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; KINDRA ANDERSON; SERGIO CORDOVA; JESSICA POCOCK; PHIL WEISER,

Respondents.

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

BRIEF OF *AMICI CURIAE* LIFE LEGAL DEFENSE FOUNDATION AND BIOETHICS DEFENSE FUND IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI[1]

Amicus Life Legal Defense Foundation ("LLDF") is a California nonprofit 501(c)(3) public interest legal and educational organization that works to assist and support those who advocate in defense of life. LLDF has fought in the courts for decades to protect the right of pro-life advocates to speak out clearly, and without unconstitutional governmental interference, in defense of the unborn.

Amicus Bioethics Defense Fund ("BDF") is a Louisiana 501(c)(3) nonprofit, public interest legal and educational organization that advocates, among other things, that governments exist to protect innocent human beings, not to intentionally destroy such human beings by abortion, physician-assisted suicide or euthanasia.

Amici LLDF and BDF are concerned that the broad reasoning of the lower court and the growing intolerance and hostility of those who advocate for untrammeled abortion on demand will lead to increased efforts not only to stifle unwanted prolife speech, but to use the force of government in certain jurisdictions to compel pro-life residents, including pro-life health professionals, to express messages that conflict with the truth of their pro-life message.

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[1] This brief was wholly authored by counsel for amicus Life Legal Defense Foundation and Bioethics Defense Fund. No party or counsel for any party made any financial contribution toward the preparation or submission of the brief. All parties have filed blanket consents for amicus briefs.

SUMMARY OF THE ARGUMENT

There are ample grounds for this Court to reverse the Tenth Circuit's decision allowing the state of Colorado to compel Petitioner's speech. *See* Pet. App. 55a-63a (Tymkovich, C.J., dissenting). Government compulsion to speak a message contrary to one's beliefs has always been considered one of the gravest First Amendment violations. Amicus wishes to make four points regarding the constitutional analysis.

First, this Court's jurisprudence on compelled speech has not been a model of clarity. In particular, this Court's cases appear to vary the analysis depending on the category of case addressed, but without quite saying so. Thus, when confronting the question presented here, the Court may have to decide whether to reach for (or better label) existing tools in its toolbox, or rather elucidate a refined standard for compelled speech, encompassing not only the compulsion to speak a view the speaker does not hold, but even to speak truthfully if the speaker chooses not to.

Second, this Court has seriously diluted the concept of a "compelling governmental interest." Over the decades, this Court has acknowledged or assumed the existence of compelling governmental interests of increasingly questionable strength, to the point where the requirement of such an interest is of little use as a bulwark against government overreach. Consequently, the second prong of the relevant tests (e.g., narrow tailoring, least

restrictive means) usually ends up bearing the entire burden of upholding First Amendment values.

Third, restoring vigor to strict scrutiny requires a sturdier standard for assessing which asserted interests are indeed compelling. Such a standard would look to historic and traditional functions of government as justification for the serious infringement presented by laws compelling speech.

Finally, this Court should clarify that only *racial* discrimination has historically been a compelling object of governmental action, not all other forms of discrimination, or "discrimination," that governments in the past, present, or future may frown upon. Of course, combating discrimination is not the only concern of overriding interest. The Court should therefore reaffirm that the protection of innocent human life against deliberate assault is a traditional and historic function of government.

ARGUMENT

I. *NIFLA v. BECERRA* AND THE UNCERTAIN BOUNDARIES OF COMPELLED GOVERNMENT SPEECH.

"Governments must not be allowed to force persons to express a message contrary to their deepest convictions." *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S.Ct. 2361, 2379 (2018) (Kennedy, J., concurring) ("*NIFLA*"). NIFLA concerned efforts by the state of California to force

pro-life licensed pregnancy health clinics to advertise the state's abortion services, and unlicensed pro-life counseling centers to print burdensome disclosure statements in all materials. This Court found both requirements were likely unconstitutional on their face. *Id*. at 2376, 2378. In its analysis of the challenged provisions, this Court identified two areas in which the government may require speech from individuals: 1) disclosures of "purely factual and non-controversial information" in the context of "commercial speech," and 2) "regulations of professional conduct that incidentally burden speech." *Id*. at 2372-73.

The leading case in the first area, *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U. S. 626 (1985), involved state restrictions on lawyer advertising, as well as disclosure requirements to ensure that consumers were not misled by attorneys' "commercial speech." This Court held that "an advertiser's [First Amendment] rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers," and the regulations are not "unjustified or unduly burdensome." *Id*. at 651.

