No. 21-476

In the Supreme Court of the United States

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

Petitioners,

v.

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

Respondents

On Petition For Writ Of Certiorari to the United States Court Of Appeals for the Tenth Circuit

BRIEF OF *AMICUS CURIAE* MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

Mountain States Legal Foundation (MSLF) is a nonprofit, public-interest law firm organized under the laws of the state of Colorado. MSLF is dedicated to bringing before the courts issues vital to the defense and preservation of individual liberties, the right to own and use property, the free enterprise system, and limited and ethical government. Since its creation in 1977, MSLF attorneys have been active in litigation regarding the proper interpretation and application of statutory, regulatory, and constitutional provisions. *See, e.g.*, *Adarand Constructors v. Pena*, 515 U.S. 200 (1995) (MSLF serving as lead counsel). In order to secure these interests, MSLF files this *amicus* brief urging the Court to grant the Petition.

SUMMARY OF THE ARGUMENT

"[W]here the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First

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[1] The parties were timely notified and have consented to the filing of this *amicus curiae* brief. *See* Sup. Ct. R. 37.2(a). Pursuant to Supreme Court Rule 37.6, the undersigned affirms that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus curiae* or their counsel, made a monetary contribution specifically for the preparation or submission of this brief.

Amendment right to avoid becoming the courier for such message." *Wooley v. Maynard*, 430 U.S. 705, 717 (1977).

In this case, the Tenth Circuit correctly found that Petitioner was being forced to engage in pure speech against her will, in order to convey a viewpoint approved by the State of Colorado. *See 303 Creative LLC v. Elenis*, 6 F.4th 1160, 1178 (10th Cir. 2021) ("Appellants' creation of wedding websites is pure speech."); *id.* at 1177 ("The Accommodation Clause also 'compels' Appellants to create speech that celebrates same-sex marriages.").

Nevertheless, instead of applying *Wooley*, the Tenth Circuit cited *Reed v. Town of Gilbert*, 576 U.S. 155, 164, (2015), for its holding that compelled speech may be permissible if the state can meet the strict scrutiny standard. *See 303 Creative*, 6 F.4th at 1178 ("Whether viewed as compelling speech or as a content-based restriction, the Accommodation Clause must satisfy strict scrutiny—i.e., Colorado must show a compelling interest, and the Accommodation Clause must be narrowly tailored to satisfy that interest.").

This case thus raises the question of whether compelling speech that expresses an ideological message contrary to the speaker's wishes—indeed, by engaging in viewpoint discrimination—is *per se* unconstitutional; or, if the government may attempt to establish the validity of compelling the expression of specific viewpoints by resort to the strict scrutiny standard.

In short, the Tenth Circuit reached the wrong conclusion; but the *way* in which it reached its conclusion highlights a serious ambiguity that this Court should grant certiorari to resolve. *See 303 Creative*, 6 F.4th at 1178 ("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 1179 ("The Accommodation Clause is, however, narrowly tailored to Colorado's interest in ensuring 'equal access to publicly available goods and services.'").

Similarly, much as the Tenth Circuit's error in permitting compulsion of ideological speech rests on unfortunate ambiguity in this Court's caselaw, its treatment of viewpoint discrimination was abetted by this Court's similarly inconsistent treatment of that issue. This Court has often suggested that viewpoint discrimination is categorically impermissible, and indeed declared that preventing such discrimination is the very purpose of the strict scrutiny applied to content-based restrictions. Yet its *rhetorical* equivocation has held open the possibility that viewpoint discrimination might survive strict scrutiny under some yet-unconceived circumstances. The Court should take this opportunity to declare unequivocally that viewpoint discrimination can never survive strict scrutiny, thus rendering strict scrutiny analysis superfluous where viewpoint discrimination has already been conceded or identified.

Separately, even if the Tenth Circuit was correct to apply strict scrutiny in the case of compelled speech, it erred by considering an interest tied to the suppression of offensive speech as a compelling state interest. If the Court is inclined to allow government compulsion of speech upon a showing of a compelling need and narrow tailoring—which it should not—it should at the very least make clear that Colorado's effort to squelch offensive viewpoints cannot be the compelling interest in the case.

