No. 21-476

In The
Supreme Court of the United States

303 CREATIVE LLC
and LORIE SMITH,

Petitioners,

v.

AUBREY ELENIS; CHARLES GARCIA; AJAY MENON;
MIGUEL RENE ELIAS; RICHARD LEWIS;
KENDRA ANDERSON; SERGIO CORDOVA;
JESSICA POCOCK; and PHIL WEISER,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

AMICUS CURIAE BRIEF OF THE INSTITUTE FOR FREE SPEECH IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*

The Institute for Free Speech is a nonpartisan, nonprofit organization dedicated to the protection of the First Amendment rights of speech, press, assembly, and petition. In addition to scholarly and educational work, the Institute represents individuals and civil society organizations in litigation securing their First Amendment liberties.[1]

SUMMARY OF ARGUMENT

The Tenth Circuit's decision threatens to shatter strict scrutiny's protection for speech in every context. Its facile creation of broadly-framed "compelling" interests—"the dignity interests of members of marginalized groups and their material interests in accessing the commercial marketplace," Pet. App. 24a—will encourage the government to shroud ever more speech under those interests' penumbra. But its example will also encourage the creation of new speech-suppressing interests. Thus, the Tenth Circuit and courts following it will make the standard "strict in theory but feeble in fact." *Fisher v. Univ. of Tex.*, 570 U.S. 297, 314 (2013).

[1] This brief is filed with the written consent of both parties, who received timely notice of this filing. No counsel for a party authored this brief in whole or part; no counsel or party contributed money intended to fund the preparation or submission of this brief; and no person other than *amicus* or its counsel contributed money intended to fund its preparation or submission.

Strict scrutiny can only protect our most important freedoms when it limits incursions on those rights to laws serving truly compelling interests. Those interests may not be couched in broad terms, and they must be rare. Thus, for example, this Court has limited political speech restrictions to laws related to fighting actual or apparent *quid pro quo* corruption, and it has specifically rejected any other interest. The broadly defined interests asserted below undermine such careful constraints.

This Court should preserve the vigorous protections against censoring and compelling speech, both because it violates the dignity interests of the speaker and because it is unwise. Such speech control undermines society's progress, the power that ideas have over us as individuals, and public peace. And decisions like that below will give the government—ever searching for ways to do so—license to control political speech.

This Court should grant certiorari to prevent strict scrutiny from becoming a rubber stamp for speech regulation.

ARGUMENT

I. The Court should stop the Tenth Circuit's dangerous expansion of "compelling government interests" in free speech jurisprudence.

Compelling interests should be rare and narrow, but the Tenth Circuit has created broad "compelling"

interests and paved a path to produce still more. To protect our most precious freedoms, this Court created strict scrutiny to require the "closest" and "most exacting" review, *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 461 (1958), *United States v. Alvarez*, 567 U.S. 709, 724 (2012) (plurality op.) (internal quotation marks omitted), one in which restrictions would pass scrutiny in only the "rare case," *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 444 (2015). But to fulfill this protective, screening function, strict scrutiny requires both that the government's asserted interests be compelling and rare, and that the tailoring demanded truly be exacting and narrow. *See Crum v. Ala. (In re Emp't Discrimination Litig.)*, 198 F.3d 1305, 1323 (11th Cir. 1999) (noting that "it is a rare day, indeed, that courts find government actors to have adequately demonstrated a compelling interest"); *Baker v. F & F Inv.*, 470 F.2d 778, 783 (2d Cir. 1972) (noting "rare overriding and compelling interest"). What constitutes a compelling interest is largely undefined, but we know that the government's assertions may not be "couched in very broad terms," *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 726 (2014), and that they must be "of the highest order," *Wis. v. Yoder*, 406 U.S. 205, 215 (1972).

Thus, this Court has confined content-based restrictions on speech "to the few historic and traditional categories [of expression] long familiar to the bar." *Alvarez*, 567 U.S. at 717 (internal quotation marks omitted) (alteration in original). That is, they have been restricted to speech that is not protected by the First Amendment—such as incitement to "imminent

lawless action" and obscenity—and to speech where the government's interest is truly compelling—such as "speech presenting some grave and imminent threat the government has the power to prevent." *Id*. Furthermore, just as "any general exception to the First Amendment for false statements" is "[a]bsent from those few categories," *id*. at 718, so is any general exception for speech that offends others or that otherwise allegedly detracts from their dignity.

