No. 21-476

In the Supreme Court of the United States

303 CREATIVE LLC, ET AL.,

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 OF ARIZONA, NEBRASKA, ALABAMA, ARKANSAS, KANSAS, KENTUCKY, LOUISIANA, MISSISSIPPI, MISSOURI, MONTANA, OKLAHOMA, SOUTH CAROLINA, TENNESSEE, TEXAS, UTAH, AND WEST VIRGINIA AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

DOUGLAS J. PETERSON
Attorney General of Nebraska
DAVID T. BYDALEK
Deputy Attorney General
JAMES A. CAMPBELL
Solicitor General
OFFICE OF THE NEBRASKA ATTORNEY GENERAL
2115 State Capitol
Lincoln, NE 68509
(402) 471-2682

MARK BRNOVICH
Attorney General of Arizona
BRUNN W. ROYSDEN III
Solicitor General
MICHAEL S. CATLETT
Deputy Solicitor General
Counsel of Record
KATE B. SAWYER
Assistant Solicitor General
KATLYN J. DIVIS
Assistant Attorney General
OFFICE OF THE ARIZONA ATTORNEY GENERAL
2005 N. Central Ave.
Phoenix, AZ 85004
(602) 542-5025
Michael.Catlett@azag.gov

Counsel for Amici Curiae
(Additional Counsel listed on Inside Cover)

STEVE MARSHALL
Attorney General
of Alabama

AUSTIN KNUDSEN
Attorney General
of Montana

LESLIE RUTLEDGE
Attorney General
of Arkansas

JOHN M. O'CONNOR
Attorney General
of Oklahoma

DEREK SCHMIDT
Attorney General
of Kansas

ALAN WILSON
Attorney General
of South Carolina

DANIEL CAMERON
Attorney General
of Kentucky

HERBERT SLATERY III
Attorney General and
Reporter of Tennessee

JEFF LANDRY
Attorney General
of Louisiana

KEN PAXTON
Attorney General
of Texas

LYNN FITCH
Attorney General
of Mississippi

SEAN D. REYES
Attorney General
of Utah

ERIC S. SCHMITT
Attorney General
of Missouri

PATRICK MORRISEY
Attorney General
of West Virginia

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INTEREST OF AMICI CURIAE

Amici curiae are the States of Arizona, Nebraska, Alabama, Arkansas, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Oklahoma, South Carolina, Tennessee, Texas, Utah, and West Virginia.[1] They file this brief in support of the petitioners.

Amici States have an interest in ensuring that this Court affirms the constitutional constraints placed on public-accommodation laws. Those statutes are important tools to eliminate specific kinds of invidious discrimination. But the First Amendment's Free Speech Clause forbids States from using public-accommodation laws to compel the expression of citizens who create custom speech for a living. Amici States do not want to violate the constitutional rights of individuals and businesses within their borders, and thus they desire to see this Court grant review to provide uniform guidance while recognizing this narrow limitation on public-accommodation laws.

SUMMARY OF ARGUMENT

Petitioner 303 Creative LLC and its owner Lorie Smith (collectively, "Smith") design custom websites and write the messages that appear on those sites. Smith wants to start creating websites that announce and tell the stories of her clients' weddings. She desires to do this so that she can celebrate what she believes to be God's design for marriage—the uniting of a husband and a wife. But a corollary of that belief, which this Court has called "decent and honorable," *Obergefell v. Hodges*, 576 U.S. 644, 672 (2015), is that

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[1] Counsel of record for all parties received timely notice of Amici States' intent to file this brief. *See* Sup. Ct. R. 37.2(a).

Smith cannot create websites for anyone celebrating same-sex weddings, though she otherwise serves LGBT customers "regardless of ... sexual orientation." App. 184a. Thus, the limitation on Smith's business is based on a *message* she cannot convey and not on the *status* of a customer she refuses to serve.

