No. 21-476

In The Supreme Court of the United States

303 CREATIVE LLC AND LORIE SMITH,

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* THE CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

The Catholic League for Religious and Civil Rights, founded in 1973 by the late Father Virgil C. Blum, S.J., is the Nation's largest Catholic civil rights organization. As a non-profit organization, the Catholic League is dedicated to safeguarding the religious freedom and free speech rights of Catholics whenever and wherever they are threatened. Both the letter and spirit of the First Amendment motivate every aspect of the Catholic League's work defending the right of all Catholics—lay and clergy alike—to participate in American public life without defamation or discrimination.

To advance these efforts, the Catholic League submits this brief in support of the Petitioners.

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[1] Pursuant to Rule 37.3(a), both the Petitioners and the Respondents have provided blanket consents to the filing of amicus briefs. In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part. No person or entity other than Amicus Curiae and the counsel below contributed the costs associated with the preparation and submission of this brief.

INTRODUCTION & SUMMARY OF THE ARGUMENT

It is a fundamental principle of our Republic that the Framers understood robust religious liberty protections as not only appropriate but necessary to protect the religious observant from the tyrannical pressures of authority. While debating the extent to which the Constitution should enshrine protections for religious freedom during the First Congress, Representative Daniel Carroll of Maryland—one of the few Catholics among the Constitution's Framers—remarked "the rights of conscience are, in their nature, of peculiar delicacy, and will little bear the gentlest touch of governmental hand." 1 Annals of Cong. 757-58 (Joseph Gales ed., 1834) (Aug. 15, 1789).

Nowhere are the rights of the religious more delicate than when they intersect with the freedom to put faith into action, belief into words. If the robust religious freedom protections guaranteed by our Constitution are to have any meaning, they must be capable of shielding a sincere religious believer from being coerced into speaking against the core tenants of her faith. To hold otherwise would be to permit the heavy hand of government to extinguish religious practice. This the Constitution will not allow.

The Founders understood that the First Amendment, as drafted, protected all religious sects in their right to speak freely in accordance with their faith. Indeed, the Founding Generation believed protections for religious liberty to be of utmost import. Since its founding, America has been gripped

in debate over religious liberty. Even before the colonies declared their independence, there were energetic discussions over the bounds of religious toleration versus a full freedom to exercise religion (with only limited exceptions). Ultimately, the Constitution's drafters settled on James Madison's view of an unalienable right to practice one's religious faith. Owed to an understanding that the Governor of the Universe supersedes any earthly authority, religious convictions were understood to command greater deference than mere personal opinions. Where opinion was required to yield to the law, tensions between law and religious belief often resulted in exemption for the believer.

The Founding Generation also viewed religious liberty as encompassing more than mere matters of conscience or decisions on the rightness or wrongness of acts. Instead, the full exercise of religion offered a right to *act* in accordance with one's faith and, necessarily, included protection from government compelled speech that violated a believer's firmly held religious convictions. This distinction was perhaps most clearly expressed in the early colonies' anti-Catholic prejudices. In colonial Georgia, for example, while all worshipers were vested by its Charter with a liberty of conscience, Catholics were expressly excluded from protections for the more robust free exercise of religion. McConnell, The Origins and Historical Understanding of Free Exercise of Religion, 103 Harv. L. Rev. 1409, 1489-90 (1989) (hereinafter McConnell, Origins).

Informed by the debates and experiences of their time, the Founders opted to include among the Constitution's protections the more extensive free

exercise of religion. In so doing, they extended the maximum protections available to all who professed belief in a Universal Sovereign. These protections, it was understood, included a right to act out belief and to speak, or refrain from speaking, freely, in accordance with faith.

With this understanding as background, it is clear the First Amendment provides dual protections for religious expression (or non-expression) in its guarantees of free speech and free religious exercise. This reality compels the conclusion that religious speech enjoys the highest constitutional protection. Certainly, this is consistent with the Founders' understanding of robust religious liberty protections, as revealed in the text, history, and tradition of the First Amendment.

This Court's recent religious liberty jurisprudence concurs with the Founders' view of full-throated religious liberty protection. Religious observers have welcomed the relief from government oppression. No longer can religious believers be excluded solely because of their religious identity. Free are the religious to express their religious views without fear of government reprisal. This Court's precedents have been unequivocal: if government can achieve its means without burdening religion, the Constitution almost always requires that it must.

Another truism is derived from this Court's precedents. When religious liberty concerns are coupled with free expression, the Constitution demands the most exacting scrutiny. That is because the First Amendment, as understood from the Founding, provides special protection for the

religious, their right to speak freely, and their right to refrain from speaking. Distinct from pure commercial speech, religious speech demands a higher constitutional protection. That is why, to Amicus Curiae's knowledge, government compelled religious speech has never been held to survive strict scrutiny.

