NO. 21-476

IN THE

Supreme Court of the United States

303 CREATIVE LLC, A LIMITED LIABILITY COMPANY; LORIE SMITH,

Petitioners,

v.

AUBREY ELENIS; SERGIO RAUDEL CORDOVA; CHARLES GARCIA; RICHARD LEE LEWIS, JR.; MAYUKO FIEWEGER; CHERYLIN PENISTON; JEREMY ROSS; DANIEL WARD; PHIL WEISER,

Respondents.

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

REPLY BRIEF FOR THE PETITIONERS

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CORPORATE DISCLOSURE STATEMENT

The Corporate Disclosure Statement in the Brief for Petitioners remains unchanged.

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INTRODUCTION

Colorado asks this Court to do something it has never done—authorize the government to compel speakers to speak certain messages while silencing others. The Court should decline that invitation, as it would be a step back for the First Amendment and our nation. The First Amendment secures our sacred freedoms of thought and mind, and it provides an essential check on government overreach. "[I]t is not forward thinking to force individuals to 'be an instrument for fostering public adherence to an ideological point of view [they] fin[d] unacceptable.'" *Nat'l Inst. of Fam. & Life Advocs.* v. *Becerra*, 138 S. Ct. 2361, 2379 (2018) (*NIFLA*) (Kennedy, J., concurring) (citing *Wooley* v. *Maynard*, 430 U.S. 705, 715 (1977)).

Reading Colorado's brief, one would be hard pressed to grasp that this case even involves speech. Yet because the State must acknowledge that Smith's "creation of wedding websites is pure speech" that expresses "approval and celebration of the couple's marriage," Pet.App.20a, this case is simple. The State may not use the Colorado Anti-Discrimination Act (CADA), a public-accommodation law, to compel speakers to convey government-approved messages.

To justify its unprecedented position, Colorado seeks to litigate a case not before this Court—one with different facts, different free-speech precedents, and a different constitutional tradition. For instance, Colorado argues that, at common law, "businesses that held themselves out to the public must offer the services advertised to all who sought them." Resp.Br.3. But that says nothing about whether the common law ever allowed the government to *compel*

speech. On that point, neither Colorado nor its amici cite a single case or historical source. Not one.

This case is straightforward. Based on the stipulated facts, the Tenth Circuit recognized that: (1) Smith does not discriminate against anyone, but only declines to speak certain messages; (2) Smith's websites are "pure speech"; (3) the Accommodation Clause forces Smith "to create custom websites [she] otherwise would not"; and (4) CADA is a content-based rule that creates a "substantial risk of excising certain ideas or viewpoints from the public dialogue." Pet.App.20a, 23a. And even the United States agrees that (1) a public-accommodation law is unconstitutional under *Hurley* v. *Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995), when the law "alter[s]" a speaker's "overall message," and (2) CADA may not be lawfully applied when a declination is "due to its message" rather than a protected characteristic. U.S.Br.14–15. That is Smith's case.

Colorado nevertheless offers a potpourri of theories as to why this Court should sanction compelled speech. None are persuasive. Colorado and the United States insist that CADA does not burden speech at all, or at most does so incidentally, for two reasons: first, because CADA facially regulates conduct, and second, because third parties might incorrectly believe Smith's websites speak only someone else's message. But there is no First Amendment exception for conduct-focused laws that affect speech as applied. And the burden here is enormous, not incidental: CADA constitutes a direct assault on Smith's freedom of mind and thought. Finally, this Court has repeatedly condemned compelled speech without relying on third-party misattribution.

To be clear, Lorie Smith does *not* seek a complete exemption from CADA for her business. Nor would she want one. She requests only the right to decline "to convey an unwanted ideological message," which the United States recognizes is constitutionally required. U.S.Br.13. That principle is well defined and eminently workable. The Court should reject Colorado's cramped (and unprecedented) view of free speech and reverse.

ARGUMENT

I. The stipulations make the outcome clear.

The outcome of this case is easy under the stipulated facts. Perhaps that's why much of Colorado's argument rests on a narrative irreconcilable with those facts.

- Colorado suggests that Smith refuses to sell services to clients "because of who they are." Resp.Br.9. But it stipulated that Smith will serve clients "regardless of classifications" like "sexual orientation," and that she decides whether to design websites based on their requested "content." Pet.App.184a.
- Colorado also claims that CADA only regulates sales and does not "alter or compel the Company's speech." Resp.Br.19. But it stipulated that each of Smith's websites convey a message "celebrat[ing] and promot[ing] the couple's wedding and unique love story." Pet.App.181a, 187a. Thus, the Tenth Circuit held that CADA "force[s] Smith to create custom websites [she] otherwise would not." Pet.App.20a, 23a.