Colorado interprets its public-accommodation law to forbid this. In its view, graphic artists who create websites celebrating opposite-sex marriages must do the same for same-sex marriages, and refusing to do so subjects those artists to punishment. By adopting this position, Colorado violates the constitutional rights of its citizens, because the First Amendment prohibits States from forcing individuals, including people who create custom speech for a living, to speak in favor of same-sex marriage. Indeed, numerous courts—including the Eighth Circuit and the Arizona Supreme Court—have recently affirmed that very point. *See Telescope Media Grp. v. Lucero*, 936 F.3d 740 (8th Cir. 2019) (Minnesota cannot compel wedding videographers' speech); *Brush & Nib Studio, LC v. City of Phoenix*, 448 P.3d 890 (Ariz. 2019) (Phoenix cannot compel speech from artists who craft custom wedding invitations); *see also Chelsey Nelson Photography LLC v. Louisville/Jefferson Cnty. Metro Gov't*, 479 F. Supp. 3d 543 (W.D. Ky. 2020) (Louisville cannot compel wedding photographer's speech).

The freedom against compelled speech applies in this case because Smith's custom websites are her constitutionally protected speech. The parties agree that "[a]ll of [her] website designs are expressive in nature, as they contain images, words, symbols, and other modes of expression that [Smith] use[s] to communicate a particular message." App. 181a. And the Tenth Circuit recognized that Smith's "creation of

wedding websites is pure speech." App. 20a. Because Smith speaks through her custom design work, Colorado cannot force her to address the topic of same-sex marriage—let alone to "express approval and celebration" of same-sex marriage, as the Tenth Circuit's decision would force her to do. App. 20a.

While the First Amendment prohibits Colorado from applying its public-accommodation law to compel Smith to speak, that happens only in limited commercial circumstances involving expressive products or services. Compelled-speech protection is implicated only when, as here, a business owner creates custom speech for her clients, a prospective client requests custom speech, and the owner declines because she objects to the message that the speech would express (and not the status of the customer being served). The compelled-speech doctrine is thus irrelevant to sales involving the "innumerable goods and services that no one could argue implicate" speech. *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1728 (2018). Nor, under this Court's precedents, does that First Amendment protection apply when a (1) public-accommodation law has only an incidental effect on speech, (2) a business owner objects merely to providing a forum for another's speech (rather than to altering her own speech), or (3) a business owner flatly refuses to work for a protected class of people. Given these limits on compelled-speech protection, a ruling in favor of Smith would be "sufficiently constrained" to ensure that States can still effectively enforce public-accommodation laws. *Id.*

The Tenth Circuit assumed that if Smith prevails, States will be unable to protect their consumers from discrimination in commercial transactions. But experience disproves that. Amici States do not compel

speech through public-accommodation laws; in fact, binding caselaw precludes States like Arizona and Nebraska from doing so. Despite this, those States are still able to robustly enforce their public-accommodation laws and effectively punish invidious status-based discrimination. Also, many States allow other exemptions to their public-accommodation laws with no ill effects. All this shows that States can respect compelled-speech rights without compromising their nondiscrimination goals.

It is also critical that the Court provide needed guidance on this important area of First Amendment protection. Jurisdictions across the country have diverged in not only the outcomes of these individual First Amendment claims, but also in the courts' rationales in arriving at the outcomes. First Amendment protection should not be conditioned on where the individual lives. But that is the case with how the law stands right now.

In short, the compelled-speech doctrine protects people on all sides of polarizing issues. Just as it prevents Colorado from forcing Smith to speak *in favor* of same-sex marriage, it also prevents Colorado from compelling another graphic designer to create a website promoting a religious organization's event *opposing* same-sex marriage if that graphic designer does not want to speak that message. But if it does not protect Smith from speaking a message, neither does it shield the other graphic designer from doing so. Thus, by granting review and ruling for Smith, the Court will ensure freedom of speech for all.

ARGUMENT

I. This Court's Precedents Ban Compelled Speech Without Nullifying Public-Accommodation Laws.

This Court has emphasized that rulings for litigants like Smith—people who make their living creating custom art—must be "sufficiently constrained" to ensure that public-accommodation laws do not lose their vitality in most commercial contexts. *Masterpiece Cakeshop*, 138 S. Ct. at 1728. In this case, the Tenth Circuit did far more than that through a distorted strict-scrutiny analysis that effectively eliminates compelled-speech protection for individuals who create custom speech for a living. App. 28a. Meanwhile, other courts have similarly withheld that constitutional protection by holding that the compelled-speech doctrine does not even apply to commercial speakers. *See, e.g.*, *Elane Photography, LLC v. Willock*, 309 P.3d 53, 66 (N.M. 2013) (holding that the compelled-speech doctrine does not protect "a clearly commercial entity that sells goods and services to the public") (cleaned up). Yet all these decisions miss the mark because, as explained below, the proper balance is found in the limits of the compelled-speech doctrine itself, which applies in a case like this but not to the vast majority of commercial transactions.

