No. 19-1413

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

303 CREATIVE LLC AND LORIE SMITH,
Plaintiffs-Appellants,
v.
AUBREY ELENIS, *et al.,*
Defendants-Appellees.

On Appeal from the United States District Court for the District of Colorado (Civil Action No. 16-cv-02372, Hon. Marcia S. Krieger)

BRIEF OF *AMICI CURIAE* LAW PROFESSORS FROM THE STATES OF COLORADO, KANSAS, NEW MEXICO, OKLAHOMA, UTAH, AND WYOMING IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE

Mari Newman
KILLMER, LANE & NEWMAN, LLP
1543 Champa Street, Suite 400
Denver, CO 80202
(303) 571-1000
mnewman@kln-law.com

Matthew R. Cushing
MATTHEW CUSHING PLLC
401 UCB
Boulder, CO 80309
(303) 735-6554
matthew@cushingpllc.com

Craig J. Konnoth
Counsel of Record
Associate Professor
University of Colorado
School of Law
2450 Kittredge Loop Dr,
Boulder, CO 80309
(303) 735-6397
craig.konnoth@colorado.edu

Counsel for Amici Curiae

ORAL ARGUMENT NOT REQUESTED

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STATEMENT OF PRIOR OR RELATED APPEALS

Plaintiffs-Appellants 303 Creative LLC and Lorie Smith filed a previous appeal in this matter, which was dismissed. *303 Creative v. Elenis*, 746 F. App'x 709, 712 (10th Cir. 2018).

INTEREST OF *AMICI CURIAE*[1]

Amici curiae are fifty professors of law at law schools in every state in the Tenth Circuit: Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming. All states in which *amici* reside and teach have laws that prohibit discrimination based on numerous vulnerable characteristics. Okla. Stat. tit. 25, § 1402; N.M. Stat. § 28-1-7(F); Kan. Stat. § 44-1002(i)(1); Wyo. Stat. § 6-9-101(a); Utah Code § 13-7-3. Any putative expressive or religious exception that this Court creates to the Colorado Antidiscrimination Act (CADA) will undermine all these anti-discrimination protections, no matter the groups protected.

As scholars and as residents of these states within the Tenth Circuit, *amici* have an abiding interest in preserving essential

[1] In accordance with Rule 29 of the Federal Rules of Appellate Procedure, the parties have consented to the filing of this brief. No party's counsel authored this brief in whole or part, and no party, party's counsel, or person other than amici, has contributed money intended to fund the preparation or submission of this brief.

attributes of the First Amendment that allow them to engage in speech and criticism on controversial topics, including antidiscrimination law. At the same time, *amici* have both scholarly and real-life expertise on the development of antidiscrimination law nationwide and its importance for protecting vulnerable minorities from discrimination.

ARGUMENT

Plaintiffs-Appellants are Lorie Smith, a web designer, and her studio, 303Creative. Appellants do not wish to design websites for same-sex weddings, and want to post a statement to that effect on their website. These actions would appear to violate CADA, and plaintiffs have preemptively sued to keep the state of Colorado from enforcing CADA against them on, *inter alia*, federal free speech and free exercise grounds. Appellant's Opening Br. 29.

For over a century, CADA has protected the access of vulnerable Coloradans—including racial minorities, religious minorities, and women—to public accommodations. The passage of CADA's 2008 amendments, extending its protections to LGBT individuals, was based on a record showing that LGBT Coloradans were the subjects of discriminatory lawmaking that was, in some ways, "unprecedented."

Romer v. Evans, 517 U.S. 620, 633 (1996). In spite of this history, the legislature was careful to ensure that adding protections for LGBT individuals did not undermine CADA's existing protections, including those prohibiting discrimination against individuals and businesses on the basis of religion. Through a process where all stakeholders, including the representatives of numerous protected minorities, had a voice, the Colorado General Assembly introduced protections for LGBT Coloradans while simultaneously taking steps to maintain the rights of other minorities and vulnerable communities. Therefore, CADA represents a balance protecting all vulnerable Coloradans which this Court should not disturb.

Through CADA's 2008 amendments, LGBT individuals obtained access to the same protections that other vulnerable populations in Colorado have long possessed. Creating a special expressive or religious exemption that allows discrimination against LGBT individuals would harm the compelling purposes CADA serves and undermine its protections, including access to vital services, for all vulnerable groups.

I. Consistent with its Historical Purpose, CADA was Expanded to Protect Vulnerable LGBT Coloradans.

A. Colorado has long protected its vulnerable citizens from discrimination in public accommodations, while respecting religious rights.

CADA, Colo. Rev. Stat. §§ 24-34-301, *et seq*. has long sought to protect vulnerable Coloradans from discrimination in public accommodations. The statute was passed in 1885, only five years after the state adopted its Constitution, in response to the invalidation of the Federal Civil Rights Act, ch. 114, 18 Stat. 825 (1875), that sought to protect individuals against the legacy of slavery. *See The Civil Rights Cases*, 109 U.S. 3 (1883); J. David Penwell, *Civil Rights in Colorado*, 46 Denv. L.J. 181, 183 (1969). The statute provided that "all citizens of this State, regardless of race, color or previous condition of servitude, shall be entitled to full and equal enjoyment of" numerous public accommodations. 1885 Colo. Sess. Laws 132.

Even while advancing these protections in the wake of slavery, Colorado's legislature was respectful of religious rights. In 1895, the General Assembly excluded churches from the definition of public accommodations, even as it expanded the reach of the statute. 1895 Colo. Sess. Laws 139.