- Similarly, Colorado says CADA "regulates conduct, not speech." Resp.Br.13. But as just noted, the Tenth Circuit correctly held that CADA regulates the creative works that Lorie is allowed to design. And Colorado stipulated that Smith's designs are "expressive," and "communicate a particular message," using "images, words, symbols, and other modes of expression." Pet.App.181a–83a. That's *speech*.
- Finally, Colorado says that it allows speakers to "pick the goods and services they sell." Resp.Br.15. But for six years in this case and years prior in two others, Colorado has zealously prosecuted speakers who decline to speak contrary to their conscience. Pet.Br.8–9; Pet.App.178a. Even today, Colorado demeans Smith's message-based refusals to create websites celebrating "same-sex weddings" as per se illegal. Resp.Br.16.

Besides fighting its own stipulations, Colorado suggests this case is not ripe because the Court must speculate about what Smith's websites might contain. Resp.Br.23–24. Yet the parties stipulated to Smith's vivid sample wedding websites and agreed that all her wedding websites convey messages celebrating the depicted wedding. Pet.App.186a–87a; J.A.51–72. Before the district court, Colorado agreed that no factual disputes existed, no evidentiary hearing was needed, and the lower court could rule on the pleadings. J.A.8–9. And Colorado has insisted that CADA requires Smith to create same-sex wedding websites if she offers opposite-sex wedding websites. CA10.Appellees.Br.42–43 (identifying examples of wedding websites Smith must create).

Smith need not describe her future speech "down to the last detail" for this Court to rule. *FEC* v. *Wis. Right to Life*, 551 U.S. 449, 463 (2007); accord *Susan B. Anthony List* v. *Driehaus*, 573 U.S. 149, 161 (2014). Colorado stipulated that every wedding website Smith designs conveys a celebratory message about marriage. Pet.App.186a–87a. That and Smith's sample websites present ample facts for judicial resolution. See *Thomas* v. *Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580 (1985). The Tenth Circuit correctly recognized this case is ripe. Pet.App.19a.

Smith's challenge to the Publication Clause also demonstrates ripeness. Colorado forbids Smith from posting her statement explaining that she can only create websites consistent with her faith, including her religious beliefs about marriage. Pet.App.189a. Smith's self-censorship is a harm realized "even without an actual prosecution," *Virginia* v. *American Booksellers Ass'n*, 484 U.S. 383, 393 (1988), and is reasonable because Colorado considers her statement illegal, *e.g.*, CA10.Appellees.Br.3, 50–57. Because Smith's challenge to her speech suppression is intertwined with her challenge to the Accommodation Clause—indeed, both Colorado and the United States argue that the Publication Clause's legality depends on the Accommodation Clause—this case is ripe from top to bottom. YoungAmericaFoundation.Br.16–26.

II. CADA violates the First Amendment by compelling Smith to speak against her convictions.

This Court uses a simple, two-part test to evaluate whether a public-accommodation law compels speech: (1) does the created work involve a form of expression, and (2) does the law affect the speaker's message. Pet.Br.17–18; Carpenter.Br.12–14. No one asks this Court to overrule the cases establishing this test, such as *Hurley*. Indeed, the United States agrees that public-accommodation laws cannot constitutionally alter someone's message by, for example, forcing someone to design websites with an "ideological message they would not create or convey for any client." U.S.Br.14–19. Here, Smith's websites are speech, and CADA affects the message conveyed by those websites by forcing her to speak a message she will not speak for anyone.

A. CADA's application to Smith compels speech, not merely sales.

In her opening brief, Smith explained that generally applicable public-accommodation laws violate the Free Speech Clause when applied to compel speech. Pet.Br.17–18. In response, Colorado fails to identify a single precedent from this Court allowing a public-accommodation law to compel speech.

Colorado instead claims CADA does *not* compel speech, only sales. Resp.Br.18–20. But this is not a case about selling widgets; it's about pure speech, and Colorado has argued all the way to this Court for the authority to force Smith to create same-sex wedding websites. There is no question that CADA "affects" the message Smith seeks to convey. See *Hurley*, 515

U.S. at 572 (public-accommodation law compels speech when it "affects the message conveyed"); *Rumsfeld* v. *Forum for Acad. & Institutional Rts.*, 547 U.S. 47, 63 (2006) (*FAIR*) ("message [i]s affected by the speech [she] [i]s forced to accommodate"). Even the Tenth Circuit concluded that CADA "force[s] Smith to create custom websites [she] otherwise would not." Pet.App.20a, 23a.