ARGUMENT

I. This Court's Case Law Implies That Laws Compelling Viewpoint-Based Speech are *Per Se* Unconstitutional, but Some Cases Have Instead Referred to the Strict Scrutiny Test.

The First Amendment enshrines "the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 641 (1994); *see also West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 640 (1943) ("Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men.").

Opinions of this Court have struck down government efforts to compel ideological speech without reference to whether the government might establish that it meets strict scrutiny. For instance, Justice Jackson's

famous formulation in *Barnette* is practically a cliché by now:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are circumstances which permit an exception, they do not now occur to us.

Barnette, 319 U.S. at 642.

The Court's emphatic language in *Barnette* suggested that there was no need to evaluate the importance of the message conveyed, or whether the government might accrue some value for the public at large, when considering the compelled speech at issue. *Id.* at 634 ("Whether the First Amendment to the Constitution will permit officials to order observance of ritual of this nature *does not depend upon whether as a voluntary exercise we would think it to be good*, bad or merely innocuous.") (emphasis added).

Indeed, the Court *in Barnette* was clear that it needed to separate the question of (1) whether forcing students to recite the pledge of allegiance was of value, from (2) the question of whether doing so was constitutional. *Id.* at 634 ("[V]alidity of the asserted power to force an American citizen publicly to profess any statement of belief or to engage in any ceremony of assent to one presents questions of power that must

be considered *independently of any idea we may have as to the utility of the ceremony in question*.") (emphasis added).[2]

Separating the concepts of the constitutionality of compelled speech from the value of the speech at issue was not merely an organizational convenience in the Court's opinion. Rather, the Court clearly worried that opening the door to some government compulsion would lead to disaster and tragedy:

> Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the fast failing efforts of our present totalitarian enemies. Those who begin coercive elimination of dissent soon find

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[2] At most, *Barnette* alluded only to potential "grave and immediate" dangers to the public. 319 U.S. at 639 ("[F]reedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent *grave and immediate danger* to interests which the state may lawfully protect.") (emphasis added). But even with this potential need in mind, the Court dismissed the idea that it could think of anything that would satisfy this test. *Id.* at 642 ("If there are any circumstances which permit an exception, they do not now occur to us.").

> themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.

Id. at 641 ("It seems trite but necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings.").

Barnette's language was echoed in *Wooley v. Maynard*:

> Here, as in *Barnette*, we are faced with a state measure which forces an individual, as part of his daily life, indeed constantly while his automobile is in public view, to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable. In doing so, the State invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.

430 U.S. at 716. In the most definitive statement on this subject, the Court in *Wooley* then held unambiguously that: "[W]here the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest *cannot* outweigh an individual's First Amendment right to avoid becoming the courier for such message." *Id.* at 717 (emphasis added).

This language resonated. In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 573 (1995), the Court held that the government's compulsion of speech violated the fundamental protections of the First Amendment. *See id.* at 573

("[T]his use of the State's power violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message."); *see also Knox v. Service Emps. Intern. Union, Local 1000*, 567 U.S. 298, 310 (2012) ("The government *may not* prohibit the dissemination of ideas that it disfavors, nor compel the endorsement of ideas that it approves.") (emphasis added).

Moreover, in *Wooley*, the Court did not apply a rigorous strict scrutiny analysis to reject mandated government authorship or modification of an individual's message, and construed the First Amendment broadly to "forbid" compelled speech like that at issue in *Hurley*. *Hurley,* 515 U.S. at 578 ("When the law is applied to expressive activity in the way it was done here, its apparent object is simply to require speakers to modify the content of their expression to whatever extent beneficiaries of the law choose to alter it with messages of their own. *But in the absence of some further, legitimate end, this object is merely to allow exactly what the general rule of speaker's autonomy forbids*.") (emphasis added). *Hurley* also implies that setting the terms of public debate is *never* a "legitimate end" sufficient to squelch Constitutional rights. *See infra*, Section III.