Over time, the General Assembly has amended CADA to protect additional vulnerable populations, including religious minorities. In 1969, CADA was expanded to prohibit discrimination based on sex and creed. 1969 Colo. Sess. Laws 200, 200–01. A nineteen-person committee extensively consulted with the community and redrafted the legislation to make sure that the changes did not inordinately harm existing rights. Richard O'Reilly, *Changes Suggested in State Civil Rights*, Denv. Post, Jan. 26, 1969, at 29.

B. Protections for LGBT individuals follows CADA's tradition of protecting vulnerable groups.

In 2008, almost 40 years after its previous major expansion, CADA's protections were extended to LGBT Coloradans. Like its protections for other vulnerable groups, CADA's protections for LGBT Coloradans came only after decades of discrimination. Until 1971, Colorado criminalized intimate conduct between individuals of the same sex. Colo. Rev. Stat. § 40-11-3 (1964).[2] Prohibitions on loitering and on

[2] Available at: https://www.law.du.edu/images/uploads/library/CLC/98a.pdf. Because the statute criminalized sexual conduct outside marriage during a time that same-sex unions were not recognized, it effectively criminalized all same-sex sexual conduct.

"lewd" behavior in public were applied disproportionately to LGBT individuals. *See People v. Gibson*, 521 P.2d 774 (Colo. 1974) (striking as unconstitutional a portion of the loitering statute); William N. Eskridge, *Dishonorable Passions: Sodomy Laws in America: 1861-2003*, at 178–79 (2008) (describing the so-called Lewd Acts).

"Gays and lesbians" thus "lived hidden lives and in fear of exposure that could, and did, result in loss of a job and professional career—even eviction from one's home."[3] Gerald Gerash, *On the Shoulders of the Gay Coalition of Denver*, *in* UNITED WE STAND: THE STORY OF UNITY AND THE CREATION OF THE CENTER 3 (Phil Nash ed., 2016). Police raided homes of openly gay men, imprisoned organizers of a prominent gay rights organization, and confiscated the group's mailing lists. *A Brief LGBT History of Colorado*, Out Front, Aug. 20, 2014, at 20.[4] Even after the repeal of Colorado's anti-sodomy laws, LBGT people faced significant hostility. When the Boulder, Colorado

[3] While the historical record often talks about discrimination against "gays and lesbians," many others faced discrimination on account of their sexual orientation or gender identity.

[4] Available at https://www.outfrontmagazine.com/news/colorado-lgbt-community/brief-lgbt-history-colorado/.

city council voted to prohibit employment discrimination against gay men and lesbians in 1974, voters withdrew those protections by ballot initiative. *See* Lisa Keen & Suzanne B. Goldberg, *Strangers to the Law: Gay People on Trial* 6 (2000).

Matters came to a head in the late 1980s. While Boulder reinstated its antidiscrimination provisions for gay and lesbian people in 1987 and Denver adopted similar measures in 1990, other cities rejected them. In these battles, some opponents of equal rights for gay men and lesbians compared homosexuality with necrophilia and bestiality and argued that homosexuality would lead to increased child molestation. *See* Susan Berry Casey, *Appealing for Justice: One Colorado Lawyer, Four Decades, and the Landmark Gay Rights Case:* Romer v. Evans 196 (2016); Stephen Bransford, *Gay Politics vs. Colorado: The Inside Story of Amendment 2* 21 (1994). By the end of the decade, gay men and lesbians felt "beaten up, stigmatized, and more isolated than ever." Casey, *supra*, at 201.

In 1992, gay-rights opponents proposed Amendment 2 to the Colorado Constitution to undo municipal public accommodation protections, that, much like CADA, protected lesbian and gay

Coloradans from discrimination, but at the local level. Colo. Const. art II, §30(b) (1992). Throughout the campaign, LGBT Coloradans "were subjected to constant scrutiny, anger and vitriol, unfair accusations, and blatant distortions about their lives." Glenda M. Russell, *Voted Out: The Psychological Consequences of Anti-Gay Politics* 3 (2000); *see also* Michael Meyer & Kenneth L. Woodward, *Onward Muscular Christians!*, Newsweek, Mar. 1, 1993, at 68 (reporting that proponents of Amendment 2 sent out pamphlets stating that "gays 'are 12 times as likely' as heterosexuals to molest children and are out to 'destroy' the American family," and "homosexual men ingest, on the average, the fecal material of 23 different men per year.'"); Ned Zeman et al., *No Special Rights for Gays*, Newsweek, Nov. 23, 1992 ("A few days after the vote [on Amendment 2] a gay man dying of AIDS wrote a note saying 'I refuse to live in a state where a few people can, and will, make my life a living hell.' Then he killed himself.").

These characterizations were accompanied by physical violence. Immediately following the passage of Amendment 2, incidents of violence against homosexual Coloradoans increased, with "homophobic incidents tripl[ing] during November and December" of 1992.

UPI, *Survey Shows an Increase in Homosexual-Related Violence*, Mar. 11, 1993. Amendment 2, which "classifie[d] homosexuals not to further a proper legislative end but to make them unequal to everyone else," passed with a comfortable majority. *Romer*, 517 U.S. at 635.

In 1996, the United States Supreme Court held that Amendment 2 violated the United States Constitution's Equal Protection Clause because it was born of "a bare . . . desire to harm a politically unpopular group." *Id.* at 634 (citations omitted). But even as *Romer* was pending before the Court, prejudice against Colorado's LGBT community endured. In 1996, the Colorado legislature enacted a bill to prohibit marriage between individuals of the same sex. While Governor Roy Romer vetoed the bill twice, Governor Bill Owens finally signed it into law in 2000. *See Governor Signs Gay Marriage Ban Among Flock of Other Bills*, Colo. Springs Gazette, May 28, 2000, at 2.

