No. 21-476

IN THE

Supreme Court of the United States

303 CREATIVE LLC, A LIMITED LIABILITY COMPANY; LORIE SMITH,

Petitioners,

v.

AUBREY ELENIS; *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF THE FREEDOM FROM RELIGION FOUNDATION, CENTER FOR INQUIRY, AMERICAN HUMANIST ASSOCIATION, AND AMERICAN ATHEISTS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

The Freedom From Religion Foundation is the largest national association of freethinkers, representing atheists, agnostics, and others who form their opinions about religion based on reason, rather than faith, tradition, or authority. Founded nationally in 1978 as a 501(c)(3) nonprofit, FFRF has more than 38,000 members, including members in every state and the District of Columbia. It has more than 1,200 active members in Colorado, with chapters in Denver and Colorado Springs. Nearly 12 percent of FFRF's members are LGBTQ+. FFRF's purposes are to educate about nontheism and to preserve the cherished constitutional principle of separation between religion and government.

FFRF supports civil rights protections for LGBTQ+ Americans, and opposes the radical redefinition of "religious freedom" as the right to impose one's religious beliefs on others. Commercial businesses seeking exemptions from antidiscrimination laws are a prime example of this alarming argument that believers have a right to impose their religion on others in violation of civil rights laws, or to inflict harm on third parties so long as their conduct is religiously motivated. FFRF's interest in this case arises from the fact that most of its members are atheists or nonbelievers, as are the members of the public it serves as a state/church watchdog.

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1. All parties consented to the filing of this brief. No party's counsel in this case authored this brief in whole or in part. No party or party's counsel contributed any money intended to fund preparing or submitting this brief. No person, other than amici, their members, or its counsel contributed money that was intended to fund preparing or submitting this brief.

The Center For Inquiry is a nonprofit educational organization dedicated to promoting and defending science, reason, humanist values, and freedom of inquiry. Through education, research, publishing, social services, and other activities, including litigation, CFI encourages evidence-based inquiry into science, pseudoscience, medicine, health, religion, and ethics. CFI advocates for public policy rooted in science, evidence, and objective trust, and works to protect the freedom of inquiry that is vital to a free society. CFI believes that the separation of church and state is vital to the maintenance of a free society that allows for a reasoned exchange of ideas about public policy.

The American Humanist Association ("AHA") is a national nonprofit membership organization based in Washington, D.C. Founded in 1941, the AHA is the nation's oldest and largest humanist organization. The AHA has tens of thousands of members and over 242 local chapters and affiliates across the country. Humanism is a progressive lifestance that affirms— without theism or other supernatural beliefs—our responsibility to lead meaningful and ethical lives that add to the greater good of humanity. The mission of the AHA's legal center is to protect one of the most fundamental principles of our democracy: the separation of church and state. To that end, the AHA has litigated dozens of First Amendment cases nationwide, including in the U.S. Supreme Court.

American Atheists, Inc., is a national 501(c)(3) civil rights organization that works to achieve religious equality for all Americans by protecting what Thomas Jefferson called the "wall of separation" between government and religion created by the First Amendment. American Atheists strives to promote understanding of atheists

through education, advocacy, and community-building; works to end the stigma associated with atheism; and fosters an environment where bigotry against our community is rejected. American Atheists opposes religiously motivated discrimination and regularly advocates for equal application of the law and equal access to the courts.

A ruling in this case that state governments must allow religiously-motivated discrimination in places of public accommodation would invite religious discrimination and cause harm to members of *Amici* and to all Americans.

SUMMARY OF ARGUMENT

The Constitution requires that federal courts only decide actual cases and controversies. In this pre-enforcement challenge, 303 Creative seeks to sidestep that constitutional requirement. It seeks a hypothetical confrontation between a business owner's religious beliefs and a state's laws ensuring nondiscrimination. This challenge is nonjusticiable because it stems from a manufactured controversy and because 303 Creative has not demonstrated that it is under a credible threat of enforcement.

This Court must apply jurisdictional doctrines uniformly, otherwise it provides special access to courts to preferred litigants. The Court's cases involving civil rights and the First Amendment demonstrate the need for the Court to act evenhandedly in its approach to jurisdiction.

