because the bakeries simply did not offer cakes bearing messages of anti-LGBTQ hate to anyone. *See id.* at 1730, 1733, 1749–50. The complainant was not, therefore, denied equal service because of his religion but in fact *received* equal service: He was allowed to purchase exactly (and only) the same cakes as anyone else. *See id.* at 1733 (Kagan, J., joined by

Breyer, J., concurring); *id.* at 1750 (Ginsburg, J., joined by Sotomayor, J., dissenting).

That the bakeries would not sell anti-LGBT cakes to anyone is no different from declining to sell pornographic cakes, or cakes bearing Nazi swastikas, or cakes topped with pepperoni and mozzarella cheese. Nor is it different from categorically refusing to make wedding cakes—whether because the baker rejects the institution of marriage entirely or just because wedding cakes are too time-consuming and labor-intensive. The crucial element is that the bakeries made blanket decisions about the products offered for sale, not selective denials of service based on the protected characteristics of customers.

In other words, what 303 paints as a double standard that disadvantages religious businesses is actually a consistent, neutral application of the antidiscrimination law: Public accommodations may refuse to provide certain services as long as the refusal is not conditioned on the customer's sexual orientation, race, religion, or other protected trait. 303, however, wants to sell wedding-related services in the public marketplace to different-sex couples who enter into state-sanctioned civil marriages but not to identically situated same-sex couples. Who receives service would therefore

turn on whether the customers are members of a protected class and not on what they wish to purchase. That is textbook discrimination.[4]

Nor does CADA employ a system of exemptions that disfavors religion. Where "a system of individualized or particularized exceptions has been set in place, a religious reason for qualifying for such an exception must be given as much weight as a non-religious reason." *Swanson v. Guthrie Indep. Sch. Dist. No. I-L*, 135 F.3d 694, 701 (10th Cir. 1998) (describing rule derived from *Sherbert v. Verner*, 374 U.S. 398 (1963), and its progeny). Thus, a law cannot allow for routine, individualized, subjectively determined exemptions that favor nonreligious justifications over comparable religious ones. *See, e.g.*, *id.*; *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1297 (10th Cir. 2004).

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[4] 303's insistence that it would turn away same-sex couples not because of their sexual orientation but because of the same-sex character of their marriage is unavailing. The Supreme Court has "declined to distinguish between status and conduct in this context," because the two are so closely linked. *Christian Legal Soc'y v. Martinez*, 561 U.S. 661, 689 (2010). And the fact remains that 303 would provide a wedding website to Pat and Chris if they were a heterosexual couple but not if they were a same-sex couple.

303's desire to create sub-classes of marriages based on the protected characteristics of the partners undermines the value of the civil status of marriage for members of a protected class. But a fundamental right is defined by the nature of the right itself, not by the identity of those who seek to exercise it or have been excluded from doing so in the past. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015). Allowing businesses to close their doors to same-sex couples who choose to exercise their fundamental right to marry would revive the second-class status that the Supreme Court forbade in *Obergefell*. Colorado has a strong—indeed, compelling—interest in ensuring that that does not happen.

The challenged Act, however, contains *no* exemptions: It binds all public accommodations equally, regardless of their motivation for denying service to members of protected classes. What is more, the Commission has no discretion to refuse to enforce the law when it receives a complaint that an investigation reveals to be valid. Aplt. App. Vol. 3 at 517 (district court in part basing on this circumstance its holding that 303 had standing to bring some claims). So it cannot grant individualized exemptions of any kind. *See Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 655 (10th Cir. 2006) (zoning board's lack of discretion to grant exemptions defeated argument that it employed suspect system of individualized exemptions).

