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 to the Tenth Circuit

BRIEF OF AMICUS CURIAE ALABAMA CENTER FOR LAW AND LIBERTY IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Constitutions and Statutes

Other Authority

IDENTITY AND INTEREST OF AMICUS CURIAE[1]

Amicus Curiae Alabama Center for Law and Liberty ("ACLL") is a conservative nonprofit public-interest firm located in Birmingham, Alabama, dedicated to the defense of limited government, free markets, and strong families. ACLL has an interest in this case because it believes that freedom of speech and free exercise of religion are indispensably essential to limited government, because violating these freedoms "invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." *W. Va. St. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). Moreover, because ACLL believes in free markets, it believes that, subject to limited exceptions, people should be free to decline working for another against their will.

SUMMARY OF THE ARGUMENT

At common law, public-accommodation laws applied only to a limited class of vendors: (1) those who provided food, drink, shelter, and other life-sustaining services to people who needed them, or (2) those who provided transportation or communication

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[1] Pursuant to Rule 37.3, all parties have consented to the filing of this brief. Pursuant to Rule 37.6, no party or party's counsel authored this brief in whole or in part, or contributed money that was intended to fund its preparation or submission; and no person other than the *amicus curiae*, its members, or its counsel, contributed money that was intended to fund the preparation or submission of this brief.

that was necessary to secure those life-sustaining goods or services. The common law's rules made sense: because people need certain fundamental things in order to live, those goods or services should not be declined without good reason. The First and Thirteenth Amendments to the United States Constitution were adopted with that background in mind.

But in recent years, the scope of public-accommodation laws has expanded drastically. Instead of occupying the limited sphere that public-accommodation laws held in the 18th and 19th centuries, they have now expanded to apply to just about anyone who does business with the public. Undoubtedly, some public-accommodation laws were needed during the Civil Rights Era, as African-Americans were being denied fundamental goods and services simply because of their skin color. But the trend today is to expand the scope from *fundamental* goods or services to *any* goods or services available to the public.

Regardless of whether the motivations behind that expansion were good or not, if the expanded public-accommodation laws cross constitutional lines, then they are not valid. In this case, the Colorado public-accommodation law violates three constitutional guarantees, at least as applied to Petitioners. First, it violates Petitioners' freedom to refrain from speaking a message with which they disagree. Second, it violates Petitioners' right to freely exercise their religion, both under an originalist analysis of the Free Exercise Clause and

under this Court's precedents. Finally, a *prima facie* case exists that forcing Petitioners to engage in personal-service contracts against their will violates the Thirteenth Amendment's prohibition of involuntary servitude. This position is supported not only by the text and history of the Amendment, but also by leading 19th and 20th century treatises and this Court's precedents.

Thus, whatever authority the states have to expand the historical function of public-accommodation laws, they cannot do so if those laws would violate the First or Thirteenth Amendments. Failing to enforce constitutional guarantees of freedom would give public-accommodation laws the right to take the average American, who just wanted to make a living, and shanghai him into supporting causes with which he has deeply held fundamental disagreements.[2] Just as teachers and students do not shed their constitutional rights at the schoolhouse gate, neither do Americans shed their constitutional rights when they go to work. Thus, while public-accommodation laws serve important purposes when kept within their proper role, they may not be abused to rob Americans of their First and Thirteenth Amendment rights under the guise of a supposed "duty to serve everyone," or maybe more specifically, a "duty not to offend anyone."

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[2] To "shanghai" means "to put aboard a ship by force often with the help of liquor or a drug," or "to put by trickery into an undesirable position." *Merriam-Webster's Collegiate Dictionary* 1143 (11th ed. 2020). This word originates from "use of this method to secure sailors for voyages to eastern Asia[.]" *Id.*

ARGUMENT

I. As the First and Thirteenth Amendments Were Being Framed, Public-Accommodation Laws Applied Only to Businesses That Provided Life-Sustaining Goods or Services

A. Public-Accommodation Laws Under the Common Law

At common law, most businesses were free to serve whom they wished; only a select few were subject to laws that did not allow them to turn down customers. Summarizing the relevant rules, Blackstone writes:

> Also if an inn-keeper, or other victualler, hangs out a sign and opens his house for travellers [sic], it is an implied engagement to entertain all persons who travel that way; and upon this universal *assumpsit* an action on the case will lie against him for damages, if he without good reason refuses to admit a traveller [sic].

