No. 21-476

IN THE

Supreme Court of the United States

303 CREATIVE LLC, *ET AL.*,

Petitioners,

v.

AUBREY ELENIS, *ET AL.*,

Respondents.

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

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

Amicus curiae Public Citizen is a nonprofit consumer advocacy organization with a nationwide membership, on behalf of which it appears before Congress, administrative agencies, and courts on a wide range of issues. Public Citizen has long been involved in First Amendment cases, with a particular focus on those in which business entities claim First Amendment defenses to avoid compliance with generally applicable laws governing business conduct and assert that regulatory measures compel speech in violation of the First Amendment. Public Citizen is concerned that overly broad applications of the First Amendment in this context can obstruct sensible laws protecting consumers and workers against harmful business practices, including discrimination. At the same time, as an advocacy organization itself, Public Citizen is sensitive to the need for First Amendment protection of the expression of viewpoints on political and social issues, including protection against compulsion to express such viewpoints.

Public Citizen submits this brief because it believes that arguments made by petitioners and some of their supporting amici would extend the First Amendment's protection against compulsion beyond the realm of speech to all commercial activity involving goods and services whose creation or performance can be characterized as artistic. If accepted, those arguments could prevent state and federal governments from enforcing laws requiring such products and

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[1] This brief was not authored in whole or part by counsel for a party. No one other than amicus curiae made a monetary contribution to preparation or submission of the brief. Counsel for both parties have consented in writing to its filing.

services to be made available to the public on a nondiscriminatory basis, regardless of whether such enforcement would actually infringe freedom of speech by compelling the unwilling expression of a viewpoint or message that the speaker does not wish to endorse. This brief explains why the Court should not adopt such a far-reaching view of compelled speech, which is neither supported by First Amendment principles nor necessary to decide this case.

STATEMENT

This case involves a Colorado law that requires businesses operating public accommodations to provide products and services without discrimination based on disability, race, creed, color, sex, sexual orientation, gender identity, gender expression, marital status, national origin, or ancestry. Petitioners, whose business is creating websites for their clients, claim that if they offer to create websites promoting and celebrating weddings between men and women, the Colorado law will require them to offer to create websites promoting and celebrating same-sex marriage. Such an application of the law, they contend, will compel them to convey a message that they are unwilling to express, in violation of the First Amendment's prohibition of compelled speech.

The court of appeals agreed with petitioners that Colorado would apply its statute to their proposed activity in the way they feared and that such an application of the law would compel them to speak in violation of their beliefs. Pet. App. 22a. The court accordingly applied strict First Amendment scrutiny to the law. Pet. App. 24a. Although such scrutiny is generally fatal, the court held that petitioners could be required to speak in support of same-sex marriage

because, in the court's view, the state has a compelling interest in providing persons desiring websites promoting same-sex marriages access to a market that includes availability of petitioners' "*unique* services" to aid in expressing that message. Pet. App. 28a.

In this Court, the state respondents explain that they would *not* apply Colorado's public-accommodation law to compel petitioners to offer websites that promote same-sex marriage if they provide websites promoting marriages between men and women. Rather, the law requires only that petitioners provide the *same* products or services to clients regardless of their sexual orientation. Thus, if petitioners create websites that promote and celebrate marriages between men and women, they must create websites *with that message* for potential clients who request them, regardless of the clients' sexual orientation. *See* Resp. Br. 9. The state asserts no interest in compelling petitioners to express a message with which they disagree; its interest is only in ensuring that they offer the websites that they sell, with their own chosen message, without regard to the sexual orientation (or other protected characteristics) of prospective clients. *See* Resp. Br. 41.

SUMMARY OF ARGUMENT

The question posed by the Court in its order granting certiorari in this case asks "[w]hether applying a public-accommodation law to compel an artist to speak or stay silent violates the Free Speech Clause of the First Amendment." In response, petitioners and some of their supporting amici advocate a broad interpretation of "artist" and argue sweepingly that a law requiring someone to make a product or perform a service compels speech if the product or service involves some form of artistic expression.

These arguments are fundamentally wrong. The application of this Court's compelled-speech doctrine does not turn on whether a product or service can be characterized as "art" or "artistic." It applies equally to the compulsion of speech that is *not* characterized as artistic (such as compelled political speech). And it is equally *inapplicable* to regulations of conduct that do *not* compel a person to communicate a viewpoint, message, or idea that she is unwilling to express, even where the object of regulation is in some way artistic. In short, the word "artist" in the question presented has no bearing on its answer.