Many lower courts have agreed with the idea that *not* engaging in expressive conduct is absolutely protected by the First Amendment, without regard to the interests the government purports to further by compelling speech. *See Oliver v. Arnold*, 3 F.4th 152, 159-60 (5th Cir. 2021) (applying *Barnette* in school

case involving compelled writing of the Pledge of Allegiance, without either the majority or dissent referring to strict scrutiny); *Coral Ridge Ministries Media, Inc. v. Amazon.com, Inc.*, 6 F.4th 1247, 1255-56 (11th Cir. 2021) ("In the same way that the Council's choice of parade units [in *Hurley*] was expressive conduct, so too is Amazon's choice of what charities are eligible to receive donations through AmazonSmile. Applying Title II in the way Coral Ridge proposes would … instead 'modify the content of Amazon's expression'—and thus modify Amazon's 'speech itself'"); *R.J. Reynolds Tobacco Co. v. Food and Drug Admin.*, 845 F.Supp.2d 266, 275 n.14 (D.D.C. 2012) ("The Government's interest in advocating a message *cannot* and does not outweigh plaintiffs' First Amendment right to not be the Government's messenger.") (emphasis added).

Additionally, in other First Amendment contexts, the Court has similarly rejected government mandates without pausing to consider whether the importance of the government's preferred message could allow it to co-opt a person's expressive conduct. For instance, in *Boy Scouts of America v. Dale*, 530 U.S. 640, 659 (2000), the Court engaged in an extensive analysis of compelled association. Without referring to strict scrutiny, it seemed to quickly weigh, but also quickly dismiss, the state's purported interest in compelling the Boy Scouts to convey a message contrary to their organization. *See id.* at 659 ("The state interests embodied in New Jersey's public accommodations law do not justify such a severe intrusion on the Boy Scouts' rights to freedom of expressive association."). There was no analysis of whether New Jersey's efforts

were narrowly tailored, nor of whether some other asserted interest could have justified New Jersey's "severe intrusion" into free association.[3] And notably, like *303 Creative*, *Dale* itself was decided against the backdrop of a state public accommodations law banning discrimination on the basis of sexual orientation.

Additionally, in the freedom of press context, this Court struck down compelled speech requirements imposed on newspapers, while also seemingly suggesting that there is no need to evaluate the government's interest or its means. *See Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 257 (1974).[4] In holding for the newspaper, the Court flatly rejected the idea that the government could compel newspapers to print certain pieces. There was no

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[3] In another part of the opinion, the Court seemed to suggest that it might consider compelling state interests so long as the interest was "unrelated to the suppression of ideas." 530 U.S. at 648. It did not return to this standard, however, when it evaluated the constitutionality of New Jersey's public accommodations law. Here again, though, the Court suggested that the "suppression of ideas" is an illegitimate interest. *See infra*, Section III.

[4] *Tornillo* is also cited in *Wooley*, where the Court seemed to adopt a *per se* rule against government compulsion of ideological messages. *Wooley*, 430 U.S. at 714 ("A system which secures the right to proselytize religious, political, and ideological causes must also *guarantee* the concomitant right to decline to foster such concepts.") (emphasis added).

evaluation of the government's interests or its tailoring. *See id.* at 258 ("It has yet to be demonstrated how governmental regulation of this crucial process *can be* exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.") (emphasis added).

Admittedly, this Court has sent mixed messages. For instance, in *Pacific Gas & Elec. Co. v. Public Utils. Comm'n of California*, 475 U.S. 1, 15 (1986), the Court stated plainly that "Appellant … [has] the right *to be free from* government restrictions that abridge its own rights in order to enhance the relative voice of its opponents." (emphasis added); *see id.* at 16 ("Were the government freely able to compel corporate speakers to propound political messages with which they disagree, this protection would be empty, for *the government could require speakers to affirm in one breath that which they deny in the next*.") (emphasis added). Despite the emphatic language, however, the Court later suggested that parties may in fact be compelled to speak messages against their will, if strict scrutiny is satisfied. *See id.* at 20 ("Notwithstanding that it burdens protected speech, the Commission's order could be valid if it were a narrowly tailored means of serving a compelling state interest.").

Similarly, in *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018), the Court seemed to determine that California's law compelled certain clinics to provide state-sponsored messages contrary to their beliefs. 138 S. Ct. at 2371 ("By requiring petitioners to inform women how they can

obtain state-subsidized abortions—at the same time petitioners try to dissuade women from choosing that option—the licensed notice plainly 'alters the content' of petitioners' speech."). But the Court did not itself announce that it would apply strict scrutiny to the provision, noting only that the Ninth Circuit was wrong to apply a lesser standard to professional speech, and that the law failed even intermediate scrutiny. *Id.* at 2371-72. Nevertheless, in a concurrence, Justice Kennedy seemed to embrace a *per se* rule that would have invalidated the law. *Id.* at 2379 (Kennedy, J., concurring) ("Governments *must not be allowed* to force persons to express a message contrary to their deepest convictions. Freedom of speech secures freedom of thought and belief.") (emphasis added).