1 William Blackstone, *Commentaries* *164.

Three observations must be made about Blackstone's rule before proceeding further. First, the rule applied to inn-keepers. Second, it applied to "other victualler[s]." At the time, a "victualler" was defined as "[o]ne who provides victuals." 2 Samuel

Johnson, *A Dictionary of the English Language* (1755).[3] A "victual," in turn, meant, "[p]rovision of food; stores for the support of life; meat; sustenance." *Id.*[4]

Thus, not everyone who provides goods or services was forced to serve people who wanted their business. Instead, only those who provided shelter, food, sustenance, or had a store "for the support of life" was subject to this rule. The reason is obvious: there are certain goods or services that people need in order to live.

Throughout history, different (and even rivaling) schools of thought have still been able to agree on what constitutes such needs. Scientists generally recognize that food, water, air, and shelter are needed to survive.[5] Abraham Maslow, the renown humanist psychologist, reasoned that physiological needs (such as food, water, and rest), as opposed to psychological and self-fulfillment needs (such as intimate relationships, feelings of prestige, and reaching one's potential), were the most fundamental

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[3] *Available at* https://johnsonsdictionaryonline.com/views/search.php?term=victualler (last visited May 20, 2022).

[4] *Available at* https://johnsonsdictionaryonline.com/views/search.php?term=victual (last visited May 20, 2022).

[5] *See Human Needs*, NASA, https://www.nasa.gov/pdf/162514main_Human_Needs.pdf (last visited May 20, 2022).

set of needs in his "Hierarchy of Needs."[6] And finally, in a sentiment reflected by many who hold to the Judeo-Christian worldview, the Apostle Paul wrote: "If we have food and covering, with these we shall be content."[7]

Thus, regardless of one's worldview, it is commonly accepted that people need food, water, air, shelter, and clothing to live. This fits neatly within Johnson's definition of "victuals." That would explain why Blackstone wrote that innkeepers and other victuallers could not turn down customers without good reason. People literally could not live without the services of victuallers.

In 1701, Chief Justice Holt of the King's Bench postulated that the rule extended beyond innkeepers to include smiths (specifically those who worked with horseshoes) and common carriers. *Lane v. Cotton*, 12 Mod. 472, 484-85, 88 Eng. Rep. 1458, 1464-65 (K.B. 1701) (Holt, C.J.). Chief Justice Holt reasoned, "Whenever any subject takes upon himself a public trust for the benefit of the rest of his fellow-subjects, he is *ipso facto* bound to serve the subject in all the things that are within the reach and comprehension of such an office[.]" *Id.*, 12 Mod. at 484. However, two things are worth noting here.

First, this Court has interpreted Chief Justice Holt's rule to apply to "innkeepers, smiths, and

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[6] Saul McLeod, *Maslow's Hierarchy of Needs*, Simple Psychology (last updated Apr. 4, 2022), https://www.simplypsychology.org/maslow.html.

[7] 1 Timothy 6:8 (New American Standard Bible 1995).

others who 'made profession of a public employment'" who could be regarded as "a sort of public servants." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 571 (1995) (citations omitted). Justice Douglas likewise focused on "innkeepers and carriers" as prime examples of "common callings." *Lombard v. Louisiana*, 373 U.S. 267, 277 (1963) (Douglas, J., concurring). This did not apply to everyone who was employed, but to those who could be regarded as public servants. It seems that this Court and Chief Justice Holt focused on those who provided victuals and infrastructure that was necessary to secure victuals. For instance, although shoeing a horse is not as critical to human survival as food and water, having the transportation to get food and water is critical to human survival.

Second, Blackstone's view of public accommodation laws might have been narrower than Chief Justice Holt's, since his recitation of the public-accommodation doctrine was not as expansive. Since this Court has recognized that Blackstone's *Commentaries* are the most satisfactory exposition of the common law,[8] more weight should be given to Blackstone's view than to Holt's if the two conflict. If they do not conflict though, then they should be harmonized by giving appropriate weight to Blackstone's view so that the "common calling" doctrine remains the exception rather than the rule.

Finally, the common law applied the innkeeper rule to "houses of public entertainment." 2 James

[8] *Schick v. United States*, 195 U.S. 65, 69 (1904).

Kent, *Commentaries on American Law* 461 (1827) (citing *Thompson v. Lacy*, 3 Barn. & Ald. 283). However, houses of public entertainment constituted inns only when "provisions and beds were furnished for travelers[.]" *Id.* Thus, places like theaters, sports arenas, and the like would not constitute a house of public entertainment.

