No. 21-476

In The Supreme Court of the United States

303 CREATIVE LLC, ET AL.,
Petitioners,
v.

AUBREY ELENIS, ET AL.,
Respondents.

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

BRIEF OF THE LONANG INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

A. Does the Law of Nature erect a jurisdictional barrier prohibiting Colorado from compelling Petitioners to recant their conscience and confess Colorado's public accommodation articles of faith?

B. Do First Amendment guarantees including free speech incorporate the law of nature's jurisdictional limitation on governmental power, thereby striking down Colorado's "recant and confess" public accommodation law?

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INTEREST OF THE AMICUS CURIAE[1]

The LONANG Institute is a Michigan-based, nonprofit and nonpartisan research and educational institute. Application of the "Laws of Nature and Nature's God" to contemporary legal disputes is its specialty. The "Laws of Nature and Nature's God" constitute the legal foundation of the civil governments established State by State and of the United States. The law was specifically adopted and referenced in the Declaration of Independence of 1776.

The Laws of Nature are enshrined into our civil laws. They animate the principles of equality, unalienable rights including freedom of the mind and conscience, speech and expression, and limited government by consent. See https://lonang.com/

This same law also presupposes that any civil government, or branch thereof, must adhere to those principles, defend such unalienable rights on an equal basis, and exercise only that power textually given. Likewise, the Law of Nature affirms that the province of a judge is to declare the law, not to make it.

As friend of the Court, the LONANG Institute offers insight into the legal implications of the Law of Nature and its integral guarantees of intellectual

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[1] It is hereby certified that counsel for Petitioner and for Respondent have filed blanket consents to the filing of this brief; that no counsel for a party authored this brief in whole or in part; and that no person other than *amicus curiae*, or their counsel made a monetary contribution to its preparation or submission.

freedom based on the mind being created free by our Creator. This founding legal principle bars a civil government like Colorado from declaring the expression of ideas and opinions illegal. It also bars Colorado from compelling a person to express ideas which he or she may abhor or embrace. When applied to places of public accommodation, the State of Colorado must stand aside and let opinions and ideas have their day in the marketplace of ideas, keeping the state's thumb off the truth scale.

SUMMARY OF ARGUMENT

When God created mankind, male and female,[2] He created them in such a way that they were free to think, speak and act without any prior restraint, punishment or coercion employed by Him against them.[3]

So too, the conscience of every person, whether pure or defiled, debates back and forth within each person's being. Conscience is given external life by

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[2] "God said, 'Let us make man in our image, after our likeness: and let them have dominion over the fish of the sea, and over the fowl of the air, and over the cattle, and over all the earth, and over every creeping thing that creepeth upon the earth.' So God created man in his own image, in the image of God created he him; male and female created he them." Genesis 1:26-27 (ESV).

[3] "And the Lord God said, Behold, the man is become as one of us, to know good and evil: and now, lest he put forth his hand, and take also of the tree of life, and eat, and live for ever: Therefore the Lord God sent him forth from the garden of Eden, to till the ground from whence he was taken. So he drove out the man; and he placed at the east of the garden of Eden Cherubims, and a flaming sword which turned every way, to keep the way of the tree of life." Genesis 3:22-24. (ESV).

speaking and writing. The internal locus of the debate and its external expression places the conscience beyond the jurisdiction of civil government.

These internal characteristics are universal, operating in all humans over the globe at all times and in all ages. As such this human function is part of the law of nature. It is a law of nature because it is universal to human beings and coexistent with the creation of mankind itself by the Creator. These internal characteristics when written or spoken constitute intellectual freedom, freedom of the mind and conscience, and freedom of belief. These freedoms may not be abridged by prior restraint, civil coercion or civil prohibition.[4]

Yet, not all written or spoken viewpoints are true. The first and foremost recorded declaration of fake news and misinformation was spoken by the devil though the serpent, his director of the disinformation governance board.[5] The serpent tweeted out a false narrative about the path to true

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[4] "For why is my liberty judged of another man's conscience?" I Corinthians 10:29 (KJV).

[5] "Now the serpent was more crafty than any other beast of the field that the Lord God had made. He said to the woman, "Did God actually say, 'You[a] shall not eat of any tree in the garden'?" And the woman said to the serpent, "We may eat of the fruit of the trees in the garden, but God said, 'You shall not eat of the fruit of the tree that is in the midst of the garden, neither shall you touch it, lest you die.'" But the serpent said to the woman, "You will not surely die. For God knows that when you eat of it your eyes will be opened, and you will be like God, knowing good and evil." Genesis 3:1-5 (ESV).

knowledge. It was believed by those present who were demonstrably harmed. The devil then spun a conspiracy theory about how to be like God knowing good and evil. His audience discussed it and then followed suit. The whole world fell into chaos, all because of one or two statements of misinformation.