Colorado and the United States still contend that CADA only regulates sales transactions. Resp.Br.18–20; U.S.Br.11. But their cases do not apply because they involve non-expressive activities: selling BBQ, firing employees, restricting school attendance, limiting club memberships, and providing room access. Resp.Br.13–14. Colorado's own cases agree that the government may *not* use public-accommodation laws to affect a commercial actor's speech. See, *e.g.*, *Runyon* v. *McCrary*, 427 U.S. 160, 176 (1976) (acknowledging schools have a right to teach certain beliefs even though they may not restrict admission).

Colorado's argument boils down to the claim that public-accommodation laws can *always* force commissioned speakers to create expression because such laws facially regulate conduct. Resp.Br.14. Yet the First Amendment regularly applies to statutes that facially do that. In *Hurley*, this Court zeroed in on the parade's expressive nature, not what the Massachusetts public-accommodation law facially regulated. 515 U.S. at 573. And in *Holder* v. *Humanitarian Law Project*, this Court focused on the plaintiffs' activities—how they "consist[ ] of communicating a message"—even though the law there "*generally* functions as a regulation of conduct." 561 U.S. 1, 27–28 (2010); Cert.Pet.19–20 (citing other cases applying strict scrutiny to generally applicable laws).

Indeed, under its same defective reasoning, Colorado even argues it can compel speechwriters. Cert.Resp.Br.29. As this example shows, Colorado's speech-is-conduct theory is a First Amendment dead end and would categorically remove commissioned speech from the First Amendment's ambit.

B. CADA's application to Smith directly burdens her speech.

Colorado and the United States next rely on *FAIR* to argue that any burden on Smith's speech is merely incidental. Resp.Br.28–29, 41; U.S.Br.6, 21. But CADA's application to Smith not only forces her to speak when she otherwise would not, it changes the content of her message. Pet.Br.28. That speech is at the heart of her decision to create a wedding website for a client. There is nothing incidental about it.

Under the United States' reading of *FAIR*, a public-accommodation law imposes only an incidental burden on speech if it compels speech "'if, and to the extent,' [Smith] would create equivalent speech for an opposite-sex couple." U.S.Br.21 (quoting *FAIR*, 547 U.S. at 62). Meanwhile, Colorado says Smith must offer only the "same" expressive products already offered to others. Resp.Br.20. In fact, Smith *would* sell the "same" product—a website celebrating an opposite-sex wedding—to anyone, including a gay couple who wished to purchase an opposite-sex wedding website for a friend. The United States is wrong that Smith would decline "*any* wedding website for a same-sex couple." U.S.Br.33. Websites celebrating same- and opposite-sex weddings are not "equivalent" or the "same." Pet.Br.23 n.2. And Smith does not provide websites—or other messages—for anyone that violate her beliefs.

Colorado and the United States raise the level of generality to wedding websites writ large, which would presumably cover polyamorous and other weddings, too. Resp.Br.17–20; U.S.Br.6. But this "Goldilocks rule"—raising and lowering the level of generality just right—doesn't work. *Masterpiece Cakeshop, Ltd.* v. *Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1738 (2018) (Gorsuch, J., concurring). It vests endless discretion with governments, allowing them to violate the First Amendment with impunity. The government, for example, could easily describe the services offered by a Hindu calligrapher who sells artwork celebrating her faith as "religious calligraphy" services. With this sleight of hand, the calligrapher *could* be compelled to write, "Jesus is Lord." Contra Resp.Br.12. Relatedly, if an artist designs a banner proclaiming "The One God is Supreme" for a Hindu festival, Colorado would insist that that artist create the "same" speech for a Catholic baptism. *Ibid.* Neither Colorado nor the United States ever explains how to determine whether an expressive service is the "same" or "equivalent" to one already offered.

Further, the United States concedes that a burden on speech is *not* incidental when a public-accommodation law "dictate[s] the content of the speech." U.S.Br.17. And it argues that a "*direct* burden" on speech exists when a speaker is "forced to create and convey ideological messages they would not create for anyone." U.S.Br.32. Both factors exist here. CADA "dictate[s]" what Smith must say and is a "direct burden" on her speech because it compels her to speak messages that she "would not create for anyone." *Id.* at 17, 32.