This Court illustrated the second category ("regulations of professional conduct") by citing the informed consent requirements upheld in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). The requirements applied only in conjunction with the provision of specific medical procedures and thus, as the joint opinion explained, "regulated speech only as part of the *practice* of

medicine, subject to reasonable licensing and regulation by the state," which practice was "firmly entrenched in American tort law." *NIFLA*, 138 S.Ct. at 2372 (simplified; original emphasis).

This Court in *NIFLA* found that California's disclosure requirements for pregnancy care centers fell into neither of these categories, and that this state-compelled speech could not pass constitutional muster. Because the disclosures could not withstand the lowest level of scrutiny, however, this Court left open the question of what standard applied to the compelled speech at issue. *See e.g.*, *id.* at 2375-77 ("We do not foreclose the possibility" that some "persuasive reason [exists] for treating professional speech as a unique category that is exempt from ordinary First Amendment principles"; "We need not decide whether the *Zauderer* standard applies to the unlicensed notice"; "We need not decide what type of state interest is sufficient to sustain" the compelled speech at issue.)

Thus, the issue of what standard to apply to compelled speech of various types remains unsettled.

II. THE DILUTION OF COMPELLING GOVERNMENTAL INTERESTS.

"Government-compelled speech is antithetical to the First Amendment." Pet. App. 55a-63a (Tymkovich, C.J., dissenting) (extensively citing compelled speech cases including *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *Wooley v. Maynard*, 430 U.S. 705 (1977); and

Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557 (1995)). Such government compulsion can take the form of compelling a speaker to express a particular message (as in the instant case); provide particular information outside particular contexts (e.g., unwarranted disclosure requirements); or speak at all (e.g., wearing a yellow star). *Amici* submit that resistance to the various forms of compulsion requires a stronger foundation than can currently be provided by reference to "compelling governmental interests," due to the weakening this standard has undergone over the last few decades.

The compelling governmental interest standard was originally used to scrutinize whether content-based restrictions on speech violated the Fourteenth Amendment's Equal Protection Clause. *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 125 (1991) (Kennedy, J., concurring) (explaining legal origins of the test); *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 98-100 (1972) (finding that content-based discrimination violates the Equal Protection Clause).

In the early years of the test, when the Court considered content-based restrictions on speech, it acknowledged as compelling governmental interests those interests that inured to the benefit of government itself, or some specific function of it. *See, e.g., Cox v. Louisiana*, 379 U.S. 559, 563-64 (1965) (protecting the judicial process); *Grayned v. City of Rockford*, 408 U.S. 104, 119 (1972) ("public schools in a community are important institutions" and ordinance was "narrowly tailored to further

Rockford's compelling interest in having an undisrupted school session conducive to the students' learning"); *Carey v. Brown*, 447 U.S. 455, 470 (1980) (protecting "the operation of vital governmental facilities" from interference); *Haig v. Agee*, 453 U.S. 280, 306 (1981) ("no governmental interest is more compelling than the security of the Nation"); *Snepp v. United States*, 444 U.S. 507, 509, n. 3 (1980) ("Government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service").

Even in the early days of "compelling governmental interests," however, the standard was not embraced by all members of this Court. *See, e.g., Ill. Elections Bd. v. Socialist Workers Party*, 440 U.S. 173, 188 (1979) (Blackmun, J., concurring) ("I have never been able fully to appreciate just what a 'compelling state interest' is."); *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 233 (1989) (Stevens, J., concurring) (expressing "same reservations" as Justice Blackmun concerning "compelling state interests").

Unfortunately, the strength of this test has diminished over time, with the "compelling interests" at issue frequently drifting from a governmental necessity to something more akin to private interests to which the government wants to add its weight. *See, e.g., R.A.V. v. St. Paul*, 505 U.S. 377, 395-96 (1992) ("help[ing] to ensure the basic human rights of members of groups that have

historically been subjected to discrimination, including the right of such group members to live in peace where they wish" is "compelling"); *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003) (student body diversity is a compelling state interest); *Burwell v. Hobby Lobby,* 573 U.S. 682, 728 (2014) (assuming compelling governmental interest in "guaranteeing cost-free access to the four challenged contraceptive methods"); *Ramirez v. Collier*, 142 S. Ct. 1264, 1280 (2022) (monitoring inmate's condition and "maintaining solemnity and decorum in execution chamber" to avoid further trauma to victim's family are compelling governmental interests).

