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

BRIEF FOR TYNDALE HOUSE PUBLISHERS, PEACHTREE PUBLISHING SERVICES, LLC, THE FOUNDRY PUBLISHING, HARVEST HOUSE PUBLISHERS, INC., URBAN MINISTRIES, INC., WHITAKER HOUSE, THE MOODY BIBLE INSTITUTE OF CHICAGO, AND WARNER PRESS, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether applying a public-accommodation law to compel an artist to speak or stay silent, contrary to the artist's sincerely held religious beliefs, violates the Free Speech or Free Exercise Clauses of the First Amendment.

2. Whether a public-accommodation law that authorizes secular but not religious exemptions is generally applicable under *Smith*, and if so, whether this Court should overrule *Smith*.

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INTEREST OF *AMICI CURIAE*[*]

Tyndale House Publishers was founded in 1962 by Kenneth Taylor, the translator of The Living Bible. It merged with Tyndale House Ministries in 2019. The mission of Tyndale House Ministries is "[t]o minister to the spiritual needs of people primarily through publication of literature consistent with biblical principles and through grants to other charitable entities." Tyndale publishes Bibles and other Christian books—about 100 new titles per year.

Peachtree Publishing Services, LLC has served publishers devoted to faith-based content for over forty years. Its mission is to protect and advance the Bible while helping faith-based, Christian readers engage with it. Peachtree performs Bible proofreading, editing of commentaries, and writing of devotionals. It helps with products that align with the Nicene Creed, and its work has reached over twenty million faith-based readers in the United States.

The Foundry Publishing, also known as The Nazarene Publishing House, was founded in 1912. Its mission is to publish Wesleyan Holiness Literature, primarily for the Church of the Nazarene, but it also assists many other denominations and independent churches. The publishing house produces several lines of quarterly curriculum for all age levels as well as hundreds of book titles and music products.

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[*] All parties have received timely notice and have consented to the filing of this brief. In accordance with Rule 37.6, no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

Harvest House Publishers was founded in 1974 and exists to fulfill its mission to provide high quality books and products that affirm biblical values, help people grow spiritually strong, and proclaim Jesus Christ as the answer to every human need. Harvest House publishes evangelical Christian books about social issues, current events, apologetics, Bible prophecy, Christian living, and children's educational books. Each year, Harvest House publishes about 100 new books and maintains an active backlist of more than 1,600 titles.

Urban Ministries, Inc. was established in 1970 to serve African American churches, denominations, and consumers with Christian education curriculum, books, and other resources uniquely written and designed to address the spiritual, social, and cultural needs of this community. Serving a diverse group of over twelve denominations and over 40,000 congregations in the African American community requires that Urban Ministries' resources reflect the unique beliefs and doctrines of its denominational customers and their congregants. Millions of African American consumers are reached through its over 100 publications.

Whitaker House was founded in 1970 with the mission of advancing God's kingdom by publishing authors who proclaim the power of the Gospel and minister to the spiritual needs of people around the world. It publishes Christian and inspirational books, Bibles, and audio/visual resources. Whitaker House works with a diverse list of authors from different backgrounds and denominational affiliations, publishing about eighty titles in English and Spanish each year. Whitaker House's efforts reached more than seven million people in 2020.

Moody Publishers, a ministry division of The Moody Bible Institute of Chicago, was founded by evangelist D.L. Moody in 1886 to proclaim the Gospel and equip people to be biblically grounded and practically trained, and to engage the world through Gospel-centered living. Since its founding, Moody has expanded to include publishing, education, and radio ministries. With over 1,400 titles in print and global editions in over eighty languages, Moody Publishers serves over four million readers every year. As a Christian ministry with specific doctrinal convictions, Moody depends on its freedom to select the content it publishes.

Warner Press was founded 140 years ago with the mission of equipping the Church to advance the Kingdom of God and give hope to future generations. It produces content and materials that supply churches, schools, and individuals for use in programming, teaching, growth, and development. Warner Press counts about 4,000 churches and 3,000 schools as clients. And Warner Press produces curriculum for about 2,000 churches within the Church of God denomination. It also produces greeting cards that reach about 500,000 individuals.