The following years saw additional attacks on the rights of LGBT Coloradoans. In 2003 and 2004, legislators proposed a civil union bill to give same-sex couples a portion of the legal protections afforded their heterosexual counterparts. The bill faced harsh opposition and died in committee both years. Michael Brewer, *Colorado's Battle Over*

Domestic Partnerships and Marriage Equality in 2006, 4:1 J. GLBT Family Stud. 117, 118 (2008). In 2005 and 2006, Governor Owens vetoed proposed employment discrimination protections for gay and lesbian Coloradans. *Id.* at 123. And in 2006, the organizations behind Amendment 2 launched a new initiative—this time to cement into the State's constitution the denial of same-sex couples' freedom to marry. *Id.* at 118–19. When the legislature sought to repeal Colorado's prohibition on same-sex marriage, the Lieutenant Governor drafted Amendment 43, a constitutional amendment that would enshrine discrimination against gay men and lesbians. It passed by a double-digit margin. *Id.* at 123; Colleen Slevin, *Norton Joins Gay Marriage Fight*, The Coloradoan, October 27, 2006.[5] Amendment 43's proponents sought to make Colorado "the epicenter of opposition to marriage amendments." Kevin Simpson, *Gay Marriage Banned; Domestic Partnerships Also Defeated*, Denv. Post, Nov. 8, 2006.[6]

Recognizing that it would be hard to obtain their freedom to

[5] Available at https://www.newspapers.com/image/226554927.

[6] Available at https://www.denverpost.com/2006/11/08/colorado-amendment-43-gay-marriage-banned-domestic-partnerships-also-defeated/.

marry, LGBT advocates sought to create family protections through state-level domestic partnership status. Because Colorado's governor had previously vetoed similar protections for same-sex couples, advocates placed a domestic partnership proposal on the ballot to provide at least some of the legal protections associated with marriage. *Id.* at 119. Even this limited measure lost handily. *Id.* at 123.

As this history suggests, legal protections for gay and lesbian Coloradans were sorely needed and hard won. In 2007, the Colorado legislature finally passed a law prohibiting discrimination on the basis of sexual orientation and gender identity in employment. Colo. Rev. Stat. § 24-34-402; *see also* H.B. 00-1331, 62nd Gen. Assemb., 2d Reg. Sess. (Colo. 2000) (first time General Assembly introduced similar bill). In 2008, as discussed further below, CADA was amended to prohibit discrimination based on sexual orientation in public accommodations and housing. In 2013, a civil union law provided some of the tangible protections and responsibilities of marriage, and, in 2014, following this Court's decision in *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014), *cert. denied* 574 U.S. 874 (2014), same-sex couples in Colorado finally obtained equal freedom to marry.

II. The General Assembly Engaged in a Thoughtful, Deliberative Process to Balance Protecting LGBT Coloradans from Discrimination with the Concerns of Religious Leaders.

The 2007 and 2008 legislative process demonstrated respectful deliberation where the legislature carefully expanded the protections for LGBT individuals, while taking steps not to undermine CADA's existing protections, including those prohibiting discrimination against individuals and businesses on the basis of religion. In the years leading up to adding sexual orientation as a protected class under CADA, the General Assembly was careful to accommodate free speech and religious concerns. The official legislative record of the CADA amendments is nearly 500 pages long. Compendium of Legis. Hist. of SB08-200 (2008 amendment to CADA) [hereinafter Leg. Record].

A. Legislators considered evidence of anti-LGBT discrimination in adding LGBT protections to CADA.

In 2008, after extensive evidentiary hearings and debate, CADA was finally amended to prohibit discrimination based on sexual orientation in public accommodations and housing. CADA's LGBT protections are of a piece with its protections for religious, racial, and

other vulnerable populations—they seek to protect LGBT individuals from harm. As Representative Joel Judd, the bill's chief sponsor in the Colorado House, explained, by extending protections to LGBT people in "places of public accommodation . . . [that] range from . . . barbershops, to hotels, to hospitals, [to] . . . funeral homes," the law ensures that LGBT individuals will "live in dignity and will ultimately die in dignity." Leg. Record. at 112.

Many opponents refused to acknowledge that sexual orientation discrimination was a serious problem requiring legislative action. One legislator who opposed the bill suggested, ostensibly in jest, that discrimination against short people was far more pervasive and serious than was discrimination against gay people. *Id.* at 76–78. Another suggested that discriminating against gay people in housing was the same as refusing to rent to a "party[ing] college freshman." *Id.* at 131. Legislators objected to analogizing discrimination based on race to that based on homosexuality: "the science is still out on that[,]" one claimed. *Id.* at 148. Opponents argued that the measure was about nothing more than putting the "feelings" of LGBT people above the rights of others to decide to whom they want to rent apartments. *Id.* at 214.

Supporters of the legislation countered that the legislation fulfilled CADA's longstanding central purpose: protecting all Coloradans' ability to engage in "transactions and endeavors that constitute ordinary civic life in a free society." *Romer*, 517 U.S. at 631. As Mark Ferrandino, Colorado's first openly gay male legislator, explained, this amendment was about the State's compelling interest in assuring all people the ability to find housing, to serve on a jury without discrimination, and to engage in the many other fundamentals of civic and commercial life. Leg. Record at 272–73. And, these legislators noted, Colorado had a compelling interest in enacting a law to end discrimination on the basis of sexual orientation, alongside discrimination against other protected groups, because such discrimination was, and is, serious and ongoing.