A. The First Amendment Generally Forbids States From Compelling Speech, Including Through Their Public-Accommodation Laws.

"Compelling individuals to mouth support for views they find objectionable violates [a] cardinal constitutional command" and is "universally condemned." *Janus v. Am. Fed'n of State, Cnty., & Mun.*

Emps., Council 31, 138 S. Ct. 2448, 2463 (2018). That rule against compelled speech forbids States from forcing their citizens to express messages they deem objectionable or from punishing them for declining to express such messages. *See, e.g.*, *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795–801 (1988) (fundraisers cannot be forced to disclose the percentage of money that they give to their clients); *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 20–21 (1986) (*PG&E*) (plurality opinion) (business cannot be forced to include another's speech in its mailing); *Wooley v. Maynard*, 430 U.S. 705, 717 (1977) (citizens cannot be forced to display state motto on their license plate); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (newspaper cannot be forced to print politician's writings); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (students cannot be forced to recite pledge or salute flag).

Not even public-accommodation laws, as important as they are, can override this freedom. *See, e.g.*, *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 572–73 (1995) (parade organizers cannot be forced to include LGBT group's message); *see also Boy Scouts of Am. v. Dale*, 530 U.S. 640, 659 (2000) (Boy Scouts cannot be forced to keep leader who contradicts group's messages).

The right to be free from compelled speech protects each person's conscience by shielding "the sphere of intellect" and the "individual freedom of mind." *Wooley*, 430 U.S. at 714–15. It ensures that the government cannot force individuals to be "instrument[s] for fostering public adherence to an ideological point of view [they] find[] unacceptable." *Id.* at 715. And it protects "individual dignity," *Cohen v. California*, 403 U.S. 15, 24 (1971), because "[f]orcing free and inde-

pendent individuals to [express] ideas they find objectionable"—to "betray[] their convictions" in that way—"is always demeaning," *Janus*, 138 S. Ct. at 2464.

This Court's decision in *Hurley* demonstrates that public-accommodation laws must occasionally give way to freedom of expression. There, the organizers of Boston's St. Patrick's Day Parade qualified as a public accommodation because they invited members of the public to participate in their parade and accepted nearly every group that applied. *Hurley*, 515 U.S. at 561–62. Despite allowing members of the LGBT community to participate as individuals, the organizers declined an LGBT advocacy group's request to march as a contingent behind a banner. *Id.* at 572. The organizers did so because of a "disagreement" with the group's message rather than an "intent to exclude homosexuals as such." *Id.*; *see also Dale*, 530 U.S. at 653 (organizers in *Hurley* did not exclude LGBT group "because of their [members'] sexual orientations," but because of what the group expressed "march[ing] behind a ... banner").

While the Massachusetts courts held that the parade organizers had engaged in unlawful discrimination and ordered them to include the LGBT group (along with its message), *Hurley*, 515 U.S. at 561–65, this Court unanimously reversed, *id.* at 581. The Court explained that the State applied its public-accommodation law "in a peculiar way," *id.* at 572, effectively declaring the parade organizers' "speech itself to be the public accommodation" and requiring them to alter their expression to accommodate "any contingent of protected individuals with a message," *id.* at 573. This violated the First Amendment right of the parade organizers "to choose the content of

[their] own message," *id.*, and decide "what merits celebration," even if those choices are "misguided" or "hurtful," *id.* at 574.

In short, *Hurley* establishes that States cannot apply public-accommodation laws to force individuals engaged in expression to alter the message they communicate.

B. Only In Narrow Circumstances Do Commercial Applications Of Public-Accommodation Laws Implicate Compelled-Speech Protection.

Public-accommodation laws "do not, as a general matter, violate the First or Fourteenth Amendments," *Hurley*, 515 U.S. at 572, which means that "most applications of antidiscrimination laws ... are constitutional." *Chelsey Nelson Photography*, 479 F. Supp. 3d at 564. It is only in narrow circumstances that commercial applications of public-accommodation laws implicate compelled-speech protection. *See Telescope*, 936 F.3d at 758 ("our holding leaves intact other applications of [Minnesota's public accommodation law] that do not regulate speech based on its content or otherwise compel an individual to speak."). Specifically, that protection applies when, as here, a business owner creates custom speech for clients, a prospective client requests custom speech, and the owner declines because she objects to the message that the speech would communicate.