FAIR itself explains why this case is different: the compelled speech there was "plainly incidental to the Solomon Amendment's regulation of conduct"—room access. 547 U.S. at 64. Here, the speech Smith is compelled to speak is not incidental to the lawful regulation of conduct. When applied to compel her websites, CADA applies to speech. And that speech is not incidental but antithetical to Smith's core convictions regarding marriage. Pet.Br.27–28 (distinguishing *FAIR*). Compelling that type of message unconstitutionally "interfere[s]" with the message Smith wants to communicate. *FAIR*, 547 U.S. at 64. While the law in *FAIR* did not compromise the law school's message, CADA is unconstitutional because it fundamentally "alter[s] the content of [Smith's] speech." *NIFLA*, 138 S. Ct. at 2371 (cleaned up).

This is clear from this Court's prior cases which have steadfastly refused to authorize government compulsion of speech. If Pacific Gas & Electric may not be required to enclose a letter, the Miami Herald to include an op-ed, the Maynards to display a license plate, the Barnetts to say a pledge, or the Boston Parade Association to include a parade contingent—all cases where the relevant message was created by and easily attributable to others—it defies belief for Colorado to insist that it may force Smith to actively design, create, and then publish unique websites conveying messages contrary to her faith.

Finally, the United States posits that same-sex couples might request designs Smith has created for others, substituting the couple's name or containing nothing but logistics. U.S.Br.21. But again, Smith does not offer fill-in-the-blank website services. Pet.App.181a–187a; J.A.51–72; WebsiteDesigners. Br.4–24.

And *Hurley* rejected that argument, holding that a banner identifying only a group's name affected a speaker's message, even though other groups were displaying equivalent banners. *Hurley*, 515 U.S. at 570–73; WalkforLife.Br.17–18. And this Court has rejected it in other contexts, too. *E.g.*, *United States* v. *United Foods, Inc.*, 533 U.S. 405, 411 (2001) (ads about branded and non-branded mushrooms conveyed different messages).

C. CADA's regulation of Smith does not depend on third-party perceptions.

Colorado and the United States both contend that CADA does not affect Smith's message because third parties would attribute that message to her clients. Resp.Br.21; U.S.Br.14, 16, 24. But Colorado has conceded that viewers will recognize "*all* of [Smith's] wedding websites" as Smith's "original artwork," and that Smith and her clients will collaborate "to express Ms. Smith's and 303 Creative's message" about marriage. Pet.App.186a (emphasis added).

Similarly, the United States is wrong that adding "Designed by 303 Creative" to Smith's websites somehow suggests viewers will be *less* likely to attribute those websites to Smith. U.S.Br.25. That unnecessary clarity is not a concession. As the United States agrees, a "speaker's right to autonomy over [its] message is compromised" when "dissemination of a view contrary to one's own is forced upon a speaker intimately connected with the communication advanced." U.S.Br.14 (quotation omitted). Here, Smith imagines, creates, and exercises editorial control over her websites, making that intimate connection—hence her company's name is on them. Viewers would logically conclude that Smith believed the messages conveyed

are "worthy of presentation and quite possibly of support." *Hurley*, 515 U.S. at 575, 577; Walkfor Life.Br.5–6, 23–24 (explaining how Smith exercises more editorial control than parade organizers did).

What's more, this Court has consistently rejected reliance on attribution to justify compelled speech, both when the government compels specific messages, as in *Wooley* and *Barnette*, and in compelled-access situations, too. Pet.Br.29–30 (collecting cases). Rather, the exercise of editorial and creative judgment is "enough" for a private speaker "to invoke [her] right … to shape [her] expression." *Hurley*, 515 U.S. at 574; WebsiteDesigners.Br.4–30 (detailing website designers' editorial contributions). Thus, in *Miami Herald Publishing Co.* v. *Tornillo*, this Court focused on the newspaper's "choice of material," an editorial decision that distinguished it from a "passive receptacle or conduit." 418 U.S. 241, 258 (1974).

These cases track the purpose behind the compelled-speech doctrine: to protect individual freedom of mind. Carpenter.Br.8–11 (explaining harms of compelled speech creation). An atheist is harmed if the government forces her to create a pro-religious message—even if no one ever knows about it. The "'[c]ompulsory unification of opinion' cautioned by Justice Jackson in *Barnette* is not only a social harm but a personal one." Pet.App.61a (Tymkovich, C.J., dissenting) (quoting *W. Va. State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 641 (1943)). This Court has held the government may not force individuals to subsidize someone else's speech, even when no one would attribute that speech to the funder. *Janus* v. *Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2464 (2018). That logic applies even more strongly to compelled speech itself.

