SUPREME COURT
OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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303 CREATIVE LLC, ET AL.,   )

        Petitioners,   )

           v.   ) No. 21-476

AUBREY ELENIS, ET AL.,   )

        Respondents.   )

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Pages: 1 through 155

Place: Washington, D.C.

Date: December 5, 2022

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5                   v.                      ) No. 21-476
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7                   Respondents.            )
8    - - - - - - - - - - - - - - - - - - -
9
10                   Washington, D.C.
11               Monday, December 5, 2022
12
13       The above-entitled matter came on for
14   oral argument before the Supreme Court of the
15   United States at 10:01 a.m.
16
17   APPEARANCES:
18   KRISTEN K. WAGGONER, ESQUIRE, Washington, D.C.; on
19       behalf of the Petitioners.
20   ERIC R. OLSON, Solicitor General, Denver, Colorado; on
21       behalf of the Respondents.
22   BRIAN H. FLETCHER, Deputy Solicitor General,
23       Department of Justice, Washington, D.C.; for
24       the United States, as amicus curiae, supporting
25       the Respondents.
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1   C O N T E N T S

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 1               P R O C E E D I N G S
 2                              (10:01 a.m.)
 3               CHIEF JUSTICE ROBERTS:  We'll hear
 4     argument first this morning in Case 21-476, 303
 5     Creative LLC versus Elenis.
 6               Ms. Waggoner.
 7               ORAL ARGUMENT OF KRISTEN K. WAGGONER
 8                 ON BEHALF OF THE PETITIONERS
 9               MS. WAGGONER:  Mr. Chief Justice, and
10     may it please the Court:
11               Lorie Smith blends art with technology
12     to create custom messages using words and
13     graphics.  She serves all people, deciding what
14     to create based on the message, not who requests
15     it.  But Colorado declares her speech a public
16     accommodation and insists that she create and
17     speak messages that violate her conscience.
18               This Court rejects such
19     government-compelled speech.  In Hurley, the
20     Court considered a very similar issue, asking
21     two questions:  Is there speech, and is the
22     message affected?  That test is easily met here.
23     Colorado agrees Ms. Smith creates speech, and
24     the law undeniably affects her message.  She's
25     not asking this Court to create new law but to
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 1   apply its precedent.

 2   Colorado first says this case is about

 3   a sale. It's not just about a sale. The state

 4   forces Ms. Smith to create speech, not simply

 5   sell it.

 6   Next, Colorado says it can compel

 7   speech on the same topic. But Ms. Smith

 8   believes opposite-sex marriage honors scripture

 9   and same-sex marriage contradicts it. If the

10   government can label this speech equivalent, it

11   can do so for any speech, whether religious or

12   political. Under Colorado's theory,

13   jurisdictions could force a Democrat publicist

14   to write a Republican's press release.

15   Colorado's last resort is to argue

16   that it can at least compel the same expression.

17   But even the same expression can mean different

18   things, like a black sculptor who carves a

19   custom cross to celebrate a Catholic baptism but

20   not an Aryan church rally.

21   If the government may not force

22   motorists to display a motto, school children to

23   say a pledge, or parades to include banners,

24   Colorado may not force Ms. Smith to create and

25   speak messages on pain of investigation, fine,

1   and re-education.

2   I welcome this Court's questions.

3   JUSTICE THOMAS: Counsel, would you

4   spend just a few minutes on whether or not this

5   -- your case is ripe?

6   MS. WAGGONER: Sure. This Court has

7   considered pre-enforcement challenges before,

8   and, in those contexts, it has looked at the

9   facts. This is one of the strongest

10   pre-enforcement cases, I think, that this Court

11   has considered in that the parties have

12   stipulated every message that Ms. Smith would

13   create has a unique, customized message and that

14   it celebrates a wedding and celebrates a

15   marriage.

16   It's also difficult to imagine a

17   scenario where there is an -- a more aggressive

18   enforcement history by Colorado. Ms. Smith's

19   speech has been chilled. For six years, she has

20   been unable to speak in the marketplace. She's

21   ready to do so today, and she's ready to post

22   her website statement today, which makes this

23   case ripe.

24   JUSTICE KAGAN: Ms. Waggoner, unless

25   you're not through with that -- sorry. Your --

1   MS. WAGGONER: I'm through.

2   JUSTICE KAGAN: Okay.

3   MS. WAGGONER: Thank you.

4   JUSTICE KAGAN: Can I give you a

5   hypothetical? It's not really a hypothetical,

6   because I happen to have two clerks in my

7   chambers this year who are engaged, so, in

8   looking at this case and preparing this case, I

9   looked at their websites.