Against this backdrop, the Tenth Circuit's opinion cannot stand. Although purporting to apply strict scrutiny, the Tenth Circuit's analysis is rife with flaws, each one fatal to the court's conclusion. From the outset, the Tenth Circuit failed to recognize the preferred status of Ms. Smith's free speech rights, grounded as they are in her religious beliefs. This failure is only compounded by the Tenth Circuit's lethargic narrow-tailoring analysis. Far from the exacting analysis this Court requires, the Tenth Circuit settles into a now familiar pattern to those of faith—ostracizing Ms. Smith from society because of her religious identity.

Once again, this Court must reverse yet another assault on religious freedom by declaring that where, as here, free speech and religion intersect, constitutional protections are at their greatest.

ARGUMENT

I. AS ORIGINALLY UNDERSTOOD, THE FIRST AMENDMENT PROTECTED THE RIGHT OF THE RELIGIOUS TO SPEAK AND TO REMAIN SILENT.

The First Amendment is "unique in form among amendments to the Constitution."[2] It is drafted, not as a grant of privileges or rights to the people, but as a disability on Congress' ability to act. Report to the Attorney General, *supra* note 2, at 15–16. In its entirety, the First Amendment reads:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const., Amdt. 1.

In barring certain kinds of laws, the First Amendment recognizes a pre-existing "immun[ity] from such legislative action." Report to the Attorney General, *supra* note 2, at 16. This reflects an understanding by the Founding Generation that these "are pre-existent rights—inalienable rights—

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[2] Office of Legal Policy, Dept of Justice, Report to the Attorney General: Religious Liberty Under the Free Exercise Clause at 15 (1986) (hereinafter Report to the Attorney General).

and not mere civil privileges conferred by a benevolent sovereign." *Id.*

Taken together, the text, history, and philosophy of the First Amendment establish the principle that "the government has no right to interfere with the free exercise of religion" unless the "government action is necessary to prevent manifest danger to the existence of the state; to protect public peace, safety, and order; or to secure the religious liberty of others." *Id.*, at v. And, even then, only if the government deploys "the least restrictive means necessary to protect these interests." *Id.* This is true as a matter of the First Amendment's Religious Liberty Clauses. And because freedom of religion cannot be divorced from freedom of expression, it is even more true when the government tries to force a believer to speak in a way that cannot be reconciled with her religious convictions.

A. Religious liberty was profoundly important to the Founding Generation; religious convictions were understood to receive greater deference than mere personal opinion.

1. The Founding Generation was uniquely attuned to issues regarding the proper relationship between religion and government. Indeed, at the time of America's founding there was "an intense and controversial theoretical debate" of these issues involving "[m]ost of the great political thinkers of the period." McConnell, Origins, at 1430. These thinkers informed the Founders' own debates on the issue and undoubtedly "influenced the American solution to the problem." *Id.*

John Locke, perhaps more than any other philosopher who contributed to the ideas underpinning America's founding, provided the "most extensive" discussion of religion and most directly influenced the Framers' drafting of the First Amendment. *Id.* Locke was an early and influential theoretical thinker and advocate for religious freedom. *Id.*, at 1431. In his view "religious rivalry and intolerance" were "among the most important of political problems," and "[r]eligious intolerance was inconsistent both with public peace and with good government." *Id.*

Locke's solution, however, was an "understanding of religious toleration," that "expressly precludes free exercise exemptions." *Id.*, at 1435. To Locke, when "individual conscience conflicts with the governmental policy, the government will always prevail and the individual will always be forced to submit or suffer the punishment." *Id.* Locke's influence on the drafters of the First Amendment makes it all the more remarkable that his view did not triumph with America's founding.

The American Revolution upended the preexisting relationship between religion and government, especially in states where the Anglican Church had the most influence. *Id.*, at 1436. "America was in the wake of a great religious revival," that brought with it a "drive for religious freedom." *Id.*, at 1437–38. Along with this drive came a push from "religious supporters of disestablishment and free exercise" to enshrine "constitutional protections" for religious freedoms "at the federal level." *Id.*, at 1440.

This movement was encapsulated in debate surrounding the religious liberty clause in Virginia's 1776 Bill of Rights. When George Mason proposed using the Lockean phrase "toleration of religion," James Madison objected, complaining that the phrase implied an act of legislative grace (which, to Locke, it did). *Id.*, at 1443. Madison was not alone among the Founding Generation in rejecting this concept. George Washington and Thomas Paine similarly eschewed "toleration," decrying its implication of government "indulgence" rather than a fundamental, preexisting right. *Id.*, at 1443–44.

Moreover, Madison objected to Mason's proposal because it excepted from even the "toleration" of religious freedom any instance where "under color of religion any man disturb the peace, the happiness, or safety of society." See G. Hunt, James Madison and Religious Liberty, 1 Ann. Rep. Am. Hist. A. 163, 166 (1901). It was Madison's belief that such phrasing "might easily be so twisted as to oppress religious sects under the excuse that they disturbed 'the peace, the happiness, or safety of society.'" *Id.*

Madison's objections were heard by Virginia's assembly. As adopted, Virginia's Bill of Rights promised that all "are equally entitled to the free exercise of religion, according to the dictates of conscience," and reminded only "that it is the mutual duty of all to practice Christian forbearance, love, and charity towards each other." Report to the Attorney General, *supra* note 2, at 102–03.

