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 *AMICI CURIAE* FIRST AMENDMENT SCHOLARS IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

Amici are legal scholars who have dedicated years to teaching, studying, and writing about the First Amendment. The names and associations of Amici are printed in an appendix following the conclusion of this brief.

[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 the counsel below contributed the costs associated with the preparation and submission of this brief.

INTRODUCTION & SUMMARY OF THE ARGUMENT

While singular in some respects, the facts of this case carry a familiar echo from this Court's past precedents rejecting government compelled affirmation in its many forms. Too often, the Court has had to step in to halt state regulation forcing private citizens to mouth words against their conscience, which is anathema to the First Amendment. Perhaps no example rings louder than the Court's initial pronouncement of the compelled speech doctrine, which addressed West Virginia's effort to force its school children to speak words contrary to their most fundamental beliefs. *West Virginia State Bd. of Educ.* v. *Barnette*, 319 U.S. 624 (1943). The Court rightly enjoined that regulation, affirming that the First Amendment provides robust and resilient protection against *all* government efforts to compel private individuals to speak a message contrary to their convictions to achieve its ends. In what is widely recognized as one of the most poignant and enduring passages from the Court's jurisprudence, Justice Robert H. Jackson wrote:

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

Id., at 642.

This case presents no such exception. Despite the Constitution's unequivocal, time-honored protection of the right *not* to speak, Colorado, through its Anti-Discrimination Act ("CADA"), now seeks to do the same thing that West Virginia and others have attempted: force its citizens to speak the message it believes they should speak to further its ends. This time, instead of advancing the government's interests in promoting patriotism, "national unity," and "national security," see *Barnette*, 319 U.S., at 640, Colorado seeks to remedy an "invidious history of discrimination" based upon sexual orientation. 6 F.4th 1160, 1178 (10th Cir. 2021), Pet.App. 23a–24a. (case below). To accomplish this, CADA requires individuals like Ms. Lorie Smith, through her company's website designs, to speak a message against her religious conscience—thereby "prescrib[ing]" to her "what shall be orthodox" and "forc[ing]" her "to confess" through her website's content a message contrary to her fundamental beliefs, see *Barnette*, 319 U.S., at 642.

The Tenth Circuit acknowledged these points and more. It found that the "speech element is even clearer here than the Court's decision in *Hurley* [v. *Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995)], because [Ms. Smith] actively create[s] each website, rather than merely hosting customer-generated content on [303 Creative's] online platform." Pet.App. 21a. The court also acknowledged that CADA "'*compels*' [Petitioners] *to create speech* that celebrates same-sex marriages." Pet.App. 22a (emphasis added). And because CADA compels speech, the court ruled that "it also works as a content-based restriction."

Pet.App. 23a. This is because, under CADA, Ms. Smith and 303 Creative "cannot create websites celebrating opposite-sex marriages, unless they also agree to serve customers who request websites celebrating same-sex marriages." *Id.* CADA, according to the Tenth Circuit, is thus content-based because it is intended to "eliminat[e]" certain ideas and viewpoints from the public square. *Id.*, at 23a–24a.

Nonetheless, the Tenth Circuit upheld CADA under what it labeled "strict scrutiny" because it furthered Colorado's compelling interest in ensuring equal access to goods in the marketplace. Pet.App. 24a–25a. The Tenth Circuit determined that granting an exemption to Ms. Smith would "relegate LGBT consumers to an inferior market because [Ms. Smith's] *unique* services are, by definition, unavailable elsewhere." Pet.App. 28a (emphasis in original). Because the court found no less intrusive way to achieve Colorado's interest in providing equal access to "wedding-related services of the same quality and nature" as those that Ms. Smith offers, CADA's requirements were narrowly tailored. *Id.*

In lending its imprimatur to Colorado's speech coercion against Ms. Smith's religious conscience, the Tenth Circuit transgressed fundamental principles of First Amendment law. "Laws that compel speakers to utter . . . speech bearing a particular message" are subject to "the most exacting scrutiny" known under Constitutional law, *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 642 (1994). When such laws require individuals to express messages that contradict their conscience, particularly religious conscience, they are viewpoint compulsions that should be subjected to a

particularly strict version of traditional strict scrutiny. See *Matal* v. *Tam*, 137 S. Ct. 1744, 1757, 1763–64 (2017); *id.*, at 1765, 1767 (Kennedy, J., concurring).[2] In failing to properly subject CADA to this most rigorous test, the Tenth Circuit severely erred.