But God did not respond like Colorado. He did not compel the devil to speak His truth. He did not prohibit the devil from speaking that being's viewpoint, though judging it to be false. He did not compel the devil or his disinformation governance board director to recant spreading misinformation or confess a contrary belief. Though God had a compelling interest in banning such speech as the harm to mankind was palpable, long lasting and contrary to human wellbeing, the Creator declined to take any action to stop or restrain its propagation. God chose only to curse the serpent's body as was His right as its Creator. Yet, Colorado is not the Petitioners' creator.

No such diversity of thought or respect for human freedom as shown by God exists in the State of Colorado.[6] Colorado is no Garden of Eden. The state's belligerent Accommodations Clause in the Colorado Anti- Discrimination Act ("CADA") "'compels' [Petitioner Smith] to create speech" celebrating marriages that her conscience tells her she cannot celebrate. 303 Creative LLC v. Elenis, 6 F.4th 1160, 1176–1183 (10th Cir. 2021), App. 22a-23a.

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[6] The motto of Colorado is "*Nil sine numine*." This is Latin and means "Nothing without Providence." Perhaps "Providence means nothing" is more accurate.

In the instant case the Petitioner's mind, thoughts, and conscience are expressed through her website designs and content. Because this expression springs from the way she was created by the Almighty, the entire realm of her human opinions, true or false, right or wrong, good or bad are beyond the jurisdiction of the Colorado legislature and the Colorado Civil Rights Commission and its investigative arm, the Civil Rights Division. The state lacks jurisdiction to declare the expression of Petitioners' opinions unlawful. For Colorado to compel or punish Petitioners' speech transgresses the law of nature made applicable to Colorado as a condition of its Congressional admission into the Union,[7] Colorado's official admission to the Union by President Grant,[8] Colorado's free speech clause which provides more protection than the national constitution's First

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[7] The admission statutes of several states expressly provide that their respective state Constitutions shall be both republican in form and "not repugnant to the principles of the Declaration of Independence." These states include Nevada (1864), Nebraska (1867), Colorado (1876), Washington (1889), Montana (1889), Utah (1896), North and South Dakota (1899), Arizona, New Mexico (1912), Alaska (1958) and Hawaii (1959). See Edward Dumbald, The Declaration of Independence and What it Means Today (Norman: University of Oklahoma Press, 1950), p. 63.

[8] That by an ordinance, irrevocable, the "perfect toleration of religious sentiment shall be secured and that no inhabitant of said State shall ever be molested in person or property on account of his or her mode of religious worship." Ulysses S. Grant, *Proclamation 230—Admission of Colorado Into the Union,* Online by Gerhard Peters and John T. Woolley, The American Presidency Project https://www.presidency.ucsb.edu/node/203513

Amendment,[9] the United States Constitution's First Amendment's freedom of speech clause, and lastly of least importance, prior decisions of this Court.

[9] "No law shall be passed impairing the freedom of speech; every person shall be free to speak, write or publish whatever he will on any subject, being responsible for all abuse of that liberty; and in all suits and prosecutions for libel the truth thereof may be given in evidence, and the jury, under the direction of the court, shall determine the law and the fact." Colo. Const. art. 2, § 10. "The object of article II, section 10 is to 'guard the press against the trammels of political power, and secure to the whole people a full and free discussion of public affairs.'" *People v. Ford*, 773 P.2d 1059, 1066 (Colo. 1989) (quoting *Cooper v. People*, 22 P. 790, 798 (Colo. 1889)). *Bock v. Westminster Mall Co.*, 819 P.2d 55, 59 (Colo. 1991) (noting "we have highlighted the second clause of Article II, Section 10 of our own constitution, which is an affirmative acknowledgement of the liberty of speech, and therefore of greater scope than that guaranteed by the First Amendment").

ARGUMENT

I. COLORADO'S "RECANT AND CONFESS" STATUTE OFFENDS FREEDOM OF THE MIND.

A. CADA Controls Political, Not Commercial Viewpoints.

> Whereas, Almighty God hath created the mind free; that all attempts to influence it by temporal punishment, or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the [Creator], who, being Lord both of body and mind, yet chose not to propagate it by coercions on either, as was in his Almighty power to do.[10]

The golden thread which ties together all of the freedoms guaranteed by the First Amendment to the Constitution (religion, speech, press, assembly and petition) is freedom of the mind. Occasionally these have been collectively referred to as the "freedom of expression," but before there can be any expression of ideas there must be thoughts, which precede them and give them substance. The distinction is important, because thoughts and ideas are internal to the mind, which by definition can be governed only by God, not other people.