B. "Good Reason" in the Anglo-American Tradition

That brings us to the third observation of Blackstone's rule. Even though victuallers' services were so essential, they would escape liability for turning down a customer if they had good reason. While Blackstone did not provide any illustrations of what "good reason" meant, he would undoubtedly agree that the preservation of religious freedom would be a good reason. As he said, "Upon these two foundations, the law of nature and the law of revelation, depend all human laws; that is to say, no human laws should be suffered to contradict these." 1 William Blackstone, *Commentaries* *42. In Blackstone's view, if a human law (such as the innkeeper rule) caused one to disobey God, then that law was bad law (or perhaps not even law at all—*see id.* at *41). It stands to reason then that if a person were to employ a victualler's services for a purpose that he would find sinful, then he would have good reason to say no. With this notion James Madison would agree, arguing that what is a "duty towards

the Creator" is a "right against man." *See* James Madison, *A Memorial and Remonstrance* (1785).[9]

Almost inseparably connected with freedom of religion is freedom of speech. "As Jefferson famously put it, 'to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors is sinful and tyrannical.'" *Janus v. AFSCME, Council 31*, 138 S.Ct. 2448, 2464 (2018) (quoting A Bill for Establishing Religious Freedom, in 2 Papers of Thomas Jefferson 545 (J. Boyd ed. 1950)). In Jefferson's view, which became quite influential, God alone had jurisdiction over the heart and mind, giving government the power over actions only. Thus, to force one to speak a message with which he disagrees was to invade a province that God alone had the right to judge: the realm of the mind, heart, and spirit. *Accord W. Va. St. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (holding that forcing one to salute the flag "invades the sphere of the intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."). Thus, by the time of the American founding, protecting the freedom to speak (or not to speak) would have been considered "good reason" as well.

Finally, Chief Justice Holt and Chancellor Kent are in agreement that lack of ability to perform the contract constituted "good reason." Chief Justice Holt, for instance, excuses an innkeeper from

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[9] *Available at* https://founders.archives.gov/documents/Madison/01-08-02-0163 (last visited May 30, 2022).

refusing to entertain a guest if his house is full. *Lane*, 12 Mod. at 484 (Holt, C.J.). Chancellor Kent likewise notes that "reasonable compensation" for the innkeeper was an indispensable element of the innkeeper rule, meaning that if the customer was unwilling to pay, then the innkeeper had no duty to serve. *See* 2 Kent, *supra*, at 461.

C. Nineteenth Century Views of Accommodations Before the Reconstruction Amendments

By the time Chancellor Kent wrote *Commentaries on American Law*, the predominant issue was not who innkeepers were required to accommodate, but rather who was an innkeeper. 2 Kent, *supra*, at 461-62. To clarify any confusion, most of the states had defined by statute who constituted an innkeeper and established a licensing scheme. *Id.* at 462-63. However, there is no indication that these statutes changed the scope of who innkeepers were required to accommodate. *See id.* at 461-63.

A year after Chancellor Kent wrote about the duties of innkeepers under American law, Noah Webster published his *American Dictionary of the English Language*. Webster defined an "innkeeper" as an "inn-holder," noting that in this country, "the innkeeper is often a tavern keeper or taverner, as well as an innkeeper, the inn for furnishing lodgings and provisions being usually used united with the tavern for the sale of liquors." Noah Webster, *Webster's American 1828 Dictionary of the English Language* 448 (compact ed., Walking Lion Press

2010) (1828). Webster defined a "victualler" primarily as, "[o]ne who furnishes provisions," "keeps a house of entertainment," or "a provision-ship." *Id.* at 899. "Victuals" in particular meant "[f]ood for human beings, prepared for eating; that which supports human life; provisions; meant; sustenance." *Id.*

Thus, Webster's definition of inn-keepers and victuallers do not deviate from Blackstone, Holt, or Kent in any material way. One may argue that "houses of entertainment" constitutes an expansion of the duty to accommodate, since entertainment is not necessary for human life. But as Chancellor Kent noted, "houses of entertainment" had been a legal term of art for almost a century, meaning one who provides entertainment *and* lodgings. 2 Kent, *supra*, at 461 (citing *Thompson v. Lacy*, *supra*). And "provisions," in the context of innkeepers and the like, meant "[v]ictuals; food…. all manner of eatables for man and beast." *See* Webster, *supra*, at 645.

