No. 21-476

In the

Supreme Court of the United States

303 CREATIVE LLC, ET AL.,
Petitioners,

v.

AUBREY ELENIS, ET AL.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

BRIEF OF *AMICUS CURIAE* CLAREMONT INSTITUE'S CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute, whose stated mission is to restore the principles of the American founding to their rightful and preeminent authority in our national life, including the individual right of freedom from compelled speech. The Center has previously appeared before this Court as *amicus curiae* or counsel of record in several cases addressing these issues, including *Janus v. American Federation of State, County, and Municipal Employees*, 138 S.Ct. 2448 (2018); *National Institute of Family and Live Advocates dba NIFLA v. Becerra*, 138 S.Ct. 2361 (2018); *Friedrichs v. California Teachers Association*, 136 S. Ct. 1083 (2016)*; Harris v. Quinn,* 134 S. Ct. 2618 (2014); and *Knox v. Service Employees International Union, Local 1000,* 567 U.S. 298 (2012).

SUMMARY OF ARGUMENT

Unlike internet services such as "Twitter" and "FaceBook," petitioners do more than simply host the speech of others. Instead, as recognized by the court below, petitioners creation of websites is itself speech. Petitioners "actively create each website, rather than merely hosting customer-generated content." Petition Appendix at 21a. Thus, this case turns on compelling individuals to speak and associate with a message

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[1] All parties have filed blanket consents to the filing of amicus briefs in this case. In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amicus* made a monetary contribution to fund the preparation and submission of this brief.

with which they disagree. The Colorado law is a direct attack on freedom of belief.

Freedom of thought and belief lies at the core of the First Amendment freedom of speech. "Compelling individuals to mouth support for views they find objectionable violates" this cardinal constitutional protection. *Janus*, 138 S.Ct. at 2463. Yet the court below held that Colorado could compel petitioners to "betray their own convictions" and "endorse ideas they find objectionable" (*Id*. at 2464) as a means of remedying past *state* discrimination against homosexual individuals.[2]

The original understanding of the Free Speech Clause included protection against compelled speech. As this Court has noted, that protection lies at the core of the liberties protected by the Constitution. Although freedom of speech was meant to serve the "search for truth," compelled speech "undermines these ends." This Court should reverse the judgment of the Tenth Circuit and rule that there is *no* governmental interest important enough to compel individuals "to mouth support for views they find objectionable."

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[2] Because the lower court's rationale only compels speech by individuals opposed to same-sex marriage based on past state discrimination against homosexual individuals, the Colorado law also discriminates on the basis of content (*NIFLA*, 138 S.Ct. at 2371) and viewpoint (*Id.* at 2378-79 (Kennedy, J. concurring)).

ARGUMENT

I. Requiring a Common Carrier to Host Speech without Discrimination Is Fundamentally Different than Compelling an Individual to Speak a Message with which He Disagrees

Petitioners in this case are not a "mere conduit" for the speech of others. *Compare Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 575 (1995) *with Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 655 (1994). They create and design the message with every website they create. This is the distinction that makes a difference in this case.

This Court has distinguished between laws that regulate speakers, as speakers, and laws that regulate entities that host or transmit speech. The Court's decision in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47 (2006), is an example of regulation of entities that host speech. In that case, the Solomon Amendment required schools that received federal aid to allow military recruiters on campus on the same basis as they allowed other employers to recruit on campus. 547 U.S. at 55. As such the law regulated conduct, not speech. *Id.* at 60. The law neither limited schools' speech nor required them to say anything at all. *Id.*

Similarly, in *Turner*, this Court upheld statutes requiring the cable system operator to set aside a portion of their channels to carry local broadcasting. 512 U.S. at 626. Although cable system operators both engaged in speech and transmitted speech through their

programming decisions (547 U.S. at 636), the regulatory burden imposed was not based on the content of the programming (*id*. at 643-44). Thus, this Court applied intermediate scrutiny to the regulation. *Id*. at 662. The law at issue did not "pose … inherent dangers to free expression" and did not present a "potential for manipulation." *Id*.

The analysis is quite different, however, when the government regulation is commanding an individual to speak or "alter the expressive content" of his own message. *See Hurley*, 515 U.S. at 572-73. One of the important protections of the First Amendment is to decide what *not* to say. *Id*. at 573. Such editorial judgments are decisions "on which the state cannot intrude." *Id*. at 575. On that basis, this Court in *Hurley* distinguished the decision in *Turner*. In *Turner*, the Court was not confronted with a regulation that compromised "the speaker's right to autonomy" over the message. *Id*.