The Tenth Circuit's error was further compounded by its adoption of an extraordinary and unusually dangerous new First Amendment principle: as expression *increases* in uniqueness, it enjoys ever *decreasing* First Amendment protection. First Amendment jurisprudence shows the opposite to be true: The Free Speech Clause's protection extends not only to common or non-controversial speech, but is at its apex when applied to unique and unconventional speech like Ms. Smith's. By weakening protections for this unique speech, the Tenth Circuit creates a self-imposed quagmire that is irreconcilable with this Court's long-standing precedents to the contrary.

Notwithstanding the controversial and emotionally charged subject matter of Ms. Smith's speech, the First Amendment unmistakably prohibits compelled speech against an individual's

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[2] See also Bloom, The Rise of the Viewpoint Discrimination Principle, 72 SMU L. Rev. 20, 31 ("The Kennedy plurality [in *Matal*] . . . seemingly treat[ed] [viewpoint discrimination] as automatically unconstitutional. Perhaps it makes little difference since it appears that the Court will not find the strict standard satisfied once it has characterized a regulation as viewpoint discriminatory.").

conscience. This remains true no matter how objectionable society may regard the individual's speech to be, and certainly if the Court deems that speech to be unique or distinctive in the marketplace of ideas.

The Tenth Circuit's ruling to the contrary must be reversed.

ARGUMENT

I. COLORADO'S SPEECH COMPULSION IS ANTITHETICAL TO THE FIRST AMENDMENT AND SUBJECT TO THE MOST EXACTING SCRUTINY.

It is a fundamental tenet of First Amendment law that "[t]he government may not . . . compel the endorsement of ideas that it approves." *Knox* v. *Service Emps. Int'l Union, Local 1000*, 567 U.S. 298, 309 (2012). Compelled speech is "antithetical to the free discussion that the First Amendment seeks to foster." *Pacific Gas & Elec. Co.* v. *Public Utils. Comm'n*, 475 U.S. 1, 16 (1986) (plurality op.). Baked into this constitutional premise is a presumption that "speakers, not the government, know best both what they want to say and how to say it." *Riley* v. *National Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 791 (1988).

This principle has its roots in the founding generation, and that generation's effort to protect the American experiment against repeating the sordid history of coerced affirmations against conscience by those in authority. America's Founders were cognizant of this "history of authoritarian government," see *National Inst. of Family & Life*

Advocs. v. *Becerra*, 138 S. Ct. 2361, 2379 (2018) (Kennedy, J., concurring), with its persistent pattern of abuses and injustices such governments have been all too prone to commit. Prominent among these is the biblical tradition of Hananiah, Mishael, and Azariah, (given the Babylonian names of Shadrach, Meshach, and Abednego) from the book of Daniel, and their refusal to bow before a golden statue as commanded by Nebuchadnezzar, who had them thrown into a fiery furnace as a consequence of their defiance. Daniel 3:1–21. Similarly from late antiquity, Roman authorities often required Christians to commit what they believed to be sacrilege by burning incense to pagan idols or paying obeisance to Roman emperors.[3] Later, under Christendom, Jews, Muslims, and unorthodox Christians were compelled to profess Christian doctrines with which they did not agree.[4]

Beyond the oppressiveness of a prohibition on expressing one's beliefs, these practices were even more invasive because they forced people to affirm

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[3] See B. Winter, Divine Honours for the Caesars: The First Christians' Responses (2015); 1 E. Gibbon, The Decline and Fall of the Roman Empire 537–538 (David P. Womersley ed., Penguin Press 1994) (1776).