D. Conclusion: The Common Law Background of the First Amendment and the Reconstruction Amendments

"'The interpretation of the United States Constitution is necessarily influenced by that fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history.'" *Schick v. United States*, 195 U.S. 65, 69 (1904) (quoting *Smith v. Alabama*, 124 U.S. 465, 478 (1888)). The Constitution "'must be interpreted in light of the common law, the principles and history of

which were familiarly known to the framers of the Constitution.'" *Schick*, 195 U.S. at 69 (quoting *United States v. Wong Kim Ark*, 169 U.S. 649, 654 (1898)). In light of the common law, then, there is a presumption that the First Amendment and Reconstruction Amendments are not necessarily at odds with the common-law accommodation rules as long as the latter remain within their proper scope.

Putting it all together, the doctrine of public accommodations that the Founding generation understood is this: The government may require those who provide goods and services *to sustain human life* to serve every customer. However, such victuallers may turn down customers if they have good reason, which includes impossibility of performance and preservation of certain unalienable freedoms, such as First Amendment rights.

II. The Recent Trend in Expanding Public Accommodation Laws Can Cause Constitutional Problems

It is no secret that in modern times, public accommodation laws are not as limited as they were at common law, the American Founding era, or the early 19th century. The Colorado statute at issue in this case is an example of what public-accommodation laws often look like today. That law defines a place of "public accommodations" as follows:

> As used in this part 6, "place of public accommodation" means *any place of business engaged in any sales to the public* and any

> place offering services, facilities, privileges, advantages, or accommodations to the public, including but not limited to any business offering wholesale or retail sales to the public; any place to eat, drink, sleep, or rest, or any combination thereof; any sporting or recreational area and facility; any public transportation facility; a barber shop, bathhouse, swimming pool, bath, steam or massage parlor, gymnasium, or other establishment conducted to serve the health, appearance, or physical condition of a person; a campsite or trailer camp; a dispensary, clinic, hospital, convalescent home, or other institution for the sick, ailing, aged, or infirm; a mortuary, undertaking parlor, or cemetery; an educational institution; or any public building, park, arena, theater, hall, auditorium, museum, library, exhibit, or public facility of any kind whether indoor or outdoor. "Place of public accommodation" shall not include a church, synagogue, mosque, or other place that is principally used for religious purposes.

Colo. Rev. Stat. § 24-34-601(1) (emphasis added).

Thus, between the 19th century and now, the duty to accommodate the public has expanded from businesses that provided life-sustaining services to almost anyone that serves the public. Without a doubt, some level of public-accommodation laws were needed during the Civil Rights Era. Denying services to anyone because of their skin color is reprehensible,

and denying basic services to someone because of their skin color was without a doubt not "good reason" to deny services to a customer. It is good that public-accommodation laws remedied that injustice.

But as always, when the pendulum swings too far one way (such as denying African-Americans essential goods and services because of their race), the pendulum can swing too far back the other way (such as expanding the scope of public-accommodation laws to include everyone). ACLL's position is that it is better to let the market solve most of these issues than to have the government force people to serve those whom they do not wish to serve, with the limited exception of life-sustaining services. But regardless of whether that is accurate or not, even if the government can expand the scope of public accommodations beyond what the common law held, it may not do so if those laws infringe upon constitutionally protected rights. Just as "[i]t can hardly be argued that either students or teachers shed their constitutional rights … at the schoolhouse gate,"[10] neither can it be argued seriously that business owners shed their constitutional rights at their businesses' doors.

A. Freedom of Speech

The Free Speech Clause, applicable to the States through the Fourteenth Amendment, provides that neither the federal nor state governments may abridge the freedom of speech. U.S. Const., amend. I.

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[10] *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

The freedom to speak includes the right not to speak. *Janus*, 138 S.Ct. at 2463. When the speech includes "controversial subjects" that are "sensitive political topics" and "matters of profound value and concern to the public," then that speech "occupies the highest rung of the hierarchy of First Amendment values and merits special protection." *Id.* at 2476 (cleaned up). Consequently, "[g]overnments must not be allowed to force persons to express a message contrary to their deepest convictions." *NIFLA v. Becerra*, 138 S.Ct. 2361, 2379 (2018) (Kennedy, J., concurring).