If the Court reaches the merits and rules in favor of 303 Creative, it will undoubtedly create religious disharmony

and create a catalyst for religious discrimination. In the years to come, businesses may begin discriminating against couples seeking to marry because of their religion or lack of religion. Given national demographic changes, couples seeking traditional religious weddings may in fact be subject to increasing discrimination.

ARGUMENT

I. This pre-enforcement challenge to rules that have never been enforced against website designers is nonjusticiable.

Article III standing requires the plaintiff to demonstrate an actual injury or immediate threat of injury that is not based on attenuated events. 303 Creative has not met its burden of establishing a concrete injury that would provide standing in this suit. Lorie Smith may dislike that loving same-sex couples in the United States are afforded the right to marry. Her religious disagreement with marriage equality, however, does not magically transform a speculative chain of events into an imminent injury. 303 Creative has manufactured a controversy and cannot demonstrate that it is under the threat of enforcement of the Colorado Anti-Discrimination Act.

A. 303 Creative lacks standing because it has manufactured a controversy where none existed and its entire case rests on hypotheticals and conjecture.

To demonstrate standing, a plaintiff must establish an injury in fact that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical."

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). A concrete injury is an "indispensable element of a dispute" and demonstrates that the litigant bringing the action has a "personal stake" in the outcome. *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 220–21 (1974). However, "motivation is not a substitute for the actual injury." *Id.* at 226. Nor is mere interest in an issue sufficient to establish an injury. *See Sierra Club v. Morton*, 405 U.S. 717, 734–35 (1971). An abstract injury which takes courts into the "area of speculation and conjecture" does not meet the standing requirement. *O'Shea v. Littleton*, 414 U.S. 488, 497 (1974).

An injury in fact requires the litigant to be "himself among the injured." *Sierra Club*, 405 U.S. at 734–35. This cannot be a far-off injury. *See Ex parte Levitt*, 302 U.S. 633, 636 (1937) ("...he must show that he has sustained, or is immediately in danger of sustaining, a direct injury as a result of that action"); *Lujan*, 504 U.S. at 563–64 ("Such 'some day' intentions - without any description of concrete plans, or indeed even any specification of *when* the some day will be - do not support a finding of the 'actual or imminent' injury that our cases require"). Standing requirements are not satisfied when litigants "manufacture standing by choosing to make expenditures based on hypothetical future harm that is not certainly impending." *Clapper v. Amnesty Inter. USA*, 568 U.S. 398, 402 (2013). A "highly attenuated chain of possibilities" fails to satisfy the immediacy required of the injury. *Id.* at 410.

303 Creative is a company that offers "many creative talents to the public, including website and graphic design in concert with branding, marketing strategy, and social-media management." Brief for the Petitioners at 4, citing

Pet.App.181a. This company has *never* offered wedding website design services. Because Lorie Smith, the owner of 303 Creative, claimed that she *intends* to offer these wedding website services in the future, 303 Creative alleges that it has suffered a direct and concrete injury. Smith's Christian beliefs would prevent her from offering these hypothetical services to same-sex couples. Brief for the Petitioners at 5, citing Pet.App.184a. Smith also *intends* to post a disclaimer about her refusal to provide services to same-sex couples, but has yet to do so. Brief for the Petitioners at 7, citing Pet.App. 189a. She claims that the Accommodations Clause and the Communication Clause of CADA have prevented her from both posting the statement and starting these new services. Brief for Petitioners at 7, 10, citing Pet.App. 189a.

A party's statement about future intentions alone is an insufficient basis to challenge a law that it does not like. The plaintiff must be a "proper party" to bring a challenge, which requires that it is not asking a court to decide "illdefined controversies over constitutional issues" or a case which is "hypothetical or abstract." *Flast,* 392 U.S. at 100 (citations omitted). In a pre-enforcement challenge in particular, the plaintiff must demonstrate "a credible threat of enforcement." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 160 (2014).