That the Commission makes case-by-case determinations about the lawfulness of conduct about which it receives complaints is both constitutional and commonplace. Enforcement of *any* law requires individualized consideration of the facts to decide whether there was a violation. *See Grace United* 451 F.3d at 654 (fact-finding to determine objective category of land use did not violate rule against "system of subjective individualized assessments"); *Axson-Flynn*, 356 F.3d at 1298 ("some degree of individualized inquiry" required to determine eligibility for permissible categorical exemption did not render governmental conduct unconstitutional). To require strict scrutiny whenever a religious explanation is offered for noncompliance with a legal requirement would preclude the

very possibility of the rule of law. *See Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 452 (1988) ("However much we might wish that it were otherwise, government simply could not operate if it were required to satisfy every citizen's religious needs and desires.").

3. To the extent that 303's claim presupposes future unequal treatment, it is not ripe, and 303 lacks standing.

Ripeness requires the Court to evaluate the fitness of issues for judicial decision and the hardship to the parties from withholding review now. *See Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967). Fitness for decision is particularly important when, as here, the claim is premised on rank speculation about imagined harms from future events that are highly unlikely to occur. 303 would have this Court assume not just that the business will begin offering wedding-related services, be approached by and turn away a same-sex couple, and be the subject of a complaint about that incident that then sparks a Commission enforcement action, but also that the Commission will, in the process of considering that complaint, display the same religious animus that led to expensive litigation and an adverse Supreme Court ruling just two years ago in *Masterpiece*.

That is exactly the reliance on "uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all" (*New Mexicans for Bill Richardson v. Gonzales*, 64 F.3d 1495, 1499 (10th Cir.

1995)), that makes judicial review improper. 303 is wrong to invite this Court to assume that the State will willfully flout the Supreme Court's authority and to punish the State preemptively based on that assumption. *Cf. Alden v. Maine*, 527 U.S. 706, 755 (1999) (presumption of states' good-faith adherence to Constitution is integral to our system of government).

Simply put, the threat of any enforcement—much less *discriminatory* enforcement—is too conjectural and the supposed injury too speculative to satisfy Article III. *See* Aplt. App. Vol. 3 at 517 (district court holding that 303 lacked standing to challenge accommodation clause because risk of enforcement too attenuated). 303 does not currently offer wedding services; the Commission has neither received a complaint nor taken any enforcement action regarding 303; and 303 identifies in its brief just one public accommodation—Masterpiece Cakeshop—that has been the subject of religiously hostile enforcement under this antidiscrimination law. 303's "speculative chain of possibilities" that might eventually end with a non-neutral enforcement action is insufficient as a matter of law to establish a legally cognizable injury. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 (2013); *cf. Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 163–65 (2014) (plaintiff had constitutional injury when, among other things, government had already taken enforcement actions against it and had frequently enforced law against others).

4. 303 has not asserted a valid hybrid-rights claim.

303 also contends that, by adding a dubious free-speech claim to its legally insupportable free-exercise claim, it has a "hybrid right" requiring strict scrutiny. Not so.

There is substantial disagreement over whether the notion of hybrid rights makes any sense at all. The mention of hybrid rights in *Smith* has thus caused confusion in the courts of appeals (*see Grace United*, 451 F.3d at 656), and has been criticized by scholars as incoherent and inconsistent with the Supreme Court's own holding in *Smith* (*see, e.g.*, Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1121–22 (1990)). As Professor McConnell put it: "the *Smith* Court's notion of 'hybrid' claims was not intended to be taken seriously." *Id.* at 1122. And while this Court has entertained the theoretical possibility of a hybrid-rights claim (*see, e.g.*, *Swanson*, 135 F.3d at 699), to our knowledge it has never ruled in favor of one on the merits.

But if there *could* be a cognizable hybrid-rights claim, it "at least requires a colorable showing of infringement of *recognized* and *specific* constitutional rights." *Swanson*, 135 F.3d at 700 (emphasis added). "[T]he mere invocation of a general right" (*id.*) is "not a talisman that automatically leads to the application of" strict scrutiny (*id.* at 699). Hence, this Court begins by determining whether "the claimed rights or the claimed

infringements are genuine" (*id.*), which entails a thorough review of the legal merits of the specific constitutional claim being appended to the free-exercise one. *See, e.g.*, *id.* at 699–700 (rejecting parents' hybrid-rights claim because right to control child's education does not extend to dictating public-school curriculum); *Grace United*, 451 F.3d at 657–58 (rejecting church's hybrid-rights claim because rights of assembly and expressive association do not override valid zoning ordinances).