D. CADA regulates Smith's content selection, not client selection.

Colorado says CADA does not address *what* a business sells, only *who* can buy it. Resp.Br.15–18. Not so. Smith plans to create custom websites with words and images that not only tell a couple's own story but celebrate the unique beauty of a particular wedding. Pet.App.181a–187a; J.A.51–72. That is the *what* Colorado insists Smith cannot "sell" unless she tells the same story about same-sex weddings.

Colorado insists Smith must create same-sex wedding websites because "refusing to *sell* based on an *attribute* inextricable from a customer's protected characteristic is discriminatory." Resp.Br.16 (emphases added); accord U.S.Br.20. That is not happening here. Colorado has stipulated that Smith works with anyone but declines to design, create, or promote content that contradicts her faith. Pet.App.184a. While prior cases have criticized efforts to distinguish conduct and status, Smith distinguishes the message her *own* speech conveys from someone else's status.

Status discrimination is different from disagreement with a message. Indeed, any other conclusion cannot be squared with the First Amendment. This was *Hurley*'s point. There, the parade organizers declined a group who wanted to march "to express pride in their Irish heritage as openly gay, lesbian, and bisexual individuals." 515 U.S. at 561. This Court protected the organizer's right to exclude this message because Massachusetts's law "altered the message that the parade organizers sought to deliver." Resp.Br.17 (citing *Hurley*, 515 U.S. at 578). So too here. Smith serves everyone but cannot create certain messages.

III. This Court should follow its compelled-speech decisions, not Colorado's novel theory.

As noted above, this Court's cases use a simple, two-part test to evaluate whether a public-accommodation law compels speech. Despite Colorado's protests, both parts of this test are easily applied here and elsewhere.

Hurley's first step—which asks whether speech is involved—is workable. According to Colorado, it is impossible to know whether someone is an "artist" or whether a product is "custom-made." Resp.Br.29–30. But this Court has never asked these questions, and Smith never called for these tests. Rather, certain mediums, like words and websites, so clearly "communicate ideas" that courts protect them without debate. *Brown* v. *Ent. Merchs. Ass'n*, 564 U.S. 786, 790 (2011); accord *Kaplan* v. *California*, 413 U.S. 115, 119–20 (1973) (pure speech includes printed and spoken words, pictures, films, paintings, drawings, and engravings).

If a particular situation is unclear, this Court has traditionally articulated a two-part inquiry, the first subjective, the second objective: (1) whether conduct "is intended to be communicative," and (2) "in context, would reasonably be understood by the viewer to be communicative." *Clark* v. *Cmty. for Creative Non-Violence*, 468 U.S. 288, 294 (1984) (citations omitted). In *Hurley*, the Court recognized that a "narrow, succinctly articulable message is not a precondition of constitutional protection," otherwise the works of Pollack, Schoenberg, or Carroll would be unprotected. 515 U.S. at 569. Thus, post-*Hurley*, the second part of the test asks whether a reasonable person would

interpret a work as conveying some sort of message, not whether the work communicates a specific message. *Ibid*; accord *Shurtleff* v. *City of Boston*, 142 S. Ct. 1583, 1598 (2022) (Alito, J., concurring) ("Speech" "refers to expressive activity that is intended to be communicative and, in context, would reasonably be understood to be communicative.") (cleaned up).[1] This test is clear, objective, and long-standing. And here, there is no debate. Smith creates websites with words and images; these are intended to—and objectively do—communicate ideas, as stipulated and held below. Pet.App.20a, 23a, 181a.

Moreover, Colorado's workability objection rings hollow given free-speech law generally. Courts routinely determine what is speech, distinguishing social dancing from black armbands, walking from parading, toilets from Duchamp's toilet sculptures. The fact that some line-drawing questions are difficult does not render the First Amendment null. See Elena Kagan, *Regulation of Hate Speech and Pornography After* R.A.V., 60 U. Chi. L. Rev. 873, 884 (1993) ("The speech/conduct line is hard to draw, but it retains much meaning in theory, and even more in practice.").

Generally speaking, bartenders, hairstylists, landscapers, plumbers, caterers, tailors, jewelers, and restaurants do not create speech—though that is of course not always the case. The question is whether a work is intended to communicate a message and is reasonably understood to do so. These line-drawing problems exist whether speech is created by busi-

[1] Thus, custom cakes sometimes qualify as protected speech—if they are intended to and are objectively understood to be communicative. See *Masterpiece Cakeshop, Ltd.* v. *Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1740 (2018) (Thomas, J., concurring).

nesses or non-profits and are no reason to allow governments to compel speech generally. Pet.App.61–63 (Tymkovich, C.J., dissenting) (describing dangers of government censorship); Pet.Br.26. Of course, Colorado's worries about the hard cases do not apply here because Smith's websites involve speech.