2. This early debate between Madison and Mason bears witness to what this Court has long noted—that Madison was "the leading architect of the

religion clauses of the First Amendment." *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 565 U.S. 171, 184 (2012) (internal quotation marks omitted). Madison's rejection of religious tolerance in favor of full and free religious expression permeates his *Memorial and Remonstrance*. Explaining that "[t]he Religion then of every man must be left to the conviction and conscience of every man," Madison understood that it is not just "the right of every man to exercise it as these may dictate," but further "the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him." J. Madison, Memorial and Remonstrance § 1 (1785), *reprinted in Everson* v. *Bd. of Educ.*, 330 U.S. 1, 64 (1947). This right, Madison admonished, "is in its nature an unalienable right." *Id.*

Madison expounded his view that "[t]his duty is precedent both in order of time and degree of obligation, to the claims of Civil Society." *Id.* Before anyone is "a member of Civil Society," they are "considered as a subject of the Governor of the Universe." *Id.* For this reason, "in matters of Religion, no man's right is abridged by the institution of Civil Society." *Id.* But Madison went further. "[I]f religion be exempt from the authority of the Society at large, still less can it be subject to that of the Legislative Body." *Id.*, at § 2, *reprinted in Everson*, 330 U.S., at 65. Legislators who "encroach[]" on the rights of the people, Madison said, "exceed the commission from which they derive their authority, and are Tyrants." *Id.*

Recognizing that Madison's *Memorial and Remonstrance* is not law, see *City of Boerne* v. *Flores*,

521 U.S. 507, 541 (1997) (Scalia, J., concurring), it nonetheless offers a clear understanding of why the Founding Generation thought it so crucial to memorialize the inalienable freedom of religion in the First Amendment. And Madison's defense of the American conception of religious liberty merely echoed the prevalent thought at the founding "of the difference between religious faith and other forms of human judgment." McConnell, Origins, at 1496.

At the Founding, the prevailing view was that the "opinions of individuals" can not take "precedence over the decisions of civil society." *Id.* The same was not true for religious convictions. "Conflicts arising from religious convictions were conceived not as a clash between the judgment of the individual and of the state, but as a conflict between earthly and spiritual sovereigns." *Id.* In those instances, the person holding the religious conviction "was not seen as the instigator of the conflict; the believer was simply caught between the inconsistent demands of two rightful authorities, through no fault of his own." *Id.* This view is essential to understanding the Founders' belief that "freedom of religion is unalienable because it is a duty to God and not a privilege of the individual." *Id.*, at 1497.

3. Bolstering this understanding, the historical record surrounding adoption of the Bill of Rights suggests that the First Amendment's use of the term "religion" was a deliberate choice. See McConnell, Origins, at 1488. Although "[t]he recorded debates in" both chambers of Congress "cast little light on the meaning of the free exercise clause," looking at successive drafts of the clause from its consideration and debate in the First Congress are especially

enlightening. *Id.*, at 1481, 1483. While earlier drafts of the First Amendment used the phrase "rights of conscience," the final version that emerged enshrined in the First Amendment a protection for the "free exercise of religion." *Id.*, at 1488. This phrasing lends further support to the Founders' understanding of religious freedoms.

To the Founders, "[b]elief in a Supreme Being was" essential to "religion." Report to the Attorney General, *supra* note 2, at 9. Indeed, "[t]he historical materials uniformly equate 'religion' with belief in God or in gods." McConnell, Origins, at 1493. These references "can be extended without distortion to transcendent extrapersonal authorities not envisioned in traditionally theistic terms"—for example, Madison's use of "Creator," "Governor of the Universe," and "Universal Sovereign," imply "an attempt at a definition more compendious than the familiar Judeo-Christian God, but it retains the distinction between transcendent authority and personal judgment." *Id.*

Religion, as understood by the Founders and expressed in the First Amendment, then, is best defined to encompass "a system of beliefs, whether personally or institutionally held, prompted by the acceptance of transcendent realities or acknowledging extratemporal actions." Report to the Attorney General, *supra* note 2, at 26–27. This interpretation of religion is both accurate to the Founders' understanding and consistent with their view that religion encompasses "duties that were beyond the jurisdiction of the state either to prescribe or to proscribe." *Id.*, at 9. To the Founders, religion encompassed a subservience to a

"transcendent reality," which if abandoned could unleash "extratemporal consequences." *Id.*, at 29. This explains their motivation to preserve a robust freedom from government "interfere[nce] with such beliefs or duties." *Id.*

B. The Founding Generation's understanding of religious liberty encompassed protection for believers from compelled speech that violates firmly held religious beliefs.