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[10] Thomas Jefferson's *Bill for Establishing Religious Freedom* (June 18, 1779), now part of the Code of Virginia, §57-1. Amicus has paraphrased the text in part. https://lonang.com/library/reference/bill-for-religious-freedom-1779/

Thus, Thomas Jefferson's starting assumption is that God made the human mind, and this is what makes it naturally and inherently free. Attempts to burden this natural freedom according to Jefferson, are both hypocritical and beyond the proper scope of civil jurisdiction. It is hypocritical because while Respondents think they have the authority to burden the free expression of Petitioners' conscience, there is little chance they would suffer the same indignity if the shoe were on the opposite foot. Just because Respondents are employed by the State of Colorado does not give them any superior ability to tell right from wrong, or truth from lies, or decree that their opinions in such matters must be adhered to by others.

The orders of the Colorado Civil Rights Commission (CCRC) exceed its jurisdiction because they intrude upon the reserved jurisdiction of God. Accountability for Petitioner Lorie Smith's speech and published website designs (which is merely the expression of her thoughts) runs to the one who gave her a mind, a mouth and hands to create, none of which came from either the CCRC or the State of Colorado. Consequently, our mind and our thoughts are wholly exempt from the cognizance of civil society, most especially civil government.

In the words of the laws of nature and of nature's God: "For who among men knows the thoughts of a man except the spirit of the man, which is in him?" 1 Corinthians 2:11a. Further, "I the Lord search the heart and test the mind, to give every man according to his ways, according to the fruit of his deeds." Jeremiah 17:10. This testimony affirms the proposition that the Almighty alone has not only the

power, but the authority, to know and judge the thoughts of any person, to the exclusion of all others. This exclusive jurisdiction of the Creator, or rather the complete lack of jurisdiction over the mind of others on the part of any public official, is the basis of the inalienable right of freedom of the mind.

It is this freedom of the mind which, in turn, is the basis for both religious liberty and the freedom of speech and press, as they are merely complementary aspects of the individual expression of personal conscience, beliefs and thought. As James Madison famously wrote,

> The [beliefs] then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right. It is unalienable . . . also; because what is here a right towards men, is a duty towards the Creator. It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him. This duty is precedent both in order of time and degree of obligation, to the claims of Civil Society.[11]

Speech, like religion and moral beliefs, whether connected with a particular system of religion or not, are all equally inalienable rights of the individual, for

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[11] See generally James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785), par. 1. Amicus has paraphrased the text in part. https://lonang.com/library/reference/remonstrance-religious-assessments-1785/

which no person is accountable to any one especially a public official. These rights are natural human rights, and are superior to the claims of civil government. In other words, Petitioners' rights of free speech and press are not subject to balancing against any of the so-called interests of state officials, whether compelling or otherwise. As Madison again reminds us, " If this freedom be abused, it is an offence against God, not against man: To God, therefore, not to men, must an account of it be rendered."[12]

B. CADA Controls How Business People Think About Same-Sex Marriage And Gay Rights, Not Commercial Relations.

The State of Colorado and the CCRC are using the Colorado Anti-Discrimination Act ("CADA") to treat the topics of same-sex marriage and gay rights, which have for centuries been regarded as highly charged and highly disputed subjects in the fields of morality, religion and politics, as merely commercial speech. Thus, via CADA, Respondents have attempted to convert the topics of same-sex marriage and gay rights into matters which are regulable by the State when expressed in the speech of Petitioners, and remove them from the field of political and religious speech which are not regulable by them.

By compelling Petitioners to speak a certain way about same-sex marriage and gay rights, Respondents can assure themselves of inducing the long-term effect of changing the public dialogue about

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[12] *Remonstrance, supra* note 11 at par. 4.

these highly charged and contested matters. In other words, Respondents are able to restrict anyone who has a moral, religious or political objection to the state's specific point of view from running a business while voicing their objections.

However, just as the freedom of speech springs from and is animated by the freedom of the mind, so too the control of private speech has the inevitable consequence of telling all whom are subject to CADA what they ought to be thinking.[13] Respondents have attempted to alter how business people think about same-sex marriage not only for business purposes, but also as to morality, religion and politics. In so doing the state has usurped every business owner's conscience and crossed over into the zone of unconstitutional coercion.[14]

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[13] "[T]he ultimate point of forbidding acts of discrimination toward certain classes is to produce a society free of the corresponding biases." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 578 (1995).

[14] "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." *Hurley*, 515 U.S. at 579.

II. COLORADO LACKS JURISDICTION TO APPROVE OR CONDEMN THE EXPRESSION OF TRUE OR FALSE OPINIONS.

A. CADA's Mandate Is a Statutory 'Ministry Of Truth' Crushing All Non-Conforming Viewpoints.

> [T]hat to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy, which at once destroys all ... liberty, because he, being of course judge of that tendency, will make his opinions the rules of judgment, and approve or condemn the sentiments of others only as they shall square with or differ from his own.[15]

It is axiomatic that the CCRC, holding a position of power to judge the speech (and necessarily the opinions) of persons subject to the provisions of CADA, only approves speech it agrees with, and prohibits speech it disagrees with. Speech which does not flow through official channels from the top down allegedly cannot remain unchecked because it always has the possibility to be dangerous. The CCRC argues that (other) people may become confused, and confusion brings uneasiness and upheaval.