SUMMARY OF THE ARGUMENT

Amici are religious publishers that create resources for millions of people to grow in their faith. *Amici* are diverse in many views but united in their commitment to the principle that every speaker should have the right to exercise their editorial and artistic judgment in a manner consistent with their core convictions. *Amici*'s publishing is an exercise in free speech, for they both convey the speech of others and convey their own speech by their editorial decisions about content, layout, and design.

In that respect, they are much like Lorie Smith, the wedding website designer who sought here to exercise her First Amendment rights by creating websites in accord with her faith. Colorado law, however, would require her to create expression with which she disagrees. It would compel her to speak in a way directly opposed to her beliefs. The "very purpose" of Colorado's law, according to the court below, is to "excis[e] certain ideas or viewpoints from the public dialogue." App. 24a. And the court found that is precisely the law's effect: Ms. Smith is "forced to create websites—and thus, speech—that [she] would otherwise refuse" because that speech violates her conscience. App. 22a–23a.

Yet the court found that this blatant restriction on free speech did *not* violate the First Amendment. To arrive at that counterintuitive result, the Tenth Circuit announced that Colorado has a compelling interest in ensuring equal access to public accommodations—and it presumed that wedding websites were a type of essential public accommodation. The court then held that forcing Ms. Smith to speak against her own views was the only

way for Colorado to further that interest, because Ms. Smith's own "services are, by definition, unavailable elsewhere." App. 28a. A different designer would not, after all, be Ms. Smith. So the State can put Ms. Smith to this choice: speak the message we demand, or do not speak at all.

Few decisions have so mangled the First Amendment. The type of editorial discretion exercised by both Ms. Smith and *amici* is a protected right rooted in this Nation's history and tradition. The First Amendment's protection of speech and press stemmed in large part from various English and colonial efforts to punish publication of disfavored books and newspapers. When a creator conveys the speech of others and exercises independent judgment as to editing, content, and design, the creator's own speech is protected just as any other speech.

By stripping First Amendment protection from Ms. Smith's exercise of editorial discretion, the Tenth Circuit departed from this Court's precedents. Those precedents protect speakers' rights to speak what they wish to speak and to refrain from speaking what they desire not to. Though the Court has allowed narrow speech restrictions where they are the least restrictive means of furthering a compelling government interest, it has rejected any suggestion that a restriction is narrowly tailored simply because the speaker has some sort of "monopoly." The Court has protected the speech of *actual* monopolies, like energy and cable companies. And it has often protected the rights of those who offer unique forms of expression, from parade organizers to Boy Scout troops. In any case, ensuring access to a particular wedding website designer is not a government interest of the highest order sufficient to compel speech.

Left unreviewed, the reasoning of the decision below would lead to widespread suppression of speech. Like Ms. Smith, *amici* could be forced to publish material at odds with their religious beliefs, depriving readers of resources about their own faith. All that the government would need to bring down its heavy hand of censorship on a speaker would be to identify some "unique" public service and an "arguabl[e]" connection (App. 11a) with a protected classification—religious beliefs, sexual preferences, even political views—or other government interests. App. 11a, 20a. A wide swath of speech could be suppressed, especially ideas that the government dislikes. Only by granting review can this Court vindicate the First Amendment rights of creative speakers and publishers.

REASONS FOR GRANTING THE WRIT

I. Editorial discretion is a protected right rooted in this country's history and legal traditions.

The editorial judgment of those who print, publish, or transmit others' speech is an essential part of the freedom of speech and the press protected by the First Amendment. This protection was borne of experience. "All nations have tried censorship and only a few have rejected it." *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 73 (1963) (Douglas, J., concurring). And colonial Americans were all too familiar with the dangers and temptations of governmental power over the written word.