Also, in *Janus v. American Federation of State, County, and Mun. Employees*, the Court cited language from *Barnette* that seemed to suggest that compelled speech might be subject to a different test than suppression of speech, although not to a *per se* rule against such compulsion. 138 S. Ct. 2448, 2464 (2018) ("Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning, and for this reason, one of our landmark free speech cases said that a law commanding 'involuntary affirmation' of objected-to beliefs would require *'even more immediate and urgent grounds' than a law demanding silence*.") (emphasis added). Yet the Court in *Janus* also cited *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781 (1988), which stated that "[t]here is certainly some difference between compelled speech and

compelled silence, but in the context of protected speech, the difference is *without constitutional significance*." 487 U.S. at 796 (emphasis added).

Likewise, some advocates may cite Justice Thomas's concurring opinion in *Masterpiece Cakeshop* either to support a *per se* ban on government compulsion of messages or to merely require "the most exacting scrutiny" for evaluation of compelled speech. *Compare Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1741 (2018) (Thomas, J., concurring) ("While this Court acknowledged that the unit's exclusion [in *Hurley*] might have been "misguided, or even hurtful, it *rejected the notion that governments can mandate thoughts and statements* acceptable to some groups or, indeed, all people as the antithesis of free speech.") (internal quotation marks and citations omitted) (emphasis added) *and id.* at 1745 ("The First Amendment *prohibits Colorado* from requiring Phillips to bear witness to these facts, or to affirm a belief with which he disagrees.") (emphasis added) (internal quotation marks, citations, and brackets omitted), *with id.* at 1746. ("In cases like this one, our precedents demand 'the most exacting scrutiny'").[5]

[5] Note, however, that Justice Thomas cited *Texas v. Johnson*, 491 U.S. 397, 412 (1989); and *Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010), for the "exacting scrutiny" proposition. Neither case involved a government entity compelling a speaker to express a message contrary to his will.

The inconsistency between the blanket statements of invalidity, and the idea that the government may be able to establish that it has met either strict scrutiny—or some alternative heightened, but unspecified test—has never been resolved.

Even more confounding, while some decisions of this Court suggest *per se* bans on compelled speech and others send mixed messages, in at least one opinion, the Court employed only the test used for evaluating content-based restrictions, and did not consider the *per se* rule. *See Turner Broad. Sys.*, 512 U.S. at 643 ("Laws that compel speakers to utter or distribute speech bearing a particular message are subject to *the same* rigorous scrutiny.") (emphasis added).

It is not surprising then, that like the Tenth Circuit in this matter, lower courts have been confused as to whether strict scrutiny applies in the compelled speech context. *See, e.g.*, *Telescope Media Group v. Lucero*, 936 F.3d 740, 752 (8th Cir. 2019) ("[T]here is no question that the government *cannot* compel an artist to paint, demand that the editors of a newspaper publish a response piece, or require the organizers of a parade to allow everyone to participate.") (emphasis added); *but see id.* at 754 ("Laws that compel speech or regulate it based on its content are subject to strict scrutiny."); *First Lutheran Church v. City of St. Paul*, 326 F.Supp.3d 745, 767 (D. Mn. 2018) ("Because the sign-posting requirement is

compelled speech, the Court must decide whether the sign-posting requirement passes strict scrutiny.").[6]

Moreover, at least one state court has even suggested that *criminal* penalties may be valid for failure to adhere to government-compelled gender labels, if the statute at issue is sufficiently narrow. In *Taking Offense v. State*, 281 Cal.Rptr.3d 298, 317-18 (Cal. Ct. App. 2021), for instance, a California Court of Appeals struck down a state law that criminally punished certain employees for "misgendering" residents of long-term care facilities; but it did so because the law was not narrowly tailored to only compelling certain speech that was actionable under discrimination laws. *See id.* at 319 ("[W]e conclude the pronoun provision—whether enforced through criminal or civil penalties—is overinclusive in that it restricts more speech than is necessary to achieve the government's compelling interest in eliminating discrimination, including harassment, on the basis of sex.").