The potential for enforcement here is too attenuated. In order for CADA to be applied in an adverse manner, the following events must occur: 1) 303 Creative must actually engage in the business of wedding website design services. 2) It would then need customers to request custom wedding website design, which is atypical of most

couples planning a wedding.[2] 3) One of those customers would need to be planning a wedding with a same-sex partner. 4) 303 Creative would need to decline to provide services to that customer. 5) That customer would then need to file a complaint with the Colorado Civil Rights Division within 60 days.[3] 6) The Division would need to determine via its investigation that probable cause exists for a CADA violation for website design services.[4] 7) If probable cause is found, 303 Creative and the complainant would need to fail to resolve the dispute via mandatory mediation. 8) The Division would then need to pursue its case and prevail against 303 Creative's defenses, with the Commission or an administrative law judge ordering 303 Creative "to cease and desist from such discriminatory or unfair practice," which is the typical remedy for CADA violation. See CO Rev. Stat. § 24-34-306.

Simply put, 303 Creative's claim presents a "highly attenuated chain of possibilities," which fails to satisfy the immediacy required of the injury. *Clapper*, 568 U.S. at 410.

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2. *See* discussion *infra*, I.B.1.

3. 303 Creative has only relied upon Division actions when arguing it is subject to an enforcement threat. While individuals may bring a civil action in state court, 303 Creative presents no evidence that this actually occurs in practice or that it is subject to such a threat.

4. In most cases, probable cause is not found by the Division. In a published state audit of all discrimination complaints brought before the Division in 2018, probable cause was found in 43 cases and was not found in 518 cases. Colo. Off. of the State Auditor, Management of Civil Rights Discrimination Complaints p.9 (Aug. 2019), https://leg.colorado.gov/sites/default/files/documents/audits/1820p_civil_rights.pdf.

The lack of actual injury here is especially problematic given how a similar "smoke and mirrors" wedding vendor challenge was litigated. Alliance Defending Freedom, which serves as counsel to 303 Creative, previously represented the plaintiffs in *Telescope Media Grp. v. Lucero,* 936 F.3d 740 (8th Cir. 2019). The plaintiffs in that case alleged that they intended to put a discriminatory statement on a film business website and that they wanted to expand their business to wedding videography. They sought to enter this market because they were "deeply troubled" by the United States Supreme Court's decision in *Obergefell v. Hodges*, 576 U.S. 644 (2015). In part, Telescope Media wanted to post a statement on its website saying that it would not make films "promoting any conception of marriage that contradicts its religious beliefs that marriage is between one man and one woman, including films celebrating same-sex marriages." *Id.* at 767 (Kelly, concurring). After a favorable ruling before the Eighth Circuit and the subsequent issuance of a preliminary injunction by the district court, Telescope Media discontinued its pursuit of a wedding videography business. *See Telescope Media Grp. v. Lucero,* No. 16-cv-4094, 2021 WL 2525412, at *1 (available online at https://bit.ly/3dv7gUd) .[5]

In *Telescope Media,* the State of Minnesota noted that the disclaimer that the plaintiffs sued to put on their website was taken down not long after they were granted

5. The plaintiffs asserted, in part, that this was because of live-event restrictions associated with the coronavirus pandemic. 2021 WL 2525412, at *1 However, they acknowledged in the fall of 2020 that they had no intent to reenter the wedding business. *Id.*

a preliminary injunction.[6] After receiving discovery requests from the state, Telescope Media sought to dismiss its case. 2021 WL 2525412, at *2. It appeared that Telescope Media had not seriously entered into the wedding videography business. The district court correctly identified that Telescope's case was likely a sham. The district court said it was "a smoke and mirrors case or controversy from the beginning, likely conjured up by Plaintiffs to establish binding First Amendment precedent rather than to allow them to craft wedding videos, of which they have made exactly two." *Id.* at *3.

Without adherence to the Court's precedent on standing, there is nothing that prevents this case from the same result as *Telescope Media.* Because of their strong beliefs, religious litigants will bring challenges that seek to hypothetically pit their beliefs against state nondiscrimination laws. But the ultimate prize for the litigants is not to engage in particular conduct. They are after a court decision. The ability to actually engage in a business venture appears to be a secondary, if not nonexistent objective. This is why the Court must ensure that standing is present here and that this case is ripe before providing a decision on the merits. For the Court to speak on the constitutionality of a law when it has not established jurisdiction is "by very definition, for a court to act ultra vires." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 101 (1998).

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6. Declaration of Janine Kimble, *Telescope Media Grp. v. Lucero,* No. 16-cv-04094, Dkt. 77 at 3 (D. Minn. Apr. 21, 2021), *available at* https://bit.ly/3plj7qd.