This protection implicates few business transactions because only a small percentage of commercial exchanges revolve around the creation of custom speech. *See Brush & Nib Studio*, 448 P.3d at 907 ("[S]imply because a business creates or sells speech does not mean that it is entitled to a blanket exemp-

tion for all its business activities."). The vast majority of transactions—clothing stores selling attire, landscaping companies mowing lawns, gas stations selling fuel, health clubs offering memberships, and restaurants selling sandwiches, to name a few—will have no basis to claim compelled-speech protection. *See Masterpiece Cakeshop*, 138 S. Ct. at 1728 (recognizing that there are "innumerable goods and services that no one could argue implicate the First Amendment"). Even among wedding vendors, many of them—such as "the tailor for the tux," "the makeup artist," "the manicurist," and "the travel agent for the honeymoon"—do not ordinarily create speech for their customers. *Chelsey Nelson Photography*, 479 F. Supp. 3d at 558 n.118 (mentioning these examples).

Moreover, an application of a public-accommodation law that has only an incidental effect on speech does not give rise to a First Amendment violation. *See Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 62 (2006) (*FAIR*) (finding no constitutional violation because the "compelled speech" at issue was "plainly incidental to the ... regulation of conduct"). So if a grocery-store employee objects to serving certain customers because she does not want to be forced to talk to them, that does not present a compelled-speech problem. Conversing with a customer is incidental to the sale of groceries, and groceries are not speech. Here, however, there is nothing incidental about the speech that Colorado would compel. If Smith started designing wedding websites, the creation of custom speech would be the essence of the transaction between Smith and her wedding clients. If she withheld that speech, there would be nothing left of that exchange.

Nor does this Court's existing compelled-speech precedents shield a public accommodation that objects merely to "provid[ing] a forum for a third party's speech." *Masterpiece Cakeshop*, 138 S. Ct. at 1744–45 (Thomas, J., concurring) (discussing *FAIR*, 547 U.S. at 60–65 and *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 87 (1980)). Compelling a public accommodation to host another's speech is a far cry from "forc[ing] speakers to alter their *own* message," as Colorado threatens to do in this case. *Masterpiece Cakeshop*, 138 S. Ct. at 1745; *accord Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 457 n.10 (2008) (forcing the "[f]acilitation of speech" is unlike the compelled "co-opt[ing]" of a person's "own conduits for speech"); *Telescope*, 936 F.3d at 758 ("Rather than serving as a forum for the speech of others, [a wedding videographer's] videos will carry their 'own message.'").

Finally, the compelled-speech doctrine applies only when the compelled speaker objects to the message communicated through her expression. *See Hurley*, 515 U.S. at 580 (noting the absence of compelled-speech protections when allegedly compelled speakers do not "object[] to the content"); *PG&E*, 475 U.S. at 12 (plurality opinion) (same). Thus, if a graphic designer flatly refuses to work for a protected class, regardless of the message that her speech would convey, she finds no refuge in compelled-speech principles. This, of course, does not describe Smith at all. While she cannot celebrate same-sex weddings through her custom websites because of the messages that those websites would express about marriage, she otherwise "works with all people regardless of ... sexual orientation." App. 184a.

In sum, the compelled-speech protection that Smith seeks is limited, and a ruling for her would not be "a license to discriminate." *Chelsey Nelson Photography*, 479 F. Supp. 3d at 564; *see also Brush & Nib Studio*, 448 P.3d at 916 ("Nothing in our holding today allows a business to deny access to goods or services to customers based on their sexual orientation or other protected status."). Thus, the necessary constraints on a ruling for Smith already exist in the compelled-speech doctrine itself.

C. Other States' Experiences Show That Compelled Speech Protection From Public-Accommodation Laws Will Not Be A License To Discriminate.

The Tenth Circuit seemed to think that compelling Smith to speak objected-to messages is necessary to ensure that States can protect their citizens against discrimination in the marketplace. The experiences of Amici States prove that is not true.

Binding state and federal caselaw already prohibits many States—including some Amici States—from applying their public-accommodation laws to compel business owners to create custom speech. Yet no evidence suggests that the enforcement of those laws has been compromised in those States or that segments of the population are losing access to goods and services.