1. The least controversial point about the phrase "free exercise" is that "by definition, the words denote action or activity." *Id.*, at 19. To the Founders, religious liberty undoubtedly included "religiously motivated *conduct* as well as belief." McConnell, Origins, at 1488 (emphasis added). This point bears emphasis because of this Court's history rejecting such a reading. See *Reynolds* v. *United States*, 98 U.S. 145, 164 (1878); but see *Fulton* v. *City of Phila.*, 141 S. Ct. 1868, 1913 (2021) (Alito, J., concurring) (noting "[t]he Court ha[s] repudiated that distinction" in *Reynolds* "that the Free Exercise Clause protects beliefs, not conduct").

In substituting the "rights of conscience" in favor of a protection for the "free exercise of religion," the Framer's chose a phrase that "strongly connoted action," in place of one that suggested mere opinion or belief. McConnell, Origins, at 1489. Leading dictionaries of that era defined "exercise" to include "[l]abour of the body," "[t]ask; that which one is appointed to perform," "[a]ct of divine worship, whether public or private," or "[t]o use or practice." See *id.* (collecting dictionary definitions). Conscience,

on the other hand, was more likely to imply a "natural knowledge, or the faculty that decides on the right or wrong of actions." *Id.* (quoting N. Webster, A Dictionary of The English Language 301 (New Haven 1807)).

Particularly instructive on this distinction is the Georgia Charter of 1732. The Charter included "a liberty of conscience allowed in the worship of God, to all persons," but reserved the more exclusive right to "a free exercise of religion," only to "all such persons, except papists." *Id.*, at 1489–90. By granting Catholics only a liberty of conscience, but not the free exercise of religion, the Georgia Charter necessarily reserved a fuller right to non-Catholic worshipers. One scholar has observed that "[t]he most plausible reading of the provision is that it permitted Catholics to believe what they wished . . . but did not permit them to put their faith into action." *Id.*, at 1490.

By including a full and robust "free exercise of religion" within the First Amendment, the Founders understood that they were protecting not only the right for the religious to believe what their faith taught, but to put those beliefs into action. To conclude otherwise would be to "trivialize the idea of religion by separating thought from life, faith from works." Report to the Attorney General, *supra* note 2, at 31. Possessing "a right to believe something in one's mind without the freedom to utter it, advocate it, or even translate it into life," is hardly a substantive freedom at all. *Id.*, at 31–32.

2. Consistent with the Founders' understanding of a robust religious liberty protection that included the right to act out your faith was the axiom that

action naturally includes expression or the freedom to refrain from expression that conflicts with belief. Although early religious liberty controversies were relatively limited, the historical record includes examples of protections for religious exercise intertwined with such expressive activity.

An early source of common conflict, for example, arose around the issue of oath requirements. Oaths served as "the principal means of ensuring honest testimony and solemnizing obligations." McConnell, Origins, at 1467. But many early religious sects refused to take an oath, believing it was in conflict with the teachings of the New Testament.[3] *Id.* Because oaths were required before court testimony, this refusal often left these sincere religious objectors without access to the court system. *Id.*

In response, many of the early colonies adopted alternatives, allowing religious dissenters to take a pledge or make an affirmation rather than to swear an oath. *Id.*, at 1467–68 ("By 1789, virtually all of the states had enacted oath exemptions."). This simple solution permitted religious sects access to the court system, without requiring them to act out of step

[3] See Matthew 5:33-37 ("Again, ye have heard that it hath been said by them of old time, Thou shalt not forswear thyself, but shalt perform unto the Lord thine oaths: But I say unto you, Swear not at all; neither by heaven; for it is God's throne: Nor by the earth; for it is his footstool: neither by Jerusalem; for it is the city of the great King. Neither shalt thou swear by thy head, because thou canst not make one hair white or black. But let your communication be, Yea, yea; Nay, nay: for whatsoever is more than these cometh of evil.").

with their religious beliefs or to make an expression they found incompatible with their faith.

A still more extreme example of laws yielding to expressive activities of religious sects in the Founding Generation can be found in colonial Georgia. There, the Trustees of Georgia granted certain groups of religious refugees a general exemption from the laws that allowed them "to organize themselves in accordance with their own faith." *Id.*, at 1471. One historian described one such group from Salzburg—which formed the town of Ebenezer—as "a state within a state, a sort of theocracy under the direction of their minsters with daily conferences of the entire congregation in which God's guidance was invoked at the beginning and the end." *Id.* Although these groups where required to obey certain colonial laws pertaining to military service, property, and good governance, they were "otherwise free to govern themselves." *Id.* at 1471 n.312

Another founding era example of religious exemptions for expressive action appeared in North Carolina and Maryland. There, laws exempted members of certain religious sects from a requirement to remove their hat in court. *Id.* The religious objectors viewed such an action as "a form of obeisance to secular authority forbidden by their religion." *Id.*, at 1472. Rather than forcing members of these sects to choose between access to the courts or expressing themselves in violation of their religious beliefs, states offered an exemption.