B. 303 Creative cannot demonstrate a credible threat of enforcement.

1) 303 Creative mistakenly relies upon enforcement actions concerning dissimilar businesses that denied service to actual customers.

303 Creative seeks to avoid any review of an attenuated chain of events and instead rely upon the Division's enforcement against completely dissimilar businesses. This is wrong for two reasons. First, 303 Creative cannot point to enforcement against similar conduct by a similar business. Second, prior enforcement actions by the Division came about due to actual disputes with customers who were denied services and filed complaints with the Division.

303 Creative has not shown that it is engaging in substantially similar activity to that which has been prosecuted under CADA. 303 Creative has previously relied upon *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Com'n*, 138 S. Ct. 1719 (2018), but that case is unavailing. Reply Brief for Petitioners concerning certiorari at 2. In *Masterpiece Cakeshop*, the plaintiff was a bakery that often designed wedding cakes. 138 S.Ct. at 1723. Charlie Craig and Dave Mullins requested a cake for their wedding and were denied service. *Id.* The couple then filed a complaint against Masterpiece Cakeshop and the Commission determined that the business had violated the statute. *Id.*

303 Creative's speech claim in this case is premised upon its allegations relating to consultation, editorial decisions, and speech that occurs via website design.

These activities, which are used to support its Free Speech analysis, are not readily comparable to the baked goods offered for sale in *Masterpiece Cakeshop*. 303 Creative does not cite to any website designers or other internet-based businesses where the Division has undertaken enforcement proceedings. This is necessary because 303 Creative must show it is engaging in the same conduct that was previously subject to enforcement. It has failed to identify a comparable business engaged in the same conduct that it alleges it will undertake.

The enforcement action in *Masterpiece Cakeshop* also stemmed from denial of service to actual customers who filed a complaint. 138 S. Ct. at 1724. The Division found probable cause and pursued a claim against Masterpiece Cakeshop. *Id.* at 1725–26. 303 Creative offers no evidence that any same-sex couples have filed any complaints against it with the Division or that it is under immediate threat of any such complaints being filed and pursued by the Division.

Counsel for 303 Creative misleadingly claimed that 303 Creative has "already received at least one request for a same-sex wedding website." Brief for the Petitioners at 7, citing J.A.30–31. First, the description provided in the online submission was not specifically for a website, but instead was for "...some design work done for our invites, placenames etc. We might also stretch to a website." J.A. 30-31. Second, this request is dated September 21, 2016, which was the same day that the *Denver Post* published an article about the newly filed lawsuit.[7] *Id.* 303 Creative's

7. *See* Kirk Mitchell, *Graphic Artist Challenges Colorado Law She Says Forces Her to Promote Same-Sex Marriage*, Denver Post (Sept. 21, 2016), https://www.denverpost.com/2016/09/21/colorado-lawsuit-says-law-promotes-same-sex-marriage/.

brief calls this online submission a "request" for a website, but the submission was more likely a way for someone to protest the fact that 303 Creative was suing Colorado so that it could discriminate against same-sex couples.[8] Third, the record fails to establish that the inquiry related to a "same-sex" wedding.

Even if 303 Creative publicized a desire to create custom wedding websites, it is speculative whether anyone, let alone a same-sex couple, would ever hire it for that purpose. Countless wedding industry websites list the vendors typically hired for weddings, including wedding planners, caterers, florists, photographers, and cake decorators, among others.[9] But virtually none of the industry websites suggest or promote the idea that couples should hire someone to design a "custom" wedding website. Most website designers are not in the business of creating custom wedding websites. And the market is saturated with pre-made wedding websites for couples to customize on their own.[10] It is 303 Creative's

8. The record also does not indicate that the inquiry in any way relates to residents of Colorado or any events taking place in Colorado.

9. *See, e.g., The Knot 2021 Real Weddings Study*, The Knot (Feb. 15, 2022), https://www.theknot.com/content/wedding-data-insights/real-weddings-study (last visited Aug. 12, 2022); *A Comprehensive List of Wedding Vendors*, Forever & Company, https://www.foreverandcompany.com/a-comprehensive-list-of-wedding-vendors/ (last visited Aug. 12, 2022); *List of Wedding Vendors Needed*, Planning with Posie: Blog (Jan. 24, 2018), https://planningwithposie.com/list-of-wedding-vendors-needed/.