For instance, it has been clear for over two years that Arizona, and its political subdivisions, cannot apply public-accommodation laws to force businesses to create custom speech. *Brush & Nib Studio*, 448 P.3d at 916 (holding that the City of Phoenix cannot compel artists who create custom wedding invitations to craft invitations celebrating same-sex marriage).

Yet Arizona continues to protect its citizens against invidious status-based discrimination in commercial transactions. *See, e.g.*, *Attorney General Brnovich Settles Race Discrimination Allegations with Uber, Postmates, DoorDash*, Ariz. Att'y Gen. Mark. Brnovich (June 2, 2021), https://www.azag.gov/press-release/attorney-general-brnovich-settles-race-discrimination-allegations-uber-postmates.

Likewise, Eighth Circuit caselaw established the same rule over two years ago. *Telescope*, 936 F.3d at 758 (holding that a State cannot apply its public-accommodation law to force a videographer to create films of same-sex marriages). Even so, Eighth Circuit States like Nebraska have not experienced any setbacks in robustly enforcing their public-accommodation laws.

More generally, other existing exemptions to States' public-accommodation laws have not hampered their enforcement efforts. Consider just a few examples. For decades, Nebraska's public-accommodation law has exempted "private club[s]," Neb. Rev. Stat. § 20-138, and religious organizations that prefer "members of the same faith," Neb. Rev. Stat. § 20-137. And for the last five years, Mississippi has exempted businesses that "decline[] to provide ... [many] services" for "the solemnization, formation, [or] celebration" of a same-sex marriage because of their belief that "[m]arriage is ... the union of one man and one woman." Miss. Code. Ann. §§ 11-62-3(a), 11-62-5(5).

These exemptions and others like them are part of creating a workable legal system that balances a State's goal of eradicating specific forms of invidious discrimination with other important interests. That States have had these statutory exemptions for many

years with no ill effects demonstrates that recognizing the narrow compelled-speech protection at issue here will not undo public-accommodation laws.

II. The Court Should Grant Certiorari To Settle The Diverging Approaches Courts Have Taken To Balance Compelled Speech And Public Accommodation.

As discussed above, this Court's precedents establish that individual First Amendment rights do not disappear in the face of public-accommodation laws. Indeed, several courts have agreed and declared that government, through public-accommodation laws, cannot compel individuals to create speech with which they disagree. But the Tenth Circuit is now among those courts that sees this differently. Not only have courts reached different outcomes, but courts have vastly diverged in how they have reached those outcomes. This inconsistency has created an uncertain atmosphere not only for individuals seeking to use their creative talents without being forced to speak messages against their conscience, but also for States seeking to enforce their public-accommodation laws while respecting the First Amendment rights of their citizens.

A. The Eighth Circuit And The Arizona Supreme Court Have Affirmed That Public-Accommodation Laws Cannot Be Used To Compel Speech.

In *Telescope Media Group*, the Eighth Circuit upheld the First Amendment rights of videographers who sought to produce wedding videos but only of opposite-sex weddings. 936 F.3d at 747. The court recognized that the wedding videos constituted "a form of speech that is entitled to First Amendment

protection," *id.* at 750, and that applying Minnesota's public-accommodation law in that case would be "at odds with the 'cardinal constitutional command' against compelled speech," *id.* at 752 (quoting *Janus*, 138 S. Ct. at 2463). The court also concluded that the law operated "as a content-based regulation" on the videographers' speech, which required strict scrutiny. *Id.* The Eighth Circuit concluded that "regulating speech because it is discriminatory or offensive is not a compelling state interest, however hurtful the speech may be." *Id.* at 755.

The Arizona Supreme Court similarly reached the conclusion that the City of Phoenix could not compel calligraphy artists to create custom wedding invitations for same-sex weddings. *Brush & Nib Studio*, 448 P.3d at 895. As the Eighth Circuit did in *Telescope Media Group*, the Arizona Supreme Court recognized that the custom invitations in that case constituted pure speech, *id.* at 908, and that because the City's ordinance, as applied, "operate[d] as a content-based law," it "must survive strict scrutiny" in order to apply to the artists. *Id.* at 914. The court ultimately held that the City's interest in ensuring equal access to goods and services was "not sufficiently overriding as to justify compelling Plaintiffs' speech by commandeering their creation of custom wedding invitations[.]" *Id.* at 914–15.