In this case, forcing Petitioners to speak a message with which they disagree under the guise of a public-accommodation law undoubtedly violates the Free Speech Clause. While Petitioners are in the business of helping promote weddings, spreading the news about a wedding is not the kind of life-sustaining service that the common law required a victualler to promote. Even if it could somehow fit within that category, the protection of religious liberty is undoubtedly "good reason" to politely decline promoting that particular event.[11] And as this Court held in *Janus* and Justice Kennedy wrote in his *NIFLA* concurrence, protecting the right not to speak on a controversial matter in which a person

[11] Opponents of this view often argue that eradicating discrimination against *people* is never good reason to turn down a customer. But as Justice Gorsuch astutely observed, it's not the identity of the customer but the content of the message that matters to people like Petitioners. *See Masterpiece Cakeshop Ltd. v. Colo. Civil Rights Comm'n*, 138 S.Ct. 1719, 1736 (2018) (Gorsuch, J., concurring).

has a deeply held fundamental disagreement is good cause as well.

Lest one object that ACLL is waxing poetic based on general principles of free speech, this Court's precedents provide analogous examples. In *Wooley v. Maynard*, 430 U.S. 705, 713 (1977), the United States Supreme Court addressed the question

> of whether the State may constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public.

It held that the State may not do so. *Id.* Although the issue in that case involved a phrase on a license plate, the same principle should apply because 303 Creative is a private company and the forced dissemination of a message on private property (website, email, etc.) should be held to be just as unconstitutional.

In *Wooley* the Court also wrote:

> Here, as in *Barnette*, we are faced with a state measure which forces an individual, as part of his daily life—indeed constantly while his automobile is in public view—to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable. In doing so, the State 'invades the sphere of intellect and spirit which it is

> the purpose of the First Amendment to our Constitution to reserve from all official control.' [*Barnette*, 319 U.S.] at 642.

Wooley, 430 U.S. at 715.

The Court in *Wooley* held that the State's second claimed interest was not ideologically neutral with the majority writing, "However, where the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message." *Id.* at 717. Certainly, this language should be applicable to the owner of 303 Creative.

303 Creative's website includes the following statement under the headline "Why I Create:"

> As a Christian who believes that God gave me the creative gifts that are expressed through this business, I have always strived to honor Him in how I operate it. My primary objective is to design and create expressive content—script, graphics, websites, and other creative content—to convey the most compelling and effective message I can to promote my client's purposes, goals, services, products, events, causes, or values. Because of my faith, however, I am selective about the messages that I create or promote – while I will serve anyone I am always careful to avoid communicating ideas or messages, or promoting events, products, services, or

> organizations, that are inconsistent with my religious beliefs.[12]

That statement sounds very similar to how a newspaper editor might describe how he decides what stories, columns, and opinions to run in his newspaper. The following language from *Miami Herald Pub. Co. v. Tornillo* 418 U.S. 241, 256-57 (1974) (cleaned up) is on point:

> We see that, beginning with *Associated Press* [*v. United States*, 326 U.S. 1 (1945)], the Court has expressed sensitivity as to whether a restriction or requirement constituted the compulsion exerted by government on a newspaper to print that which it would not otherwise print. The clear implication has been that any such a compulsion to publish that which "reason" tells them should not be published' is unconstitutional. A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution, and, like many other virtues, it cannot be legislated.
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> Appellee's argument that the Florida statute does not amount to a restriction of appellant's right to speak, because "the statute in question here has not prevented the Miami Herald from saying anything it wished," begs the core question. Compelling

[12] *Why I Create*, 303 Creative, https://303creative.com/about/ (last visited May 27, 2022).

> editors or publishers to publish that which "'reason' tells them should not be published" is what is at issue in this case. The Florida statute operates as a command in the same sense as a statute or regulation forbidding appellant to publish specified matter. Governmental restraint on publishing need not fall into familiar or traditional patterns to be subject to constitutional limitations on governmental powers. *Grosjean v. American Press Co.*, 297 U.S. 233, 244 -245 (1936). The Florida statute exacts a penalty on the basis of the content of a newspaper. The first phase of the penalty resulting from the compelled printing of a reply is exacted in terms of the cost in printing and composing time and materials and in taking up space that could be devoted to other material the newspaper may have preferred to print. It is correct, as appellee contends, that a newspaper is not subject to the finite technological limitations of time that confront a broadcaster, but it is not correct to say that, as an economic reality, a newspaper can proceed to infinite expansion of its column space to accommodate the replies that a government agency determines or a statute commands the readers should have available.

Thus, no matter how one slices it, the First Amendment protects Petitioners' rights not to speak. It does not matter whether this case most closely resembles forcing newspapers to select which articles to print (*Miami Herald*), displaying a message on a

license plate with which one disagrees (*Wooley*), forcing a pro-life agency to display a pro-choice message (*NIFLA*), forcing one to pay union dues to support messages with which one disagrees (*Janus*), or forcing one to salute the flag against one's will (*Barnette*). Each category has two things in common: they violate fundamental free speech guarantees, and this Court has declared each one unconstitutional. The similar violation of Petitioners' free speech rights should not get a pass here simply because they were violated under the guise of public-accommodation laws.