In documenting the need for this protection, legislators relied in part on their own experiences in Colorado. Senator Chris Romer, the son of former Governor Roy Romer, described "how painful" it was for a former staffer of his father "to explain to people what it means to be afraid and to be gay" after Amendment 2 passed. *Id.* at 78–79. Another legislator explained how his son, a prosecutor, left Colorado for Oregon,

because he found Colorado to be hostile to gay people. He concluded, "I don't have formal statistics, I just have one, and the one is my son. He was uncomfortable in Colorado." *Id.* at 88. Yet another representative explained that what motivated her was the need to ensure "basic human decency," to guarantee that the housing and health care needs of her sister, her partner, and their three children were properly satisfied. *Id.* at 222–23.

Witnesses also testified to the prevalence of discrimination on the basis of sexual orientation. A representative from the Anti-Defamation League said that its office received calls about individuals being denied housing because of their sexual orientation. *Id.* at 42. The director of the LGBT Community Center reported calls from people who had heard doctors in emergency rooms suggesting that they did not want to treat gay patients because of their sexual orientation.[7] *Id.* at 52.

[7] The Center on Colfax opened in 1976 and is the largest LGBTQ community center in the Rocky Mountain region, giving voice to Colorado's lesbian, gay, bisexual, transgender, and queer community.

B. CADA's LGBT protections were part of a broader legislative balance that seeks to protect all of CADA's vulnerable groups.

Because CADA seeks to protect all vulnerable populations, the legislature considered the interests of other groups besides LGBT minorities in the process of passing the 2008 bill. The legislative process represented a "neutral and respectful consideration" of the interests of all groups. *Cf. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1721 (2018). This deliberation resulted in a balance that respects the sentiments of all stakeholders. The equipoise CADA achieves is thus the result of "fair and honest debate," and should not lightly be disturbed. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2625 (2015) (Roberts, C.J., dissenting). "That is exactly how our system of government is supposed to work." *Id.*

The deliberative process which led to the 2008 amendments embodied mutual respect for the various groups that CADA seeks to protect. Ordained witnesses representing numerous congregations presented testimony. For example, one minister spoke movingly of the discrimination a gay church employee had suffered, even though his congregation did not ordain gay and lesbian ministers. *Id.* at 55–57.

He thus concluded that a "bill that protects gay and lesbian people from discrimination" in public accommodations helped Coloradans "rise to a higher standard from that of dehumanizing our fellow human beings." *Id.* at 56. Ordained witnesses affirmed again and again the importance of protecting the basic human rights of LGBT Coloradans. *See id.* at 177 (the legislature should "not . . . cater to any one particular religious group, but . . . protect the rights of all citizens."); *id.* at 161 ("[T]here are a variety of understandings of Christian belief and practice that lead to a variety of opinions about rights for persons in the GLBT community.").

Despite this support from religious leaders, the legislature actively considered the effects of the 2008 bill on religious groups who were already protected from discrimination under CADA. Some witnesses raised the very question presented by this case in the hearings. One witness testified about his concern that religious people who run businesses would be required to serve gay people despite their "personal conscience." *Id.* at 25–27. In response, the law's supporters noted that, by prohibiting discrimination based on sex, race, or creed, CADA already considered and rejected demands by those who elect to

run a business for unfettered license to discriminate. *Id.* at 155–56.

As legislators explained, CADA seeks to strike the right balance between the desire of some individuals to discriminate, whatever their reason, and "the need for individuals to be able to acquire acceptable housing . . . to raise a family," *id.* at 127, or to access and participate in the marketplace without injury or insult. That familiar balance, struck again and again over decades of civil rights legislation—as one witness noted—separated "private organizations" that can "choose to exclude people based on their own creed and practices" from those in the commercial or "public sphere." *Id.* at 58. Accordingly, as one legislator observed, "[i]f you choose to go into the world of commerce and offer your services to the general public, then, at that point, you've given up the ability to draw a line on the basis of race, on the basis of religion, or on the basis of sexual preference." *Id.* at 197.

Even while defending the essential purposes that CADA served, legislators recognized that CADA's purpose was to protect all vulnerable groups, and were eager to listen to, negotiate with, and accommodate religious interests. For example, some legislators sought to narrow the definition of public accommodations in CADA to limit the

reach of CADA's protections. *Id.* at 232. The Assembly reached a compromise, which expanded the public accommodations exemptions in CADA beyond just churches, synagogues, and mosques to include any "other place that is principally used for religious purposes," so that religious camps, among other entities, would not be subject to the law. *Id.* at 261. The legislature also amended the bill to allow restrictive covenants on cemetery plots to respect religious preferences. *Id.* at 62.

The complexity of accommodating the interests of the various groups CADA protects is all the more apparent in other changes to the bill. Witnesses raised religious freedom concerns because of proposed prohibitions on discrimination based on *religion*. Before 2008, CADA protected discrimination in public accommodations based on "creed." 1969 Colo. Sess. Laws 200–01. As originally proposed, the 2008 bill would have expanded this language to prohibit discrimination in public accommodations based on religion, so that the language was symmetrical with other antidiscrimination provisions in Colorado law. Leg. Record at 24. However, the Catholic Church expressed a concern—the only concern it offered with respect to the 2008 bill—that this language would hamper its ability to restrict certain services such as

those of "soup kitchens, hospitals, clinics, athletic fields, gymnasiums." *Id.* at 40. Legislators believed that the change would not change the operation of the statute, which *already* prohibited discrimination based on "creed." Nonetheless, out of respect for the Church's concerns, legislators removed the proposed language. *Id.* at 64, 71, 107.