10   And so the hypothetical is about,

11   like, I'm going to call it the standard website.

12   They both have their names on it, the date of

13   the wedding, a picture of the couple. Then

14   there are a bunch of places that you can click

15   to, and one is the schedule of events and the

16   other is travel and hotel arrangements, and

17   another is favorite things to do in town while

18   you're here, and another is registry.

19   So that's what most websites look

20   like, yeah? And they're not particularly

21   ideological and they're not particularly

22   religious. They're not particularly anything,

23   all right?

24   And -- and then there's a -- a tag

25   line just like the tag line in this case about

1   sort of who created the website or whose

2   graphics and design and typefaces and so forth

3   were used in the website. And so one of them

4   says -- I'm going to substitute a woman's name

5   just to not advertise -- but one of them says,

6   Made By Love With Amber by -- Made With Love By

7   Amber, right? It's actually bigger than the 303

8   tag line.

9   So I guess what I want to know is

10   suppose Amber wakes up tomorrow morning and

11   says, you know what, I don't want to do those

12   websites anymore for same-sex couples.

13   Could she do that?

14   MS. WAGGONER: In terms of creating

15   new websites?

16   JUSTICE KAGAN: No, you know, like

17   she's providing these templates and she has all

18   these designs and -- and -- and typefaces and --

19   and that's what people use when they create

20   their own website because they give her the date

21   and they give her the -- the -- you know, the --

22   the -- the list of hotels and so forth.

23   So can Amber wake up and just say no

24   more gay couples?

25   MS. WAGGONER: She can't say no more

1   gay couples, but a speaker does have the ability

2   to decide not to speak under the law, but I

3   think the hypothetical that you're mentioning is

4   assuming that it's a plug-and-play website

5   essentially, that the website is already made

6   and that the speech creator isn't making any

7   additions to it.

8   JUSTICE KAGAN: No, no, no.

9   MS. WAGGONER: But compelled --

10   JUSTICE KAGAN: I mean, you know, just

11   like -- I -- I mean, I -- I have to think that

12   your client does something similar. You have

13   lots of graphics, you have, you know, typefaces,

14   and, you know, maybe, you know, some are a

15   little bit more you talk to the client and some

16   are a little bit less you talk to the client.

17   But, basically, you know, clients are

18   coming in and they're saying, we just want a

19   standard website, you know, that tells people

20   where to stay and what -- how to travel there

21   and -- and, you know, what our favorite things

22   to do are.

23   And -- and the question is, can a

24   website designer say, sorry, that's not my kind

25   of marriage?

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1           MS. WAGGONER:  The website designer --
2           JUSTICE KAGAN:  There's no scripture,
3      there's no ideology, there's no nothing.
4           MS. WAGGONER:  There is ideology.  And
5      this Court has already recognized that there is
6      ideology and different views on marriage.  And
7      the Court's promise in Obergefell is to protect
8      those who would believe marriage is between a
9      man and a woman from having to express a view
10     that violates their conscience.  But I think --
11          JUSTICE KAGAN:  Okay.  So I think that
12     if I understand you, you're saying, yes, she can
13     refuse because there's ideology just in the fact
14     that it's Mike and Harry and there's a picture
15     of these two guys together.
16          MS. WAGGONER:  That is speech.  You
17     are announcing a wedding.  And if you believe
18     the wedding to be false, then the -- the
19     government would be compelling you to say
20     something that you otherwise wouldn't say, which
21     makes it --
22          JUSTICE KAGAN:  So --
23          MS. WAGGONER:  -- content-based.
24          JUSTICE KAGAN:  -- so it's really
25     nothing about the content of this speech.  I
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 1   mean, it could be Mike and Pat and you don't

 2   actually even know whether Pat is a woman or a

 3   man. There's really nothing about the content

 4   of this speech, am -- am I right?

 5   In your case, you have, like,

 6   scripture examples, and so that might, you know,

 7   be different maybe, but you're being forthright

 8   and saying it's really not about that. It's

 9   nothing about the content of the speech. It's

10   just that the content is being -- what --

11   what -- whatever the graphics and typefaces and,

12   you know -- you know, which hotels are -- you

13   know, have been reserved for the wedding, it's

14   being used in a same-sex marriage.

15   MS. WAGGONER: No, it's not about the

16   use. It -- what is it's about when a person is

17   creating speech, it is what is the message that

18   they are expressing. The Hurley framework asked

19   this Court to first look at is there speech, and

20   there clearly is words, graphics, text, videos,

21   pictures. That's speech, and it's generally

22   protected.