10. *See, e.g.*, *Free Wedding Website Builder: Examples & Templates*, The Knot, www.theknot.com/gs/wedding-websites (last

burden to prove a credible threat of enforcement against it, and yet, it has failed to demonstrate that there is even a market for its hypothetical service. No market means no customers. This niche category of wedding vendor adds to the problematic nature of the case. The seeming lack of a market for a hypothetical custom wedding website service underscores a fatal flaw in this case: it looks like it was manufactured.

Given the circumstances, it is puzzling that 303 Creative relies upon a solitary online inquiry related to invites and placename designs to show a credible threat of enforcement. *See* Reply Brief for Petitioners at 1. Instead, it shows that the threat of imminent enforcement is paper thin. Any deficiencies in developing a factual record are the fault of 303 Creative's counsel and not for the Court to stretch credulity to claim that 303 Creative has in fact received a valid "request for a same sex wedding website."

2) This challenge is distinct from cases where the plaintiffs had standing and demonstrated a credible threat of prosecution.

Plaintiffs may bring pre-enforcement challenges against laws when they have "alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder." *SBA List*, 573 U.S. at 160, *quoting Babbitt v. United Farm*

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visited Aug. 12, 2022); *Free Weddings Websites and Templates Just For You*, Zola, https://www.zola.com/wedding-planning/website (last visited Aug. 12, 2022).

Workers Nat. Union, 442 U.S. 289, 298 (1979). The Court found the plaintiffs in *SBA List* had standing because they satisfied both of these elements. First, SBA List had *already* made statements about candidate Driehaus in the past and intended to "engage in substantially similar activity in the future." *Id.* at 155 (emphasis added). SBA List's conduct was also arguably proscribed by the statute, as a Commission panel had previously found probable cause that the organization violated the statute for its past comments. *Id.* at 162.

It is significant that the threat of criminal penalties increases the potential chilling effect of statutes. Where standing has been found in cases involving a chilling effect, there was often a criminal penalty associated with it. *Updegrove v. Herring*, No. 1:20-cv-1141, 2021 WL 1206805, at *5 (E.D. Va. Mar. 30, 2021); *see also Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 387 (1988); *Wooley v. Maynard*, 430 U.S. 705, 708–709 (1977). Not only did the plaintiffs in *SBA List* already engage in the prohibited speech and were found to have violated the statute, but the penalty for continuing to engage in this speech had "the additional threat of criminal prosecution." *SBA List,* 573 U.S. at 166. All of these factors combined is why the Court found the group to have standing related to the chilling effect of this statute.

Although 303 Creative and SBA List both intended to make statements in the future that could be in violation of certain statutes, the difference here is that SBA List had actually already engaged in that type of speech, so the possibility that they would do so again is far less conjectural than it is in this case. The same is true in *Babbitt*, where the Court upheld standing for Arizona

farmworkers who "actively engaged in consumer publicity campaigns in the past." 443 U.S. at 301. Here, 303 Creative only claims future intent to engage in speech.

303 Creative has presented self-serving claims of intent, which are unconnected to typical indicators that an entity will be subject to an imminent and credible threat of prosecution. The fabricated claims of standing in this case illustrate a fight for a desired ruling that would permit discrimination against a protected class, rather than a fight for the desired relief. That is, 303 Creative seeks an advisory opinion from this Court on an issue, rather than relief alleviating a true concern over enforcement.

In contrast to the cases mentioned above, elements of this case, such as a barren factual record and lack of actual injury, create the impression that this is a manufactured case or controversy. 303 Creative has only a string of possibilities that may or may not occur as proof of its injury. Courts have routinely held that the "increased risk of future injury is nothing more than speculation" and is insufficient to create standing. *Reilly v. Ceridian Corp.*, 664 F.3d 38, 43 (3rd Cir. 2011). This extends to a "string of hypothetical injuries." *Id.* at 44, *see also Reddy v. Foster*, 845 F.3d 493, 505 (1st Cir. 2017) ("If the dispute were to develop into a case or controversy fit for adjudication, it would be at some future time when the Act is causing cognizable harm—to particular plaintiffs, at a particular clinic, and under particular circumstances."); *see also*, *Grand Lodge of Fraternal Order of Police v. Ashcroft*, 185 F.Supp.2d 9 (D.C. Cir. 2001); *School of the Ozarks, Inc. v. Biden*, No. 21-2270, 2022 WL 2963474, at *4 (8th Cir. July 27, 2022).