Campaign finance law shows that the limits on strict scrutiny's compelling interests must be few and "only . . . of the highest order." *Yoder*, 406 U.S. at 215. This Court has rejected repeated attempts to invite or invoke additional interests, holding that the only "legitimate governmental interest for restricting campaign finances" is an interest in "preventing corruption or the appearance of corruption," *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 206 (2014) (Roberts, C.J., controlling op.), and that the target of this interest is specifically "limited to *quid pro quo* corruption," *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 359 (2010). In particular, this Court has rejected the government's assertion that it needs to protect the marketplace of ideas and control the costs of elections. *Id*. at 346-56 (rejecting anti-distortion/leveling interest, and interests in protecting against undue influence and increasing election costs).

But because this Court has so rarely recognized compelling interests, there has been little opportunity to study the common characteristics of compelling interests (aside from their rarity) or to establish a test

to determine whether an interest is compelling. *See Gilardi v. United States Dep't of Health and Human Servs.*, 733 F.3d 1208, 1219 (D.C. Cir. 2013) (noting there are "but a few reliable metrics [that] exist" to "divine precisely what makes an interest 'compelling' "), *rev'd on other grounds*, 573 U.S. 956 (2014). Unfortunately, the government and the lower courts have interpreted this paucity of interests and dearth of definition, not as counsel to restraint, but as opportunity to innovate and expand. *See* Matthew D. Bunker, Clay Calvert, and William C. Nevin, *Strict in Theory, but Feeble in Fact? First Amendment Strict Scrutiny and the Protection of Speech*, 16 Comm. L. & Pol'y 349, 378 (2011) ("When no criteria for what constitutes a 'compelling interest' are provided, future courts are left with little guidance and ample room for their own improvisation.").

This inclination to innovate is amply evident in the panel majority's decision below, whose "permissive application of strict scrutiny is troubling." Pet. App. 75a. The majority concluded that "Colorado has a compelling interest in protecting both the dignity interests of members of marginalized groups and their material interests in accessing the commercial marketplace." *Id.* at 24a.[2] Both these asserted interests are "couched in very broad terms." *Hobby Lobby*, 573 U.S. at 726. And, despite asserting that "Colorado's interest in preventing both dignitary and material harms to LGBT

[2] The panel majority held that Colorado's particular restriction was "not narrowly tailored to preventing dignitary harms," but it nonetheless held that Colorado had a "compelling . . . interest in protecting . . . dignitary rights." Pet. App. 25a-26a.

people is well documented," the majority provided remarkably little support. Pet. App. 25a.

This Court has noted the government's "strong historical commitment to . . . assuring its citizens equal access to publicly available goods and services." *Roberts v. United States Jaycees*, 468 U.S. 609, 624 (1984). But the panel majority formulated an "unconventional characterization" of that interest, one without "any case law to support" it: that it extends to "ensuring access to a *particular* person's unique, artistic product." Pet. App. 77a-78a (emphasis in original).

As for the dignity interest, the majority's only authority regards anti-discrimination. *Id.* at 24a-25a. But fighting discrimination is distinct from demanding dignity. The majority does little to explain what it means by the more expansive term. If protecting dignity were truly an interest, it would allow almost unbounded control over and involvement in citizens' relationships and interactions with one another. It takes the concept of positive liberty and imposes it, not just on the government, but on citizens, forcing every individual to take on others' sense of belonging and self-esteem as a legal duty. *See Jackson v. Joliet*, 715 F.2d 1200, 1203-04 (7th Cir. 1983) (Posner, J.) (discussing negative and positive liberty as applied to the government). And, as majorities and ruling parties change, the government could build on this broad interest to control the thought—or at least the outward manifestations interrelated with thought and belief—of those it today hopes to help.

Thus, the interests affirmed below are stunning in their breadth and effect. The majority makes a pretense of minimizing the effect of its decision, and thus of the governmental interest required to justify it, by asserting that it will not be used to "limit[] offensive speech." Pet. App. 26a. The plain language and effect of the opinion bely any such claim. First, the law here in fact "compels silence," forbidding Ms. Smith from publishing a statement of "her firm conviction—grounded in her Christian faith." *Id*. at 70a, 72a. But the decision goes beyond merely limiting offensive speech. It compels expression, contrary to the speaker's conscience, that the government and the court consider necessary to sustain others' dignity, regardless of its effect on the speaker's. *Id.* at 23a-24a, 68a. At the same time, it allows the government to declare that each individual's unique talents and abilities are valuable commodities that she must share, "promot[ing] messages approved by the government," regardless of her sentiments and conscience. *Id.* at 80a.