Thus, within Arizona and the seven states in the Eighth Circuit, public-accommodation laws cannot be used to compel speakers to create custom speech. Those jurisdictions recognize that "[e]ven antidiscrimination laws, as critically important as they are, must yield to the Constitution." *Telescope*, 936 F.3d at 755.

B. The Tenth Circuit Has Now Joined A Handful Of State Courts In Permitting Public-Accommodation Laws To Be Used To Compel Speech.

Not every court has reached the same (correct) conclusion as Arizona and the Eighth Circuit. The Tenth Circuit has now joined courts in Colorado, New Mexico, Oregon, and Washington, which have all applied public-accommodation laws in ways that permit compelling speakers to express messages with which they disagree.

1. In *Elane Photography*, the New Mexico Supreme Court held that the New Mexico Human Rights Act ("NMHRA") compelled Elane Photography to speak unwanted messages about marriage. *Elane Photography*, 309 P.3d at 63. The New Mexico court reasoned that this Court "has never found a compelled-speech violation arising from the application of antidiscrimination laws to a for-profit public accommodation" but only to "free-speech events." *Id.* at 65–66. Therefore, because Elane Photography is "a clearly commercial entity that sells goods and services to the public," the photographs it produces are not entitled to First Amendment protections regardless of their "artistic merit." *Id.* at 66 (cleaned up). According to the court, "because [Elane Photography] is a public accommodation, its provision of services can be regulated, even though those services include artistic and creative work." *Id.*; *see also id.* at 68 ("[T]he NMHRA applies not to Elane Photography's photographs but to its business operation, and in particular, its business decision not to offer its services to protected classes of people."); *id.* at 66 ("If Annie Leibovitz or Peter Lindbergh worked as public

accommodations in New Mexico, they would be subject to the provisions of the NMHRA.").

Similarly, in *Arlene's Flowers*, the Washington Supreme Court held that Washington's public-accommodation law did not compel Arlene's Flowers to speak by requiring it to provide floral arrangement services for same-sex weddings. *Washington v. Arlene's Flowers, Inc.*, 441 P.3d 1203, 1226 (Wash. 2019). The court concluded that the floral arrangements were unprotected "conduct" rather than speech. *Id.* at 1228. Relying on *Elane Photography*, the court concluded that Arlene's Flowers "is the kind of public accommodation that has traditionally been subject to antidiscrimination laws," and thus the florist was not entitled to First Amendment protection. *Id.* at 1227.

In addition to the decisions of these two States' highest courts, two state courts of appeals have also weighed in and concluded that public-accommodation laws can compel the creation of custom speech.

In *Masterpiece Cakeshop*, the Colorado Court of Appeals held that Colorado's public-accommodation law can compel a custom cake shop to create wedding cakes for same-sex weddings. *Craig v. Masterpiece Cakeshop*, 370 P.3d 272, 288 (Colo. Ct. App. 2015), *rev'd on other grounds*, *Masterpiece Cakeshop*, 138 S. Ct. 1719. Also analyzing the creation of custom speech as mere conduct, the court stated that while "Masterpiece's status as a for-profit bakery" does not "strip[] it of its First Amendment speech protections," the court must "consider the allegedly expressive conduct within 'the context in which it occurred.'" *Id.* at 287. Interpreted in that light, the court concluded that as a for-profit business, a reasonable observer

would not view Masterpiece's conduct as expressive. *Id.*

And in *Klein*, the Oregon Court of Appeals also held that Oregon's public-accommodation law could compel a cake shop to create a custom cake for a same-sex wedding. *Klein v. Or. Bd. of Lab. & Indus.*, 410 P.3d 1051, 1057 (Or. Ct. App. 2017), *vacated*, 139 S. Ct. 2713 (2019). The court assumed (without affirmatively deciding) that a wedding cake did not constitute speech, *id.* at 1073, but concluded that even if it did, the State's interests survived intermediate scrutiny, *id.* at 1074.

2. In this case, the Tenth Circuit has now reached the same outcome as these state courts, but in doing so, it has added a new rationale.