A few examples prove the point. After the printing press came to England in 1476, Henry VIII quickly realized the potential (and dangers) of such mass distribution of the written word. See Michael W. McConnell et al., *Religion and the Constitution* 559

(4th ed. 2016). He gave favors to certain printers and prosecuted printers who opposed the Crown. *Ibid.* He also prosecuted those who printed Protestant religious works. See *ibid.* "[O]ne of the burning issues of the day was whether the Bible should be translated and published in the vernacular." *Ibid.* The famed publisher William Tyndale "fled to the Continent to publish his English translation and smuggled copies into England from there." *Ibid.* Many other individual publishers, religious and otherwise, did similarly. *Ibid.* For Tyndale, his new translation of the New Testament into English would lead to exile from England and ultimately being burned at the stake.[1] The Puritans opposed the Crown's "scheme of royal censorship," launching a campaign led by John Milton against press licensing in the 1640s. *Id.* at 559–60.

Yet still, even in colonial America, freedom of speech for publishers was not always secure. For instance, in 1733, John Peter Zenger created the *New York Weekly Journal*, the first opposition newspaper in the colonies. Livingston Rutherford, *John Peter Zenger: His Press, His Trial and A Bibliography of Zenger Imprints* 28 (1904). His publication included essays by leading English libertarian philosophers, as well as the popular Cato's Letters that played a key role in the American Revolution. "Zenger Trial," *The Oxford Companion to United States History* 858–59 (Paul S. Boyer ed., Oxford University Press 2001).

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[1] For this reason, Margaret Atwood has called him a "martyr[] for 'free speech.'" Jemimah Steinfeld, *Novel Lines*, Index on Censorship, July 2017, at 73, 73.

Zenger also used sarcasm, innuendo, and allegory to ridicule New York's British Governor. *Id.* at 858.

Because of these criticisms, Zenger was charged with seditious libel. At trial, Zenger argued for acquittal, not by denying that he had published the materials at issue, but by arguing that the content of what he published was true. He was acquitted by a jury and would be the last colonial publisher to be prosecuted by royal authorities. *Ibid.* Zenger's trial established that publishers would be free to criticize the government, an important marker on the path to the adoption of the First Amendment. *Id.* at 858–59.

The "exigencies of the colonial period" and "the efforts to secure freedom from oppressive administration" were part of the motivation for the First Amendment. *Near* v. *State of Minnesota ex rel. Olson*, 283 U.S. 697, 716–17 (1931). Against this history, the rights to speak and to be free from compelled speech have long been recognized as encompassing the right to exercise editorial discretion in fields that create and produce messages, including publishing, broadcasting, and cable programming. "[T]he free publication and dissemination of books and other forms of the printed word furnish very familiar applications of these constitutionally protected freedoms." *Smith* v. *California*, 361 U.S. 147, 150 (1959). This protection holds even if "the dissemination takes place under commercial auspices." *Ibid.* Indeed, the publisher's "economic stake" in the speech can give it a particularly strong interest in preventing "infringements of freedom of the press" and speech. *Bantam Books*, 372 U.S. at 64 n.6; accord *Bigelow* v. *Virginia*, 421 U.S. 809, 818 (1975); *Time, Inc.* v. *Hill,* 385 U.S. 374, 397 (1967) ("That books . . . are published and sold for profit does not

prevent them from being a form of expression whose liberty is safeguarded by the First Amendment." (cleaned up)).