Requiring a person to create and sell goods and services on a nondiscriminatory basis typically involves no compulsion of speech, whether or not the goods and services have some artistic attributes. Compulsion to create expression that conveys a specific message that the creator is unwilling to endorse, however, implicates the compelled-speech doctrine, and the application of an otherwise constitutional law to compel fully protected speech is subject to strict scrutiny.

Here, the court of appeals' decision to apply strict scrutiny rested on its erroneous understanding that Colorado would enforce its public-accommodation law to compel petitioners to create websites expressing messages that they oppose if they created websites expressing their own point of view. As Colorado's brief explains, there is no threat that the law will be enforced in that manner, and no ripe case or controversy over whether the law would be unconstitutional if so enforced.

To the extent any issue of compelled speech may be presented by the case, application of the compelled-speech doctrine here must turn on the nature of the

communicative content of the potential websites at issue, not on broader assertions about compelled creation of "art." Whether a website designer may be compelled to convey an explicit message of support for a particular type of wedding or other event is a different question from whether providers of other goods and services that have artistic qualities can withhold them from individuals who wish to acquire them in connection with such an event. The facts of this case provide no occasion for determining whether or how the compelled-speech doctrine may apply to other circumstances.

ARGUMENT

Whether requiring a business to provide products or services constitutes compelled speech in violation of the First Amendment does not turn on whether the products or services are "artistic."

A. This Court's compelled-speech cases emphasize that, in cases not involving commercial speech, requirements "compelling individuals to speak a particular message" are content-based speech regulations that are generally subject to strict scrutiny. *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018). The Court's decisions reflect "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). The compelled-speech doctrine not only addresses "the situation in which an individual must personally speak the government's message," but also "limit[s] the government's ability to force a speaker to host or accommodate another speaker's message." *Id.* at 63 (citing *Hurley v. Irish-Am. Gay, Lesbian &*

Bisexual Group of Boston, Inc., 515 U.S. 557, 566 (1995), *Pac. Gas & Elec. Co. v. Pub. Util. Comm'n.*, 475 U.S. 1, 20–21 (1986) (plurality opinion), and *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 258 (1974)). The doctrine thus provides substantial protection to "individual freedom of mind." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943); *accord Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

Where these concerns are not implicated, however, the prohibition on compelled speech does not apply. *See Rumsfeld*, 547 U.S. at 61–65. In particular, the First Amendment does not prohibit requirements aimed at conduct rather than speech, even where the requirements may also necessitate some "incidental" speech that does not involve endorsement of another's message. *Id.* at 62. Requirements that someone provide a service to another person but that do not "suggest[ ] … agree[ment]" with some idea or compel association in "inherently expressive" activities do not "sufficiently interfere with any message" to warrant First Amendment condemnation. *Id.* at 65. And requirements that a person engage in conduct that would express an idea only if the person "accompanied their conduct with speech explaining it" do not violate the prohibition on compelled speech: "The fact that such explanatory speech is necessary is strong evidence that the conduct … is not so inherently expressive that it warrants [First Amendment] protection." *Id.* at 66.

For example, as the Court explained in *Rumsfeld*, the application of a law prohibiting race discrimination in employment raises no compelled speech concerns because it addresses conduct and affects speech only incidentally, insofar as the conduct is "in part initiated, evidenced, or carried out by means of

language, either spoken, written, or printed." *Id*. at 62 (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)).

Moreover, the possibility that an employer might intend discriminatory conduct to express a message (for example, the message that the employer does not believe members of other racial groups are entitled to equal treatment in employment matters) would not transform the requirement of equal treatment into compelled speech. "[N]early any action can be understood as expressing endorsement of that very action. But that cannot bring every action within the protective coverage of the Free Speech Clause." Brian Soucek, *The Constitutional Irrelevance of Art*, 99 N.C. L. Rev. 685, 699–700 (2021).

Thus, although speech about discrimination may be protected by the First Amendment, the First Amendment does not confer protection on discrimination itself. And being required to refrain from discrimination is not the equivalent of being compelled to express support for the idea of nondiscrimination. As the Court has explained, "[i]f combining speech and conduct were enough to create expressive conduct, a regulated party could always transform conduct into 'speech' simply by talking about it." *Rumsfeld*, 547 U.S. at 66. Thus, for example, the requirement that an individual pay income tax does not violate the First Amendment just because "an individual announces that he intends to express his disapproval of the Internal Revenue Service by refusing to pay his income taxes." *Id*.