In a case with similar factual allegations to this one, a district court found that a wedding photographer did not have standing. *Updegrove v. Herring*, No. 1:20-cv-1141, 2021 WL 1206805, at *5 (E.D. Va. Mar. 30, 2021). In that case, "Plaintiff has never actually acted in a way that would arguably violate the statute. Plaintiff has never been approached by anyone seeking his photography services for a same-sex wedding. Plaintiff also has never published any statement reflecting his decision not to provide wedding photography for same-sex weddings. At the moment, Plaintiff has no reason to suspect that Defendant might attempt to penalize him using a statute he has never violated." *Updegrove*, 2021 WL 1206805, at *3.

The plaintiff in *Updegrove* also tried to establish standing on the basis of a speech chilling effect. However, the court noted that "Plaintiff never previously engaged in the type of speech that he claims is currently being chilled." *Id.* at *4. This amounts to a "subjective chill" which, in the context of standing, is "not an adequate substitute for a claim of specific present objective harm" *Reddy*, 845 F.3d at 504, *quoting Laird v. Tatum*, 408 U.S. 1, 11 (1972); *see also School of the Ozarks, Inc.*, 2022 WL 2963474, at *5 ("Although the complaint states that the Memorandum 'chills the speech of colleges,' it alleges no facts to support that legal conclusion"). Like the plaintiff in *Updegrove*, 303 Creative has never violated CADA by either discriminating against same-sex couples or posting the discriminatory statement. 303 Creative is concerned about a subjective chill for speech that it has never spoken. Similar to the situation in *Updegrove*, these facts are insufficient to establish standing.

The Court would establish broad Article III precedent if it finds that 303 Creative has standing. If a company can allege that its speech has been chilled because it is prevented from saying something it has never said before, "then anyone has standing to challenge any statute simply by alleging that they would like to make a future statement that the statute arguably prohibits." *Updegrove*, 2021 WL 1206805, at *4. Only a few parts of this case create the "odor of a case or controversy," but not enough to meet the standing requirements. *Mobil Oil Corp. v. Attorney General of Com. of Va.*, 940 F.2d 73, 77 (4th Cir. 1991).

II. The Court must apply jurisdictional doctrines uniformly, otherwise it manipulates its jurisdiction in order to benefit preferred litigants.

The Court must evaluate whether a plaintiff has Article III standing before transitioning to the merits of the case. Article III requires federal courts to establish that a "case or controversy" exists between "adverse litigants" before they can exercise jurisdiction over a matter. *Muskrat v. United States*, 219 U. S. 346, 361 (1911). Whether this exists is the "threshold question" in federal cases because it determines a court's ability to hear the suit. *Baker v. Carr*, 369 U.S. 186, 204 (1962). This fundamental limit on judicial power ensures that courts do not "engage in policymaking" which should be left to elected representatives. *Hollingsworth v. Perry*, 570 U.S. 693, 700 (2013). The doctrine of standing considers generally whether the litigant is the "proper party to request an adjudication of a particular issue." *Flast v. Cohen*, 392 U.S. 83, 100 (1968).

The Court cannot pick and choose when to ignore Article III. If the Court's jurisdiction is circumscribed by Article III's case or controversy requirement, then the Court must decline to hear the matter. If the Court asserts it has jurisdiction to decide such cases, it must apply its jurisdiction uniformly to all litigants, and not only to cases involving preferred litigants. A review of the Court's cases involving religion and civil rights highlights the need for the Court to adopt an even handed approach to jurisdiction.