Hurley's second step—which asks whether the government affects a speaker's message—is also eminently workable. Pet.Br.20–22; Carpenter.Br.12–14. Under *Hurley*, the speaker's stated objections, the requested speech's facial content, its context, and whether the speaker generally serves a protected class are relevant. Pet.Br.21–22. Thus, speech is not compelled in rare situations involving pretextual objections, objections based solely on someone's status, or artists refusing to sell off-the-shelf products to a protected class. *Ibid.*; Arizona.Br.13–15; Carpenter.Br.9–11. And again, the analysis is straightforward here—where CADA threatens to punish Smith unless she agrees to write words and create pictures celebrating same-sex weddings when she otherwise would not.

Colorado never engages with the factors *Hurley* and similar cases considered. It just frets about workability, even though courts commonly make message and status distinctions. *E.g.*, *N.Y. State Club Ass'n* v. *City of New York*, 487 U.S. 1, 13 (1988) (distinguishing exclusion based on club members' views and their status); *World Peace Movement* v. *Newspaper Agency Corp.,* 879 P.2d 253, 258 (Utah 1994) (distinguishing objection to religious message and religious status).

Colorado's position is the unworkable one, empowering officials to compel speech in far-ranging circumstances. Indeed, the Tenth Circuit held that, as applied to Smith, CADA creates a "substantial risk of excising certain ideas or viewpoints from the public dialogue." Pet.App.23a–24a (cleaned up). Many public-accommodation laws today are sweeping in their classifications, including political affiliation and personal appearance. Cert.Pet.30–31; Pet.Br.27. And in many places, including Colorado, they apply to anyone who offers anything publicly, including sites like Etsy.com as well as to non-profits. See Cert.Pet.30–35. Colorado would subvert the First Amendment, allowing the government to compel speech du jour.

IV. CADA's application to Smith fails any level of heightened scrutiny.

As the Tenth Circuit held, since CADA regulates and compels speech based on content and viewpoint, it must satisfy strict scrutiny. Pet.App.24a; Pet.Br.36. Yet Colorado and the United States urge this Court to apply intermediate scrutiny under *United States* v. *O'Brien*, 391 U.S. 367 (1967), arguing that the State's interest in enforcing CADA is "unrelated" to speech suppression. Resp.Br.25–26; U.S.Br.31. But the Court has consistently applied strict scrutiny to laws that textually focused on conduct but altered, or were triggered by, content. Pet.Br.25 (collecting cases); see *Cohen* v. *California*, 403 U.S. 15 (1971) (breach of peace statute); *Hess* v. *Indiana*, 414 U.S. 105 (1973) (disorderly conduct). This is because strict scrutiny applies both to content-based regulations, *Holder*, 561 U.S. at 28, and when a law "directly and immediately affects" constitutional rights, *Boy Scouts of Am.* v. *Dale*, 530 U.S. 640, 659 (2000).

Here, CADA "directly and immediately" burdens speech based on its content. *Ibid.*; WalkforLife.Br.29–31. It "applies to" Smith's "speech because of the topic discussed"—namely, marriage. *Reed* v. *Town of Gilbert*, 576 U.S. 155, 163 (2015). Indeed, as applied to Smith, CADA functions "a lot like a matrimonial version of the equal-time doctrine the Supreme Court rejected in *Tornillo*." *Chelsey Nelson Photography, LLC* v. *Louisville/Jefferson Cnty. Metro Gov't*, No. 3:19-CV-851-BJB, 2022 WL 3972873, at *16 (W.D. Ky. Aug. 30, 2022) (finding application of similar law to be content based).

Of course, not *every* application of a public-accommodation law is content based. But it can be when, as here, it applies based on the expression's content or viewpoint. Tellingly, none of the cases Colorado cites for its intermediate-scrutiny theory involved speech compulsion. Resp.Br.25–28. Colorado cannot escape the reality that CADA forces Smith to alter her speech and does so in a content- and viewpoint-based way. Pet.Br.33–35. Such ideological favoritism offends the First Amendment and is per se unconstitutional. *Ibid.* At the least, it demands strict scrutiny.

A. Censoring Smith's speech does not serve an important or compelling interest.

Colorado spills much ink discussing its interest in "enforcing its non-discrimination policies generally." *Fulton* v. *City of Philadelphia*, 141 S. Ct. 1868, 1881 (2021) (cleaned up). No one disputes the importance of such policies. What Colorado needs to show is that letting Smith speak consistent with her conscience will *specifically* undermine that interest. Cf. *ibid.* (making the same point in the Free Exercise context). Colorado fails to offer even a word on that.