23   The second is to ask is the speaker's

24   message affected. And when you're requiring a

25   speaker to create a message to celebrate

 1   something that they believe to be false, you're

 2   compelling their speech and it's affecting their

 3   message.

 4   JUSTICE JACKSON: So their message is

 5   not actually the content of the website. I

 6   mean, this is Justice Kagan's point. We could

 7   have a situation in which the identical website

 8   is being offered, one to Harry and Ann and one

 9   to Harry and Steve, but everything on the

10   website is exactly the same.

11   I think I hear you saying that the

12   message that the designer would be sending when

13   she offered the website to Harry and Steve would

14   be different and contrary to her beliefs, and

15   that -- so -- so it's -- it's the implicit

16   message that she's endorsing that wedding --

17   MS. WAGGONER: No.

18   JUSTICE JACKSON: -- that's the

19   problem.

20   MS. WAGGONER: No, she's not -- it's

21   not about whether she's endorsing it. She's not

22   speaking through anything but creating a speech.

23   And when you switch out those names, you're

24   switching out the concept and the message that

25   is actually in the website. Think of an example

1   --

2   JUSTICE SOTOMAYOR: Where?

3   MS. WAGGONER: -- of "God bless this

4   marriage."

5   JUSTICE ALITO: Suppose that we --

6   JUSTICE SOTOMAYOR: Well, that's --

7   that's a particular message. But I looked and

8   -- and to your proposed website, and turn to

9   page 51. It says Save The Date, Lilly and Luke,

10   November 17, 2017.

11   So what's the message if it says, Save

12   The Date, Lilly and -- Lilly and Lillian or

13   Lilly and Mary? What's the message there?

14   MS. WAGGONER: That's an invitation to

15   celebrate a marriage, and --

16   JUSTICE SOTOMAYOR: But why is it your

17   invitation? I go to a wedding website. It's

18   something that I send, meaning you, your client,

19   I send it to my family and friends or Lilly and

20   Luke send it to their family and friends. You

21   don't send it. They go to this website. You're

22   not inviting them to the wedding. Lilly and

23   Mary are. So how is it become your message?

24   MS. WAGGONER: In the same way that it

25   is the message of a ghostwriter who writes an

1　anonymous press release or a book. It is still

2　that writer's speech. The whole point of the

3　Compelled Speech Doctrine is to ensure that in

4　--

5　　　　　JUSTICE SOTOMAYOR: So what's the

6　limiting line of yours -- of yours? Justice

7　Kagan asked you about another website designer.

8　But how about people who don't believe in

9　interracial marriage or about people who don't

10　believe that disabled people should get married?

11　　　　　What's -- where's the line? I choose

12　to serve whom I want. If I disagree with their

13　personal characteristics, like race or

14　disability, I can choose not to sell to those

15　people --

16　　　　　MS. WAGGONER: Not at --

17　　　　　JUSTICE SOTOMAYOR: -- this website --

18　　　　　MS. WAGGONER: -- not --

19　　　　　JUSTICE SOTOMAYOR: -- because it's my

20　speech?

21　　　　　MS. WAGGONER: -- not at all, Your

22　Honor. The Hurley framework provides that in a

23　public accommodation context, the first thing

24　the Court looks at is, is the speech creator

25　otherwise serving those in the protected class

1   and expressing other messages.

2   In the context of race, it's highly

3   unlikely that anyone would be serving black

4   Americans in other capacities but only refusing

5   to do so in an interracial marriage context --

6   JUSTICE KAGAN: Well, it's not

7   impossible.

8   MS. WAGGONER: -- but --

9   JUSTICE ALITO: Suppose -- suppose we

10   agreed that the website designer could not

11   refuse to provide that service to a same-sex

12   couple if the website is of the kind that

13   Justice Kagan described.

14   What does that say about the

15   particular case that is before us on stipulated

16   facts?

17   MS. WAGGONER: Well, it would say that

18   the Court isn't considering those facts because

19   that's not this case that's presented to them,

20   but, at the same time, even that website --

21   JUSTICE ALITO: Well, so what are the

22   differences between -- what differences do you

23   see between her hypothetical and the actual case

24   that is before us?

25   MS. WAGGONER: She provided a number

         1   of hypotheticals, so in terms of assuming it's a

         2   --

         3   JUSTICE KAGAN: Just one, Ms.

         4   Waggoner.

         5   JUSTICE ALITO: The hypothetical --

         6   MS. WAGGONER: -- website --

         7   JUSTICE ALITO: -- where there is a

         8   website and, basically, all the -- the website

         9   operator does is to put in the names of the two

        10   people who are getting married.