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[6] Note that even the well-written dissent below seemed to think that strict scrutiny was the appropriate standard to apply. *See 303 Creative*, 6 4th at 1202 (Tymkovich, J., dissenting) ("Whether CADA compels speech or regulates speech based on its content or discriminates against speech based on its viewpoint—or all three—one thing is clear, as the majority concedes: CADA must undergo strict scrutiny."); *but see Cressman v. Thompson*, 798 F.3d 938, 951 (10th Cir. 2015) ("Thus, the Supreme Court, starting with *Barnette*, has consistently "*prohibited* the government from telling people what they must say.") (emphasis added).

Thus, the court seemed to suggest that if the state had drafted its law differently, criminal punishments on *not* expressing certain messages related to gender-identity might have been permissible. *Id.* ("Rather than prohibiting conduct and speech amounting to actionable harassment or discrimination as those terms are legally defined, the law criminalizes even occasional, isolated, off-hand instances of willful misgendering—provided there has been at least one prior instance—*without requiring that such occasional instances of misgendering amount to harassing or discriminatory conduct*.") (emphasis added). The idea that individuals might go to prison for not expressing themselves in government-approved ways ought to give this Court grave concern, and cause it to grant certiorari to resolve these important questions.

Given the confusion among the cases of this Court—and the inconsistencies with respect to lower courts—certiorari is warranted to resolve the question of whether the government may in fact compel speakers to express ideological messages if it can withstand the strict scrutiny inquiry. The stakes could not be higher.

II. This Court's Statements on Viewpoint Discrimination Have Also Been Ambiguous.

It is not just the area of compelled speech where the Court has left ambiguity. Unfortunately, the Tenth Circuit's errors in permitting viewpoint

discrimination also find support in this Court's varied rhetorical treatment of viewpoint discrimination. While this Court's *holdings* have uniformly treated viewpoint discrimination as impermissible, its language has at times been equivocal and ambiguous, suggesting that viewpoint discrimination against protected private speech might conceivably survive strict scrutiny. This Court should clarify that it cannot.

This Court has made categorical statements regarding the impermissibility of viewpoint discrimination. *See, e.g.*, *Iancu v. Brunetti*, 139 S. Ct. 2294, 2299 (2019) ("The government may not discriminate against speech based on the ideas or opinions it conveys."); *Matal v. Tam*, 137 S. Ct. 1744, 1751 (2017) (trademark provision "offend[ed] a bedrock First Amendment principle: Speech may not be banned on the ground that it expresses ideas that offend."); *Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."); *Masterpiece Cakeshop*, 138 S. Ct. at 1733 (Kagan, J., concurring) ("As the Court states, a principled rationale for the difference in treatment *cannot* be based on the government's own assessment of offensiveness.") (emphasis added).

But the Court has also said, for example, that viewpoint discrimination is merely "presumptively unconstitutional." *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829-30 (1995). That

word—"presumptively"—could be read to suggest that the presumption against viewpoint discrimination might be overcome. *But see id.* at 829 ("The government *must abstain* from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.") (emphasis added). Similarly, in *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 571 (2011), the court wrote that "[i]n the *ordinary* case it is *all but* dispositive to conclude that a law is content-based and, in practice, viewpoint-discriminatory." *Id.* (emphasis added).

Adding to this confusion, this Court's opinions have sometimes found the presence of viewpoint-discriminatory infringements to be dispositive, but sometimes suggested that viewpoint discrimination receives the same strict scrutiny as any other content-based regulation of speech. *Compare, e.g., Barnette*, 319 U.S. at 642 (finding the presence of viewpoint discrimination dispositive); *and Rosenberger*, 515 U.S. at 828-29 (determination that government was discriminating against speech because of its viewpoint was dispositive) *with, e.g.*, *McCullen v. Coakley*, 573 U.S. 464, 478 (2014) (noting that petitioners alleged both content and viewpoint discrimination, and opining that "[i]f either of these arguments is correct, then the Act must satisfy strict scrutiny[.]").