The Colorado statute at issue in this case is a direct regulation of speech, similar to the regulation at issue in *Hurley*. The petitioners are not mere conduits of speech. As the Tenth Circuit noted, the "speech element is even clearer here than in *Hurley* because Appellants actively create each website rather than merely hosting customer-generated content." Pet. App. at 21a. Thus, this Court should analyze the statute as a direct regulation of speech. Like the situation in *Hurley*, it is petitioners' expressive conduct that Colorado law regulates as a place of public accommodation.

II. The First Amendment Was Intended to Protect Against Compelled Speech

In his dissent in *Lathrop v. Donohue*, Justice Black noted: "I can think of few plainer, more direct abridgments of the freedoms of the First Amendment than to compel persons to support candidates, parties, ideologies or causes that they are against." *Lathrop v. Donohue*, 367 U.S. 820, 873 (1961) (Black, J., dissenting). In its decision in *Janus*, this Court has come to accept Justice Black's point of view, ruling that government compelled support of ideological causes "is always demeaning" and therefore violates the core principles of the First Amendment.[3] *Janus*, 138 S.Ct. at 2464; *see also Knox v. SEIU Local 1000*, 132 S. Ct., at 2295; *United States v. United Foods, Inc.*, 533 U.S. 405, 411 (2001); *Keller v. State Bar of California*, 496 U.S., at 15-16 (1990); *Wooley v. Maynard*, 430 U.S. 705, 714 (1977); *Board of Education v. Barnette*, 319 U.S. 624, 633-34 (1943). This conclusion comports with the founders understanding of freedom speech.

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[3] Amicus here use the term "ideological" in its broadest sense. As this Court noted in *Abood v. Detroit Board of Education*, 431 U.S. 209, 231-32 (1977) (overruled on other grounds, *Janus*, 138 S.Ct. at 2460):

> But our cases have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters—to take a nonexhaustive list of labels—is not entitled to full First Amendment protection. Union members in both the public and private sectors may find that a variety of union activities conflict with their beliefs. Nothing in the First Amendment or our cases discussing its meaning makes the question whether the adjective 'political' can properly be attached to those beliefs the critical constitutional inquiry.

Although evidence of congressional intent or ratification arguments concerning the Free Speech Clause is scarce, practices at the founding illuminate the purpose of the speech protections in the First Amendment. There was clear consensus that the measure prohibited "censorship" but there was debate about the extent to which government could punish speech after it was published. That debate is revealed in the sources recounting the debates over the Sedition Act of 1798. *See* History of Congress, February, 1799 at 2988; *New York Times Co. v. Sullivan*, 376 U.S. 254, 275 (1964) (quoting 4 Annals of Congress, p. 934 (1794)). But the founding generation intended the First Amendment to protect against compelled speech as demonstrated by the "practices and beliefs of the Founders" in general. *See McIntyre v. Ohio Election Comm'n*, 514 US 334, 361 (1995) (Thomas, J., concurring).

While there was no discussion of compelled support for political activity, there was significant debate over compelled financial support of churches in Massachusetts and Virginia, the Virginia debate being the most famous. This Court has often quoted Jefferson's argument "That to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors is sinful and tyrannical." Thomas Jefferson, A Bill for Establishing Religious Freedom (1779) in 5 The Founders Constitution, University of Chicago Press (1987) at 77; quoted in *Keller v. State Bar*, 496 U.S. at 10; *Chicago Teachers Union v. Hudson*, 475 U.S. at 305 n.15; *Abood*, 431 U.S. at 234-35 n.31; *Everson v. Board of Education*, 330 U.S. 1, 13 (1947). Jefferson went on to note, "That even forcing him to support this or that teacher of his own

religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor whose morals he would make his pattern." Jefferson, Religious Freedom, *supra* at 77.

James Madison was another prominent voice in the Virginia debate, and again this Court has relied on his arguments for the scope of the First Amendment protection against compelled political support: "Who does not see . . . [t]hat the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?" James Madison, Memorial and Remonstrance Against Religious Assessments in 5 The Founders Constitution at 82; quoted in *Chicago Teachers Union*, 475 U.S. at 305, n.15; *Abood*, 431 U.S. at 234-35 n.31.