But the Tenth Circuit did not merely create a gaping hole in strict scrutiny with its broadly created interests. In blessing blatant disregard for the narrowness of strict scrutiny's compelling interest requirement, other courts may simply widen the hole left by the Tenth Circuit, creating other compelling interests with little or no precedent or justification. That is, the decision below not only affirmed extremely broad interests that will rubber stamp government action, but paved the way for still other interests to justify First Amendment violations.

Absent action by this Court, the effect of the decision below will not be limited to the battles between religious belief and LGBT+ identity. Indeed, proponents of campaign finance restrictions will quickly run with these interests to undermine decades of decisions by this Court, which has repeatedly held that the only compelling interest for restricting campaign speech is that in fighting actual or apparent *quid pro quo* corruption. *McCutcheon*, 572 U.S. at 206-07. And it has repeatedly rejected any interest in leveling influence or limiting distortions in the marketplace of political ideas. *See Davis v. Fed. Election Comm'n*, 554 U.S. 724, 740 n.7 (2008) (rejecting leveling interest); *Citizens United*, 558 U.S. at 346-56 (rejecting anti-distortion interest); *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) (per curiam) (rejecting equalizing interest). But the interests named in the decision below—"in protecting both the dignity interests of members of marginalized groups and their material interests in accessing the commercial marketplace," Pet. App. 24a—necessarily extend to ensuring that the perspectives and interests of minority groups are not shut out of the marketplace of ideas by those with allegedly greater power and resources. That is, of leveling influence and limiting distortions.

And that the decision below upheld compelled speech only heightens the danger of future First Amendment harm. After all, when the government controls speech by coercing individuals "into betraying their convictions," then "additional damage is done," and the government must demonstrate "even more

immediate and urgent grounds than a law demanding silence." *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2464 (2018) (internal quotation marks omitted). But if courts can condone compelled speech as easily as the Tenth Circuit did here, then it has made compelled silence much easier.[3]

"Strict scrutiny must not be strict in theory but feeble in fact." *Fisher*, 570 U.S. at 314. To keep it from becoming so, this Court must narrow or reject the Tenth Circuit's broadly "couched" interests. *Hobby Lobby*, 573 U.S. at 726. This Court should also explain and set standards for recognizing compelling interests, as "[t]he impressionistic nature of current doctrine appears to be one key reason why compelling interests have proliferated and protection for speech is subject to such uncertainty." Bunker, 16 Comm. L. & Pol'y at 379. Otherwise, the courts will continue to create "categories of speech [with] diminished constitutional protection" whenever they want, giving government "unfettered power to reduce a group's First Amendment rights . . . [and] impose invidious discrimination of disfavored subjects." *Nat'l Inst. of Fam. and Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2372, 2375 (2018) ("*NIFLA*") (internal quotation marks omitted).

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[3] Indeed, contrary to its claim that Colorado could not "enforce [its] interest by limiting offensive speech," Pet. App. 26a, the majority upheld such "compel[led] silence," *id*. at 70a.

II. The government will use the decision below to control political speech.

In watering down strict scrutiny, the Tenth Circuit ignored deeply held principle and hard-won wisdom about individuals' and society's need for freedom of speech, as well as the inevitable spread of the speech control it condoned. Regardless of whether the government thinks an opinion is wrong, demeaning, or offensive, the First Amendment removes any power to control "expression because of its message, its ideas, its subject matter, or its content." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015); *see also Matal v. Tam*, 137 S. Ct. 1744, 1751, 1763 (2017) (controlling and plurality op.) (prohibiting restriction on speech that disparaged others or subjected to contempt). And this Court has "held time and again that [this] freedom of speech includes both the right to speak freely and the right to refrain from speaking at all." *Janus*, 138 S. Ct. at 2463 (internal quotation marks omitted); *see also Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 797 (1988) (collecting cases).

Indeed, "[w]hen speech is compelled . . . additional damage is done." *Janus*, 138 S. Ct. at 2464. Coercing "individuals . . . into betraying their convictions," and "[f]orcing free and independent individuals to endorse ideas they find objectionable is always demeaning." *Id*. Thus there is irony in characterizing the government's interest as one in upholding dignity. Colorado compels Ms. Smith to celebrate ideas and actions contrary to her deeply held beliefs, and it simultaneously restricts her from sharing her personal beliefs. *See* Pet. at 5;

Pet. App. 68a. ("Ms. Smith must either agree to propound messages accepting and celebrating same-sex marriage contrary to her deeply held principles or face financial penalties and remedial training under CADA."); *id*. at 70a, 72a ("Moreover, CADA compels silence," prohibiting her from "forthrightly stat[ing] her firm conviction—grounded in her Christian faith. . . .").