CADA thus strikes a balance. "[P]rivate organizations" can "choose to exclude people based on their own creed and practices." *Id.* at 58. But in the commercial or "public sphere," such as "housing [and] education," *id.*, individuals "give[] up the ability to draw a line on the basis of race, on the basis of religion, or on the basis of sexual preference." *Id.* at 197. In striking this careful balance through a democratic process that guided the decision, "some people will inevitably be disappointed with the results." *Obergefell*, 135 S. Ct. at 2625 (Roberts, C.J., dissenting). However, it is a balance that courts should nonetheless respect.

III. Introducing an exception to CADA would expose all Coloradans to discrimination.

Creating an exemption to permit discrimination on the basis of sexual orientation could either allow the same carve-out to discriminate on other bases (e.g., gender, race, or even religion), or would

impermissibly single out one class of citizens as "unequal to everyone else." *Romer*, 517 U.S. at 635. A novel expressive or religious exception to CADA would therefore swallow the rule against discrimination that the law embodies with respect to all the groups that CADA protects—including religious minorities themselves. The consequences would be extreme. CADA's protections span a vast array of services, through which all Coloradans access basic needs, such as food, shelter, and health care. Weakening these protections invites would-be discriminators to "inflict[ ] . . . immediate, continuing, and real injuries" on all Coloradans. *Id.*

A. CADA is vital to protect LGBT Coloradans from ongoing discrimination in commercial settings.

CADA's public-accommodations protections are as necessary for protecting LGBT Coloradans today as they were in 2008. A recent report on LGBT health care in Colorado revealed that 21% of health care providers refused to provide services to LGBT people. *See* One Colorado Education Fund, Invisible: The State of LGBT Health in Colorado 9 (2012).[8] Among LGBT patients, 55% feared they would be

[8] Available at https://one-colorado.org/wp-content/uploads/2017/06/OneColorado_HealthSurveyResults-1.pdf.

treated differently if their provider found they were LGBT. *Id.* Another 28% reported that their sexual orientation stopped them from seeking health services. *Id.* Only 59% are very open about sexual orientation with their medical providers. *Id.* at 11.

Statistics from the Colorado Human Rights Commission tell a similar story. Since 2008, when the Commission began collecting data about discrimination based on sexual orientation, there has been a regular uptick in complaints, from 23 in 2007–08, to 115 in 2017–18. *See* Colorado Civil Rights Commission, Colorado Civil Rights Division, 2018 Annual Report 9 (2018);[9] Colorado Civil Rights Commission, Colorado Civil Rights Division, Annual Report 2014, at 5 (2014).[10]

Those statistics find even greater meaning in the stories of LGBT people in Colorado who have faced recent discrimination:

- In 2015, Tonya Smith, and her wife Rachel, were looking for an apartment to rent. When they found a promising unit, the potential landlord allegedly asked invasive questions and told the couple at the

[9] Available at https://www.colorado.gov/pacific/dora/civil-rights/reports .

[10] Available at https://drive.google.com/file/d/0Bzk2zYFlBh6bUxwcmlvUGh3VzQ/view.

last minute that she would not rent to them because of their "unique relationship." *Smith v. Avanti*, 249 F. Supp. 3d 1194, 1198, 1201 (D. Colo. 2017). Tonya and Rachel ended up having to get rid of over half their belongings as they were unable to find another residence on short notice.

- In 2017, Cherry Creek Mortgage Company, Colorado's largest residential mortgage firm, was sued by a married lesbian couple, who both worked for the company, because the firm declined to provide them with the same health care coverage that it provided to different-sex married couples. The company changed its policy to provide equal treatment to its LGBT employees as a consequence of this litigation. Mark Harden, *Cherry Creek Mortgage Chairman Resigns as Company Changes Same-Sex Benefits Policy,* Denver Bus. J. (Aug. 26, 2017, 11:43 AM).[11]

- In the fall of 2017, the Equal Employment Opportunity Commission found sufficient evidence that a Denver tire company engaged in discrimination when it refused to hire a transgender man.

[11] Available at https://www.bizjournals.com/denver/news/2017/08/26/cherry-creek-mortgage-chairman-resigns-as-company.html.

The EEOC therefore filed a lawsuit against the company under Title VII of the Civil Rights Act of 1964. Compl. ¶¶ 2–3, *EEOC v. A&E Tire, Inc.*, 325 F.Supp.3d 1129 (D. Colo. Sept. 29, 2017) (No. 1:17-cv-02362-STV). The applicant allegedly had been told he "had the job so long as he could pass all of the screening process." *Id.* ¶ 33. When he acknowledged in paperwork that he had been born female, the manager hired someone else. *Id.* ¶¶ 42–55.

- In 2012, two employees of the Colorado State Patrol received settlements from the agency as a result of their claims that they were discriminated against on the job because of their sexual orientation. Tak Landrock, *Colorado State Patrol Payouts Cost Taxpayers $2 Million in 2013*, KDVR, (Dec. 27, 2013, 9:51 PM).[12]

Of course, experience teaches that, for every instance of discrimination such as the above, there are many more that go unreported.