B. Under these principles, whether a regulation unconstitutionally compels speech has no necessary relationship to whether the object of regulation is "art"

or an "artist." Compelling someone to communicate an idea they do not want to express, in a medium generally recognized as subject to First Amendment protection because of its expressive nature, is just as objectionable if the speech is unartistic as it is if the speech is expressed artistically. For example, "[t]hat some prose might also be deemed art does not change the level of protection it does or should receive." Soucek, *supra*, at 725).

Just as fully protected speech does not deserve *lesser* protection when it is not artistic, otherwise unprotected activity does not acquire protection against all forms of compulsion when it has artistic elements. This point is particularly applicable to activities involving the creation of things that have both functional and aesthetic qualities. A chair, for instance, is a piece of furniture that people sit on. Some chairs also have artistic attributes: the beauty of their design and of its execution by a craftsman. A chair may even be said to communicate its designer's or builder's idea of a piece of furniture that harmoniously combines form and function. But compelling a furniture maker to serve members of the public without discriminating on the basis of their protected characteristics does not compel the furniture maker to communicate any unwanted message. Whatever message the chair in itself sends is the same regardless of who buys it or what the buyer does with it after acquiring it.

In particular, building a chair and conveying it to a buyer do not imply endorsement of the buyer's character or the worthiness of what she does when she sits in it. Nor does doing so associate the artist with any expressive activity in which the chair is used by the buyer. No such message or association could be expressed or inferred absent additional information

about the buyer or his intentions and additional speech from the craftsman about it—just as a law school sends no message about organizations to which it provides space for on-campus interviews absent some additional speech. See *Rumsfeld*, 547 U.S. at 66.

The same point applies where the artistic aspect of a product has a more specific, but still generic, meaning. The design of a cake, a table setting, a flower arrangement, or an article of clothing may convey both the idea of a beautiful and useful item, and the idea of celebration (or, alternatively, mourning), or even suggest a specific type of event (a wedding, a birthday party, a funeral) and evoke the emotions associated with it. But the commercial production and sale of such an item, whether bespoke or off the shelf, does not inherently convey any message concerning the specific event for which the buyer has purchased it: A person looking at the item, no matter how artistic it may be, has no idea whether its creator was even aware of who was to be married (or buried), let alone how the creator felt (or whether they felt anything at all) about whether the wedding should take place or how the person being memorialized should be remembered. No such message could be conveyed without some speech by the creator. And compelling creation of the product neither entails compulsion of any such speech nor requires the creator to participate or associate with others in the expressive event itself.

C. Some otherwise functional items may incorporate more explicitly communicative elements, such as symbols, words, or slogans. The display of such communicative elements is constitutionally protected. *See*, *e.g.*, *Spence v. Washington*, 418 U.S. 405 (1974) (upside-down American flag with peace symbol); *Cohen v. California*, 403 U.S. 15 (1971) (jacket with anti-

draft slogan); *Tinker v. Des Moines Indep. Commun. Sch. Dist.*, 393 U.S. 503 (1969) (black armband). So, too, is their commercial production and sale. *See Iancu v. Brunetti*, 139 S. Ct. 2294 (2019) (clothing bearing a vulgar trademark).[2]

It likely follows that, just as dissenting individuals cannot be compelled to display a slogan, *see Wooley*, 430 U.S. at 714, a law compelling someone to incorporate into their product the display of an inherently expressive symbol, word, or slogan that they find objectionable (aside from a label with warnings or other commercial disclosures) would trigger strict First Amendment scrutiny under the compelled-speech doctrine—even if the maker's views about what is objectionable and what is unobjectionable were somehow discriminatory. For instance, the government could not force someone to print and sell a "Black Lives Matter" t-shirt because they were willing to print and sell one saying "White Lives Matter," or to put a swastika on a banner because they were willing to print a banner with a peace symbol.[3] Again, however, that

---

[2] *See also Anderson v. City of Hermosa Beach*, 621 F.3d 1051 (9th Cir. 2010) (holding tattooing to be fully protected speech); *Mastrovincenzo v. City of New York*, 435 F.3d 78 (2d Cir. 2006) (holding clothing bearing communicative messages to be protected by the First Amendment, but allowing reasonable time, place, and manner restrictions on its sale); *cf. New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964) (holding that a speaker's First Amendment rights are not diminished because it was paid to speak).

[3] That products with such slogans may be perceived as the speech of the companies that sell them is illustrated by the controversy that resulted when a retailer marketed a t-shirt with the slogan "Manifest Destiny," for which the company formally apologized when members of the public complained. *See* James

(*Footnote continued*)

consequence has nothing to do with whether the creator is an artist.