The same rule that protects publishers also protects analogous entities that exercise editorial discretion in conveying the speech of others. For instance, the government cannot regulate a newspaper's "choice of material" or "the size and content of the paper," "whether fair or unfair." *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241, 258 (1974); see also *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations*, 413 U.S. 376, 391 (1973). The same rule applies to broadcasters and many others whose creative product constitutes speech. *E.g.*, *Arkansas Education Television Commission* v. *Forbes*, 523 U.S. 666, 674 (1998) ("When a public broadcaster exercises editorial discretion in the selection and presentation of its programming, it engages in speech activity."); *Turner Broadcasting System, Inc.* v. *FCC*, 512 U.S. 622, 636 (1994) ("Through original programming or by exercising editorial discretion over which stations or programs to include in its repertoire, cable programmers and operators see[k] to communicate messages on a wide variety of topics and in a wide variety of formats." (cleaned up)); *Buehrle* v. *City of Key West*, 813 F.3d 973, 977 (CA11 2015) ("The First Amendment protects the artist who paints a piece just as surely as it protects the gallery owner who displays it, the buyer who purchases it, and the people who view it."); *Telescope Media Group* v. *Lucero*, 936 F.3d 740, 750 (CA8 2019) (wedding videos "are a form of speech").

This protection for the exercise of editorial discretion serves important public purposes. "Those

who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truth." *Thornhill* v. *Alabama*, 310 U.S. 88, 95 (1940). Thus, "[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail." *FCC* v. *League of Women Voters of California*, 468 U.S. 364, 377 (1984). And in that way, freedom of speech and the press "will ultimately produce a more capable citizenry and more perfect polity." *Cohen* v. *California*, 403 U.S. 15, 24 (1971). For that reason, protecting editorial discretion "contribute[s] greatly to the development and well-being of our free society and its continued growth." *Smith*, 361 U.S. at 155. But because the temptation for any government to suppress disliked speech is so strong, "[c]easeless vigilance is the watchword to prevent" the erosion of speech protections "by Congress or by the States." *Ibid.*

II. By sanctioning a violation of editorial discretion, the decision below contradicts this Court's First Amendment precedents.

The First Amendment prohibits "[c]ompelling individuals to mouth support for views they find objectionable." *Janus* v. *American Federation of State, County & Municipal Employees, Council 31*, 138 S. Ct. 2448, 2463 (2018). "[T]he government, even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers and listeners." *Riley* v. *National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 791 (1988). The decision below agreed that Ms. Smith's editorial judgment in designing wedding websites constitutes "pure speech" protected by the First Amendment. App. 20a. And it correctly acknowledged that "forc[ing]" Ms. Smith to

create a wedding website would amount to the government compelling her to speak an "inherently expressive" message that she "would otherwise refuse." App. 21a–23a. In fact, the "very purpose" of the state law, according to the Tenth Circuit, is to "excis[e] certain ideas or viewpoints from the public dialogue." App. 24a.

Yet the Tenth Circuit concluded that the First Amendment allows the government to "excis[e]" Ms. Smith's speech because it dislikes the content of that speech. That is incredible. No decision of this Court supports that implausible reading of the First Amendment, and many decisions refute it. The Tenth Circuit invoked strict scrutiny, under which the government must prove that its restriction is narrowly tailored to a compelling government interest. But its application of both parts of that test departs from this Court's precedents.

The Tenth Circuit agreed that "LGBT consumers may be able to obtain wedding-website design services from other businesses," but it thought that other services "will never be . . . the same quality and nature as" Ms. Smith's custom designs. App. 28a. In other words, Ms. Smith is a monopolist who has cornered the market for her own services. Thus, according to the Tenth Circuit, Colorado's restriction on Ms. Smith's speech is narrowly tailored to an interest in equal access to public accommodations.

The First Amendment does not give way nearly so easily, and that is why the Court has protected the speech even of actual monopolists like energy and cable companies. And it has repeatedly protected the speech of speakers offering unique services against public accommodations attacks. To excuse a First

Amendment violation on monopoly grounds for a wedding website design twists the Court's narrow tailoring test beyond recognition. What's more, allowing the government to state a compelling interest at a high level of generality—*e.g.*, "equal access"—misunderstands the demanding nature of the government's burden to justify violations of a speaker's constitutional rights. And it is doubtful that the government's interest, properly defined—access to specific wedding website designers—is a pressing public necessity of the highest order.