President Joseph Biden's fledgling Disinformation Governance Board via the

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[15] *Religious Freedom*, s*upra* note 10.

Department of Homeland Security is another example of this dangerous power to judge ideas. This "working group" will look for the best way to tackle "disinformation" that allegedly threatens national security. Critics have dubbed the Board the Ministry of Truth, in a reference to the novel "1984" by George Orwell. The fictional Ministry of Truth was, of course, actually a Ministry of Lies.

Whenever government gets in the truth business, whether the Ministry of Truth, the Disinformation Governance Board, or the Colorado Civil Rights Commission, it ends up asserting, in Jefferson's own words, "a dangerous fallacy" and should never be legally sanctioned.

B. CADA Shares The Same False Legal Assumptions As Articulated In The 1521 Edict Of Worms.

Petitioners and Martin Luther share a similar story. Luther was commanded by Emperor Charles V to likewise recant his opinions and confess the official line. Luther had criticized the commercial speech of Pope Leo X offering indulgences for sale. He was ordered at the Diet of Worms to recant his writings. Because he refused to do so the Emperor declared him an outlaw and a heretic. The Emperor's Edict commanded all of "Luther's books and writings burned and destroyed in public." It also ordered all printed material be pre-approved by the city clerk and obtain the consent of theologians. It further stated that:

> to prevent poisonous false doctrines and bad examples from being spread all over

> Christendom, and so that the art of printing books might be used only toward good ends, we, . . . order and command you by this edict that henceforth, under penalty of confiscation of goods and property, no book dealer, printer, or anybody else mention the Holy Scriptures or their interpretation without having first received the consent of the clerk of the city and the advice and consent of the faculty of theology of the university, which will approve those books and writings with their seal.

Not being content with control of religious speech, the Edict went on to cover all printed material. It ordered that: "As for books that do not even mention faith or the Holy Scriptures, we also want this decree applied to them, except that our consent or that of our lieutenants will be sufficient. All this will apply for the first printing of the books hereabove mentioned."[16]

This Edict when compared to Colorado's prohibition reveals no material difference in arrogance, intolerance or lawlessness. Petitioners, like Luther before them, have been ordered to never mention their viewpoints about civil rights in their business conduct "without having first received the consent" of the Civil Rights Commission. The Commission has not burned Smith's writings. It has only made her rewrite them to serve its mandate. The Commission has not yet de-platformed her website, the modern equivalent to burning her creative works.

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[16] Edict of Worms, May 1521. https://famous-trials.com/luther/299-edict

C. CADA Shares The Same False Legal Assumptions As Articulated In Civil Laws Punishing Heresy And Blasphemy.

The famous English jurist Sir William Blackstone enumerated the following offenses against God and religion among the laws of England: apostasy, heresy, offenses against the established Church of England, blasphemy, profane and common swearing or cursing, witchcraft or sorcery, religious impostors, simony, and profaning the Lord's day.[17] Blackstone justified the offenses against God and religion on the basis that such offenses, "by openly transgressing the precepts of religion either natural or revealed . . . constitutes that guilt in the action, which human tribunals are to censure."[18]

Several of these common law offenses appeared in the early statutes of some of the original thirteen colonies. God was free to implement and enforce them in ancient Israel and Judah since He was the supreme King and sole Lawgiver in those nations. His right to rule and impose such punishments was established by His offer and the free consent of His People at Mount Sinai.[19] But God was not the King

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17 William Blackstone, 4 Commentaries on the Laws of England, 41-64 (1769). (Emphasis added). https://lonang.com/library/reference/blackstone-commentaries-law-england/

18 4 Commentaries at 43.

19 "So Moses came and called the elders of the people and set before them all these words that the Lord had commanded him. All the people answered together and said, "All that the Lord has spoken we will do." And Moses reported the words of the people to the Lord." Exodus 19:7-8.

or sole legislature of the Massachusetts Colony, never having offered to govern them as a civil body and they being legally disabled thereby to incorporate His punishments previously effective only in the land of Israel.

Yet, heresy and blasphemy were still declared capital offenses in the 1641 Massachusetts Body of Liberties.