Although these statements were made in the context of compelled religious assessments, this Court easily applied them to compelled political assessments in *Chicago Teachers* and *Abood*. This makes sense. Jefferson himself applied the same logic to political debate. In his first Inaugural Address, Jefferson equated "political intolerance" with the "religious intolerance" he thought was at the core of the Virginia debate. Thomas Jefferson, First Inaugural Address (1801) in 5 THE FOUNDERS CONSTITUTION at 152. The theme of his address was unity after a bitterly partisan election, and the goal he expressed was "representative government" — a government responsive to the force of public opinion. *Id.*; Thomas Jefferson Letter to Edward Carrington (1787) in 5 THE FOUNDERS CONSTITUTION at 122 (noting, in support of freedom of

the press, "[t]he basis of our government [is] the opinion of the people"). How is government to be responsive to public opinion unless individuals retain the freedom to choose which opinions they will voice?

Madison too noted the importance of public opinion for the liberty the Founders sought to enshrine in the Constitution. "[P]ublic opinion must be obeyed by the government," according to Madison, and the process for the formation of that opinion is important. James Madison, Public Opinion (1791) in 2 THE FOUNDERS CONSTITUTION at 73-74. Madison argued that free exchange of individual opinion is important to liberty and that is why he worried about the size of the nation: "[T]he more extensive a country, the more insignificant is each individual in his own eyes. This may be unfavorable to liberty." *Id*. The concern was that "real opinion" would be "counterfeited." *Id*.

Compelling the individual to create and publish speech with which he disagrees is an effective censor of individual opinion. Instead of being drowned out by many genuine voices, the individual is forced to boost the voice of those he opposes – to voice opinions that are contrary to his own core beliefs. He is forced to broadcast counterfeited public opinion, distorting democracy, and losing his freedom in one fell swoop. This is flatly incompatible with the First Amendment with its "respect for the conscience of the individual [that] honors the sanctity of thought and belief." *Public Utilities Commission v. Pollak*, 343 U.S. 451, 468 (1952) (Douglas, J., dissenting).

Freedom of conscience and the dignity of the individual are the foundations underlying the liberty enshrined in the First Amendment. They lay at the core of Jefferson's and Madison's arguments that have

influenced the separate opinions regarding the Freedom of Speech of Justices Black (*Machinists v. Street*, 367 U.S. 740, 788 (1961) (Black, J. dissenting) ("The very reason for the First Amendment is to make the people of this country free to think, speak, write and worship as they wish, not as the Government commands.")), Douglas (*Pollak*, 343 U.S. at 468-69 (Douglas, J. dissenting)), and Stone (*Minersville School District v. Gobitis*, 310 U.S. 586, 604 (1940) (Stone, J., dissenting) ("The guaranties of civil liberty are but guaranties of freedom of the human mind and spirit")), to name but a few. They also lay at the heart of this Court's opinion in *Janus*.

This Court recognized these principles in *West Virginia Board of Education v. Barnette*, 319 U.S. at 641. There, Justice Jackson writing for the Court observed that "Authority here is to be controlled by public opinion, not public opinion by authority." Yet reaching this conclusion was not easy for the Court. Just three years earlier the Court upheld a compulsory flag salute law in *Minersville School District v. Gobitis*. That decision prompted Justice Stone to observe that "The very essence of the liberty … is the freedom of the individual from compulsion as to what he shall think and what he shall say." *Id.* at 604 (Stone, J. dissenting).

Justice Stone's dissent *Minersville* was vindicated in cases from *Barnette* to *Janus*. This Court has ruled that the freedom of conscience and human dignity protected by the First Amendment were violated in compelled flag salutes (*Barnette*, 319 U.S. at 641), required membership in a political party (*Elrod v. Burns*, 427 U.S. 347, 356-57 (plurality) (1976)), compelled display of state messages on license plate

frames (*Wooley v. Maynard*, 430 U.S. at 713), required distribution of other organizations' newsletters (*Pacific Gas & Electric Co. v. Public Utilities Commission*, 475 U.S. 1, 17-18 (1986) (plurality)), and compelled contributions for political activities (*Janus*, 138 S.Ct. at 2478; *Keller*, 496 U.S. at 16). These are the rights that are at stake in this case. Petitioners are engaged in pure speech and the Colorado law at issue seeks to convert petitioners' expressive activities into a public accommodation, subject to editorial control by the State.

III. No State Interest Is Sufficient to Compel an Individual to Publish the Sentiments of Another Private Party

As this Court noted in *Janus*, compelled speech is, in many ways, worse than censorship. "[F]or this reason, … a law commanding 'involuntary affirmation' of objected-to-beliefs would require 'even more immediate and urgent grounds' than a law demanding silence.'" *Janus*, 138 S.Ct. at 2464 (quoting *Barnette* at 633). This Court has yet to find grounds sufficiently "immediate and urgent" to uphold a state required "involuntary affirmation of objected-to-beliefs." The state interest posited here is plainly insufficient. Colorado seeks to compel petitioners to create and publish websites for same sex weddings based on a finding that the State had discriminated against homosexuals in the past. Pet. App. at 25a. Thus, the State argues that it can withdraw fundamental liberties from an individual to remedy past discrimination by the State. As this Court noted in *Hurley*, the State "is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one." *Hurley*, 515 U.S. at 579. If the State feels

a need to provide a remedy for past *State* discrimination, then the State can create and publish websites for same-sex weddings on its own. There is no basis, however, for taking away the speech rights of individuals. There is no legitimate, never mind compelling, interest in forcing an individual to speak the state's preferred message.