There is no established free-speech right to violate otherwise-valid public-accommodations laws. Quite the contrary. *E.g.*, *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 572 (1995) ("Provisions like these are well within the State's usual power to enact[,] . . . and they do not, as a general matter, violate the First or Fourteenth Amendments."); *accord Masterpiece*, 138 S. Ct. at 1727. The Supreme Court has repeatedly affirmed that "the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011); *see also R.A.V. v. St. Paul*, 505 U.S. 377, 389 (1992) ("[W]ords can in some circumstances violate laws directed not against speech but against conduct."). Thus, as Chief Justice Roberts explained for a unanimous Court in *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006), the fact that a prohibition against race discrimination in hiring "will require an employer to take down

a sign reading 'White Applicants Only' hardly means that the law should be analyzed as one regulating the employer's speech rather than the conduct." CADA likewise regulates discriminatory conduct; any incidental burden on speech does not violate the Free Speech Clause. "[T]he Constitution . . . places no value on discrimination." *Norwood v. Harrison*, 413 U.S. 455, 469 (1973).

In sum, 303 cannot mash together two losing First Amendment claims to create a winning one. *Cf. Watchtower Bible & Tract Soc'y of N.Y. v. Vill. of Stratton*, 536 U.S. 150, 171 (2002) (Scalia, J., concurring) (writing separately to reject notion that combining invalid free-exercise claim with invalid free-speech claim could produce valid legal claim). The hybrid-rights argument should fail.

B. The Establishment Clause forbids the requested exemption.

The rights to believe, or not, and to practice one's faith, or not, are sacrosanct. But they do not extend to imposing the costs and burdens of one's beliefs on others. Just as the neutrality principle at the heart of both Religion Clauses prohibits government from singling out religion for worse treatment, it also prohibits government from preferring one religion over others, or religion over nonreligion. Government therefore cannot grant religious exemptions that would detrimentally affect nonbeneficiaries. For when it does, it prefers the religion of the benefited over the rights, beliefs, and

interests of the nonbeneficiaries, in violation of the Establishment Clause. Granting 303's requested exemption would contravene this settled constitutional rule.

a. Thus, in *Caldor* the Supreme Court invalidated a law requiring employers to accommodate Sabbatarians in all instances, because "the statute t[ook] no account of the convenience or interests of the employer or those of other employees who do not observe a Sabbath." 472 U.S. at 709–10. The Court held that "unyielding weighting in favor of Sabbath observers over all other interests" has "a primary effect that impermissibly advances a particular religious practice," violating the Establishment Clause. *Id.* at 710. Similarly, in *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 18 n.8 (1989) (plurality opinion), the Court invalidated a sales-tax exemption for religious periodicals because, among other defects, it unconstitutionally "burden[ed] nonbeneficiaries . . . to offset the benefit bestowed on subscribers to religious publications."

The Supreme Court's free-exercise jurisprudence also reflects this principle. In *United States v. Lee*, 455 U.S. 252, 261 (1982), the Court rejected an Amish employer's request for an exemption from paying social-security taxes because the exemption would "operate[ ] to impose the employer's religious faith on the employees." In *Braunfeld*, the Court refused an exemption from Sunday-closing laws because it would have provided Jewish

businesses with "an economic advantage over their competitors who must remain closed on that day." 366 U.S. at 608–09. And in *Prince v. Massachusetts*, 321 U.S. 158, 167–70 (1944), the Court denied a request for an exemption from child-labor laws to allow a minor to distribute religious literature on the street because of the danger it posed to the child's welfare. In contrast, the Court recognized a Seventh-Day Adventist's right to an exemption from a restriction on unemployment benefits in *Sherbert* because the exemption would not "serve to abridge any other person's religious liberties." 374 U.S. at 409. And the Court granted exemptions from state truancy laws in *Wisconsin v. Yoder*, 406 U.S. 205, 235–36 (1972), only after Amish parents demonstrated the "adequacy of their alternative mode of continuing informal vocational education" to meet their children's needs.