[4] See B. Tierney, Religious Rights: A Historical Perspective, in Religious Liberty in Western Thought 29 (N. Reynolds & W. Durham, Jr. eds., 1996); N. Cantor, The Civilization of the Middle Ages 512–13 (rev. ed. 1993); J. Gerber, The Jews of Spain 115–44 (1992).

what they did *not* believe through both word and action. The injustice of this compulsion is particularly evident in the martyrdom of Sir Thomas More, who had served as Lord Chancellor to King Henry VIII. Instead of affirming the validity of Henry's annulment of his marriage to Catherine of Aragon and his marriage to Anne Boleyn, More resolved to remain silent. Despite his steadfast silence on the matter, More was imprisoned and beheaded because he would not affirm, contrary to his beliefs, Henry's annulment and succession.[5] More's story served as an important monument to freedom of expression and conscience in the Anglo-American tradition, and was thus an inspiration to many in the founding generation.

The Founders themselves frequently warned of the dangers inherent in government coercion against conscience. For instance, in explaining his opposition to imposition of taxes to support Christian ministers, Thomas Jefferson wrote that it is "sinful and tyrannical" "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves." 2 The Papers of Thomas Jefferson 545–553 (J. Boyd ed. 1950) ("Papers of Jefferson").

In fact, during the First Congress's debate over which rights should be specifically enumerated in the Bill of Rights, reference was made to "[o]ne of the most notorious courtroom cases of religious intolerance in England" which incidentally involved government compelled speech against religious

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[5] See R. Marius, Thomas More: A Biography 461–514 (1984).

conscience. McConnell, The Origins and Historical Understanding of Free Exercise of Religion, 103 Harv. L. Rev. 1409, 1471–1472 (1990). The founding generation was very familiar with this case involving William Penn's indictment for speaking to an unlawful assembly. Specifically, Penn refused to observe the requirement of removing his hat in court because he viewed it to be "a form of obeisance to secular authority forbidden by [his Quaker] religion," *id.,* at 1472, meaning removal of his hat would communicate an obeisant message contrary to his religious convictions. Although acquitted for the charge on which he was tried, Penn was held in contempt and imprisoned for refusing to remove his hat.

"This case became a *cause célèbre* in America," *id.*, and was used by John Page of Virginia during the First Congress's debate to illustrate the importance of enumerating certain unalienable rights like the right to free speech. In response to Representative Theodore Sedgwick's criticism that specifically including self-evident rights like the right of assembly would be a "trifle[]" akin to specifying that an individual has "a right to wear his hat if he pleased," Page referenced Penn's case, stating 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[.]" I Annals of Cong. 759–760 (J. Gales ed. 1834) (Aug. 15, 1789). Protecting citizens from government compulsion of this kind was thus very much at the forefront of the Founders' concerns in enumerating and adopting the Bill of Rights.

Modern constitutional theory reinforces this historical principle against compelled expression. Theorists offer numerous weighty bases for the constitutional commitment to freedom of speech; these include the important concepts of a truthseeking "marketplace of ideas," or of the communication of information as essential to the proper functioning of democratic processes, or of the inextricable link between free expression and individual autonomy and integrity.[6] Under any of these rationales, compelling a person explicitly or symbolically to affirm something against her conscience defies any commitment to expressive freedom. Forcing people to profess or celebrate what they do not believe obstructs the pursuit of truth and distorts the marketplace of ideas; it undermines democracy by polluting the flow of information with insincere affirmations; and it assaults the autonomy, integrity, and conscience of those who are forced to affirm what they do not believe.

It is therefore axiomatic that "the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." *Wooley* v. *Maynard*, 430 U.S. 705, 714 (1977); accord. *Barnett*, 319 U.S., at 645 (Murphy, J., concurring). This is because the "right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'" *Wooley*, 430 U.S., at 714 (citing *Barnette*, 319 U.S., at 637). When

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[6] See Toni M. Massaro, Tread On Me!, 17 U. PA. J. Const. L. 365, 386 (2014).

dissemination of a viewpoint contrary to one's own is "forced upon a speaker intimately connected with the communication advanced, the speaker's right to autonomy over the message is compromised." *Hurley*, 515 U.S., at 576.