In *Barnette*, this Court did not look for a compelling interest. Instead, the Court inquired as to whether there was "clear and present danger" that would justify the compelled flag salute. 319 U.S. 624, 634. It is significant that this decision was handed down in the midst of World War II – a time when the entire world, not just the United States, faced an existential crisis.

The Court in *Miami Herald Publishing v. Tornillo*, 418 U.S. 241, 258 (1974), likewise declined to announce a standard by which the government could compel a newspaper to publish something it did not wish to publish. Instead, the Court merely noted that "[i]t has yet to be demonstrated how governmental regulation" of this type "can be exercised consistent with the First Amendment." *Id.*

In *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781 (1988), the Court noted that freedom from compelled speech and freedom from censorship, at the very least, receive equivalent protection under the First Amendment. *Id*. at 797. The Court then went on to apply strict scrutiny since the regulation at issue was content-based. *Id*. at 798. On its way to these holdings, this Court noted that it presumed that "speakers, not the government, know best both what they want to say and how to say it." *Id*. at 790-91. According to the Court, this means

that government, regardless of motive, may not interfere in free and robust debate by dictating what speakers must say. *Id*. at 791. When it came to proposing a standard of review, the Court simply noted "[w]e perceive no reason to engraft an exception to this settled rule." *Id*.

The Court in *Wooley v. Maynard*, 430 U.S. 705 (1977), did suggest something approaching a "compelling interest" test for compelled speech. Yet, the Court imposed a strict rule that a state's interest to disseminate an ideology "cannot outweigh an individual's First Amendment right to avoid becoming the courier for such a message." *Id*. at 717. Moving from compelling publication of a state ideology to accommodating a private third party's ideology, the Court in *Hurley*, considered whether a private organization could be compelled by the state to carry the message of other private parties.

Like Colorado in this case, the lower courts in *Hurley* relied on the state public accommodations statute to force parade organizers to include the Irish-American Gay, Lesbian and Bisexual Group in the parade. Like Petitioners here, the parade did not discriminate on the basis of sexual orientation in deciding which individuals could participate. Instead, the parade exercised control over which groups – and thus which messages – could participate. Thus, this Court concluded that it was the parade organizers own speech (characterized by its editorial decisions of which groups may march) that the state was declaring to be a "place of public accommodation." *Hurley*, 515 U.S. at 572-73. Because the law forced speakers to modify their messages, the Court ruled that speaker autonomy forbids such a regulation "in the absence of

some further, legitimate end." *Id*. at 578. The Court rejected as illegitimate any state purpose to promote "orthodox" viewpoints or a purpose of discouraging state-disfavored opinions. *Id*. at 579. Again, the Court did not announce any particular standard of scrutiny beyond a rejection of the state's proffered interest as illegitimate.

The Court did discuss the standard of scrutiny in *Janus*. The question was whether to apply "exacting scrutiny" or "strict scrutiny." The Court eventually decided not to specify the appropriate standard since the compelled subsidy at issue could not satisfy even the less strict "exacting scrutiny" standard. *Janus*, 138 S.Ct. at 2465.

Confusion over the appropriate standard leaves parties free to invent and lower courts free to recognize new or even slightly different state interest as the basis for compelling the creation or publication of the speech of another private party. In the more than 75 years since *Barnette*, however, no such interest has won the approval of this Court. Rather than encouraging the inventiveness of state regulators who wish to control the speech of others, this Court should rule that there is no state interest that would justify compelling an individual to create and publish a message with which he disagrees.

As the Court noted in *Barnette*, the purpose of the First Amendment was to put rights (such as what one is entitled to believe and say) beyond the reach of political majorities. "One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections." *Barnette*, 319 U.S. at 638. Coerced

belief by totalitarian regulations cannot be countenanced by the First Amendment. This Court should rule that compelled coercion of belief is beyond the power of state and federal government.

CONCLUSION

The Court should reverse the judgment of the Tenth Circuit and rule that there is no state interest sufficient to compel an individual to create and publish a message with which he disagrees.

May 2022 Respectfully submitted,

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