A. The Tenth Circuit's narrow tailoring analysis departs from this Court's precedents.

Though the Tenth Circuit held that Colorado's speech limitation was narrowly tailored because Ms. Smith is a monopolist, this Court has repeatedly rejected both premises of that holding. First, a speaker is not a monopolist without First Amendment rights simply because it provides unique speech. Second, even actual monopolists do not give up their First Amendment rights.

Start with this Court's pathmarking decision in *Hurley* v. *Irish-American Gay, Lesbian & Bisexual Group of Boston*, which recognized that statutes preventing discrimination "do not, as a general matter, violate" the First Amendment. 515 U.S. 557, 572 (1995). At issue was a St. Patrick's Day parade organized by the South Boston Allied War Veterans Council, which decided to exclude a gay, lesbian, and bisexual pride group from its annual parade. The group sued based on the state's public accommodations law, and the Council defended based on the First Amendment. See *id.* at 559–63.

Much like the statute here, the Massachusetts statute in *Hurley* did not "on its face, target speech," but prevented "discriminating against individuals in the provision of publicly available goods, privileges, and services." *Id.* at 572. But a First Amendment problem arose because the statute was applied to "essentially requir[e] petitioners to alter the expressive content of their parade." *Id.* at 572–73. Though the state law characterized "the parade as a place of public accommodation," applying the statute to the parade's choice of participants "had the effect of declaring the sponsors' speech itself to be the public accommodation." *Id.* at 573. That was because of "the expressive character of both the parade and the marching GLIB contingent." *Ibid.*

Under the decision below, the parade organizers should have lost. After all, a certain parade is, by the definition below, "unique," and a group of people did not have equal access to participate in this "unique" parade. As this Court emphasized, the "success of [the Council's] parade makes it an enviable vehicle for the dissemination" of opposing views. *Id.* at 578.

But, unlike the decision below, this Court did not treat the uniqueness of speech as reason to eliminate the speaker's First Amendment rights. That the parade was unique did not show that it "enjoy[s] an abiding monopoly of access to spectators," as the parade does not have "the capacity to silence the voice of competing [messages]." *Id.* at 577–78 (cleaned up). Thus, the Court held that compelling the parade organizers to accept the group would "violate[] the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." *Id.* at 573. Though "the law is free to promote all sorts of conduct

in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." *Id.* at 579.

If the speech restriction in *Hurley* was not narrowly tailored to any equal-access interest, neither is Colorado's here. Indeed, for Ms. Smith (like *amici* publishers), the protected nature of the speech "is even clearer than in *Hurley*" because she "actively create[s]" expression "rather than merely hosting" others' content. App. 21a.

Likewise, in *Boy Scouts of America* v. *Dale*, this Court rejected the argument that a State's interest in ensuring access to public accommodations superseded a private entity's First Amendment rights to expressive association. 530 U.S. 640 (2000). There, the Boy Scouts revoked Mr. Dale's assistant scoutmaster position when it learned that he was active in the LGBT community. *Id.* at 644. He sued the Scouts for violating New Jersey's statute that "prohibit[ed] discrimination on the basis of sexual orientation in places of public accommodation." *Id.* at 645.

Again, by the Tenth Circuit's measure, the Scouts offer a "unique" good or service. But that could not justify "such a severe intrusion" on the Scouts' First Amendment rights. *Id.* at 642. Under the First Amendment, the State could not "compel the organization to accept members where such acceptance would derogate from the organization's expressive message." *Id.* at 659–61. As this Court explained, "the First Amendment prohibits the State from imposing . . . requirement[s] through the application of its public accommodations laws" that

interfere with individuals' First Amendment rights. *Id.* at 659.

Even in the context of *actual* monopolies—*i.e.*, companies in industries that face high fixed costs or other barriers to entry—this Court has not stripped monopolists of their First Amendment rights. For instance, in *Pacific Gas and Electric Co.* v. *Public Utilities Commission of California*, the Court held "that the State cannot advance some points of view by burdening the expression" of a regulated energy company, for "monopoly [status] does not decrease" the constitutional "value of its opinions." 475 U.S. 1, 17 n.14, 20 (1986). And in *Tornillo*, the Court upheld the freedom of the press against governmental interference despite large media outlets' "monopoly of the means of communication." 418 U.S. at 250; see *id.* at 254–58. If speech restrictions are not narrowly tailored even where actual monopolies are involved, the restrictions here—in an industry with essentially no barriers to entry—certainly are not.