Moreover, not every decision whether to create and sell an item that bears communicative words and symbols constitutes fully protected speech that may not be compelled. A baker who otherwise has no objection to making and selling cakes that say "Happy Birthday" has no First Amendment protected right to refuse to provide a cake to someone to whom he does not in fact wish a happy birthday. The message of such a cake, when sold in the marketplace, is, at most, "This is a cake that wishes someone happy birthday," not, "I, the baker, wish this specific person a happy birthday." A baker compelled to make and sell "Happy Birthday" cakes on a nondiscriminatory basis is not being compelled to communicate any message that has any impact on his "freedom of mind." And again, improper compulsion of speech in the constitutional sense is absent regardless of how "artistic" the cake may be.

The same is true of other products that may contain words. In the example discussed above, for instance, a silk-screener who prints and sells "White Lives Matter" t-shirts has no First Amendment right to discriminate against Black purchasers. Similarly, a commercial printer that prints invitations whose content is dictated by the customer may lack a First Amendment interest in discriminatorily refusing to print an invitation that contains no words or phrases the printer would be unwilling to print for someone else, regardless of whether the job may involve artistic choices by the printer in recommending paper and

---

Mackay, *Gap's 'manifest destiny' T-shirt was a historic mistake*, The Guardian (Oct. 2012), https://www.theguardian.com/commentisfree/2012/oct/16/gap-manifest-destiny-t-shirt.

typefaces. The same may be true of a person who designs website templates for clients who insert the content after purchasing the product, regardless of whether the designer exercises aesthetic choices in choosing background colors and fonts. In such cases, requiring the business not to discriminate against customers does not force it to express any message of its own.

Compelling someone to compose inherently communicative content with a message that the speaker does not wish to convey is a different matter. Such compulsion is generally subject to strict scrutiny, *see Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 797 (1988)—outside of factual disclosure requirements concerning such matters as the nature of commercial products, transactions, and services, and the terms on which they are offered, *see Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), or the financing of political speech, *see Citizens United v. FEC*, 558 U.S. 310, 366–67 (2010). Similarly, the First Amendment requires strict scrutiny of laws compelling actual participation by a private person in a communicative event or ceremony, whether it be the pledge of allegiance, *see Barnette*, 319 U.S. at 636–42, a parade, *see Hurley*, 515 U.S. at 568, or a wedding. These protections, moreover, have nothing to do with whether the person subjected to compulsion is an artist.

For example, lawyers and lobbyists who hold themselves out to the public as advocates of the interests of clients have a First Amendment interest in not advocating causes that they are unwilling to support. *Cf. Janus v. Am. Fed'n of State, Cty., & Mun. Emp'ees*, 138 S. Ct. 2448 (2018) (recognizing First Amendment protection of right not to subsidize lobbying); *NAACP v. Button*, 371 U.S. 415 (1963) (recognizing First

Amendment protection of a nonprofit entity's practice of law). Likewise, someone who offers her services to the public as a website designer would certainly have a First Amendment objection to a law that tried to force her to create website content advocating white supremacy, socialism, election of a particular candidate, or any other cause she did not support. The same is true of someone whose business is to create communications that expressly promote the sanctity and worthiness of particular weddings or types of weddings. Once again, that consequence follows from the nature of the communicative expression at issue, not from whether it is artistic: Declining to create text celebrating or promoting a wedding within the framework of an artistically designed website is no more or less protected than declining to use a typewriter and plain white paper to compose the service to be delivered by the officiant.

D. The court of appeals treated this case as raising a question of compulsion of fully protected speech because it understood that Colorado's public-accommodation law would require that, if petitioners provided clients with custom websites promoting and celebrating the sanctity of marriages between men and women, they must also create websites promoting and celebrating same-sex marriage if asked to do so by gay clients. As the court put it, the law " 'compels' [petitioners] to create speech that celebrates same-sex marriage." Pet. App. 22a. Petitioners' arguments, and those of its supporting amici, rest on the same premise: Petitioners claim that, under the Colorado statute, if they design and create website content expressing their message of support for marriage between men and women, they must "also imagine, design, and

create [websites] that celebrate a message about marriage" that contradicts their own. Pet. Br. 3.

In respondents' brief, however, Colorado's Attorney General explains that the state does not interpret the statute to require petitioners to create messages with which they disagree, and that it will not enforce the statute in a way that compels petitioners to do so. Rather, in the state's view, the statute requires only that if petitioners create websites that express their message promoting marriages between men and women, they must make websites *with that same message* available without regard to the sexual orientation of their clients. Resp. Br. 9, 12, 15, 20. On that reading, the statute does not require petitioners to sell gay clients a website promoting *the clients'* marriage, but rather a website promoting a marriage between a man and a woman—should the clients for some reason want such a thing.