B. Free Exercise of Religion

The First Amendment protects not only the freedom to speak, but also the free exercise of religion. U.S. Const., amend. I. In *Employment Div. v. Smith*, 494 U.S. 872 (1990), the Court cabined the strict-scrutiny test from past cases into a limited category of free-exercise cases. *Smith*, 494 U.S. at 881. Instead, *Smith* held that the Free Exercise Clause does not "relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Id.* at 879 (cleaned up). Respondents may argue that the public-accommodation law at issue here is such a law, and therefore there is no free-exercise violation.

However, five (and maybe six) justices of the Court have reasoned that *Smith* does not do justice to the Free Exercise Clause. *See Fulton v. City of*

Philadelphia, 141 S.Ct. 1868, 1882-83 (2021) (Barrett, J., joined by Kavanaugh, J., agreeing that the Free Exercise Clause must be more than "protection from discrimination" based on its text and structure); *id.* at 1883-1926 (Alito, J., joined by Thomas and Gorsuch, JJ., concurring in judgment) (making the originalist case for religious accommodations and that strict scrutiny should replace *Smith*); *see also Obergefell v. Hodges*, 576 U.S. 644, 711-12 (2015) (Roberts, C.J., dissenting) (arguing that permitting religious people to believe and teach that same-sex marriage is immoral but not to act on those beliefs may violate the Free Exercise Clause).

As Justices Alito, Thomas, and Gorsuch observed in *Fulton*, a reasonable person at the time of the Founding would have understood the free "exercise" of religion to mean that one had the right to unrestrained practice or outward performance of their religion. *Fulton*, 141 S.Ct. at 1896 (Alito, J., concurring in judgment). The limited exceptions to this rule are where the public peace or safety would be endangered. *Id.* at 1901. This is a far cry from modern times where, as Respondents appear to believe, one's dignity must come from the State rather than from being made in the image of God. *Obergefell*, 576 U.S. at 735 (Thomas, J., dissenting). Since the common law did not recognize a requirement to uphold a person's dignity but only their life-sustaining services, and since the Founding generation recognized only a public peace and safety exception to the Free Exercise Clause, an originalist reading of the Free Exercise Clause would not permit

the public accommodation law at issue here to force Petitioners to violate their religious beliefs.

In the alternative, Justices Barrett and Kavanaugh expressed skepticism of Justice Alito's interpretation of the Free Exercise Clause and though that a more "nuanced" approach may be warranted. *Fulton*, 138 S.Ct. at 1883 (Barrett, J., concurring). But even if this is the case, *Smith* reveals that when a person's rights to free exercise of religion and free speech are violated simultaneously, strict scrutiny applies. *Smith*, 494 U.S. at 881-82 (citing *Wooley* and *Barnette*).[13]

Thus, regardless of whether the standard for judging free-exercise claims is Justice Alito's framework or *Smith*, strict scrutiny would apply. As a threshold matter, ACLL shares Justice Kavanaugh's concerns about standards of review, even the strict-scrutiny test. *See Ramirez v. Collier*, 142 S.Ct. 1264, 1286-87 (2022) (Kavanaugh, J., concurring) (citing Brett M. Kavanaugh, *Two Challenges for the Judge as Umpire: Statutory Ambiguity and Constitutional Exceptions*, 92 Notre Dame L. Rev. 1907, 1914-19 (2017)). ACLL believes

[13] The U.S Court of Appeals for the Eleventh Circuit, interpreting the hybrid-rights doctrine, has postulated that it applies when a case arises involving scenarios like the ones described in *Smith*. *Henderson v. McMurray*, 987 F.3d 997, 1006-07 (11th Cir. 2021) (Pryor, C.J., for the court). Even if the interpretation of the hybrid-rights doctrine is that limited, that is not a problem here. As mentioned above, the hybrid-rights passage in *Smith* cited *Wooley* and *Barnette*, which both involved compelled speech. Since that aspect is also present in this case, strict scrutiny applies.

that a simple test should apply: if a religious practice jeopardizes the public peace or safety, then the First Amendment would not cover it. *Fulton*, 141 S.Ct. at 1901 (Alito, J., concurring). Such a framework would provide a clear strike zone for judges as umpires.