As the dissent below well explained, the Tenth Circuit's understanding of narrow tailoring would swallow the rule against compelled speech. Simply by defining the relevant market for a particular service as beginning and ending with a speaker's custom services, "the government could regulate the messages communicated by *all* artists, forcing them to promote messages approved by the government in the name of 'ensuring access to the commercial marketplace.'" App. 80a (Tymkovich, C.J., dissenting). That reasoning would "empty" the First Amendment's protection for a wide range of speakers, "for the government could require [them] to affirm in one breath that which they deny in the next." *Pacific Gas*, 475 U.S. at 16. The decision below conflicts with this Court's precedents.

B. The Tenth Circuit's understanding of compelling government interests contradicts this Court's precedents.

Beyond the Tenth Circuit's mangling of the narrow tailoring test, its compelling interest analysis is also dubious. A compelling government interest necessary for strict scrutiny must be of the highest order. As this Court has said, under strict scrutiny, "only the gravest abuses, endangering paramount interest, give occasion for permissible limitation." *Sherbert* v. *Verner*, 374 U.S. 398, 406 (1963) (cleaned up).

At least outside the national security context, it is doubtful whether *any* government interest is of a sufficiently high order to warrant a restriction (or compulsion) of speech protected by the First Amendment. Cf. *Telescope Media*, 936 F.3d at 755 ("[A]s compelling as the interest in preventing discriminatory conduct may be, speech is treated differently under the First Amendment."). The decision below found a compelling government interest in "ensuring equal access" to "public accommodations." App. 26a (cleaned up). But this characterization ignores that "public accommodations laws have expanded" dramatically from "traditional places of public accommodation." *Dale*, 530 U.S. at 656. Compare 42 U.S.C. § 2000a(b) (defining as public accommodations lodgings, restaurants, and gas stations), with Colo. Rev. Stat. Ann. § 24-34-601 (covering "any place of business engaged in any sales to the public and any place offering services, facilities, privileges, advantages, or accommodations to the public").

Though the Tenth Circuit cited *Roberts* v. *U.S. Jaycees*, 468 U.S. 609 (1984), for an "equal access"

interest, App. 26a, the Court in *Jaycees* "went on to conclude that the enforcement of the[] statute[] would not materially interfere with the ideas that the organization sought to express." *Dale*, 530 U.S. at 657. Thus, *Jaycees* does not answer the question of what compelling government interests suffice to limit protected speech, much less analyze the expansion of public accommodations laws.

When the government defines "public accommodations" so broadly as to encompass wedding website designers, stating the relevant interest as "equal access to public accommodations" is much too general. The government may as well assert a compelling interest in "equality" or "freedom." "[B]ut the First Amendment demands a more precise analysis." *Fulton* v. *City of Philadelphia*, 141 S. Ct. 1868, 1881 (2021). Thus, the Court's precedents have "narrowly restricted the interests that qualify as compelling." *Parents Involved in Community Schools* v. *Seattle School District No. 1*, 551 U.S. 701, 766 n.15 (2007) (Thomas, J., concurring) (rejecting "[t]he notion that a 'democratic' interest qualifies as a compelling interest"); see, *e.g.*, *NAACP* v. *Button*, 371 U.S. 415, 438–39 (1963) (rejecting Virginia's "attempt to equate" the NAACP's litigation activities with prohibited legal activities and thereby define the relevant government interest at a high level).[2]

Properly defined, Colorado's only interest here is in equal access to a speaker's expression (in this case, expression by a wedding website designer). And that is simply not a compelling government interest. If

[2] Colorado's "systems of exceptions" to its provision only confirms that no compelling government interest is at issue. *Fulton*, 141 S. Ct. at 1882; see Colo. Rev. Stat. Ann. § 24-34-601(3) (allowing sex discrimination in some cases); Pet. 26–28.