The Court's precedents overwhelmingly favor a categorical approach prohibiting compelled speech. Indeed, "[s]ome of this Court's leading First Amendment precedents have established the principle that freedom of speech prohibits the government from telling people what they must say." *Rumsfeld* v. *Forum for Acad. & Inst. Rights, Inc.*, 547 U.S. 47, 61 (2006). Full stop. With few exceptions, governments' attempts to compel speech do not withstand scrutiny.[7]

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[7] See, *e.g.*, *Wooley*, 430 U.S., at 717 (holding that New Hampshire could not compel Jehovah Witnesses to display a state-scripted slogan on their vehicles' license plates); *Keller* v. *State Bar of Cal.*, 496 U.S. 1, 17 (1990) (holding that California could not compel bar members to pay for bar's ideological programs in contrast with bar-related activities); *Riley*, 487 U.S., at 799–800 (holding that North Carolina's law forcing professional fundraisers to announce to potential donors the percentage of funds raised that have been given to charities was unconstitutional under exacting First Amendment scrutiny); *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209, 241–242 (1977) (holding that state cannot compel nonunion members to pay for union's ideological messages as opposed to union-related activities); *Miami Herald Publ'g Co.* v. *Tornillo*, 418 U.S. 241, 258 (1974) (holding that

First Amendment scholars of all ideological stripes are largely in accord on this point, particularly as it applies to compelled affirmations of fundamental beliefs contrary to one's convictions; such compelled affirmations violate the First Amendment, and are nearly universally blocked or struck down under strict scrutiny.[8]

This Court again upheld this principle recently when California sought to require pro-life pregnancy centers to promote its preferred messaging advertising how women could obtain state-subsidized abortion services, even while those centers were simultaneously attempting to dissuade women from choosing that option. *Becerra*, 138 S. Ct., at 2371. Because California's licensed notice altered the content of the pregnancy centers' speech, the law was enjoined under the First Amendment. *Id.,* at 2378. As with the statute in *Becerra*, CADA "compels individuals to contradict their most deeply held beliefs, beliefs grounded in basic . . . religious

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Florida right-of-reply statute forcing newspapers to print political columns was unconstitutional); *Pacific Gas & Elec. Co.*, 475 U.S., at 20–21 (holding that state public utilities commission's order forcing companies to include opposing third-party newsletters in their billing envelopes was unconstitutional compelled speech).

[8] See, *e.g.*, Corbin, Compelled Disclosures, 65 Ala. L. Rev. 1277, 1283 (2014) ("For the most part, government attempts to force individuals to affirm beliefs contrary to their own . . . are subject to strict scrutiny and struck down.").

precepts[.]" *Id.*, at 2379 (Kennedy, J., concurring). This makes CADA another "paradigmatic example of the serious threat presented when government seeks to impose its own message in the place of individual speech, thought, and expression." *Id.* Accordingly, it is not "forward thinking" on the part of Colorado "to force individuals to 'be an instrument for fostering public adherence to an ideological point of view [they] fin[d] unacceptable.'" *Id.* (quoting *Wooley*, 430 U.S., at 715).

And as this Court also affirmed in recent years, compelled speech is a particularly noxious infringement on liberty, even more so than outright restrictions on speech. See *Janus* v. *American Fed'n of St., Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2464 (2018) (holding that "measures compelling speech are *at least as threatening*" as those restricting "what can be said" (emphasis added)). This is especially true because compelled speech typically involves *viewpoint* compulsion,[9] making it a viewpoint-based regulation of speech the Court has shown utmost skepticism toward. See, *e.g.*, *Morse* v. *Frederick*, 551 U.S. 393, 436 (2007)

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[9] Duncan, Viewpoint Compulsions, 61 Washburn L.J. 251, 259–272 (2021–2022) (illustrating that compelled speech cases typically concern viewpoint compulsions); see also Duncan, Seeing the No-Compelled-Speech Doctrine Clearly through the Lens of Telescope Media, 99 Nebraska L. Rev. 78 (explaining that "viewpoint-based mandates are laws that compel an unwilling speaker to express a message that takes a particular ideological position on a particular subject").