Importantly, in the Tenth Circuit, CADA and its analogous state protections in the employment context, Colo. Rev. Stat. § 24-34-402,

[12] Available at https://kdvr.com/news/problem-solvers/colorado-state-patrols-payout-cost-taxpayers-2-million/.

currently provide the only reliable, robust, and explicit recourse for LGBT Coloradans. This Court has held that Title VII does not include protections for members of the LGBT community. *See Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1222 (10th Cir. 2007) (holding that Title VII does not currently protect transgender individuals, but noting that future claims may be possible as, "[s]cientific research may someday cause a shift in the plain meaning of the term 'sex' so that it extends beyond the two starkly defined categories of male and female."); *Medina v. Income Support Div.*, 413 F.3d 1131, 1135 (10th Cir. 2005) ("Title VII's protections . . . do not extend to harassment due to a person's sexuality."). *But see Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 112 (2d Cir. 2018), *cert. granted* 139 S. Ct. 1599 (2019) (disagreeing with *Medina* and concluding "sexual orientation discrimination is motivated, at least in part, by sex and is thus a subset of sex discrimination"). Granting would-be discriminators a license to discriminate in defiance of CADA risks undoing the protections Colorado has put in place to assure LGBT people, their families, and others, equal opportunity to participate in and contribute to the marketplace and other important areas of life.

B. An expressive or religious exception would sweep broadly, harming all of the minorities that CADA protects, not just LGBT individuals.

Fulfilling CADA's intent to eliminate invidious discrimination in commercial life, *all* vulnerable groups have sought the protection of CADA for a wide variety of purposes. Native Americans have used CADA to challenge school regulations that discriminated against their religious beliefs. *Sch. Dist. No. 11-J v. Howell*, 517 P.2d 422, 423 (Colo. App. 1973). Children have sought access to recreational facilities to which they were allegedly denied access because of their race. *Creek Red Nation, LLC v. Jeffco Midget Football Ass'n,* 175 F. Supp. 3d 1290, 1292–93 (D. Colo 2016). Women have sought access to local stores to purchase basic necessities. *Arnold v. Anton Co-op. Ass'n*, 293 P.3d 99, 102 (Colo. App. 2011). Disabled individuals have sought access to major restaurant and retail chains. *Lucas v. Kmart Corp.*, No. 99-cv-01923-JLK, 2005 WL 1648182, at *1 (D. Colo. July 13, 2005); *Colo. Cross-Disability Coal. v. Taco Bell Corp.*, 184 F.R.D. 354, 355–56 (D. Colo. 1999). Other plaintiffs have turned to CADA to combat discrimination in public transportation, *Reeves v. Queen City Transp.*, 10 F. Supp. 2d 1181, 1182–83 (D. Colo. 1998); in obtaining cellular telephones, *Lewis v.*

Strong, No. 09-cv-02861-REB-KMT, 2010 WL 4318884, at *1, *5 (D. Colo. Aug. 19, 2010), report and recommendation adopted, No. 09-CV-02861-REB-KMT, 2010 WL 4318599 (D. Colo. Oct. 25, 2010); and in obtaining access to essential medical care, *Colo. Cross-Disability Coal. v. Women's Health Care Assocs., P.C.*, No. 10-cv-01568-RPM, 2010 WL 4318845, at *1–2 (D. Colo. Oct. 25, 2010).

There is no principled way to allow an exception for sexual orientation but not for other characteristics that the same law has long protected. If commercial businesses can claim an expressive exception to CADA for participation in a wedding between two people of the same sex, a business that objected to a marriage between people of two different races, or two different religions, may also claim such an exception. Likewise, a business owner who subscribes to the belief that a woman's place is in the home may claim that it is entitled to deny service to women. *See also Fulton v. City of Philadelphia*, 922 F.3d 140, 159 (3d Cir. 2019), *cert. granted* 140 S. Ct. 1104 (2020) ("If all comment on religiously motivated conduct by those enforcing neutral, generally applicable laws against discrimination is construed as ill will against the religious belief itself, then. . . the nation's civil rights law might" as

well be dead letter); *Elane Photography, LLC v. Willock*, 309 P.3d 53, 72 (N.M. 2013) ("[A]doption of Elane Photography's argument *would* allow a photographer who was a Klan member to refuse to photograph an African-American customer's wedding, graduation, newborn child, or other event if the photographer felt that the photographs would cast African-Americans in a positive light or be interpreted as the photographer's endorsement of African-Americans. . . . Such a holding would undermine all of the protections provided by antidiscrimination laws.")

Even former Georgia Attorney General Michael Bowers—hardly a radical advocate of the equal rights of gay people, *see Bowers v. Hardwick*, 478 U.S. 186 (1986), *overruled by Lawrence v. Texas*, 539 U.S. 558 (2003) (supporting Georgia's sodomy statute); *Shahar v. Bowers*, 114 F.3d 1097 (11th Cir. 1997) (defending anti-gay state policies)—has publicly declared that laws creating sweeping exceptions to non-discrimination statutes for those who do not want to comply in the name of religion are "unequivocally an excuse to discriminate." Letter from Michael J. Bowers to Jeff Graham, Executive Director,

Georgia Equality, Inc. at 6 (Feb. 23, 2015).[13] If an exemption were allowed, Bowers asserted, "there is no limit to the discrimination and disruption that could be brought about in the name of religious freedom." *Id.* at 3.

Bowers, like many others, has recognized that "permitting citizens to opt out of laws because of a so-called burden on the exercise of religion in effect 'would permit every citizen to become a law unto himself.'" *Id.* at 6. "Allowing each person to become a law unto his or herself," in turn, "destroys uniformity to the law and creates mass uncertainty," a can of worms that would threaten our very democracy. *Id.* As Bowers concluded, "[t]his . . . is not about gay marriage, or contraception, or even so-called 'religious freedom.' It is more important than all of these, because it ultimately involves the rule of law." *Id.* at 7.