While this example may seem trivial by today's standards, it was very much on the minds of the

Founding Generation. At the time, "[o]ne of the most notorious courtroom cases of religious intolerance in England involved William Penn's refusal to remove his hat when he appeared in court" to face indictment for speaking to an unlawful assembly. *Id.* When Penn refused to remove a court-furnished hat from his head in respect to the court, he was held in contempt and imprisoned. *Id.* This case attracted significant attention in America, and undoubtedly influenced the exemptions passed in North Carolina and Maryland. *Id.*

Indeed, the importance of this exemption was demonstrated in debates over the Bill of Rights in the First Congress. *Id.,* at 1472, n.320. In ridiculing the list of freedoms proposed to be protected, Theodore Sedgwick of Massachusetts remarked "they might have declared that a man should have a right to wear his hat if he pleased . . . but he would ask the gentleman whether he thought it necessary to enter these trifles in a declaration of rights." *Id.* (citation omitted). With unmistakable reference to the Penn case, John Page of Virginia replied:

> The gentleman from Massachusetts . . . objects to the clause, because the right is of so trivial a nature. He supposes it no more essential than whether a man has a right to wear his hat or not; but let me observe to him that such rights have been opposed, and a man has been obliged to pull off his hat when he appeared before the face of authority; people have also been prevented from

> assembling together on their lawful occasions.

Id. (citation omitted). Certainly, the Founders were acutely aware of the potential for abuse by authorities absent a robust religious liberty protection that clearly extended to actions, including religiously motivated expression or non-expression.

3. Taken together, the Free Exercise Clause and the Free Speech Clause elevate the freedom not to speak out of accordance with firmly held religious beliefs to the highest echelon of First Amendment protection. This conclusion is buttressed by the First Amendment's other guarantees—e.g., freedom of assembly and freedom to petition the government. If the Free Exercise Clause conferred nothing more than a "right to express religious beliefs," it would "add nothing to the First Amendment, since that right is fully protected by the right to assemble, speak, and publish." Report to the Attorney General, *supra* note 2, at 19. Indeed, "because religious expression is doubly protected by the constitutional text" it would make little sense if it were "less protected in practice." *Id.*, at 19, n.30.

The examples cited above represent a clear understanding by the Founding Generation that civil laws, even of general applicability, must yield when they conflict with religious expression or the freedom to refrain from expression on the basis of a sincerely held religious belief. As it seems early legislative bodies believed exemptions in such cases were required by the principle of free exercise, it stands to reason that the Framers understood "similar applications of the principle" would guide the courts

in these cases, once "entrusted with the responsibility of enforcing" First Amendment guarantees. McConnell, Origins, at 1473.

Although there was a dearth of litigation over religious liberty protections in the early years of the Republic, what scarce examples exist support this view. Consider, for example, the earliest state court opinion addressing the issue of a religious liberty exemption, *People* v. *Phillips*. In that case, the court held that the New York Constitution protected a Catholic priest from compulsory testimony to matters learned while administering the Sacrament of Confession. See *id.*, at 1504.

Important to the *Phillips* court was the notion that requiring testimony from the priest to "what he receives in confession, is to declare that there shall be no penance; and this important branch of the Roman Catholic religion would be thus annihilated." *Id.* (citation omitted). The court did not believe it was compatible with religious liberty to compel expression that would so eviscerate a core belief of Catholic faith. Rather than establishing a special privilege for adherents to the Catholic faith, though, the court viewed its actions as necessary to ensure Catholics received *the same* treatment as Protestants (the dominant faith at the time) in the administration of their sacraments. *Id.*, at 1504-05.

The through line to the Founding Generation's understanding of religious liberty was a belief that such freedom was without substantive meaning if it did not encompass expression, and non-expression, rooted in religious belief. Noted Nineteenth Century

Constitutional commentator, Michigan Supreme Court Justice Thomas Cooley, explained:

> An earnest believer usually regards it as his duty to propagate his opinions, and to bring others to his views. To deprive him of this right is to take from him the power to perform what he considers a most sacred obligation.

T. Cooley, A Treatise on the Constitutional Limitations 665 (7th ed. 1903). Put another way: religious freedom, as understood by the Founders, necessarily encompasses the freedom to put belief into action, to engage in expression consistent with the dogmas of your faith, and to refrain from expression that may engender extratemporal consequences.

II. THIS COURT'S PRECEDENTS—ESPECIALLY ITS DEMANDING APPLICATION OF THE LEAST-RESTRICTIVE MEANS TEST—DEMONSTRATE AGREEMENT WITH THE FOUNDING GENERATION'S ROBUST RELIGIOUS LIBERTY PROTECTIONS.

This Court has a commendable history of recognizing the principles discussed above. In particular, the Court's recent religious liberty jurisprudence has been a welcome reprieve for members of all faith communities who have been disheartened by the antagonism of some government actors. See, *e.g.*, *Espinoza* v. *Mont. Dept of Revenue*, 140 S. Ct. 2246 (2020); *Masterpiece Cakeshop, Ltd.* v. *Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018); *Hosanna-Tabor*, 565 U.S. 171.