Thus, even the dissent in *303 Creative* seemed to endorse the idea that viewpoint discrimination might be constitutional in some cases—because such discrimination is merely "highly suspect." *See* 6 F.4th at 1201 ("Like laws that compel speech, laws that

restrict speech based on content or viewpoint are also highly suspect."). The Court should thus step in to clarify whether viewpoint discrimination—as in this case, where Colorado prevented *303 Creative* from speaking its own message, and instead forced it to endorse the State's—may be yet valid if the government can satisfy strict scrutiny.

III. Certiorari is Appropriate to Clarify That State Interests Connected to Viewpoint Discrimination Can Never Be Compelling.

Finally, certiorari should be granted in this case to make clear that even preventing discrimination cannot justify a government compelling viewpoint discrimination in private speech.

The Tenth Circuit cited *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625 (1984), for the proposition that prohibiting discrimination in public accommodations is a compelling government interest. *Jaycees*, 468 at 625 ("By prohibiting gender discrimination in places of public accommodation, the Minnesota Act protects the State's citizenry from a number of serious social and personal harms."); *accord Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 733 (2014) ("The Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal.").

However, it is one thing to suggest that non-discrimination interests generally are compelling. It

is quite another to suggest that compelling private actors to express certain viewpoints is a constitutionally permissible advancement of that interest. *303 Creative*, 6 F.4th at 1178 ("Eliminating such ideas is CADA's very purpose."). Indeed, the idea that the government may compel speech because it has a good reason to do so simply echoes the argument rejected in *Barnette* that saluting the flag was part of American citizenship. *See* 319 U.S. at 637 ("To enforce those [constitutional] rights today is not to choose weak government over strong government. It is only to adhere as a means of strength to individual freedom of mind in preference to officially disciplined uniformity for which history indicates a disappointing and disastrous end.").

The Tenth Circuit's holding is therefore wholly inconsistent with existing case law, which protects even that speech which is offensive, or which targets specific individuals and groups. Moreover, it is precisely because some opinions touch on important topics that we must safeguard the First Amendment right not to be compelled to speak a message. That is the true "test of its substance." *See Barnette,* 319 U.S. at 642 ("[F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. *The test of its substance* is the right to differ as to things that touch the heart of the existing order.") (emphasis added).

Indeed, this Court has cautioned that even otherwise *unprotected* categories of speech cannot be made subject to viewpoint discrimination by the government. *See, e.g., R.A.V. v. St. Paul*, 505 U.S. 377,

384-90 (1992) (explaining that the First Amendment does not permit the government to engage in viewpoint discrimination under the guise of regulating unprotected speech). "Thus, the government may proscribe libel, but it may not make the further content discrimination of proscribing *only* libel critical of the government." *Id.* Even with regard to generally unprotected "fighting words," "[t]he First Amendment does not permit . . . special prohibitions on those speakers who express views on disfavored subjects." *Id.* at 391.

Indeed, it would defeat the purpose of applying strict scrutiny to credit the government's interest in a case like this. Strict scrutiny of content-based regulation of speech is justified by the vital purpose it serves: ferreting out viewpoint discrimination such as that proposed by Colorado here.

Such discrimination is typically disguised by pretext.[7] Content-based laws are thus rigorously scrutinized

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[7] *See* Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 451 (1996) ("The critical question is thus whether the distinction between content-based and content-neutral action – more specifically, the distinction among viewpoint-based, other content-based, and content-neutral action – facilitates the effort to flush out improper purposes. The distinction in fact serves just this function: it separates out, roughly but readily, actions with varying probabilities of arising from illicit motives.").

because they carry "the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information and manipulate the public debate through coercion rather than persuasion." *Id.* Content-based regulation of speech is suspect *because* it might be viewpoint-based regulation of speech. *See R.A.V.*, 505 U.S. at 387, quoting *Simon & Schuster v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991) ("The rationale of the general prohibition [on content discrimination] is that [it] raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace.") (internal quotation marks omitted).[8]

Additionally, given the weight that the Tenth Circuit afforded to the state's interest in preventing discrimination, this Court should take this opportunity to establish that it is inherently impossible for viewpoint discrimination to pass strict scrutiny, because viewpoint discrimination is the very

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[8] The bar on viewpoint discrimination against citizens, of course, does not apply "where the government itself is speaking or recruiting others to [voluntarily] communicate a message on its behalf." *Matal v. Tam*, 137 S. Ct. at 1768 (Kennedy, J., concurring), because the First Amendment does not regulate government speech. Thus, the government may "enlist the assistance of those with whom it already agrees[.]" *Agency for Int'l Dev. v. All. For Open Soc'y Int'l, Inc.*, 570 U.S. 205, 218 (2013).

thing that strict scrutiny of content-based speech restriction or compulsion exists to prevent.