And with good reason. After all, Colorado stipulated that Smith serves anyone, regardless of status. Pet.App.1884a. This stipulation—which reflects how many people of faith (and non-faith) operate their businesses—defeats Colorado's assertions that CADA "merely requires that [artists] not deny goods or services based on a customer's protected characteristic." Resp.Br.39. It also makes Colorado's promise that "[b]usinesses can decline commissions for products they would not offer to anyone" ring hollow. *Ibid.*

Colorado and the United States posit an equally generalized interest in "ensuring equal access to goods and services." Resp.Br.37; U.S.Br.26. But since Smith only makes message-based referrals, everyone already has equal access to the services she offers. Further, Colorado does not show how Smith's speech (or failure to speak) would impair marketplace access. It contends instead that states cannot "analyze the availability of each good or service for each protected characteristic." Resp.Br.42. Yet when states burden fundamental rights like speech, they must show that their methods are necessary and "brook no departures." *Fulton*, 141 S. Ct. at 1882. In *Hurley*, though the parade was an "enviable vehicle" for GLIB's message, GLIB could have marched in other parades or even "obtain[ed] a parade permit of its own." 515 U.S. at 577–78. Even under intermediate scrutiny,[2]

[2] Smith does *not* agree that "the Accommodation Clause satisfies the *O'Brien* standard," U.S.Br.7, as Colorado shows neither harm to its asserted interests nor sufficient tailoring. See Pet.Br.37–41 (Colorado cannot show undermining of interests).

courts regularly analyze market alternatives. *Turner Broad. Sys.* v. *FCC*, 520 U.S. 180, 197 (1997).[3]

If the First Amendment protects Smith's speech, Colorado fears that the plethora of current market alternatives will disappear. Resp.Br.32. But Colorado has done nothing to show that the thousands of existing market alternatives will vanish, see J.A.17–23; Pet.App.28a, and it bears the "risk" of any uncertainty, *Brown*, 564 U.S. at 799–800.

Finally, Colorado tries to justify its censorial power based on its desire to protect dignitary interests. That theory contradicts *Hurley*, *Dale*, and many other cases where dignity interests did not justify overriding First Amendment rights. Rather, the "public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." *Matal* v. *Tam*, 137 S. Ct. 1744, 1763 (2017); Pet.Br.35 (collecting cases); George.Br.3–21 (detailing insufficiency of dignity harm to justify compelling Smith's speech). To silence minority viewpoints "would impoverish the richness of conversation and impede the search for truth contemplated by the First Amendment." Pet.App.63a (Tymkovich, J., dissenting).

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[3] That does not mean that states can, as Colorado suggests, automatically regulate speech in rural areas "where alternatives might be limited or nonexistent." Resp.Br.43. While a state might have a stronger interest in that instance, "monopoly" status does not "preclude … First Amendment rights." *Consol. Edison Co.* v. *Pub. Serv. Comm'n of N.Y.*, 447 U.S. 530, 534 n.1 (1980); accord *Miami Herald Publ'g Co.* v. *Tornillo*, 418 U.S. 241, 250 & n.15, 254 (1974).

Further, Colorado ignores that the dignity interests run both ways. The government harms a speaker's dignity—like Smith's—when it forces her to speak or stay silent contrary to her conscience. See *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209, 234–35 (1977) ("[O]ne's beliefs should be shaped by his mind and his conscience rather than coerced by the State."). And as this Court has noted, Smith's views on marriage rest on "decent and honorable religious or philosophical premises" about the nature of marriage itself. See *Obergefell* v. *Hodges*, 576 U.S. 644, 672 (2015).

B. Colorado fails to refute numerous alternatives to compelling speech.

Smith's opening brief identified many less burdensome alternatives Colorado could have pursued to achieve its objectives. Pet.Br.47–50. Colorado must, but cannot, demonstrate that it even considered those alternatives—or any others. Both "history and contemporary state practices" show Colorado has other avenues it could pursue without burdening speech. *Ramirez* v. *Collier*, 142 S. Ct. 1264, 1287 (2022) (Kavanaugh, J., concurring); JewishCoalition.Br.6–21.

Instead, Colorado asserts that Smith's proposed alternatives are either vague or unworkable. Yet it is the First Amendment that has struck the balance here, and the State has provided no evidence that it is unworkable to allow people to exercise their First Amendment freedoms. Strict scrutiny requires the State to provide more than "mere say-so." *Holt* v. *Hobbs*, 574 U.S. 352, 368–69 (2015); accord *Parents Involved in Cmty. Schs.* v. *Seattle Sch. Dist. No. 1*, 551 U.S. 701, 735 (2007).