Accordingly, the Supreme Court has consistently rejected attempts to undermine neutrally applicable antidiscrimination laws based on the putative expressive or religious interests of those who seek

[13] Available at https://drive.google.com/file/d/0B_KEK8-LWmzhUjdmMlRHZ0h2TEk/view.

to discriminate. For example, in *Hishon v. King & Spalding*, the Supreme Court rejected the argument that forcing a law firm to comply with Title VII's prohibition on gender discrimination infringed on the firm partnership's First Amendment freedom of association. 467 U.S. 69, 78–79 (1984). While recognizing that lawyers' work involves "a distinctive contribution . . . to the ideas and beliefs of our society," the Court concluded, as it had in other contexts, that "invidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections." *Id.* at 78 (citations and quotations omitted).

Similarly, in *Newman v. Piggie Park Enters., Inc.*, owners of drive-in restaurants argued that they should be exempt from Title II of the Civil Rights Act of 1964 because, by mandating that they not discriminate against customers based on race, the law infringed on their free exercise of religion. 390 U.S. 400 (1968). In awarding attorney's fees to the plaintiffs, the Supreme Court characterized the merchant's free exercise argument as "patently frivolous." *Id.* at 402 n.5; *see also Bob Jones Univ. v. United States*, 461 U.S. 574, 580 (1983)

("The sponsors of the University genuinely believe that the Bible forbids interracial dating and marriage. To effectuate these views, Negroes were completely excluded until 1971"); *Loving v. Virginia*, 388 U.S. 1, 3 (1967).

In short, CADA is an essential tool to protect equal access to a vast array of public accommodations for numerous minorities. A special exemption based on speech or religion that undermines the balance that CADA has struck would therefore harm all vulnerable minorities, including, perhaps, religious minorities themselves.

C. The vulnerable minorities that CADA protects would lose protections across a wide array of public and commercial contexts.

CADA's mandates are nearly identical to the municipal protections that triggered the passage of Amendment 2. *See Romer*, 517 U.S. at 623–24. The law prohibits "any place of business engaged in any sales to the public . . . [or] offering services, facilities, privileges, advantages, or accommodations to the public" from discriminating against protected classes of individuals. Colo. Rev. Stat. § 24-34-601. To be clear about the breadth of protection the legislature intended to provide, CADA non-exhaustively lists several such entities as examples.

Id.

Access to these accommodations can be a matter of life and death for many Coloradans. Although most of Colorado's citizens live in or near the Denver metro area, the vast reaches of the state are rural, and citizens in those areas frequently lack choice as to where they can receive essential services. Of Colorado's 64 counties, 51 are wholly or partially designated as Primary Care Health Professional Shortage Areas by the federal government. Colorado Department of Public Health and Environment GIS, Primary Care Health Professional Shortage Areas (HPSAs) (2015).[14] Similarly, a report found that "[a]ccess to supermarkets is a problem in many Colorado neighborhoods but exceedingly so in lower-income, inner-city and rural communities where the incidence of diet-related disease is highest." Allison Karpyn et al., The Food Trust, *Special Report: The Need for More Supermarkets in Colorado* 10 (2009).[15] CADA ensures equal access to stores that do

[14] Available at https://www.colorado.gov/pacific/sites/default/files/PCO_HPSA-primary-care-map.pdf.

[15] Available at https://www.coloradohealth.org/sites/default/files/documents/2017-01/Food_Trust_Rpt-Colorado-Special%20Report%20the%20Need%20for%20More%20Supermarkets%20in%20CO.pdf.

exist in such areas. *Cf. Anton Co-op. Ass'n*, 293 P.3d at 102 (CADA case in which plaintiff noted that the Association's store "is the only place within 30 miles to purchase many necessities"). Colorado's geography makes seeking alternative services in the Rockies even harder. Any exception to CADA could transform a shortage into a complete deprivation of basic services for vulnerable minorities.

The implications of a carve-out from CADA based on the kind of alleged compelled speech or free exercise claim put forward in this case would be far-reaching. If a merchant could refuse service in defiance of a civil rights law simply by asserting that its expressive or religious beliefs are implicated by the identity of the customer or the customer's exercise of his or her rights, then nearly any merchant could claim an expressive or religious license to evade the law. If this kind of discrimination were permitted because of a carve-out to CADA, then members of any vulnerable group could be denied even essential services.

A commercial carve-out in the name of religious beliefs would have similarly damaging effects. It is not difficult to imagine a landlord who refuses to rent to a same sex couple because their marriage or

cohabitation is contrary to his religious beliefs. *Cf. Evans v. Romer*, 882 P.2d 1335, 1342 (Colo. 1994), *aff'd*, 517 U.S. 620 (1996) (Proponents of Amendment 2 relied on cases holding that laws prohibiting marital discrimination in rentals burdened free exercise, even though those cases upheld the validity of the regulations as neutral principles of general applicability). For example, medical treatment may implicate the religious beliefs of practitioners—doctors can, and have, refused to treat the children of LGBT parents. Abby Phillip, *Pediatrician Refuses to Treat Baby with Lesbian Parents and There's Nothing Illegal About It*, Wash. Post, February 19, 2015.[16] Funeral parlors might similarly decline to provide services for same-sex couples, or religious or racial minorities, because of their religious beliefs.

* * *

Colorado has a compelling interest in protecting the rights of all of its citizens. LGBT Coloradans have the same right to dignity and participation in the public sphere that CADA assures to all other citizens of the State. Creating a carve-out to permit discrimination

[16] Available at https://www.washingtonpost.com/news/morning-mix/wp/2015/02/19/pediatrician-refuses-to-treat-baby-with-lesbian-parents-and-theres-nothing-illegal-about-it/.

against LGBT people would deny them that essential dignity, threaten the civil rights laws themselves, and undermine the protections of these laws for all Coloradans.

CONCLUSION

For the foregoing reasons, the district court should be affirmed.