> 1. If any man after legal conviction shall have or worship any other god, but the lord god, he shall be put to death. Duet. 13:6,10. Duet. 17:2, 6. Ex. 22:20.
> 2. If any man or woman be a witch, (that has or consults with a familiar spirit,) They shall be put to death. Ex. 22:18. Lev. 20:27. Duet. 18:10.
> 3. If any man shall Blaspheme the name of god, the father, Son or Holy ghost, with direct, express, presumptuous or high handed blasphemy, or shall curse god in the like manner, he shall be put to death. Lev. 24:15,16.[20]

Both the Edict and laws were justified on the basis that they would keep "false doctrines and bad examples from being spread all over." In the alternative, they protected the peace, tranquility and safety of the public, no more or less than CADA claims to secure.

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[20] Massachusetts Body of Liberties (1641) https://lonang.com/library/organic/1641-mbl/

In the next section, we will see that this connection between forbidding the declaration of opinions not approved by government and the former laws against blasphemy is no accident. But for now, the point is that Colorado is well down the slippery slope If Respondents (like Emperor Charles V before them), can prohibit the speech of Petitioners because of its supposed ill tendencies, then Colorado can justify the prohibition of any speech by any of its residents that public officials do not approve.

III. COLORADO'S PUBLIC ACCOMMODATION LAW PUNISHES THE FUNCTIONAL EQUIVALENT OF SEDITIOUS LIBEL.

> [T]hat the impious presumption of legislators and rulers, civil as well as ecclesiastical, who, being themselves but fallible and uninspired men, have assumed dominion over the [beliefs] of others, setting up their own opinions and modes of thinking as the only true and infallible, and as such endeavoring to impose them on others, have established and maintained [injustices] over the greatest part of the world, and through all time.[21]

Unfortunately, the legislators and rulers of Colorado including Respondents have continued the long tradition of impiously presuming to assume a dominion over the beliefs of Petitioners and others. They have set up their own opinions concerning the expression about same-sex marriage and gay rights

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21 *Religious Freedom, supra* note 10.

as the only true and infallible, and seek to impose them by the force of law.

The ink has hardly dried on Justice Kennedy's opinion that: "those who believe allowing same-sex marriage is proper or indeed essential, whether as a matter of religious conviction or secular belief, may engage those who disagree with their view in an open and searching debate." *Obergefell v. Hodges*, 576 U.S. 644, 680 (2015). But in Colorado the Commission has cast Kennedy's optimism aside, preferring force and coercion rather than "open and searching debate" with the Petitioners.

Any government seeking to freeze public opinion on a subject so volatile as the recognition and treatment of homosexuals by society is doomed to failure. Still, many governments have tried. Seditious libel, the speaking or publishing of sentiments deemed (by government officials, of course) to damage the reputation of the government or its key officials, was made criminal in England until 1792. Thus Blackstone, in describing the capital offense of high treason, lists the first species of such crime to include a crime of the mind, evidenced by speech. This included "When a man doth *compass or imagine* the death of our lord the king, or our lady his queen, or of their eldest son and heir."[22]

Seditious libel is, in its nature, the offense of blasphemy against the government or its public officials. The offense of blasphemy assumes that the person of God is someone beyond question, whose

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[22] 4 Commentaries 76. (Emphasis added).

authority and position cannot be maligned. Likewise the authority and opinions of His ministers, who spread His teachings among the people, cannot be questioned or challenged. Neither can its ministers, whoever they be, who are charged with spreading the gospel of inclusion, diversity, and equity. However, we must ask, if blasphemy against God cannot rightly be punished, how can "blasphemy" of mere human beings rightly be punished?

Here is the pertinent text of CADA:

> It is a discriminatory practice and unlawful for a person, directly or indirectly ... to publish, circulate, issue, display, post, or mail any written, electronic, or printed communication, notice, or advertisement that indicates that ... an individual's patronage or presence at a place of public accommodation is unwelcome, objectionable, unacceptable, or undesirable because of disability, race, creed, color, sex, sexual orientation, gender identity, gender expression, marital status, national origin, or ancestry.[23]

Although worded so as to prohibit actions derogatory of people other than government officials, nonetheless CADA is the functional equivalent of the Sedition Act of 1798 which punished any malicious speech directed at the federal government, the President or Congress. For it prevents business owners from propagating any moral, religious,

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[23] C.R.S. 24-34-601(2)(a).

political or commercial speech which maligns the provisions enacted in CADA and/or the policies it promotes. Effectively, CADA outlaws speech which calls the legislative goals of CADA into question, disparages them, or calls them into disrepute, which is the same as disparaging the legislators who enacted that legislation, and the members of the CCRC who stridently enforce it.

IV. FREEDOM TO BOTH ASSENT AND DISSENT ARE GUARANTEED BY THE LAW OF NATURE.

A. Colorado's Statutory Opinions Are Neither Superior Nor Inferior To Petitioners, And Therefore Enjoy No Basis for Compulsion.