In short, a religious accommodation "must be measured so that it does not override other significant interests" (*Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005)), and must not "impose substantial burdens on nonbeneficiaries" (*Texas Monthly*, 489 U.S. at 18 n.8 (plurality opinion)). When nonbeneficiaries would be detrimentally affected, religious exemptions are forbidden. *Cutter*, 544 U.S. at 720; *Caldor*, 472 U.S. at 709–10. The Free Exercise Clause is a personal shield from government oppression, not a sword with which to harm others.

b. In only one narrow set of circumstances (in two cases) has the Supreme Court ever upheld religious exemptions that materially burdened third parties—namely, when core Establishment *and* Free Exercise Clause protections for the ecclesiastical authority of religious institutions required the exemption. In *Hosanna-Tabor Lutheran Evangelical Church & School v. EEOC*, 565 U.S. 171, 194–95 (2012), the Court held that the Americans with Disabilities Act could not be enforced in a way that would interfere with a church's selection of its ministers. And in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 339–40 (1987), the Court upheld, under Title VII's statutory religious exemption, a church's firing of an employee who was not in religious good standing. These exemptions did not amount to impermissible religious favoritism, and therefore were permissible under the Establishment Clause, because they directly implicated "church autonomy," which is "enshrined in the constitutional fabric of this country." *Real Alts., Inc. v. Sec'y Dep't of Health & Human Servs.*, 867 F.3d 338, 352 (3d Cir. 2017).

This ecclesiastical-authority doctrine has no bearing on whether a for-profit business that sells goods in the public marketplace may ignore antidiscrimination laws because it holds conflicting religious views.[5] Indeed,

[5] 303's contention that *Hosanna-Tabor* announced a general free-exercise right to be free from laws that burden "religious exercise in ways inconsistent

in *Masterpiece* the Supreme Court warned against expanding this tightly circumscribed doctrine, lest "a long list of persons who provide goods and services for marriages and weddings might refuse to do so for gay persons, thus resulting in a community-wide stigma inconsistent with the history and dynamics of civil rights laws that ensure equal access to goods, services, and public accommodations." 138 S. Ct. at 1727.

c. Granting the religious exemption requested here would license 303—and by extension, all other public accommodations—to discriminate against customers because of their sexual orientation, and any other protected characteristics, as long as the business offered a religious reason for doing so.[6]

Recognizing that LGBTQ people "cannot be treated as social outcasts or as inferior in dignity and worth" (*Masterpiece*, 138 S. Ct. at 1727), CADA ensures that sexual orientation is not a barrier to "acquiring whatever

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with our nation's history and tradition" (Appellants' Br. 52) is baseless. The holding in *Hosanna-Tabor* was limited to the "ministerial exception rooted in the Religion Clauses." 565 U.S. at 190. It is an *exception* not just to laws that would interfere with church autonomy, but to the general rules for free-exercise jurisprudence; to suggest otherwise "has no merit" (*id.*).

[6] Ripeness concerns resurface here: As explained, requests for religious exemptions must, because of the relationship between the Religion Clauses, be evaluated with consideration for the costs and harms that they would impose on third parties. There is no factual record on which to make that determination here because there has been no actual complaint to or enforcement action by the Commission. So judicial review is premature.

products and services [one] choose[s] on the same terms and conditions as are offered to" everyone else (*id.* at 1728). It protects LGBTQ people "from a number of serious social and personal harms," including deprivation "of their individual dignity" (*Roberts*, 468 U.S. at 625). And it spares them the "serious stigma" of living in a community in which all manner of businesses can publicly declare their refusal to serve LGBTQ people. *See Masterpiece*, 138 S. Ct. at 1728–29. Put simply, "acts of invidious discrimination in the distribution of publicly available goods [and] services . . . cause unique evils" (*Roberts*, 468 U.S. at 628), which Colorado has chosen to exorcise.