The Tenth Circuit recognized Smith's website design as "pure speech"; it concluded that Smith's "profit motive" did not transform that speech into "'commercial conduct'"; and it recognized that Colorado's law "compels" Smith "to create speech that celebrates same-sex marriages." App. 20a–22a. The court also recognized that Colorado's law "work[ed] as a content-based restriction" in this case. App. 23a. All of this led the court to apply strict scrutiny.

But according to the Tenth Circuit, enforcing Colorado's law as to Smith survives strict scrutiny. The court held that Colorado's law is "narrowly tailored to Colorado's interest in ensuring 'equal access to publicly available goods and services.'" App. 26a (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 624 (1984)). The court reasoned that if Smith was excepted from the public-accommodation law, LGBT consumers "would necessarily [be] relegate[d] … to an

inferior market because" Smith's "*unique* services are, by definition, unavailable elsewhere."[2] App. 28a.

In reaching this conclusion, the Tenth Circuit gravely distorted strict-scrutiny analysis. It ignored this Court's point in *Hurley* that forcing speakers to "modify the content of their expression" does not satisfy strict scrutiny because it "allow[s] exactly what the general rule of speaker's autonomy forbids." *Hurley*, 515 U.S. at 578. Rather, the Tenth Circuit eviscerated compelled-speech protection by defining the relevant government interest as ensuring access to Smith's "*unique* services." App. 28a. Because all custom speech is unique by its very nature, the Tenth Circuit's logic would leave all creators of custom speech without any compelled-speech protection from public-accommodation laws.

* * *

So as it stands now, an individual's First Amendment protection against being compelled to create custom speech is dependent on where the individual lives. That should not be. In Arizona and states within the Eighth Circuit, individuals can create custom speech for clients without being forced by the government to speak against their conscience. But for those citizens who live in Colorado, New Mexico, Washington, Oregon, or a state within the Tenth Circuit, public-accommodation laws can override an individuals' First Amendment rights.

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[2] The Tenth Circuit expressly recognized its conflict with the Arizona Supreme Court. App. 30a ("[T]he Supreme Court of Arizona then held that exempting custom invitations from a public accommodation law would not undermine the law's purpose. … Thus, ostensibly, the [Arizona Supreme] Court reasoned that any market harm was limited. We are unconvinced.").

And still there remains jurisdictions throughout the country that have not affirmatively answered this question. Citizens and governments in those jurisdictions would greatly benefit from this Court's guidance on the protection afforded to the creation of custom speech. In the meantime, the law surrounding these important issues remains unsettled. This Court should grant review and clarify again that the government cannot compel protected speech.

CONCLUSION

For the foregoing reasons, the Court should grant the petition.

October 28, 2021

Respectfully submitted,

DOUGLAS J. PETERSON
Attorney General of Nebraska
DAVID T. BYDALEK
Deputy Attorney General
JAMES A. CAMPBELL
Solicitor General
OFFICE OF THE NEBRASKA ATTORNEY GENERAL
2115 State Capitol
Lincoln, NE 68509
(402) 471-2682

MARK BRNOVICH
Attorney General of Arizona
BRUNN W. ROYSDEN III
Solicitor General
MICHAEL S. CATLETT
Deputy Solicitor General
Counsel of Record
KATE B. SAWYER
Assistant Solicitor General
KATLYN J. DIVIS
Assistant Attorney General
OFFICE OF THE ARIZONA ATTORNEY GENERAL
2005 N. Central Ave.
Phoenix, AZ 85004
(602) 542-5025
Michael.Catlett@azag.gov

Counsel for Amici Curiae
(Additional Counsel listed below)

STEVE MARSHALL
Attorney General
of Alabama

AUSTIN KNUDSEN
Attorney General
of Montana

LESLIE RUTLEDGE
Attorney General
of Arkansas

JOHN M. O'CONNOR
Attorney General
of Oklahoma

DEREK SCHMIDT
Attorney General
of Kansas

ALAN WILSON
Attorney General
of South Carolina

DANIEL CAMERON
Attorney General
of Kentucky

HERBERT SLATERY III
Attorney General and
Reporter of Tennessee

JEFF LANDRY
Attorney General
of Louisiana

KEN PAXTON
Attorney General
of Texas

LYNN FITCH
Attorney General
of Mississippi

SEAN D. REYES
Attorney General
of Utah

ERIC S. SCHMITT
Attorney General
of Missouri

PATRICK MORRISEY
Attorney General
of West Virginia