("[C]ensorship that depends on the viewpoint of the speaker, is subject to the most rigorous burden of justification."); *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 828–829 (1995) (holding that when the government targets "particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant" because "viewpoint discrimination is . . . an egregious form of content discrimination" (citation omitted)).

The egregiously violative nature of viewpoint compulsion can be seen in the facts of this case before the Court. When Ms. Smith uses her online artwork on 303 Creative to express a viewpoint she favors, CADA not only restricts her speech because of the viewpoint communicated in that message, but also punishes her by compelling her to create new expression supporting a contrary viewpoint she does not believe. Such coercion thus amounts to a "twice-viewpoint-based regulation" that is "doubly poisonous" to the First Amendment.[10] In that sense, CADA is akin to the "right of reply" statute in *Miami Herald*, which required newspapers publishing their viewpoints in editorials to also use their limited space to print contrary viewpoints in the same publications. The statute contravened the First

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[10] See Duncan, 61 Washburn L.J., at 272; see also *id.,* at 253–259 (explaining how viewpoint compulsions are "more poisonous to freedom of speech than viewpoint restrictions"); *id.,* at 254 ("If viewpoint restrictions give off the scent of authoritarian control of the marketplace of ideas, viewpoint compulsions give off the noiseome vapors of totalitarianism.").

Amendment both because it was functionally a command akin to a statute forbidding a newspaper from publishing its viewpoints altogether, and because it penalized those editors that did speak their viewpoints by compelling them to simultaneously "publish that which reason tells them should not be published." *Miami Herald*, 418 U.S. at 256–257.

Additionally, the Court has already decided that an unquestionably legitimate antidiscrimination law cannot be applied in a way that compels orthodox affirmation. In *Hurley*, the Court held that a Massachusetts antidiscrimination law, which required private parade organizers and a parade council to allow an LGBT organization to march in its parade, contravened the First Amendment's proscription of compelled speech. Specifically, the Court reasoned that, under the First Amendment, the government may not "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. Accordingly, applying state public accommodations laws to a speaker's message and expressive conduct as "a means to produce speakers free of . . . biases . . . . is a decidedly fatal objective." *Id.*

Hurley's message is clear: Public accommodations laws cannot be used to force individuals to engage in speech or expressive activities that convey messages they do not wish to convey. And yet, this is precisely what CADA does here. Colorado is using a public accommodations law to seek to compel speech without regard for the speaker's autonomy, much

like the anti-discrimination law in *Hurley*. Ms. Smith is being forced, through her conduct, to customize websites for same-sex weddings against her religious conscience. This case similarly cuts to the heart of "individual freedom of mind," *Wooley*, 430 U.S., at 714, our Constitution zealously guards and protects.

Yet as the Tenth Circuit correctly determined, Ms. Smith's situation involves an even more egregious violation of her First Amendment rights than those at issue in *Hurley* because she actively creates each website as part of her business practice. Juxtaposed against the more passive hosting of groups by the parade organizer in *Hurley*, it becomes clear that when Ms. Smith speaks through her website creation, it is much more likely the content and viewpoints expressed on her website will be attributed to her individually than would allowing the LGBT organization to march in a parade composed of numerous different messages and speakers that are not necessarily uniform. Cf. *Hurley*, 515 U.S., at 577 (compelled expression would be "perceived by spectators as part of the whole" message by the unwilling speaker). The government compulsion facing Ms. Smith also imposes a more significant burden and quandary on her because her refusal to speak Colorado's preferred message puts her very livelihood in jeopardy, in contrast with the law in *Hurley* that implicated the private parade organizers' ability to speak their preferred message once each year in a St. Patrick's Day parade. See *id.*, at 560. Because that regulation in *Hurley* was held to violate the First Amendment, however, the same outcome must necessarily follow for CADA here.

Accordingly, it follows from the above cases that

"[l]aws that compel speakers to utter or distribute speech bearing a particular message are subject to . . . rigorous scrutiny"—"the most exacting scrutiny." *Turner Broad. Sys.*, 512 U.S., at 642.