To accept 303's arguments here would give official imprimatur to all the harms that "surely accompan[y] denials of equal access to public establishments" (*Roberts*, 468 U.S. at 625 (quoting *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250 (1964))). It would deny LGBTQ people the fundamental American promise of equality for all and diminish their standing in society. These are grave harms that the Establishment Clause forbids government to impose in the name of religious accommodation.

II. ANTIDISCRIMINATION LAWS PROTECT RELIGIOUS FREEDOM.

Far from offending religious liberty, public-accommodations laws like Colorado's protect it. Countless federal, state, and local laws prohibit discrimination on the basis of religion in the provision of goods and services, ensuring that all people can believe and worship, or not, according to their

conscience, without fear that they will be denied equal treatment. The religious freedom of all, therefore, is threatened by attempts to use the language of free exercise to license religiously motivated discrimination.

a. Although 303 here states a religious objection solely to providing wedding-related services to same-sex couples, the drastic revision of free-exercise law that it seeks could not be so cabined. Antidiscrimination laws "protect[ ] against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society." *Romer v. Evans*, 517 U.S. 620, 631 (1996). If this Court were to interpret the Free Exercise Clause to grant a license to violate these laws whenever one has a religious motivation for doing so, all manner of discrimination would become permissible. Anyone, anywhere, could be denied service in a restaurant, hotel, shop, or other public establishment, for no reason other than that the person is gay, Black, Jewish, or disabled, and the proprietor states a religious reason for not serving the person.

People of minority faiths would be among the principal victims. For as the case law shows—and the experiences of *amici* and our members confirm—discrimination against members of minority faiths and nonbelievers is often, sadly, religiously motivated.

In *Paletz v. Adaya*, No. B247184, 2014 WL 7402324 (Cal. Ct. App. Dec. 29, 2014), for example, a hotel owner in California closed a poolside event

hosted by a Jewish group. After learning that the group was Jewish, the hotelier told an employee, "I don't want any [f—ing] Jews in the pool" (*id.* at *2 (alteration in original)); said that "her family members would cut off her financing if they learned of the gathering" (Michael Cieply, *Jews Awarded Damages in California Hotel Case*, N.Y. TIMES (Aug. 15, 2012), http://tinyurl.com/9myoenc); and directed hotel staff to remove the Jewish guests from the property (*Paletz*, 2014 WL 7402324, at *2).

And in *Khedr v. IHOP Restaurants, LLC*, 197 F. Supp. 3d 384 (D. Conn. 2016), a restaurant in Connecticut refused service to a Muslim family because of their faith. The father recounted: "The restaurant manager started to look at us up and down with anger, hate, and dirty looks because my wife was wearing a veil, as per our religion of Islam." *Id.* at 385. In front of the family's 12-year-old child, the IHOP manager told his staff "not to serve 'these people' any food." *Id.*

The problem is also stark in the closely related context of employment discrimination. For if refusing on religious grounds to adhere to antidiscrimination requirements were held to be a matter of constitutional right for public accommodations, must not the same be true for employers—and every other context?

In *Nappi v. Holland Christian Home Ass'n*, No. 11-cv-2832, 2015 WL 5023007, at *1–2 (D.N.J. Aug. 21, 2015), for instance, a Catholic maintenance

worker in New Jersey was repeatedly harassed by his supervisor and colleagues, who identified as Protestant and Reformed Christian. They called Catholicism a "'Mickey Mouse religion' and criticized Catholics for worshipping saints," encouraged the employee to leave his church, put religious literature in his locker, and "wanted to shoot [him]." *Id.* at *2. The supervisor eventually fired the employee "because, as a Roman Catholic, he was an 'outsider' who did not 'fit in.'" *Id.* at *3.