We also protect First Amendment rights "to preserve an uninhibited marketplace of ideas." *McCullen v. Coakley*, 573 U.S. 464, 476 (2014) (internal quotation marks omitted). The marketplace of ideas serves a sifting function for society, allowing ideas to be tried against one another. *See NIFLA*, 138 S. Ct. at 2375 (noting that "the best test of truth is the power of the thought to get itself accepted in the competition of the market" (internal quotation marks omitted)). Our liberal tradition has denied the state a role in this sifting because those in power cannot be trusted to know the truth and act impartially to further it.[4]

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[4] John Locke, *A Letter Concerning Toleration* 46 (James H. Tully ed., Indianapolis, Ind., Hackett Publishing, 1983) (1689) ("For Truth certainly would do well enough, if she were once left to shift for her self. She seldom has received, and I fear never will receive much Assistance from the Power of Great men, to whom she is but rarely known, and more rarely welcome."); John Stuart Mill, *On Liberty*, *in On Liberty and Other Essays* 22-23 (John Gray ed., Oxford University Press, 1991) (1859) (noting that "few think it necessary to take any precautions against their own fallibility," but that "it is as certain that many opinions, now general, will be rejected by future ages, as it is that many, once general, are rejected by the present").

In addition, the marketplace's freedom of thought facilitates better citizens. This facet of the liberal tradition's marketplace doctrine is grounded in the belief that truth gains much of its power over individuals when they search and sift ideas on their own.[5] Attempts to compel speech, and the thought it carries, rob ideas of their animating potential.

The liberal tradition further values freedom of speech and association because controlling and compelling speech—to control and oust ideas deemed too dangerous—may be counterproductive. It creates sentiments of oppression that seethe and smolder in silence, waiting for air to give them life and actualize the self-fulfilling prophecy that some ideas are too dangerous to allow. The hard-won lesson of the liberal tradition—after decades of religious conflict—is that such ideas are far safer in the open, known and tempered by

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[5] *See*, *e.g.*, Locke, *Letter* at 46 ("But if Truth makes not her way into the Understanding by her own Light she will be but the weaker for any borrowed force Violence can add to her."); Mill, *On Liberty* at 46 (stating that there must be an unrestrained conflict of ideas to keep in each mind "a lively apprehension of the truth which they nominally recognize, so that it may penetrate the feelings, and acquire a real mystery over the conduct"); *id*. at 59 (to preserve an opinion's "vital effect on the character and conduct"); Jean-Jacques Rousseau, *On the Social Contract, in The Basic Political Writings* 172 (Donald A. Cress trans., Indianapolis, Ind., Hackett Publishing, 1987) (1762) (stating that "the most important [sort of law] of all" is that "engraved . . . in the hearts of citizens. It is the true constitution of the state. . . . When other laws grow old and die away, it revives and replaces them, preserves a people in the spirit of its institution. . . .").

persuasion rather than fanned by perceived oppression.[6]

For all these reasons, "the people lose when the government is the one deciding which ideas should prevail," *NIFLA*, 138 S. Ct. at 2375, even when the government believes that it must act to protect society and its vulnerable groups, *see id.* at 2379 (Kennedy, J., concurring) ("[I]t is not forward thinking to force individuals to 'be an instrument for fostering public adherence to an ideological point of view [they] fin[d] unacceptable.'" (quoting *Wooley v. Maynard*, 430 U.S. 705, 715 (1977)) (first alteration added)). Thus "this Court's leading First Amendment precedents have established the principle that freedom of speech prohibits the government from telling people what they must say." *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 61 (2006) (citing examples).

Yet "Colorado and the majority" demand that Ms. Smith "create expressive content celebrating same-sex weddings," while prohibiting her from sharing her own deeply held beliefs. Pet. App. 55a, 70a-72a. As discussed above, the Tenth Circuit's broadly couched interests, and its example in expanding or creating new interests, is easily adaptable to other forms of speech—

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[6] Locke, *Letter* at 52 ("For if men enter into Seditious Conspiracies, 'tis . . . their Sufferings and Oppressions that make them willing to ease themselves."); Alexis de Tocqueville, *Democracy in America* 193 (J.P. Mayer ed., George Lawrence trans., HarperPerennial 1988) ("[I]n countries where associations are free, secret societies are unknown. There are factions in America, but no conspirators.").

including political speech. And experience demonstrates that proponents of campaign regulation will seize on such interests to both limit others' speech and to compel others to share the government's messages.