> [T]hat our civil rights have no dependence on our [moral] opinions any more than our opinions in physics or geometry; that therefore the proscribing any citizen as unworthy the public confidence by laying upon him an incapacity of being [able to engage in a lawful business], unless he profess or renounce this or that [moral] opinion, is depriving him injuriously of those privileges and advantages to which, in common with his fellow citizens, he has a natural right.[24]

Once again, Jefferson is on point. But what is he talking about? Petitioners' civil rights - in this case, the right to freely engage in a lawful business -

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[24] *Religious Freedom, supra* note 10.

ought not depend on her views of same-sex marriage or gay rights. In other words, Petitioners have a right to be free from coercion - either coercion which forces their speech activities to conform to approved opinions, or coercion which forces their business activities to properly reflect an approved opinion. The first form of coercion - forced approved speech - negates Petitioners' inherent right to dissent. The second form of coercion - forced conduct reflecting approved opinions - imposes a form of involuntary servitude.

The Colorado legislature has mandated that a place of public accommodation may not in any way discriminate against persons on the basis of "sex, sexual orientation, gender identity, gender expression, [or] marital status," among other things. However, the enactment of a statute has no power to end all debate on a matter. In this case, Petitioners have a dissenting opinion which they wish to publicly express. Respondents assert the power under CADA to both prevent Petitioners from expressing such opinions, or alternatively forcing them to say things they disbelieve, effectively quashing Petitioners' right to dissent. How this could possibly stand under prior precedents of the Court cannot be rationally imagined.

The right of free speech, if it means anything at all, means the right to dissent from the opinions of others - most especially the opinions of public officials. Jefferson said it best - public officials are fallible and "uninspired." This means that respondent Aubrey Elenis, Director of the Colorado Civil Rights Division is fallible and "uninspired." So too are Anthony Aragon, Ulysses J. Chaney, Miguel

Rene Elias, Carol Fabrizio, Heidi Hess, Rita Lewis, and Jessica Pocock, members of the Colorado Civil Rights Commission.

The point is that none of these people are superior to anyone else in deciding whose opinions are right or wrong, the best or the worst. We could add this Court's names to the list. None are any more qualified than the general public, no more virtuous than the general public, and have no inside track on truth.

"[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."[25] Moreover, when a law not only requires an individual to speak but mandates what he will say, then courts must treat the law as "target[ing] speech based on its communicative content" and therefore "presumptively unconstitutional," only to be upheld "if the government proves that [the law is] narrowly tailored to serve compelling state interests."[26] In short, "[c]ompelling individuals to mouth support for views they find objectionable violates [a] cardinal constitutional command" unless justified by the strongest of rationales.[27]

The case law on this subject does not mince words though its compelling interest exception sells freedom of speech short to the most clever of

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[25] *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

[26] *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2371 (2018)

[27] *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2463 (2018).

respondents. Particularly repugnant to the First Amendment is when the government forces a private party to voice the government's compelled message, not merely in private or in direct dealings with government itself, but "in public," as an involuntary "instrument for fostering public adherence to an ideological point of view."[28] The Supreme Court has even suggested that "such compulsion so plainly violates the Constitution" that it is rare for the courts to even have to step in to enforce the prohibition against it.[29]

B. Petitioner's Personal Services Are Exempt From Specific Performance Precisely Because They Are Not Fungible.

But Respondents have gone much further than merely quashing dissent. Indeed, Respondents have insisted that Petitioner Smith may lawfully be coerced to perform personal services for people she does not wish to accept as customers of her business. Such coercion, focusing on her business activities rather than her speech as such, serve the supposed higher purpose of reflecting Respondents' opinion as to whom Petitioners' business should be serving. All of which is allegedly justified by the fact that Petitioner's services are custom and unique. As stated by the majority opinion in the case below:

> [O]ur analysis emphasizes the custom and unique nature of Appellants' services. For

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[28] *Wooley*, 430 U.S. at 715.

[29] *Janus*, 138 S. Ct. at 2464. See also *Ward v. Polite*, 667 F.3d 727, 733 (6th Cir. 2012).

> the same reason that Appellants' custom and unique services are speech, those services are also inherently not fungible. To be sure, LGBT consumers may be able to obtain wedding-website design services from other businesses; yet, LGBT consumers will never be able to obtain wedding-related services of the same quality and nature as those that Appellants offer.[30]

Indeed, where can you get preaching service of the same quality and nature as those Martin Luther has to offer? So why not make him recant and confess, and then serve to proclaim the official line (or else)? Why not force him embrace the blessings of the state's one view, even against his conscience?

In essence, Respondents have demanded that Petitioners enter into personal service contracts they do not wish to enter into, and insist (on behalf of such future customers) on the specific performance of those contracts in lieu of damages. This demand contravenes the longstanding rule at common law that personal service contracts are generally exempt from specific performance.[31]

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[30] See *303 Creative LLC v. Elenis*, No. 19-1413 (10th Cir. Jul. 26, 2021), App. 28a.