A painter in Oregon was fired after refusing to participate in Bible study at work. *See* Rachel Siegel, *He Said He Wouldn't Join His Company's Bible Study. After Being Let Go, He's Suing*, WASH. POST (Aug. 31, 2018), https://tinyurl.com/y9bwdlxb. In Illinois, a supervisor called a Muslim employee who wore hijab "evil," denied her time off for Islamic religious holidays, and engaged in "social shunning, implicit criticism of non-Christians, and uniquely bad treatment of [the employee] and her daughter." *Huri v. Office of the Chief Judge*, 804 F.3d 826, 830, 834 (7th Cir. 2015). And a gym in Minnesota "justifie[d its] . . . rigid policy" of excluding applicants and employees not living according to the gym owners' faith, by reference to the owners' "religious belief that they are forbidden by God, as set forth in the Bible, to work with 'unbelievers.'" *Minnesota ex rel. McClure v. Sports & Health Club, Inc.*, 370 N.W.2d 844, 846–47 (Minn. 1985) (en banc).

b. If the Court accepts 303's interpretation of free-exercise rights, religiously motivated discrimination like the examples above could become commonplace across Colorado. For even under the somewhat narrowed challenge now presented in this appeal, 303 necessarily rejects the idea that the Commission could take *any* valid enforcement action against it, effectively arguing that the administrative proceeding in *Masterpiece* has tainted all future Commission actions. If that argument succeeds, the Commission will be left unable to enforce the law against any public accommodation that expresses religious reasons for discriminating, whether on the basis of sexual orientation, religion, or any other protected trait. Moreover, 303's argument would create a "one strike and you're out" rule for this Circuit: A single misstep or ill-chosen word by a public official in evaluating a religious explanation for violating an antidiscrimination law would effectively nullify the law for all others who cite their religion as a reason for noncompliance.

In the wedding context alone, suppose that an interfaith couple wished to marry, and in keeping with the religion of one partner, the couple planned to serve kosher or halal food. But the only kosher or halal caterer in town refused to prepare food for interfaith weddings based on *its* religious belief that interfaith marriages are sinful. Should the caterer have the right, in the face of public-accommodations protections against religious discrimination, to

force the couple to choose between forgoing a catered reception and violating one spouse's sincere religious beliefs?

And what of children who are part of a family that, in the opinion of a businessowner, should not exist because the parents are of different faiths or were married within a faith that the merchant's own religion rejects? Might the children be denied a birthday cake or a party celebrating a bar or bat mitzvah or a communion?

May the local movie theater refuse to sell a ticket to a boy in a yarmulke because his faith is at odds with that of the manager? May a restaurant deny service to a Muslim woman who wears a hijab, a Hindu woman who wears a sari, or a Sikh man who wears a turban, because the owner's religion forbids associating with members of other faiths? May a grocer refuse to sell fruit to an unmarried pregnant woman because his religion tells him that he would be facilitating someone else's living in sin? And what about the recently widowed Catholic whose Protestant spouse would have wanted a Protestant funeral? May a Protestant funeral director bar the widow from the funeral home on account of *her* faith, leaving her unable to say goodbye in a way that respects her *beloved's* faith?