Of particular note is the Court's insistence on a forceful application of the strict scrutiny test to any restriction that burdens religious liberty. Indeed, "in this highly sensitive constitutional area, 'only the gravest abuses, endangering paramount interests, give occasion for permissible limitation.'" *Sherbert* v. *Verner*, 374 U.S. 398, 406 (1963) (quoting *Thomas* v. *Collins*, 323 U.S. 516, 530 (1945)).

1. A few examples illustrate the point. Consider *Burwell* v. *Hobby Lobby Stores, Inc.*, where this Court considered a government-imposed contraceptive mandate on private employers who believed such a requirement to be against their religious beliefs. 573 U.S. 682, 726 (2014).[4] While assuming, without deciding, that the government's interest was compelling, the Court nonetheless found that the least-restrictive-means standard was not met. *Id.*, at 728. Identifying alternative solutions to the rigid mandate imposed by the government, the Court explained, "[t]he least-restrictive-means standard is exceptionally demanding." *Id.* As Justice Kennedy explained, religious freedom "implicates more than just freedom of belief"; rather "[i]t means, too, the right to express those beliefs and to establish one's religious (or nonreligious) self-definition in the political, civic, and economic life of our larger

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[4] *Hobby Lobby* was decided under the Religious Freedom Restoration Act of 1993 ("RFRA"), which requires as an initial matter finding a substantial government burden on the exercise of religion; if such a burden exists, the Court must determine whether there is a compelling governmental interest and that the burden is the least restrictive means of furthering that interest. *Hobby Lobby*, 573 U.S., at 694-95.

community." *Id.*, at 736–37 (Kennedy, J., concurring).

In another instance, this Court found Missouri violated a church's religious liberty guarantees under the First Amendment when it categorically denied their participation in a grant program for playground surface materials. *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 137 S. Ct. 2012, 2017, 2025 (2017). Finding that otherwise eligible grant recipients were disqualified solely because of their religious nature, this Court held that such a penalty worked against the free exercise of religion and "triggers the most exacting scrutiny." *Id.*, at 2021. Importantly, the harm was not the denial of the grant itself but instead was Missouri's refusal to even allow the church to compete with secular organizations for grant funds solely on the basis of its religious identity. *Id.*, at 2022.

More recently still, this Court took up the mantle of religious liberties in *Fulton* v. *City of Philadelphia.* Despite the Catholic Church's over two centuries of dedication to serving the needy children of Philadelphia, the City in 2018 stopped referring foster children to the Catholic Social Services ("CSS") after learning the organization would not "consider prospective foster parents in same-sex marriages." *Fulton*, 141 S. Ct., at 1874–75. Finding that "it is plain" the City burdens CSS's "religious exercise by putting it to the choice of curtailing its mission or approving relationships inconsistent with its beliefs," this Court sought a review of whether such burden was "constitutionally permissible." *Id.*, at 1876. In determining that Philadelphia imposed an unconstitutional burden on CSS's religious exercise,

Fulton admonishes that "so long as the government can achieve its interests in a manner that does not burden religion, it must do so." *Id.*, at 1881.

Taken together, the precedents of this Court establish that an exacting analysis is required in religious liberty cases to determine whether the government's interest is compelling, and its burden narrowly tailored to achieve that interest. The existence of an alternative means for achieving even a compelling interest is nearly always fatal to the government's argument.

2. When religious liberty and free expression concerns intertwine, this Court has been even less hesitant to invalidate an infringing law. This skepticism is warranted, as attempts to compel expression that conflicts with an individual's religious beliefs are nothing more than indirect attempts to regulate religion itself.

In 1943, this Court took issue with a West Virginia law mandating a flag salute and pledge, when its application was challenged by a group of Jehovah's Witnesses who said such action violated their religious beliefs. *W. Va. State Bd. Of Educ.* V. *Barnette*, 319 U.S. 624 (1943). Refusing to find that "a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not on his mind," the *Barnette* Court blocked the law's enforcement. *Id.*, at 634; see also *id.*, at 645 (Murphy, J., concurring) (recognizing "[t]he right of freedom of thought and of religion as guaranteed by the Constitution against State action includes both the right to speak freely and the right to refrain from

speaking at all"). Underlying the Court's opinion was the belief that "[i]f 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." *Id.*, at 642.

Expanding on the holding in *Barnette*, the Court in *Wooley* v. *Maynard* considered a religious objection to display of the New Hampshire state motto—"Live Free or Die"—on the license plate of a car owned by Jehovah's Witness. 430 U.S. 705 (1977). In *Wooley*, the Court expressly rejected the idea that "the State may constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property." *Id.*, at 713.

Foundational to its decision was the Court's holding that the freedoms contained within the First Amendment "includes both the right to speak freely and the right to refrain from speaking at all." *Id.*, at 714. It matters not whether most agree with the message the State seeks to force a person to convey; the First Amendment unquestionably "protects the right of individuals to hold a point of view different from the majority and to refuse to foster . . . an idea they find morally objectionable." *Id.*, at 715. Finding the existence of a governmental burden, the Court was left to question whether a substantial governmental interest existed and, if so, whether the burden was narrowly tailored to advance that interest. Even assuming a legitimate and substantial interest, the Court concluded "that purpose cannot be pursued by means that broadly stifle fundamental

personal liberties when the end can be more narrowly achieved." *Id.*, at 716. New Hampshire failed that test.