[31] "In general, specific performance does not lie to enforce a provision in a contract for the performance of personal services. . . . A court will not compel performance of services of a strictly personal nature, requiring special knowledge, ability, or the exercise of judgment or discretion." 81A C.J.S. Specific Performance § 72.

"Specific performance of a contract will not be decreed, where the duties to be fulfilled by the grantee are continuous,

Logic, experience, and legal precedent all judge that civil government cannot compel a person to perform a personal service, *because* the service is personal. Yet the State of Colorado, exhibiting an inquisitorial zeal, insists in a novel claim that it *can* compel every person to perform personal service, precisely *because* the personal service is unique and not fungible. Of course, the lack of fungibility is exactly why personal services cannot be compelled.

C. CADA Establishes Involuntary Servitude.

A third legal defect with Colorado's position exists. Namely, that requiring someone to perform personal services or labor to fulfill a contract is prohibited by the 13th Amendment in the United States, which bars involuntary servitude. The Court has previously defined involuntary servitude to mean "a condition of servitude in which the victim is forced to work for the defendant by the use or threat of physical restraint or physical injury, or by the use or threat of coercion through law or the legal process. This definition encompasses those cases in which the defendant holds the victim in servitude by placing the victim in fear of such physical restraint or injury or legal coercion."[32]

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and involve the exercise of skill, personal labor, and cultivated judgment . . . ." *Rutland Marble Co. v. Ripley*, 77 U.S. 339, 350, 19 L. Ed. 955 (1870).

[32] *United States v. Kozminski*, 487 U.S. 931, 952 (1988). The Court added, "our precedents clearly define a Thirteenth Amendment prohibition of involuntary servitude enforced by the use or threatened use of physical or legal coercion." *Id.* at 944.

In the instant case, Respondents have asserted they have the authority to force Petitioner Smith to accept contracts with customers whom the CCRC alone has chosen, to force her to perform custom and unique personal services for such customers as a means of enforcing those contracts, and have used the threat of coercion through law or the legal process to obtain this service. Colorado is Petitioners' Master. If this is allowed, Petitioners would not so much be working for other people as they would be working for the State of Colorado, at its behest and in furtherance of its stated goals and objectives. Is this not the essence of involuntary servitude as defined by the Court?

Accordingly, forcing Petitioner Smith to provide her personal services as the Respondents' demand, is a form of civil incapacity which deprives her most injuriously of her natural rights. This force is in contravention not only of the universal principles articulated in Thomas Jefferson's famous statute, but also the United States Constitution. Further, it is a quest on the part of Respondents for perfect justice, who seek not only to redress wrongs, but to prevent any possibility of anyone else being wronged in the future. It also serves to eliminate what, in its collective legislative and administrative mind, is simply wrong thinking.

It is the nature of all human government that there are certain things it can never do, one of which is to implement perfect justice. Not even the Almighty, who by definition has the power to do so, compels people to do the right thing, but rather consistently allows people to do whatever they want. Far be it for the State of Colorado to impose a form of

justice that not even the Almighty ever chose to impose beginning with the first injustice by the devil spreading misinformation in the Garden. In so doing,

Respondents assert a power that has not been given to mere mortals. They exercise it only as usurpers and tyrants. Otherwise, they could just as well compel Petitioner Smith to bow the knee and swear allegiance to the CCRC demanding she recant and confess prostrate. Is that what it will take to awaken the Court to the principles at stake?

V. THE RIGHT TO EXPRESS OFFENSIVE VIEWPOINTS IS CONSTITUTIONALLY GUARANTEED.

Thomas Jefferson correctly observed:

> [T]hat it is time enough for the rightful purposes of civil government, for its officers to interfere, when principles break out into overt acts against peace and good order; and finally, that truth is great and will prevail, if left to herself; that she is the proper and sufficient antagonist to error, and has nothing to fear from the conflict, unless by human interposition disarmed of her natural weapons, free argument and debate; errors ceasing to be dangerous when it is permitted freely to contradict them.[33]

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[33] *Religious Freedom, supra* note 10.

George Orwell also wrote: "If liberty means anything at all, it means the right to tell people what they do not want to hear.[34]

Curiously, CADA prohibits speech by any person subject to the Act, if it would make any person who has been discriminated against feel "unwelcome, objectionable, unacceptable, or undesirable." In other words, the free speech rights of persons subject to the Act are conditioned upon, and made subservient to, how other people perceive and receive such speech. It is not an exaggeration to characterize CADA as providing more protection for the right to not be offended, than the right of free speech itself.