"combatting juvenile delinquency" is not a compelling government interest, *Bantam Books*, 372 U.S. at 76 (Harlan, J., dissenting), neither is ensuring access to a speaker's expression, including a particular wedding website designer. No one could call that a "pressing public necessity." *Grutter* v. *Bollinger*, 539 U.S. 306, 351 (2003) (Thomas, J., concurring in part and dissenting in part).

If the Tenth Circuit was right to characterize the relevant government interest at such a high level of generality, then this Court should reconsider the "balancing tests" involved in the tiers of scrutiny, invented in the 1950s and 1960s. See *Heller* v. *District of Columbia*, 670 F.3d 1244, 1280–81 (CADC 2011) (Kavanaugh, J., dissenting). The State here violated the First Amendment because it seeks to compel protected speech. No historical evidence supports the proposition that this constitutional violation is excused if the government comes up with a good enough reason. "The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs." *Id.* at 1283 (quoting *United States* v. *Stevens*, 559 U.S. 460, 470 (2010)). Nor do the Court's longstanding "precedents and traditions" allow States to "censor speech whenever they believe there is a compelling justification for doing so." *Simon & Schuster, Inc.* v. *Members of New York State Crime Victims Board*, 502 U.S. 105, 125 (1991) (Kennedy, J., concurring in the judgment). As Justice Black put it:

> What are the 'more important' interests for the protection of which constitutional freedom of speech and press must be given second place? What is the standard by which one can determine when abridgment of speech and

> press goes 'too far' and when it is slight enough to be constitutionally allowable? Is this momentous decision to be left to a majority of this Court on a case-by-case basis? What express provision or provisions of the Constitution put freedom of speech and press in this precarious position of subordination and insecurity?

Smith, 361 U.S. at 157 (concurring opinion); cf. *Williams-Yulee* v. *Florida Bar*, 575 U.S. 433, 475 (2015) (Kennedy, J., dissenting) ("Although States have a compelling interest in seeking to ensure the appearance and the reality of an impartial judiciary, it does not follow that the State may alter basic First Amendment principles in pursuing that goal.").

In sum, the decision below erred in defining the government interest too broadly, and in transmogrifying the narrow tailoring test to encompass every creative speaker. And if those were *not* errors, then the decision below fell into the trap set by this Court of "using made-up tests to displace longstanding national traditions as the primary determinant of what the Constitution means." *Whole Woman's Health* v. *Hellerstedt*, 136 S. Ct. 2292, 2327 (2016) (Thomas, J., dissenting) (cleaned up). Either way, this Court's review is necessary.

III. The decision below would allow the government to suppress disfavored speech.

Publishers—who create expression by conveying certain speech—play an integral role in contributing to the marketplace of ideas. Just as Ms. Smith uses her own creative judgment in crafting messages for others, *amici* and other publishers routinely decide whether

and how to convey the speech of others. Their choices in curation, style, and content convey important messages to the public about their values and beliefs. As discussed, that is why this Court has repeatedly "reaffirm[ed] unequivocally the protection afforded to editorial judgment and to the free expression of views on these and other issues, however controversial." *Pittsburgh Press*, 413 U.S. at 391.

The decision below would nullify this protection. If a state non-discrimination commission can force Ms. Smith to create or share messages with which she disagrees, then it can do the same for publishers. So too can it prohibit publishers from even explaining their views publicly. Publishers would face content-based restrictions on speech that would force them to violate their principles or cease operation. The concomitant disruption to speech will reduce ideas available to a free society—especially ideas that may deviate from the governmental or societal orthodoxy. Official suppression of disfavored ideas would be the result. Absent review, these consequences would be stark.