In still another line of cases, this Court found that it violated Constitutional protections to subject religious observants, who went door to door distributing religious materials and soliciting for the purchase of religious books, to a government solicitation registration requirement. *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943); see also *Follett* v. *Town of McCormick*, 321 U.S. 573 (1944). Acknowledging that the practice was derived from the believer's understanding that he was "obeying a commandment of God," the Court found that the First Amendment prohibited the imposition of a generally applicable registration requirement to engage in such conduct. *Murdock*, 319 U.S., at 108, 117. Indeed, the Court went out of its way to describe the literature being distributed as "provocative, abusive, and ill-mannered." *Id.*, at 115–16. Nevertheless, "[p]lainly a community may not suppress . . . the dissemination of views because they are unpopular, annoying or distasteful." *Id.,* at 116 To allow otherwise would "be a complete repudiation of the philosophy of the Bill of Rights." *Id.*

The Court went further still, establishing that the mere fact the religious materials were being "sold" was not enough to transform "evangelism into a commercial enterprise." *Id.*, at 111. As such, the Court acknowledged heightened constitutional protections for "those spreading their religious beliefs through the spoken and printed word." *Id.* As compared to purely commercial activity, "[f]reedom of

press, freedom of speech, freedom of religion are in a preferred position." *Id.*, at 115.

Even *Employment Division* v. *Smith*, often criticized as having watered down constitutional religious liberty protections, recognized the Court's unique hostility toward burdens that implicate both the free exercise of religion and the freedom of speech. The "First Amendment bars application of a neutral, generally applicable law to religiously motivated action" when that action "involve[s] not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech." *Empl. Div.* v. *Smith*, 494 U.S. 872, 881–82 (1990). Even some precedents, decided on free speech grounds alone, were undoubtedly reinforced by touches of freedom-of-religion concerns. *Id.*

3. This much is clear: the arc of this Court's precedent bends in one incontrovertible direction. Scrutiny of any government burden is at its zenith when the burden effects an individual's exercise of their religious beliefs in a manner that implicates free speech protections. This conclusion, rooted in the history and tradition of religious exercise as understood by the Founders and enshrined in the First Amendment, demands that any such burden be subjected to the most rigorous application of strict scrutiny analysis.

It is precisely for this reason that, to the best of Amicus Curiae's knowledge, the Court has *never* issued an opinion finding that governmentally compelled religious speech satisfies strict scrutiny. See *303 Creative Ltd. Liab. Co.* v. *Elenis*, 6 F.4th

1160, 1191 (U.S. 10th Cir. 2021) (Tymkovich, C.J., dissenting) ("[T]he majority takes the remarkable—and novel—stance that the government may force Ms. Smith to produce messages that violate her conscience. . . . No case has ever gone so far.").

This case should not be the first.

III. THE TENTH CIRCUIT'S OPINION CANNOT BE SQUARED EITHER WITH THE FIRST AMENDMENT'S RICH HISTORY OR THIS COURT'S PROTECTION OF BELIEVERS' FREE SPEECH RIGHTS.

In its permissive application of strict scrutiny, the Tenth Circuit bastardized this Court's protection of free speech rights, especially as applied to religious expression. If allowed to stand, its precedent will give license to courts across this Country to humiliate members of all religious sects by compelling them to speak in contravention of their sincerely held religious beliefs. By purporting to apply strict scrutiny, the Tenth Circuit's opinion cheapened the First Amendment rights of Catholics, Protestants, Muslims, Jews, and all other believers alike.

Luckily, this precedent does not need to stand. This Court, once again, has an opportunity to admonish that the free speech protections of believers are no less than non-believers and, in fact, are heightened when faced with government regulation that would compel speech antithetical to the tenants of a believer's faith. The First Amendment commands such a result.

Although the Tenth Circuit rightly concluded that Ms. Smith's website designs are "pure speech," *303 Creative LLC,* 6 F.4th, at 1176, the Tenth Circuit wrongly concludes that the commercial nature of Ms. Smith's speech gives Colorado a regulatory hook to latch onto. *Id.*, at 1179. By failing to acknowledge the religious nature of her objection to the would-be compelled speech, the Tenth Circuit did not afford her First Amendment rights the "preferred" status they deserve.[5] Cf., *Murdock*, 319 U.S., at 115. What is remarkable is that the religious nature of Ms. Smith's objection is not disputed. See *303 Creative*, 6 F. 4th, at 1172 (Ms. Smith is "willing to create custom graphics and websites for gay, lesbian, or bisexual clients . . . so long as the custom graphics and websites do not violate [her] religious beliefs, as is true for all customers." (internal quotation marks omitted)); *id.*, at 1192 (Tymkovich, C.J., dissenting) ("In short, Colorado appears to agree that Ms. Smith does not distinguish between customers based on protected-class status and thus advances the aims of CADA. But when any customer asks Ms. Smith to create expressive content that violates her sincerely held beliefs, she will decline the request.").