Exceptions where the Court has not subjected compelled-speech regulations to strict scrutiny tend to fall into one of three camps: (1) compelled commercial speech containing "purely factual and uncontroversial information," see *Zauderer* v. *Office of Disciplinary Couns.*, 471 U.S. 626, 650 (1985), (2) regulations of professional conduct that incidentally burden speech, see *Sorrell* v. *IMS Health Inc.*, 564 U.S. 552, 567 (2011), or (3) political disclaimer and disclosure requirements, see *Citizens United* v. *FEC*, 558 U.S. 310, 366–367 (2010). Outside these narrow contexts, the government "may not compel affirmance of a belief with which the speaker disagrees." *Hurley*, 515 U.S., at 573.

None of these categories of exclusion applies here. Because these rare exceptions where compelled speech is subject to lower tiers of scrutiny do not apply to these facts, CADA must be subject to a particularly rigorous application of strict scrutiny. And because this Court has never upheld a compelled speech regulation when it was subject to strict scrutiny, the Tenth Circuit has truly entered uncharted territory. Instead, had it properly applied strict scrutiny in accordance with applicable precedents, CADA plainly would not be permitted to stand as applied to artists like Ms. Smith.

If the First Amendment's Free Speech Clause "protects flag burning, funeral protests, and Nazi parades—despite the profound offense such

spectacles cause" then certainly too, the Free Speech Clause permits 303 Creative to *abstain* from "mouth[ing] support for views they find objectionable." *McCutcheon* v. *FEC*, 572 U.S. 185, 191 (2014); *Janus*, 138 S. Ct., at 2463–2464. Stated differently, if the Free Speech Clause permits the despicable and vociferous public jeering of a loved one at their private funeral, *Snyder* v. *Phelps*, 562 U.S. 443, 460–461 (2011), then surely the Free Speech Clause permits Ms. Smith's civil and silent dissent within the privacy of her conscience.

In short, Colorado law compels Ms. Smith and 303 Creative to speak a message they do not want to communicate. CADA requires them "to affirm in one breath that which they deny in the next," making the promise of freedom of speech "empty." *Hurley*, 515 U.S., at 576 (citation omitted). Because "[t]he First Amendment protects the right of individuals to . . . refuse to foster . . . an idea they find morally objectionable," *Wooley*, 430 U.S., at 715, CADA's intrusion on Ms. Smith's speech and conscience must be prohibited.

The Tenth Circuit has given its stamp of approval to Colorado's prescription of what is orthodox for public discourse by compelling people, such as Ms. Smith and 303 Creative, to mouth support for views they find objectionable. This government-mandated speech is exactly the kind of compelled speech that the First Amendment unequivocally prohibits. If Jefferson was correct that it is "sinful and tyrannical" to compel individuals to monetarily subsidize opinions contrary to their conscience, see Papers of Jefferson at 545–553, it is even more problematic to compel their express affirmation of

views that contradict their most fundamental beliefs, whether through word or deed. And by compelling Ms. Smith to use her own artistic talents to create content celebrating marriages that she believes to be contrary to her religious convictions, CADA runs even more afoul of the First Amendment's dictates.

Contrary to the Tenth Circuit's failure, an appropriately rigorous application of strict scrutiny to Colorado's law yields an inevitable outcome: as applied to artists like Ms. Smith, CADA's compulsion of speech is unconstitutional.

II. AS SPEECH BECOMES MORE UNIQUE, FIRST AMENDMENT PROTECTION INCREASES RATHER THAN DECREASES.

The rationale relied on by the Tenth Circuit is not merely constitutionally erroneous; it is dangerous. In the court's view, if an expressive service is unique, celebrated, or imbued with distinctive artistic talent, it enjoys *less* First Amendment protection. This perverse conclusion is based on the premise that (1) the creativity driving the expression effectively creates a "monopoly" and that (2) the government has an especially compelling interest in ensuring access to the services of the "monopoly." "Taken to its logical end, the government could regulate the messages communicated by *all* artists, forcing them to promote messages approved by the government in the name of 'ensuring access to the commercial marketplace.'" Pet.App. 80a (Tymkovich, C.J., dissenting) (emphasis in original).