Moreover, with increasing frequency this Court assumes *arguendo* the government's assertion that an interest is compelling with minimal critical analysis, thus giving lower courts little guidance in assessing what is or is not a compelling governmental interest. *E.g., Burwell v. Hobby Lobby, supra,* 573 U.S. at 728; *Reed v. Town of Gilbert*, 576 U.S. 155, 171 (2015) (assuming for the purpose of argument that "preserving the Town's aesthetic appeal and traffic safety" are compelling governmental interests but striking down ordinance as underinclusive). The ease with which governmental interests are deemed or assumed "compelling" by this Court leads to improperly considered decisions by lower courts. *E.g., Mast v. Fillmore Cty.*, 141 S. Ct. 2430, 2432 (2021) (criticizing the county and lower courts for not considering whether the compelling governmental interest was indeed compelling in the specific application of the law to the Amish). Lower courts are left to their own devices, predilections,

and policy preferences because it appears that the field of compelling governmental interests is wide open.

In short, the recent trajectory of the compelling governmental interest standard has degraded it to the point of uselessness as a basis to protect Petitioners and others with beliefs differing the mainstream or the popular from being compelled to speak.

Moreover, these so-called compelling interests, grounded speciously in vague and recently discovered "civil rights" (enforced by unelected "civil rights commissions") increasingly come into direct conflict with other, firmly established First Amendment rights such as freedom of speech (or silence) and expression, as in the instant case. When they do conflict, "[e]ven antidiscrimination laws, as critically important as they are, must yield to the Constitution." *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 755 (8th Cir. 2019); *see also Smith v. Daily Mail Pub. Co.*, 443 U.S. 97, 104 (1979) (internal citations omitted) (holding that the First Amendment can itself overcome even a compelling governmental interest). Attempting to create "speakers free of . . . biases" through compelled speech "is a decidedly fatal objective" which runs contrary to the First Amendment and must be rejected. *Hurley,* 515 U.S. at 579. Constitutionally, the government cannot be permitted to place any interest, however "compelling," above the right not to express a message contrary to one's convictions.

III. HISTORY AND TRADITION AS AN ANCHOR FOR COMPELLED SPEECH.

"This Court's precedents do not permit governments to impose content-based restrictions on speech without "'persuasive evidence . . . of a long (if heretofore unrecognized) tradition'" to that effect." *NIFLA*, 138 S.Ct. at 2372 (*quoting Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 792 (2011)). By the same token, the government's right to compel speech should be rooted in, and limited to, genuine *governmental* interests validated by historical practice. Speech should only be compelled where it is necessary to the carrying out of traditional governmental functions.

For example, voting and election law contain elements of compelled speech (e.g., voter registration and identification laws) specifically tied to the traditional government function of conducting elections. *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 158 (1978) ("conduct of the elections themselves is an exclusively public function").

The authority of the government to compel speech in the interest of assessing and collecting taxes cannot be reasonably questioned. Other examples of traditional government functions that necessitate compelling private citizens to speak when they might wish to remain silent abound: taking the census, conducting jury voir dire, issuing licenses.[2]

Less plentiful are instances where the government may permissibly compel a private individual or entity to convey *its* message, even if the message be "purely factual and

noncontroversial." *Zauderer*. Had the state compelled *Zauderer* to inform clients that free legal services are available elsewhere, the outcome might have been different, or at least not so easily reached. There is room for much governmental mischief and favoritism in even "purely factual" disclosures.

Moreover, while government-mandated disclosures related to health and safety have "long [been] considered permissible," as have consumer advisories in connection with commercial activity (*NIFLA*, 138 S.Ct. 2376), no such tradition exists to compel speech where public health and safety or consumer protection are not at issue. "While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." *Hurley*, 515 U.S. at 579. Limiting compelled utterance of even "factual and uncontroversial" government messages to the service of traditional government functions may provide a surer footing than an examination of whether the compelled speech "alters the content" of the speaker's message.

As to compelling a speaker to convey a message contrary to his conscience or beliefs, as Petitioners point out, this Court has never approved such compulsion under the strict scrutiny standard (Brief of Petitioners are 36), and it is difficult to conceive of a situation where compelled speech outside the categories outlined in *NIFLA*

would be necessary to the carrying out of a traditional government function.

Certainly, neither the Tenth Circuit nor the state of Colorado has provided any justification under the circumstance presented in the instant case. Indeed, the former goes dangerously far with an irrational justification for compelled speech that the dissent fairly but reluctantly characterized as Orwellian. Pet. App. 51a. In the lower court's truncated view of the First Amendment, Petitioner may be compelled to speak against her conscience by the full power of the government apparatus in order that she provide her "unique" speech-based contribution to the marketplace. But the power of her artistic creativity comes from acting consistently with her conscience. Thus, even if the state were to succeed in forcing her to violate her conscience, the result would be low quality graphic design work, forming the basis for a respondents' next assault, in which commissions and judges would sit in judgment over the quality and sincerity of her efforts.