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[5] Remarkably, the Tenth Circuit suggests that its sweeping holding may not apply to "all artists" if they were not engaged in "commercial activity," but rather "commissioning a mural for some charitable purpose." *303 Creative*, 6 F.4th, at 1182, n.6. To suggest that a local artist who refuses to paint a Christian mural for a church may enjoy more constitutional protections than a woman called to live out her sincerely held religious beliefs by creating custom wedding websites is, thankfully, not supported by the history or tradition of the First Amendment and the muscular protections it affords religious believers.

This failure is compounded by the Tenth Circuit's fallacy of a marketplace of one for Ms. Smith's speech. *Id.* at 1180. Such convenient analysis allowed the court to conclude "there are no less intrusive means of providing equal access to *those* types of services." *Id.* (emphasis added). But this clever reasoning flips this Court's precedent on its head. Rather than prioritize the religious speaker's objection in search of a less restrictive means, the court below merely concluded that she is the only one and therefore no other means will suffice. But, where, as here, the government can achieve its interests without burdening religion, the Constitution requires it to do so. *Fulton*, 141 S. Ct., at 1881. The analysis is also anomalous in the free speech context because it cannot be that the more unique and distinctive the speech, the *less* First Amendment protection it deserves. But that is the staggering breadth of the Tenth Circuit majority's conclusion. See *303 Creative*, 6 F.4th, at 1204-05 (Tymkovich, C.J., dissenting).

Moreover, by categorizing Ms. Smith as nothing more than a "public accommodation," the Tenth Circuit minimized her right to participate in the marketplace, even as a woman of faith. See *303 Creative*, 6 F.4th, at 1181 ("[W]hether an exception limits market access depends upon the uniqueness of the public accommodation's goods and services—not the sincerity of the public accommodation's beliefs.").

To deny a benefit to those "who engage in certain forms of speech is in effect to penalize them for such speech," and constitutionally, no different than conditioning a benefit on a person's "willingness to violate a cardinal principle of her religious faith;" the

result is the same: to "deter[] or discourage[] the exercise of First Amendment rights of expression." *Sherbert*, 374 U.S., at 405-06 (citing *Speiser* v. *Randall*, 357 U.S. 513, 518 (1958)). Here too, Colorado seeks to impose the same constitutional harm: speak in violation of your core religious faith or lose the benefit of marketplace participation. Put simply, Colorado seeks to punish Ms. Smith for her sincerely held religious beliefs. See also *Trinity Lutheran Church*, 137 S. Ct., at 2021–22 (finding a constitutional violation where a burden puts religious believers "to a choice: [] participate in an otherwise available benefit" or maintain your religious identity).

The same fundamental principle must apply to free speech and religious practices when they act in concert: "In an open, pluralistic, self-governing society, the expression of an idea cannot be suppressed simply because some find it offensive, insulting, or even wounding." *Fulton*, 141 S. Ct., at 1924-25 (Alito, J., concurring). To lose this principle is to lose the "preservation of religious freedom." *Id.*, at 1925. That is because "[s]uppressing speech—or religious practice—simply because it expresses an idea that some find hurtful is a zero-sum game." *Id.*

This Court's jurisprudence confirms this link between religious exercise and free speech because this Court's opinions "make it perfectly clear that discrimination against religious, as opposed to secular, expression is viewpoint discrimination." *Nurre* v. *Whitehead*, 559 U.S. 1025, 1028 (2010) (Alito, J., dissenting). And because viewpoint discrimination is "an egregious form of content discrimination," *Rosenberger* v. *Rector & Visitors of*

the Univ. of Va., 515 U.S. 819, 829 (1995), it brings with it heightened constitutional skepticism.

Although some may find Ms. Smith's religious beliefs objectionable, "religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned." *Obergefell* v. *Hodges*, 576 U.S. 644, 679 (2015). "An open society can keep that promise while still respecting the 'dignity,' 'worth,' and fundamental equality of all members of the community." *Fulton*, 141 S. Ct., at 1925 (Alito, J., concurring) (quoting *Masterpiece Cakeshop*, 138 S. Ct., at 1727). Ms. Smith should be free to practice all aspects of her faith, without fear of government-compelled expression against her sincerely held religious beliefs. The Constitution demands no less.

CONCLUSION

"[T]here is before us the right of freedom to believe, freedom to worship one's Maker according to the dictates of one's conscience, a right which the Constitution specifically shelters." *Barnette*, 319 U.S., at 645 (Murphy, J., concurring). For this Court, there is "no loftier duty or responsibility than to uphold that spiritual freedom to its farthest reaches." *Id.*

To exclude Ms. Smith from offering her services—solely on the basis of her religious identity—would be "odious to our Constitution." *Trinity Lutheran Church*, 137 S. Ct., at 2025.

For the foregoing reasons, the Court should reverse the opinion of the Tenth Circuit.

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