This sounds initially good until it is recalled that there is no right to not be offended. Freedom of speech is a right belonging to the speaker, not the hearer. There is no right of the public to be shielded by the law from unpopular opinions which are not also profane, obscene, or an incitement to violence, but are merely politically unpopular. And in the instant case, we are not left to speculate what it is that Petitioner wishes to say, because it is a matter of record in the court below:

> These same religious convictions that motivate me also prevent me from creating websites promoting and celebrating ideas or messages that violate my beliefs. So I will not be able to create websites for same-sex marriages or any other marriage that is not between one man and one woman. Doing

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[34] App. 51a, as quoted by Chief Judge Tymkovich, dissenting.

> that would compromise my Christian witness and tell a story about marriage that contradicts God's true story of marriage - the very story He is calling me to promote.[35]

Petitioners' proposed statement appears out of sync with the LGBT belief system and political agenda. It certainly does not mesh with the provisions of CADA. But that only explains why her beliefs are unpopular in some circles, and with Respondents. It is reasonable to infer that many proponents of gay rights and same-sex marriage would be offended by the proposed statement. It is equally reasonable to infer that Petitioners' are offended by the LGBT agenda and the stated purposes of CADA. So what? Absent physical violence, that is not enough to trigger use of state power to stop it.

But, is the proposed statement merely commercial speech, entitled to less protection, and more regulation, than political speech? Or is the proposed statement in fact political speech? Commercial speech is the advertising of a product or service through printed materials, broadcast, or the Internet. Generally, commercial speech is regulated to protect consumers from misleading advertisements.

Amicus submit that the statement itself is not an advertisement. It is merely a disclaimer Petitioners wish to append to an advertisement. What the statement actually says, in express terms, has to do with Petitioners' religious convictions, her

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[35] App. 70a, fn. 7.

motivation, her beliefs, her Christian witness, and God's true story of marriage. Such things are not commercial in nature. There is nothing about the proposed statement that is fraudulent, deceitful, or in the nature of a scam. Nor can the statement be construed as misleading in any way. None of the valid reasons for regulating or prohibiting commercial speech are present.

Respondents do not seek to prohibit Petitioners' speech because it will lead to a poor purchasing decision on the part of consumers. Respondents want to prohibit the speech because it might possibly diminish the opportunity of gay and lesbian people to commandeer the artistic speech of Petitioner. Respondents are not trying to protect consumers' pocketbooks. They are trying to protect consumers' feelings. That is not a commercial purpose.

Therefore, the proposed statement is not commercial speech at all. It is a form of political speech, entitled to the full protection of the First Amendment.

Political advocacy can be punished by states only "where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[36] There is nothing in Petitioners' proposed statement which approaches "inciting or producing imminent lawless action." Though members of the LGBT community may take offense or feel angry or believe others may thereby act similarly, that belief does not create a danger warranting a state to punish or prevent statements

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[36] *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

causing such belief. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[37]

CONCLUSION

In 1521, Martin Luther was brought before Emperor Charles V at the Diet of Worms to account for his opinions. Luther was, in part, critical of the commercial speech of Pope Leo X offering indulgences for sale. He was ordered to recant his opinions. He was ordered to confess the official view. He refused both declaring that "my conscience is captive to the Word of God. I cannot and I will not recant anything for to go against conscience is neither right nor safe."

Approximately five hundred years later, Petitioner Smith was brought before the Colorado Civil Rights Commission's Civil Rights Division. She was told to recant her conscience. She was told to confess Colorado's official opinions. She did neither only stating that based on her conscience, 303 Creative LLC services "will be withheld from [potential customers] because of sexual orientation"[38]

Colorado's antiquated understanding of freedom reflects the thinking of Charles V and the Holy Roman Empire, not America's statesman or law. Over 235 years ago, Thomas Jefferson restated the law of nature regarding freedom of the mind

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[37] *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943).

[38] App. 116a-121a.

grounded in the creation of human beings by God. The danger of a civil official intruding his or her power into the field of conscience or opinion, and use of civil punishments to restrain their profession on supposition of their ill tendency was rejected. Also rejected was the legal requirement that every person must either recant their views, confess the state's articles of faith, or be punished.

The Civil Rights Commission has wrongfully assumed dominion over the thoughts and ideas of Colorado citizens. Colorado has given up on the idea that truth is great and will prevail, if left to herself. Colorado's CADA, disarms both Petitioner and truth itself, of her natural weapons, free argument and debate. Errors only cease to be dangerous when truth is permitted freely to contradict them, not when the state compels or punishes the expression of belief or opinion it dislikes.

Amicus encourage the Court to affirm the Law of Nature, including its fixed concept of freedom of the mind, mandating but one practice--to leave the expression of ideas and opinion alone. In this case, that law commands the civil government of Colorado, to cease and desist enforcement of its public accommodation law against the expression of ideas and opinions, no matter how they shall square with or depart from the state's view about service offered under its public accommodation statute.

Governmental mandates to "recant and confess" have no place in our Constitutional Republic.

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