But if strict scrutiny applies, then there is no question that the law at issue would fail that test here. The level of the government's interest depends on the type of purported discrimination. This Court has recognized that eliminating sex-based discrimination is an important interest, and that protecting homosexual conduct is a legitimate interest. *See Craig v. Boren*, 429 U.S. 190, 197 (1976); *Lawrence v. Texas*, 539 U.S. 558, 578 (2003); *id.* at 599 (Scalia, J., dissenting). Assuming that these precedents are correctly decided, then regardless of whether the Court views this as sex-based discrimination or sexual-orientation-based discrimination, the government's interest in ending such (purported) discrimination does not constitute a compelling interest. Even if it could somehow be that high, the availability of other vendors to do the job for customers who wish to promote same-sex weddings shows that Colorado's one-size-fits-all accommodation law is not narrowly tailored.

Thus, regardless of whether the issue is analyzed under an originalist approach to the Free Exercise Clause or under the Court's current precedents, the Colorado law at issue here is unconstitutional as applied to Petitioners. Even though the question presented focuses on free speech, the question of whether public-accommodation laws may force one to

violate their religious convictions has been presented to this Court again and again. *See, e.g.*, *Fulton*, 139 S.Ct. 141 S.Ct. at 1874; *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S.Ct. 1719 (2018); *Arlene's Flowers, Inc. v. Washington*, 138 S.Ct. 2671 (2018). The Court should take this opportunity to note that if expanding the scope of public-accommodation laws cannot undermine the Free Speech Clause's protections, then it should follow that the same could not undermine the Free Exercise Clause's protections, either.

C. Freedom from Involuntary Servitude

As noted in Part I, *supra*, the common law limited public-accommodation laws to those who provided either life-sustaining services or to those who provided things that were necessary to obtain life-sustaining services. But in modern times, pubic-accommodation laws have applied to everyone open to the public. These policies of forcing nearly everyone, not just those who provide life-sustaining goods or services, to work for others against their will may infringe on another constitutional provision: the Thirteenth Amendment's prohibition of involuntary servitude. This is especially true when it comes to personal-service contracts, as Petitioners would have to perform in this case.

The Thirteenth Amendment provides, in relevant part, "Neither slavery *nor involuntary servitude*, except as punishment for a crime whereof the party shall have been duly convicted, shall exist within the

United States, or any place subject to their jurisdiction." U.S. Const., amend. XIII § 1 (emphasis added). The amendment prohibits not only slavery—which is clearly not at issue here or in cases of public-accommodation laws generally—but also involuntary servitude. The latter is broader than the former: involuntary servitude refers to other forms of forcing one to involuntarily serve others.

"Viewed in historical context and in the tradition of American political thought, the amendment is an affirmation of the idea that liberty, in the most fundamental sense, consists in the right of individuals not to be interfered with in the exercise of their natural rights." Herman Belz, *Abolition of Slavery*, in *The Heritage Guide to the Constitution* 380 (1st ed. 2005). In the context of our natural rights, American political thought has long held that all men are endowed by their Creator with the unalienable right of "liberty." *The Declaration of Independence* para. 2 (U.S. 1776). Thus, involuntary servitude has "been defined in personal libertarian terms with respect to conditions of *enforced compulsory service*[.]" Belz, *supra,* at 382.

The question of constitutional interpretation then becomes whether a reasonable person at the time would have read the amendment to believe that the right from involuntary servitude was the right to be free from working for another against his will. *See* Antonin Scalia, *A Matter of Interpretation* 38 (new ed. 2018). In addition to the textual evidence and the evidence from classical American political thought, Thomas Cooley noted the possible connection

between involuntary servitude and requiring specific performance of personal-service contracts—which comes awfully close to telling Petitioners that they must produce custom creative content against their will. Specifically in the context of discussing slavery and involuntary servitude, Cooley wrote, "Contracts for personal services cannot, as a general rule, be enforced, and application to be discharged from service under them on *habeas corpus* is evidence that the service is involuntary." Thomas Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 363 n.3 (6th ed. 1890) (hereinafter "*Constitutional Limitations*").