The state's reading of its public-accommodation law places the statute well outside the range of the compelled-speech doctrine, because it leaves petitioners free to convey only their chosen message of support for marriage between men and women, as long as they are willing to enter into transactions with all comers who wish to purchase products and services containing that message. Although strict scrutiny might well apply if the law compelled petitioners to create communications supporting same-sex marriages, the state's construction of the statute avoids the possibility of such an application and obviates any need to consider whether the interest postulated by the court of appeals to support such compulsion is, itself, "compelling." *Cf. Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 161–66 (2014) (holding that an action presents a case or controversy over application of a

statute to protected speech if the statute arguably applies and there is a realistic threat of enforcement); *Rumsfeld*, 547 U.S. at 56 (stating that it is "appropriate" to consider whether a statute actually imposes a challenged requirement before considering whether the requirement unconstitutionally compels speech).

The parties' divergent understandings about the application of the statute reflect the highly abstract setting in which this case arises and the absence of a fully developed factual record concerning the nature of petitioners' services, what they would do in the unlikely event that a same-sex couple wanted them to provide a website, and how the state would actually respond to that scenario. As a result, the court of appeals decided the case based on a stipulation about the wedding websites petitioners "wish" to create and the court's own, apparently incorrect, understanding of the state's position on how its law would apply to that hypothetical conduct. As respondents argue, ripeness concerns weigh heavily against deciding significant constitutional issues in such a setting. *See* Resp. Br. 23–25; *see, e.g.*, *Int'l Longshoremen's & Warehousemen's Union, Local 37 v. Boyd*, 347 U.S. 222, 223–24 (1954); *Pub. Serv. Comm'n v. Wycoff Co.*, 344 U.S. 237, 245–46 (1952); *United Pub. Workers of Am. (C.I.O.) v. Mitchell*, 330 U.S. 75, 88–91 (1947).

E. In any event, whether a potential application of the statute is subject to strict scrutiny depends on whether the Court determines that it would compel petitioners to convey a message contrary to their own. If the compelled-speech doctrine were applicable, it would not be because of the artistry of the message or its surroundings, but because of its content and petitioners' role in conveying it. And the suggestion of petitioners and their amici that the compelled-speech

doctrine applies whenever a law is applied to require the nondiscriminatory provision of any products or services that can be characterized as artistic is, as explained above, manifestly erroneous.

The use of "art" as the defining criterion for the First Amendment's protection against compulsion of speech would add a subjective and indeterminate consideration to First Amendment adjudication by requiring courts to grapple with a question that has baffled philosophers for centuries: What is art? As Judge Cabranes has observed, " 'art' … is a famously malleable concept the contours of which are best defined not by courts, but in the proverbial 'eye of the beholder.' " *Mastrovincenzo*, 435 F.3d at 90. Using art as the measure of First Amendment protection, moreover, is potentially overinclusive, for "in a world where anything can be an artwork, the First Amendment could potentially be invoked against any regulation at all." Soucek, *supra*, at 699. It also may be underinclusive, because, as this Court has repeatedly recognized, the constitutional protection afforded to communicative expression does not generally turn on a court's assessment of its value. *See*, *e.g.*, *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 790 (2011); *United States v. Stevens*, 559 U.S. 460, 479–80 (2010).

This case provides no occasion for mapping the exact boundaries of protected communication and unprotected commercial activities. Applying compelled-speech principles to some media, such as music or photography, may involve difficult line drawing. Singing a hymn during a wedding service, for example, may be different from playing dance music at a wedding reception, either because of the difference between the content of the communication that the performance itself entails, or the difference between taking part in

an expressive ceremony and entertaining at a party, or both. Similarly, whether commercial wedding photography involves communication of a photographer's messages or simply the skillful memorialization of events may also present a difficult question. This case's facts and record provide no basis for considering such issues, beyond recognizing that they cannot be answered merely through the use of the label "art."

CONCLUSION

This Court should reject petitioners' position that application of a public-accommodation law constitutes compulsion of speech in violation of the First Amendment whenever the activity to which the law is applied can be characterized as art. The Court should either affirm the judgment below on the ground that the statute does not compel petitioners to convey a message of support for same-sex marriage, or vacate and remand for dismissal of petitioners' claims on the ground that the potential application of the statute to require petitioners to convey such a message does not present a ripe controversy.

Respectfully submitted,

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