Respectfully submitted this 29th day of April 2020.

/s/ Mari Newman

Mari Newman
KILLMER, LANE & NEWMAN, LLP
1543 Champa Street, Suite 400
Denver, CO 80202
(303) 571-1000
mnewman@kln-law.com

/s/ Matthew R. Cushing
Matthew R. Cushing
MATTHEW CUSHING PLLC
401 UCB
Boulder, CO 80309
(303) 735-6554
matthew@cushingpllc.com

/s/ Craig Konnoth

Craig J. Konnoth
Associate Professor
University of Colorado School of Law
2450 Kittredge Loop Dr,
Boulder, CO 80309
(303) 735-6397
craig.konnoth@colorado.edu

Counsel for Amici Curiae

April 29, 2020

APPENDIX OF *AMICI* SIGNATORIES

The following list of *amici*'s employment and titles are for identification purposes only:

- Maryam Ahranjani, Associate Professor of Law, University of New Mexico School of Law
- Andrea Boyack, Professor of Law, Washburn University School of Law
- Kristen Carpenter, Council Tree Professor of Law, University of Colorado Law School
- Violeta Chapin, Clinical Professor of Law, University of Colorado Law School
- Ming Hsu Chen, Associate Professor of Law, University of Colorado Law School
- Richard B. Collins, Professor of Law, University of Colorado School of Law
- Patience A. Crowder, Associate Professor of Law, University of Denver Sturm College of Law
- Nancy Ehrenreich, Professor of Law, University of Denver Sturm College of Law
- Stephen M. Feldman, Jerry W. Housel/Carl F. Arnold Distinguished Professor of Law, University of Wyoming College of Law
- Leslie Francis, Alfred C. Emery Professor of Law and Professor of Philosophy, University of Utah, S.J. Quinney College of Law
- Carla F. Fredericks, Clinical Professor of Law, University of Colorado School of Law
- Alexi Freeman, Associate Professor of the Practice, University of Denver Sturm College of Law

- Kristelia Garcia, Associate Professor of Law, University of Colorado School of Law
- Erika George, Samuel D. Thurman Professor of Law, University of Utah, S.J. Quinney College of Law
- Marc-Tizoc González, Professor of Law, University of New Mexico School of Law
- Emily Grant, Professor of Law, Washburn University School of Law
- Aya Gruber, Professor of Law, University of Colorado School of Law
- Jennifer Hendricks, Professor of Law, University of Colorado School of Law
- Steven K. Homer, Principal Lecturer, University of New Mexico School of Law
- Sharon Jacobs, Associate Professor of Law, University of Colorado Law School
- John M. Kang, Professor of Law, University of New Mexico School of Law
- Pamela Keller, Clinical Professor of Law, University of Kansas School of Law
- Derek Kiernan-Johnson, Legal Writing Professor, University of Colorado School of Law
- Sarah Krakoff, Moses Lasky Professor of Law, University of Colorado School of Law
- Benjamin Levin, Associate Professor of Law, University of Colorado Law School
- Kevin Lynch, Associate Professor of Law, University of Denver Sturm College of Law

- Suzette Malveaux, Provost Professor of Civil Rights Law and Director of The Byron R. White Center for the Study of American Constitutional Law, University of Colorado Law School
- Lauren McLane, Assistant Professor of Law, University of Wyoming College of Law
- Suzanna Moran, Professor of the Practice of Law, University of Denver Sturm College of Law
- Zachary Moutin, Associate Clinical Professor of Law, University of Colorado School of Law
- Christopher K. Odinet, Associate Professor of Law, University of Oklahoma College of Law
- Govind Persad, Assistant Professor of Law, University of Denver Sturm College of Law
- Blake E. Reid, Clinical Professor of Law, University of Colorado School of Law
- Paula R. Rhodes, Int'l Human Rights Educator & Associate Professor(ret), University of Denver Sturm College of Law
- Colene Robinson, Clinical Professor of Law, University of Colorado School of Law
- Lysette Romero Cordova, Visiting Assistant Professor of Law, University of New Mexico School of Law
- Tom I. Romero, II, Associate Professor of Law, University of Denver Sturm College of Law
- Clifford Rosky, Professor of Law, University of Utah, S.J. Quinney College of Law
- Laura Rovner, Professor of Law & Director of Civil Rights Clinic, University of Denver Sturm College of Law
- Meredith A. Schnug, Clinical Associate Professor of Law, Legal Aid Clinic, University of Kansas School of Law

- Michael Siebecker, Professor of Law, University of Denver Sturm College of Law
- Scott Skinner-Thompson, Associate Professor of Law, University of Colorado School of Law
- Catherine Smith, Professor of Law, University of Denver Sturm College of Law
- Anna Spain Bradley, Professor of Law, University of Colorado School of Law
- Laura Spitz, Associate Professor of Law, University of New Mexico School of Law
- Mark Squillace, Raphael J. Moses Professor of Law, University of Colorado School of Law
- Sarah Steadman, Assistant Professor of Law, University of New Mexico School of Law
- Matthew Tokson, Associate Professor of Law, University of Utah, S.J. Quinney College of Law
- Kyle C. Velte, Associate Professor of Law, University of Kansas School of Law
- Clifford Villa, Associate Professor of Law, University of New Mexico School of Law

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/s/ Mari Newman
April 29, 2020 *Counsel for Amici Curiae*

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/s/ Mari Newman
April 29, 2020 *Counsel for Amici Curiae*

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/s/ Mari Newman
April 29, 2020 *Counsel for Amici Curiae*

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/s/ Mari Newman
April 29, 2020 *Counsel for Amici Curiae*