In short, if the Free Exercise Clause licenses religiously motivated denials of service to same-sex couples, as 303 maintains, then it also sanctions all other religiously motivated denials, including those based on

customers' faiths. One could be refused a hamburger, a room in a hotel, or a tuxedo rental for a wedding just for being the "wrong" religion. And the state could do nothing about it. Such a system would devastate religious freedom, not protect it.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

/s/ *Kenneth D. Upton, Jr.*
RICHARD B. KATSKEE
KENNETH D. UPTON, JR.
PATRICK GRUBEL
Americans United for Separation of Church and State
1310 L Street NW, Suite 200
Washington, DC 20005
Tel: (202) 466-3234
Fax: (202) 466-3353
katskee@au.org
upton@au.org
grubel@au.org

Counsel for Amici Curiae

Date: April 29, 2020

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME, TYPEFACE, AND TYPE-STYLE REQUIREMENTS

1. This document complies with the type-volume limit of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), it contains 6,483 words including footnotes.

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Date: April 29, 2020 /s/ *Kenneth D. Upton, Jr.*

PRIVACY REDACTION CERTIFICATION

I certify that all privacy redactions have been made in compliance with 10th Cir. R. 25.5.

Date: April 29, 2020 /s/ *Kenneth D. Upton, Jr.*

Note: No certification concerning paper copies is included because the Court's General Order filed March 16, 2020, temporarily suspends the requirement to submit paper copies.

CERTIFICATE OF SERVICE

I certify that on April 29, 2020, the foregoing brief was filed using the Court's CM/ECF system. All participants in the case are registered CM/ECF users and will be served electronically via that system.

/s/ *Kenneth D. Upton, Jr.*

APPENDIX OF *AMICI CURIAE*

Americans United for Separation of Church and State

Americans United for Separation of Church and State is a national, nonsectarian public-interest organization that is committed to preserving the constitutional principles of religious freedom and the separation of religion and government. Americans United represents more than 125,000 members and supporters nationwide. Since its founding in 1947, Americans United has participated in the leading church–state cases decided by federal and state courts throughout the country. It has long fought to uphold the First Amendment principles that government must not favor, disfavor, or punish based on religion or belief, and that religious accommodations therefore must not detrimentally affect third parties.

ADL (Anti-Defamation League)

ADL (Anti-Defamation League) is a leading anti-hate organization with the timeless mission to protect the Jewish people and to secure justice and fair treatment for all. ADL's ultimate goal is a world in which no group or individual suffers from bias, discrimination, or hate. To this end, ADL is a steadfast supporter of antidiscrimination laws and the religious liberties guaranteed by the First Amendment. ADL staunchly believes that the Free Exercise Clause is a critical means to protect individual religious exercise, but it must not be used as a vehicle to discriminate by enabling some Americans to impose their religious beliefs on others.

Bend the Arc: A Jewish Partnership for Justice

Bend the Arc: A Jewish Partnership for Justice is the nation's leading progressive Jewish voice empowering Jewish Americans to advocate for the most vulnerable. Bend the Arc mobilizes Jewish Americans beyond religious and institutional boundaries to create justice and opportunity for all through bold leadership development, innovative civic engagement, and robust progressive advocacy.

Global Justice Institute, Metropolitan Community Churches

The Global Justice Institute was founded to serve as the social-justice arm of Metropolitan Community Churches and was separately incorporated in 2011. GJI partners with people of faith and allies around the globe on projects and proposals that further social change and human rights.

Hadassah, the Women's Zionist Organization of America, Inc.

Hadassah, the Women's Zionist Organization of American, Inc., founded in 1912, is the largest Jewish and women's membership organization in the United State, with over 330,000 Members, Associates, and supporters nationwide. While traditionally known for its role in developing and supporting healthcare and other initiatives in Israel, Hadassah has a proud history of protecting the rights of women and the Jewish community in the United States. Hadassah vigorously condemns discrimination of any kind and, as a pillar of the Jewish community, understands the dangers of bigotry.

Hadassah strongly supports the constitutional guarantees of religious liberty and equal protection, and rejects discrimination on the basis of sexual orientation.