Indeed, the colors already bleed together. In allowing a challenge to a law like Colorado's, the Eighth Circuit in *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 753-54 (8th Cir. 2019), relied on this Court's precedent in *Miami Herald Pub. Co., Div. of Knight Newspapers, Inc. v. Tornillo*, 418 U.S. 241 (1974), holding that an equal time law for political speech was unconstitutional. In *Tornillo*, Florida required that newspapers publish candidates' responses, free of cost, when they "published attacks on [those candidates'] personal character or official record." *Telescope Media*, 936 F.3d at 753 (internal quotation marks omitted). In *Telescope Media*, Minnesota likewise forced a speaker to carry the government's chosen message—a positive message about same-sex marriage—whenever the speaker chose to share a contrary message—speaking affirmatively about opposite-sex marriage. *Id*. Drawing on *Tornillo*'s concerns about compelled, content-based speech, the Eighth Circuit concluded that Minnesota's law would "compel[] self-censorship . . . unquestionably dampen[ing] the vigor and limit[ing] the variety of public debate." *Id*. at 754 (internal quotation marks omitted).

The Eighth Circuit also warned about the danger to political speech: The government could "declare political affiliation or ideology to be a protected characteristic," and then "force a Democratic speechwriter to

provide the same services to a Republican, or . . . require a professional entertainer to perform at rallies for both the Republican and Democratic candidates for the same office." *Id*. at 756 (citing jurisdictions already doing so).

Indeed, state and local governments provide many examples of imaginative attempts to limit or compel political speech. For example, Connecticut is attempting to punish two legislative candidates, clients of *Amicus*, for mentioning their efforts to fight the governor's agenda in their campaign communications. *See Markley v. State Elections Enf't Comm'n*, No. SC 20305, 2021 Conn. LEXIS 137, at *4 (Conn. May 21, 2021); Final Order at 5-7, *In the Matter of a Complaint by John Mazurek, Wolcott*, No. 2014-170 (State Elections Enforcement Commission Feb. 14, 2018), https://bit.ly/3E8hr8V.

In another case, *Amicus* represents a candidate challenging a Florida law that prohibits candidates from referring to party affiliation in campaigns for non-partisan office: not from claiming he is that party's candidate for that office, but from mentioning that he is a member of a party at all. *See* Order at 3, 5, *Hetherington v. Madden*, No. 3:21-cv-671-MCR-EMT (N.D. Fla. July 14, 2021), https://bit.ly/3vBYGb0.

And state and local governments across the county have taken this Court's affirmation of disclosure and disclaimer requirements in *Citizens United*, 558 U.S. at 366-70, as license to create new, ever more burdensome impositions on political speech. Even though this

Court has warned the government that it should directly publish information it wants the public to know, rather than force others to carry its messages, *NIFLA*, 138 S. Ct. at 2376, jurisdictions are requiring that speakers disclose their donors as part of their messages. *See*, *e.g.*, *Yes on Prop B v. City & Cnty. of S.F.*, 440 F. Supp. 3d 1049, 1052, 1055 (N.D. Cal. 2020) (allowing on-communication disclosure—requiring not just that a speaker identify its top three donors, but also that it identify its donors' top two contributors—as long as the government's message consumed 40% or less of the communication); Multnomah County Code § 5.203(A) and (B), https://bit.ly/2XEUNWd (requiring that a political communication state the names of the speaker's top five donors, the types of businesses providing the majority of the donors' income over the previous five years, and the top three contributors to those donors); Alaska Stat. § 15.13.090(a)(2)(C) (requiring "identification of the name and city and state of residence or principal place of business . . . of each of the person's three largest contributors"); NY City Charter § 1052(a)(15)(c)(i) ("Top Three Donors").

Those who wish to control political speech are imaginative and persistent. As these examples show, they have invented diverse ways to restrict speaker's messages or to burden them to the point that speakers give up. Preserving strict scrutiny as an exacting standard of the closest review is necessary to shield us from attempts to compel and restrict speech, but particularly to protect the criticism that those in power always dislike. To protect "speech which is at the core of our

electoral process and of the First Amendment freedoms," *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 222-23 (1989) (internal quotation marks omitted), this Court should rein in the Tenth Circuit's broadly couched interests and guide lower courts in better determining what makes an interest compelling.

CONCLUSION

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

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October 28, 2021

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