This was not only the rule when Cooley wrote *Constitutional Limitations*, but a form of it survives to this day. The Second Restatement of Contracts provides:

> A court will refuse to grant specific performance of a contract for service or supervision that is personal in nature. The refusal is based in part upon the undesirability of compelling the continuance of personal association after disputes have arisen and confidence and loyalty are gone and, in some instances, of imposing *what might seem like involuntary servitude.*

Restatement of Contracts (2d) § 367 cmt. a (1979) (emphasis added). Thus, it is not only Thomas Cooley who noted the connection between specific performance (at least of personal contracts) and

involuntary servitude; it was also the American Law Institute. As the former Chief Justice of the Alabama Supreme Court put it not long ago, requiring specific performance of personal-service contracts "smacks of slavery." *Cavalier Mfg. v. Jackson*, 823 So. 2d 1237, 1244 n.3 (Ala. 2001) (Moore, C.J., dissenting).[14]

While the text, history, and commentary on the Involuntary Servitude Clause suggest that ordering one to serve another against his will (at least when it comes to personal-service contracts) may violate that Amendment, there is also recent precedent on the matter. In 1988, this Court considered the issue of whether taking advantage of mentally disabled people, convincing them to work for someone, and then convincing them they were not free to leave constituted involuntary servitude. In expounding the meaning of the Involuntary Servitude Clause, the Court held that absent several categories of recognized exceptions, the Court's precedents "clearly define a Thirteenth Amendment prohibition of involuntary servitude enforced by the use or threatened use of physical *or legal coercion*." *United States v. Kozminski*, 487 U.S. 931, 944 (1988) (emphasis added). Thus, under *Kozminski*, a *prima facie* case of involuntary servitude exists when one attempts to force another to work for him against his will by use or threatened use of (1) physical coercion, or (2) legal coercion. Isn't the latter exactly what public-accommodation laws do?

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[14] While "involuntary servitude" would have been the more accurate term, the Chief Justice probably chose the words "smacks of slavery" for the effect of alliteration. Still, his point about involuntary servitude is well-taken.

As with any rule, there are exceptions. *Kozminski* recognized several categories: (1) involuntary servitude as punishment for a crime, (2) government compelling citizens to "perform certain civic duties" (such as jury service, military service, and roadwork); and (3) "'exceptional' cases well established in the common law at the time of the Thirteenth Amendment" such as the right of parents to their children or preventing sailors from abandoning ship. *Id.* at 943-44. And of course, because the common law required victuallers to serve all customers unless they had good reasib, that rule should be viewed as an exception as well. *See* Part I, *supra*. But in the cases of others, it should be presumed from the text and history of the Amendment, the learned treatises commenting on the issue, and this Court's precedent that the Amendment prohibits one from having to work for another against his will. "The fact that the drafters felt it necessary to exclude this situation indicates that they thought involuntary servitude includes at least situations *in which the victim is compelled to work by law*." *Kozminski*, 487 U.S. at 942 (emphasis added).

Thus, in light of the Thirteenth Amendment, the question should be asked whether a state may ever force one to work for another against his will, subject to the limited historical exceptions. It might be argued that the Involuntary Servitude Clause's prohibition on such work applies only to personal-service contracts. But even if that was the case, it would apply here, because the personal creativity

required from Petitioners would make contracts between them and those seeking to promote same-sex weddings personal-service contracts. *See Restatement of Contracts* (2d) § 367 cmt. b (1979).

The Thirteenth Amendment's effect on public-accommodation laws is a monumental issue that deserves thorough briefing, argumentation, and consideration. The Court need not go that far in this case unless it finds, somehow, that the First Amendment does not excuse Petitioners from complying with the Colorado law in question. But just as Justice Thomas frequently flags a potential constitutional problem, analyzes it, and states that he would be willing to consider that argument in the appropriate case, the Court (or at least a special writing from a Justice) should flag the issue of whether the Involuntary Servitude Clause prohibits sweeping public-accommodation laws like this. Failing to take note of this constitutional issue risks injuring the right for which more American blood was spilled than any other right: the right of "personal freedom of all the human race." *The Slaughter-House Cases*, 83 U.S. 36, 39 (1873).

CONCLUSION

In recent years, public-accommodation laws have grown from a defined and limited set of rules affecting only those who provide life-sustaining services to a behemoth-sized rule applying to nearly everyone in business. While the reasons behind that may be noble in some cases (or not noble in others), the Constitution of the United States is still the

"Supreme Law of the Land." U.S. Const., art. VI, cl. 2. However sweeping a state may desire to craft its public-accommodation laws, it may not do so at the expense of constitutional guarantees, such as the right to free speech, free exercise of religion, and even freedom from involuntary servitude. Because the Colorado law at issue here violates at least three constitutional guarantees and far exceeds the limited historical role of such laws, the judgment of the Tenth Circuit is due to be reversed.

Respectfully submitted,

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