In fact, numerous precedents suggest the opposite. As speech increases in novelty, the First

Amendment affords *increased* protection to that speech, not less. *Miami Herald*, 418 U.S., at 241 (protection from compelled speech extended to unique op-ed); *Riley*, 487 U.S., at 781 (unique fundraiser pitches protected against compelled speech); *Pacific Gas & Elec. Co.*, 475 U.S., at 1 (unique newsletter protected against compelled speech); cf. *Matal*, 137 S. Ct., at 1764 (2017) ("[T]he proudest boast of our free speech jurisprudence," is that we protect the speech "we hate." (citation omitted)); *Bennett* v. *Metropolitan Gov't of Nashville & Davidson Cty.*, 977 F.3d 530, 554 (6th Cir. 2020) ("[T]he First Amendment would serve no purpose if it safeguarded only 'majority views.'").

In spite of this principle, the Tenth Circuit "use[d] the very quality that gives the art value—its expressive and singular nature—to cheapen it." Pet.App. 79a (Tymkovich, C.J., dissenting).

Beyond its inconsistency with precedent, the Tenth Circuit's approach to unique speech is also nonsensical. It creates a "catch-22" that is unworkable for courts. As speech increases in uniqueness, it receives increased First Amendment protection; yet as the Tenth Circuit would have it, this uniqueness simultaneously opens it up to vulnerability by making it a one-person or one-company monopoly in the marketplace, which in turn reduces the protection it receives under a strict scrutiny test. This contradiction is irreconcilable, and must not be further enshrined as law by this Court.

Importantly, the First Amendment exists to make sure that the state may not use the machinery of government to compel uniformity of opinion. See

Barnette, 319 U.S., at 640–641. To permit a state untrammeled access within the marketplace of ideas would grant the power to regulate and silence those views that the state disapproves. Pet.App. 80a (Tymkovich, C.J., dissenting). Applying state public accommodations laws to a speaker's message and expressive conduct as "a means to produce speakers free of . . . biases . . . is a decidedly fatal objective." *Hurley*, 515 U.S., at 579.

Thus, the Court does not permit state antidiscrimination laws that "distinguish between prohibited and permitted activity on the basis of viewpoint." *Roberts* v. *United States Jaycees*, 468 U.S. 609, 623 (1984); see also *Board of Dirs. of Rotary Int'l* v. *Rotary Club of Duarte*, 481 U.S. 537, 549 (1987) (upholding public accommodations law because it makes "no distinctions on the basis of the organization's viewpoint"); *Boy Scouts of Am.* v. *Dale*, 530 U.S. 640, 659 (2000) (declaring unconstitutional New Jersey's public accommodations law that required the Boy Scouts to accept a scoutmaster that would "significantly burden the organization's right to oppose or disfavor homosexual conduct").

This case is a paradigm for what may happen when a court warps these principles. Petitioners have dedicated their time, effort, and artistic talent to creating unique expressive products for sale. Their efforts have paid off (both monetarily and artistically), and their exceptional products are in demand. They also are compelled by their faith to say, and to not say, certain things while participating in their craft. The First Amendment, and this Court's jurisprudence, afford Petitioners the space to create expression and market it while at the

same time adhering to their faith. The Tenth Circuit has adopted an irrational (and breathtakingly dangerous) principle that, the more talented and recognizable the artist, the less the First Amendment protects their expression, permitting the state to compel speech the speaker disapproves.

CONCLUSION

As Justice Kennedy wrote, "Governments must not be allowed to force persons to express a message contrary to their deepest convictions." *Becerra*, 138 S. Ct., at 2379 (Kennedy, J., concurring). Because compelled speech against one's conscience is anathema to the First Amendment, a particularly strict version of strict scrutiny should be applied to CADA. And because, if anything, unique speech like this is entitled to increased, rather than decreased, protection under the Free Speech Clause, the Tenth Circuit erred and should be reversed.

June 2, 2022 Respectfully submitted,

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[1] Institutions are listed for identification purposes only. Opinions expressed are those of the individual *amici*, and not necessarily of their affiliated institutions.

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