More frighteningly, however, such a view of a "compelling" government interest "in ensuring equal access to the commercial marketplace" (Pet. App. 32a) could be broad enough to compel a pro-life physician, a pro-life nurse or a pro-life pharmacist into expressive conduct contrary to their pro-life conscience because no one else can provide their unique learning, experience, and talents (the exact "quality and nature" of their individual expression as the lower court characterized it, Pet. App. 29a). Under this all-encompassing view of the legitimacy of compelled

speech, the State could compel anyone, unique and unrepeatable individual that they are, to provide any service that the State favors and deems equivalent to other services, no matter how irrational, immoral, or repugnant to their conscience (i.e., abortion, assisted suicide or euthanasia). Nothing in the Common Law of England, the arguments of the Founders or drafters of the Constitution nor any opinion of this Court has gone to this extreme. And, nothing in this Country's traditions or history has ever promoted or accepted such a strained and outrageously broad view of the power of Government.

IV. PRE-EMPTING AN EXPANSION OF TRADITIONAL GOVERNMENT FUNCTIONS.

Grounding permissible compelled speech in history and tradition will lead naturally to several specific guardrails around the government's power. Of these, one has particular significance to this case, and another to Amici's interest in where compelled speech could lead.

First, the government interest in combatting and eradicating discrimination has historical roots only with respect to racial discrimination. In this area of law, this Court has taken care to consistently hold that the state's aim to further race-based equal protection is compelling. *See, e.g., Johnson v. California*, 543 U.S. 499, 505 (2005) ("Racial classifications raise special fears that they are motivated by an invidious purpose.")

Discrimination against African-Americans in particular has been the focus of landmark Supreme Court cases concerning racial equal protection, in an effort to remedy the unique social effects of past discrimination and the legacy of slavery. *See, e.g., The Civil Rights Cases*, 109 U.S. 3, 11 (1883); *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955); *Loving v. Virginia*, 388 U.S. 1 (1967).

This Court's precedents have distinguished between racial discrimination and other forms of discrimination that do not trigger strict scrutiny, such as discrimination based on sex, age, or disability. *City of Cleburne v. Cleburne Living Center*, 473 US. 432, 441-42 (1985) (age and mental disability discrimination does not trigger strict scrutiny); *Craig v. Boren,* 429 U.S. 190, 197 (1976) (sex-based equal protection claims assessed under the "important" state interest standard).

In short, government should not be allowed to put the weight of our nation's commitment to atone for centuries of maltreatment of African-Americans at the service of whatever newly-minted victim class it decides to favor this decade.

Second, government has a historical and traditional interest in preserving innocent human life from destruction. See Letter from Thomas Jefferson to the Republican Citizens of Washington County, Maryland (March 31, 1809), in 8 The Writings of Thomas Jefferson 165 (H.A. Washington ed. 1871) (stating that "[t]he care of human life and happiness, and not their destruction, is the first and only legitimate object of good government").

This Court has already acknowledged the "unqualified [governmental] interest in the preservation of human life." *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997) (quoting *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 282 (1990)). Along with eradicating or ameliorating racial discrimination, the preservation of human life from deliberate destruction is a uniquely traditional government function, indeed duty.

This Court's jurisprudence recognizes that a state's unique interest in the "preservation" of human life against assault or destruction is so foundational that it may affirmatively promote that interest in various ways, including imposing specific informed consent protocols on abortion. *See Casey*, *supra*, 505 U.S. at 883 (government may "further its legitimate goal of protecting the life of the unborn by enacting legislation aimed at ensuring a decision that is mature and informed, even when, in so doing, the State expresses a preference for childbirth over abortion"). Indeed, specifically in the context of abortion, the Court has recognized that abortion is a "unique act," *id.* at 852, and is "inherently different from other medical procedures," *Harris v. McRae*, 448 U.S. 297, 325 (1980). Abortion is different from other medical procedures because in abortion "the fetus will be killed." *Gonzalez v. Carhart*, 550 U.S. 124, 159 (2007).

But there is no converse tradition supporting a governmental interest in taking innocent human life, and thus there is no "two-way street" for compelled speech relating to abortion. No speaker

should be forced to speak, and particularly to speak a message at odds with his or her conscience or beliefs, in the service of a purported governmental interest in promoting or enabling the extinguishing of innocent human lives.

CONCLUSION

Amici respectfully urge this Court to reverse the lower court's decision and repudiate its broad and dangerous rationale.

Respectfully submitted,

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