Hindu American Foundation

The Hindu American Foundation is a nonprofit advocacy organization for the Hindu American community. Founded in 2003, HAF's work impacts a range of issues—from the portrayal of Hinduism in K-12 textbooks, to civil and human rights, to addressing contemporary problems, such as environmental protection and inter-religious conflict, by applying Hindu philosophy. Since its inception, HAF has made legal advocacy one of its main areas of focus. From issues of religious accommodation and religious discrimination, to defending the fundamental constitutional rights of free exercise and the separation of church and state, HAF has educated Americans and the courts about the effect of such issues on Hindu Americans as well as various aspects of Hindu belief and practice in the context of religious liberty and basic civil rights.

Interfaith Alliance Foundation

Interfaith Alliance Foundation is a national nonprofit organization committed to advancing true religious freedom and strengthening the separation between religion and government. With members from over 75 faith traditions and of no faith, Interfaith Alliance promotes policies that

protect personal belief, combat extremism, and ensure that all Americans are treated equally under law.

Interfaith Alliance of Colorado

Interfaith Alliance of Colorado envisions a society where all people are free and supported to live the life they wish for. We imagine faith communities from many traditions and backgrounds who are committed to work grounded in our shared values, in order to engage in collaborative action to dismantle systemic oppression. To that end, the organization promotes justice, religious liberty and interfaith understanding through building relationships in order to educate, advocate, and catalyze social change.

People For the American Way Foundation

People For the American Way Foundation is a nonpartisan civic organization established to promote and protect civil and constitutional rights, including religious liberty. Founded in 1981 by a group of civic, educational, and religious leaders, PFAWF now has hundreds of thousands of members nationwide. Over its history, PFAWF has conducted extensive education, outreach, litigation, and other activities to promote these values. PFAWF strongly supports the principle of the Free Exercise Clause of the First Amendment as a shield for the free exercise of religion, protecting individuals of all faiths. PFAWF is concerned, however, about efforts, such as

in this case, to transform this important shield into a sword to obtain accommodations that unduly harm others, which also violates the Establishment Clause. This is particularly problematic when the effort is to obtain exemptions based on religion from antidiscrimination laws, which protect against discrimination based on race, gender, sexual orientation and other grounds, including religion.

Reconstructionist Rabbinical Association

The Reconstructionist Rabbinical Association is a 501(c)(3) organization that serves as the professional association of 340 Reconstructionist rabbis, the rabbinic voice of the Reconstructionist movement, and a Reconstructionist Jewish voice in the public sphere. Based on our understanding of Jewish teachings that every human being is created in the divine image, we have long advocated for public policies of inclusion, antidiscrimination, and equality.

Sikh Coalition

The Sikh Coalition is the largest community-based Sikh civil-rights organization in the United States. Since its inception on September 11, 2001, the Sikh Coalition has worked to defend civil rights and liberties for all people, to empower the Sikh community, to create an environment where Sikhs can lead a dignified life unhindered by bias or discrimination, and to educate the broader community about Sikhism. The Sikh Coalition joins this

brief, believing that antidiscrimination laws are essential to protecting the rights of vulnerable populations and that religious exemptions from such laws will ultimately lead to greater discrimination.

Union for Reform Judaism, Central Conference of American Rabbis, Women of Reform Judaism, and Men of Reform Judaism

The Union for Reform Judaism, whose nearly 850 congregations across North America include 1.5 million Reform Jews; the Central Conference of American Rabbis, whose membership includes more than 2,000 Reform rabbis; Women of Reform Judaism, which represents more than 65,000 women in nearly 500 women's groups in North America and around the world; and Men of Reform Judaism come to this issue out of our long-standing commitment to the principles of religious freedom and separation of church and state. The United States' commitment to religious liberty has allowed religious freedom to thrive throughout its history. At the same time, we believe strongly in protecting fundamental civil and human rights. We are guided by the Jewish value that we are all created *b'tzelem Elohim*: in the image of God. We oppose discrimination against all individuals and are committed to equality, inclusion, and protection of people of all sexual orientations, gender identities and gender expressions, for the stamp of the Divine is present in each and every human being.