The contrast in the parties' positions is stark. Smith's theory follows this Court's precedents and has reasonable limiting principles. Colorado invokes no test based on this Court's precedents, cites no case approving speech compulsion, and provides no guardrails. Colorado's answer to every objection is to trust the government and give officials a blank check to compel speech whenever government officials think it necessary.

C. Alternatively, the Court could apply a historical rule prohibiting government-compelled speech.

This Court routinely applies strict scrutiny in compelled-speech cases. In others, it has spoken in more absolute terms. *E.g.*, *Dale*, 530 U.S. at 654 ("[T]he choice of a speaker not to propound a particular point of view … is presumed to lie beyond the government's power to control.") (cleaned up); Pet.Br.15–17 (citing cases). This bright-line rule is especially appropriate given this Court's decision in *New York State Rifle & Pistol Association* v. *Bruen*, which held that, at least for Second Amendment purposes, text and history are superior to the tiers-of-scrutiny approach developed in the 20th century. 142 S. Ct. 2111, 2129 (2022).

To begin, the First Amendment textually and historically protects the creation and distribution of Smith's commissioned websites. Pet.Br.18–23; Tyndale.Br.6–11. As a result, Colorado must show that its speech compulsion "is consistent with this Nation's historical tradition" to justify the State's regulation. *Bruen*, 142 S. Ct. at 2126.

As explained above, Colorado and its amici cite not a single case or any historical source showing that governments tried to use public-accommodation laws or common-law equivalents to compel speech. Instead, Colorado asserts that public-accommodation laws historically applied to any business holding itself out to the public. Resp.Br.3–4. But scholars traditionally defined public accommodations more narrowly to monopoly situations or entities clothed in the public interest, like innkeepers and common carriers. Alfred Avins, *What Is a Place of "Public" Accommodation?*, 52 Marq. L. Rev. 1, 2–7 (1968); ChristopherGreen.Br.19–32. And by the time the Fourteenth Amendment was ratified, states universally defined public accommodations narrowly. Lisa G. Lerman & Annette K. Sanderson, *Discrimination in Access to Public Places: A Survey of State and Federal Public Accommodations Laws*, 7 N.Y.U. Rev. L & Soc. Change 215, 238–39 (1978). Even entities that clearly fit the traditional definition of public accommodation could decline services for "good reason." MacCloud.Br.4–13.

It is not enough for Colorado to show that compelling access to *non-expressive* goods is historically well founded. "To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must *demonstrate* that the regulation is consistent with this Nation's historical tradition of [speech] regulation." *Bruen*, 142 S. Ct. at 2126 (emphasis added).

In other words, Colorado needs to show that public-accommodation laws historically c*ompelled speech*, not that they merely existed. Yet Colorado and its amici fail to provide even one example. If three

historical firearm regulations did not carry the day in *Bruen*, then *zero* examples cannot show a "broad tradition" of public-accommodation laws compelling speech. *Id.* at 2156.

This historical silence is deafening. As Colorado and its amici's common-law citations show, earlier generations—including the Founders and their Fourteenth Amendment counterparts—knew the problems that discrimination and marketplace access posed. That these generations never targeted speech to solve this "general societal problem" dooms Colorado's attempt to do so here. *Bruen*, 142 S. Ct. at 2131. Serving everyone no matter who they are but declining to create messages that violate one's conscience fits the historical framework. Since Colorado has no historical analogue showing otherwise, this Court should hold that CADA's speech compulsion is invalid.

V. The Publications Clause also violates the First Amendment.

Colorado and the United States both concede that the constitutionality of applying the Publication Clause to Smith depends on the constitutionality of applying the Accommodation Clause to her websites. Resp.Br.44–45; U.S.Br.33–34. But as explained above, Smith's statement is not incidental to a valid limit on non-expressive, illegal conduct. Rather, it is an unconstitutional content- and viewpoint-based restriction on protected speech. Pet.Br.33–35. The interrelation between Smith's challenges to the Accommodation and Publication Clauses underscores the justiciability of this case. YoungAmerica Foundation.Br.16–26.

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Throughout our history, officials invoked many different ends "thought essential" to justify compelling speech. *Barnette*, 319 U.S. at 640. Yet none of them overrode the First Amendment's foundational promise—that each individual has the freedom to choose what to say and not to say. The Court should reject Colorado's attempt to trample that promise.

CONCLUSION

For these reasons, and those stated in Petitioners' opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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