Amici work to protect the rights of nonreligious Americans, including through litigation concerning the Establishment Clause of the First Amendment. This Court has dismissed Establishment Clause claims as nonjusticiable in several important cases. The Court has also often declined to hear other important civil rights lawsuits when its jurisdiction was questioned. *See O'Shea v. Littleton,* 414 U.S. 488 (1974) *(*Holding that Black city residents did not have standing to challenge a city's illegal criminal bond-setting, sentencing, and court fees*); City of Los Angeles v. Lyons,* 461 U.S. 95 (1983*)* (Finding that Lyons lacked standing to enjoin illegal choke hold practices by police); *Whitmore v. Arkansas,* 495 U.S. 149 (1990) (Third parties lacked standing to challenge allegedly invalid death sentence).

Most recently, abortion providers sought a pre-enforcement challenge related to Texas' "bounty hunter" abortion law and the Court largely held that there was no adequate "adverse litigant" for the organization to sue, so there was no real "case or controversy." *Whole Woman's Health v. Jackson*, 143 S.Ct. 522, 532–33 (2021).

What is concerning to *Amici,* and to those watching the Court, is whether the Court will apply its jurisdictional framework in the same manner to all litigants. The same access to courts must be provided to all citizens, regardless of whether they identify as Christian, Muslim, Jewish, or atheist. Or, more broadly, if they seek to assert rights that are opposed by one religious segment of the population. If constitutional challenges may be brought on a limited record in a pre-enforcement challenge, then the Court must uniformly apply such a determination.

Concerns over manipulation of jurisdictional requirements by the Supreme Court have been noted by multiple observers of the Court. *See* Wright and Miller, 12 13A Fed. Prac. & Proc. Juris. § 3531.1 (3d ed.) (Recognizing that justiciability determinations have sometimes led to "disingenuous manipulation."). As one scholar put it, "Many observers believe the manipulation of justiciability doctrine to be rampant."[11] Another scholar has analyzed the mechanisms by which courts manipulate outcomes by utilizing procedural, substantive, and justiciability principles.[12]

Atheist and Muslim plaintiffs who bring Establishment Clause claims ought not to face higher procedural and jurisdictional hurdles when seeking judicial relief than

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11. Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—and Their Connections to Substantive Rights*, 92 Va. L. Rev. 633, 655 (2006).

12. Michael Coenen, *Right-Remedy Equilibration and the Asymmetric Entrenchment of Legal Entitlements*, 61 B.C. L. Rev. 129, 134–135 (2020).

other First Amendment litigants.[13] Yet, the Court has often found that it had no authority to decide cases involving the first ten words of the First Amendment.

In *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, the Court, in part, found that plaintiffs who resided in Maryland could not challenge a transfer of property in Pennsylvania to vindicate their claim that the transfer violated the Establishment Clause. 454 U.S. 464, 471, 486–487 (1982).

In *Elk Grove Unified Sch. Dist. v. Newdow*, the Court concluded that a father lacked prudential standing to challenge the Pledge of Allegiance on behalf of his daughter when he did not have legal custody of the child at the time the Court of Appeals issued its decision. 542 U.S. 1, 17–18 (2004), *abrogated by Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014).

In *Hein v. Freedom From Religion Found., Inc.*, the Court held that taxpayers lacked standing to challenge federal expenditures under the Establishment Clause without express authorization for the expenditures from Congress. 551 U.S. 587, 608 (2007).

Likewise, in *Arizona Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125 (2011), the Court ruled that taxpayers

13. Beyond justiciability issues, Muslim litigants have faced substantial scrutiny of their religious liberty claims before the Supreme Court. *See Trump v. Hawaii*, 138 S. Ct. 2392 (2018); *Dunn v. Ray*, 139 S. Ct. 661 (2019) (Vacating stay of execution of Muslim death row inmate who sought the comfort of an imam at his last moments of life).

challenging a tax credit for religious education, as opposed to an expenditure, lacked Article III standing.

Christians who have brought First Amendment challenges have not faced significant procedural and jurisdictional hurdles. The Court has not only heard such cases when jurisdiction was in doubt, it has done so regularly. In *Trinity Lutheran Church of Columbia, Inc. v. Comer,* the Court determined, in a footnote, that the case had not become moot despite the Missouri Governor providing the relief sought by the church. 137 S. Ct. 2012, 2019 n.1 (2017). The new Missouri Governor had directed the Department of Natural Resources to allow religious organizations to receive grants from the state. *Id.*

In a per curiam decision, the Court ordered injunctive relief in *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020). Dissenting justices noted the fact that the religious organizations seeking an injunction were no longer subject to restrictions implicating the Free Exercise Clause. Id. at 75 (Roberts, C.J., dissenting) ("None of the houses of worship identified in the applications is now subject to any fixed numerical restrictions."); (Breyer, J., dissenting) ("[N]one of the applicants are now subject to the fixed-capacity restrictions that they challenge in their applications.").