Viewpoint discrimination, as *Turner* suggests, is never a *legitimate* regulatory goal, and strict scrutiny serves to prevent its being pursued covertly. *Turner*, 512 U.S. at 641 ("Laws of this sort pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion."). Strict scrutiny is therefore one way to force the government to articulate a compelling interest and demonstrate that its actions are narrowly tailored as a way of proving that the government is in fact not discriminating on the basis of viewpoint. When the government simply confesses that its interest is related to suppressing unpopular views, it does not satisfy this test.[9]

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[9] Similarly, in the race discrimination context, the Court has declared some purported government interests flatly off limits, even though (presently) race discrimination may be constitutional if it satisfies the elements of strict scrutiny. *Compare, e.g.*, *Regents of University of California v. Bakke*, 438 U.S. 265, 307 (1978) (Opinion of Powell, J.) ("Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids.") *with id.* at 314-15 ("As the interest of diversity is compelling in the context of a university's admissions program, the question remains whether the program's racial classification is necessary to promote this interest.").

For example, the under-inclusiveness of the statute at issue in *Brown v. Ent. Merchants Ass'n*, 564 U.S. 786 (2011), served to "raise[] serious doubts about whether the government [was] in fact pursuing the interest it invoke[d], rather than disfavoring a particular speaker or viewpoint." *Id.* at 802. *See also Reed v. Town of Gilbert*, 576 U.S. 155, 174 (2015) (Alito, J., concurring) ("Content-based laws merit [strict scrutiny] because they present, albeit sometimes in a subtler form, the same dangers as laws that regulate speech based on viewpoint."); *Id.* at 183 (Kagan, J., concurring in judgment) (noting "the category of content-based regulation . . . exists to create a buffer zone guaranteeing that the government cannot favor or disfavor certain viewpoints.").

It would be anathema to the First Amendment to conclude that there is a compelling government interest related suppressing offensive viewpoints. *See, e.g., R.A.V.*, 505 U.S. at 386 ("The government may not regulate use based on hostility—or favoritism—towards the underlying message expressed."); *id.* at 389 ("[A] State may not prohibit only that commercial advertising that depicts men in a demeaning fashion."); *cf. Christian Legal Soc. Chapter of the Univ. of California, Hastings Coll. of the L. v. Martinez*, 561 U.S. 661, 680 (2010) (noting that a "compelling interest . . . related to the suppression of ideas" cannot satisfy strict scrutiny of restrictions on associational freedom) (internal brackets omitted).

As Justice Thomas's concurring opinion in the *Masterpiece Cakeshop* case noted, in the context of the exact same law that is at issue here:

> There is an obvious flaw, however, with one of the asserted justifications for Colorado's law. According to the individual respondents, Colorado can compel Phillips' speech to prevent him from "denigrating the dignity" of same-sex couples, "asserting their inferiority," and subjecting them to "humiliation, frustration, and embarrassment." These justifications are completely foreign to our free-speech jurisprudence.

See Masterpiece Cakeshop, 138 S. Ct. at 1741 (Thomas, J., concurring) (internal quotation marks and citations omitted); *see also Nurre v. Whitehead*, 130 S. Ct. 1937, 1939 (2010) (Alito, J., dissenting from denial of certiorari) ("[O]ur cases categorically reject the proposition that speech may be censored simply because some in the audience may find that speech distasteful.").

As the dissent below and the Petition before the Court amply demonstrate, the Tenth Circuit's analysis should have ended with the here-undisputed conclusion that CADA discriminates on the basis of viewpoint. *See 303 Creative*, 6 F.4th at 1199 (Tymkovich, J., dissenting) ("A state may not regulate speech itself as a public accommodation under anti-discrimination laws. But CADA does so here.").

It is up to this Court to clarify the law.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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