First, the rule announced below would infringe on the "individual dignity and choice" promised by the First Amendment. *Cohen*, 403 U.S. at 24. The Tenth Circuit's approach would force a publisher to publish speech with which it fundamentally disagrees. The government could force a Christian publisher to print tracts that attack Christianity, a feminist publisher to publish literature opposed to women's rights, and a liberal publisher to propound conservative views. Cf. D.C. Code § 2-1402.01 (including "political affiliation" as a protected class). Or it could assert some interest in fairness or accuracy and prevent alleged "disinformation" or compel equal airtime. An essential

element of the freedom to speak would be eviscerated. Being compelled to speak is even more "damag[ing]" than other speech regulations, for "[i]n that situation, individuals are coerced into betraying their convictions." *Janus*, 138 S. Ct. at 2464.

Not only would speakers be silenced or coerced, the rights of consumers who rely on and share the speakers' viewpoints would be diluted too. For instance, many depend on the works published by *amici* for devotion, worship, and deepening their faith. If *amici* are coerced into speech they do not believe or silenced, those who find sustenance in *amici*'s works suffer constitutional harm too. For the First Amendment's protection of the freedom of speech encompasses the "right to receive information and ideas." *Stanley* v. *Georgia*, 394 U.S. 557, 564 (1969); see also *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976) ("[T]he protection afforded is to the communication, to its source and to its recipients both.").

Second, the rule announced below would "dampen[] the vigor and limit[] the variety of public debate," threatening an underlying premise of the First Amendment: that a vibrant marketplace of ideas will lead to the truth. *Tornillo*, 418 U.S. at 257. How publishers involved in disseminating third-party speech exercise their editorial discretion, and the values and goals that inform their decisions about messaging, go to the heart of defining how any one publisher is different from another. Stamping out speech based on its content would eliminate a slice of the spectrum of ideas that contributes to society's "search for truth." *Janus*, 138 S. Ct. at 2464. And if the decision below does not make a monopolist of

everyone, it puts the speech of unique, skilled, or innovative publishers at special risk of censorship. See App. 28a ("Appellants' *unique* services are, by definition, unavailable elsewhere."). Publishers would be incentivized to select, to edit, to publish—to speak—in a generic way. Innovation and ingenuity would be punished. And consumers would suffer.

Third, the rule below would influence speech in a particularly dangerous way: censoring *disfavored* speech. How easy it would be for government commissions to characterize much speech as "arguably" implicating classifications in non-discrimination laws, App. 13a, thereby ensnaring any publisher that dares print a controversial viewpoint. At minimum, the government can drag the offending speaker through years of litigation. At maximum, it can stamp out disfavored speech, terminate the speaker's business, and destroy the speaker's personal livelihood. Cf. *State* v. *Arlene's Flowers, Inc.*, 441 P.3d 1203, 1237 (Wash. 2019) (imposing personal liability on speaker of disfavored views). For that reason, the Tenth Circuit's view—that its decision would somehow promote "a free and open economy"—strains credulity. App. 26a.

Fourth and relatedly, speech critical of the government is especially likely to be targeted for suppression. Because "informed public opinion is the most potent of all restraints upon misgovernment," "[t]he durability of our system of self-government hinges upon the preservation of these freedoms" of speech and the press. *Pittsburgh Press*, 413 U.S. at 382. Government efforts to censor critical speech are not new. See, *e.g.*, *Ex parte Vallandigham*, 68 U.S. 243, 244 (1863) (noting that a citizen of Ohio was charged for publicly criticizing the Civil War as "wicked, cruel,

and unnecessary"); *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 274 (1964) (discussing the 1798 Sedition Act, which criminalized "any false, scandalous and malicious writing or writings against the government of the United States"). But the decision below would give the government a potent new weapon to use against speech that criticizes it.

The decision below threatens the basic freedoms of *amici* and all similar organizations, and all Americans who rely on publishers for learning, devotion, and faith. By threatening the freedom of editorial discretion, the decision undermines one of this Nation's central constitutional promises: that citizens may think and speak for themselves. Review is urgently needed.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

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