The Court has erected substantial barriers to plaintiffs who assert civil rights claims. The court ought to apply the same scrutiny to claims asserted by Christian litigants who espouse First Amendment claims. The Court must act as an impartial arbiter when it comes to justiciability determinations. Because these decisions foreclose access to courts, they must not be manipulated to provide judicial relief only to preferred litigants.

III. A ruling on the merits by the Court in favor of 303 Creative will result in increased religious discrimination.

Religious discrimination will increase if this Court decides that wedding vendors engaged in some forms of speech may discriminate against LGBTQ+ customers. Amicus briefs filed in support of 303 Creative view this case only through the lens of religious businesses declining to provide goods or services because of their own religious beliefs on the issue of same-sex marriage. However, the reach of this case will go far beyond same-sex marriage. If the Supreme Court sanctions discrimination by businesses as a matter of free speech, one likely result will be an increased amount of religious discrimination. The Court would then cause significant harm by sanctioning discrimination against religious and nonreligious customers by businesses.

In the years, if not decades to come, the shoe may be on the other foot. That is, those wishing to celebrate religious weddings may find themselves discriminated against when searching for wedding vendors. When the Supreme Court weighs in on a contentious case appearing to favor Christians, a public reaction may take hold that counters the religious favoritism. Even though such discrimination is not the norm today, the Court's decision may cause a reaction by citizens and businesses.

One form of reaction that is possible is greater discord over not only same-sex weddings, but possibly denominational religious weddings. No longer will vendors accept all customers when providing goods or services. Instead, business owners may determine whether they

view the *customer's* religion as consistent with the owner's religion or lack thereof.

Already, traditional religious weddings are in the minority. Only 30 percent of Americans who were married in the past decade report having a religious leader officiate their wedding in a church or religious venue.[14] This differs significantly from couples who were married more than 40 years ago, when 72 percent of Americans were married at a religious location with a religious officiant. *Id.* Nearly half of marriage ceremonies that took place within the past decade were secular services. *Id.*

Given this demographic shift, it can hardly be viewed as a victory for religious Americans when businesses will increasingly be allowed to vet them based on the customer's religion. While Americans overwhelmingly support the right to same-sex marriage, many churches and religious institutions have continued to oppose equality. Those wishing to purchase goods and services for weddings held in churches that oppose equality may find themselves on the receiving end of discrimination in the years to come.

If 303 Creative prevails, it may mean that former members of the Roman Catholic Church will decline to provide services to traditional Catholic weddings. Former Mormons may not wish to associate with or provide benefits to those marrying in the LDS Church. Or vendors

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14. Daniel A. Cox, *Emerging Trends and Enduring Patterns in American Family Life*, The Survey Center on American Life (Feb. 9, 2022), https://www.americansurveycenter.org/research/emerging-trends-and-enduring-patterns-in-american-family-life/.

may choose to decline services more broadly to weddings held in churches that they view as anti-LGBTQ.

In some parts of the country, especially areas where Christian Nationalism has already taken hold, antisemitism may see a resurgence and Jewish couples may face obstacles in finding local wedding vendors. Similarly, atheists and Muslim Americans may face increased obstacles in finding businesses to provide services if the business owners simply disagree with their religion or lack of religion.

In effect, the Supreme Court will create religious disharmony and act as a catalyst for religious discrimination should it seek to exempt wedding vendors from a state's antidiscrimination laws that are aimed at commercial conduct. This is neither desirable nor necessary. It would stem from the Court deciding a case that has been manufactured with the goal of securing a public victory for Christianity over LGBTQ equality. If the Court reaches the merits, it should decline 303 Creative's invitation to create religious disharmony.

CONCLUSION

Because 303 Creative lacks standing, the Court should dismiss the appeal for lack of jurisdiction. Alternatively, the Court should affirm the ruling of the Court of Appeals.

Respectfully submitted,

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