        11   MS. WAGGONER: That's not a service

        12   that -- or a speech creation that Ms. Smith

        13   provides, but, if she did provide that, if it's

        14   a plug-and-play website where the couple, for

        15   example, is putting in their names and -- and

        16   using their website, then you don't have

        17   compelled speech because you don't have a speech

        18   creator.

        19   But even in the context of putting in

        20   names --

        21   JUSTICE SOTOMAYOR: I'm sorry. Show

        22   me on your website -- show me in -- on the pages

        23   of your petition for a writ of certiorari, show

        24   me a page on that website that is an endorsement

        25   of a marriage as opposed to the story of a

             1   couple.

             2   MS. WAGGONER: Well, either one

             3   violates the Compelled Speech Doctrine.

             4   JUSTICE SOTOMAYOR: No, no, no.

             5   MS. WAGGONER: You can't --

             6   JUSTICE SOTOMAYOR: Please show me a

             7   page on your website that's attached to your

             8   petition. I'll start you on page 51.

             9   MS. WAGGONER: Pages 53, 52, 54 --

            10   JUSTICE SOTOMAYOR: Okay. But leave

            11   this --

            12   MS. WAGGONER: -- 55, and 56 all

            13   represent an invitation and a celebration --

            14   JUSTICE SOTOMAYOR: Fifty-three says

            15   "Our Photo Gallery." Fifty-four says "Funny

            16   Dating Story." How is that your story, your

            17   photo gallery?

            18   MS. WAGGONER: Fifty --

            19   JUSTICE SOTOMAYOR: It's the couple's

            20   photo gallery. Page 54 is "Funny Dating Story."

            21   It's their story, not your story.

            22   I'm looking at every page, and,

            23   basically, it's the story of the couple. It's a

            24   date on page 51. Fifty-two is "Our Special

            25   Day." Fifty-three is RSVP. "Our Photo

1   Gallery." Fifty-four is a funny dating story.

2   I keep looking at all of the mockups, and all of

3   them relate to what Lilly and Luke are saying or

4   doing, who they are, who are their grooms, who

5   aren't their -- who's their bridesmaids. I

6   don't understand. How is this your story? It's

7   their story.

8   MS. WAGGONER: If you're asking

9   whether -- first of all, book authors, newspaper

10   editors, those who write all kinds of

11   publications may be writing about someone else's

12   story, but it's still their speech, and it's

13   still protected --

14   JUSTICE JACKSON: But they're not

15   public accommodations in the same way.

16   JUSTICE BARRETT: Ms. Waggoner, can I

17   ask you --

18   MS. WAGGONER: They --

19   JUSTICE BARRETT: -- a question about

20   a heterosexual couple? So, in response to

21   Justice Sotomayor's questions, I took it that

22   your website where you say why a wedding

23   website, you go through and it seems like

24   careful, Ms. Smith was careful to say things

25   like I fully customize the look, feel, theme,

1   message, color palettes, et cetera. And then

2   there's the engagement story page and inspired

3   by -- "a page inspired by you and written by

4   Lorie that captures and conveys the cherished

5   storybook of your love."

6   So I want to ask you a hypothetical

7   about a heterosexual couple that comes to your

8   client, and their wedding story, you know, that

9   they want to write under the engagement story

10   page goes like this: We are both cisgender and

11   heterosexual, but that is irrelevant to our

12   relationship which transcends such categories.

13   We knew we were soulmates from the moment that

14   we met and on and on.

15   Would your client publish that site?

16   MS. WAGGONER: Yes, she would publish

17   the site because her objection -- assuming that

18   the marriage is between a -- a man and a woman,

19   she would publish it and that there's no

20   message that she objected --

21   JUSTICE BARRETT: Even though that

22   narrative, I assume, is inconsistent with her

23   biblical views about marriage? Or I'll give you

24   another related one. A heterosexual couple

25   comes to her and in the engagement story part

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 1    writes a story that goes like this:  We met at
 2    work, we were both married to other people, but
 3    what began as late nights at the office quickly
 4    turned into love.  After six months, we realized
 5    we could be happy only with each other, so we
 6    decided to begin our story today, got divorced,
 7    and are marrying each other.
 8              Does she publish it?
 9              MS. WAGGONER:  I don't believe that
10    she would.  I also don't believe that she would
11    embrace or express a message that would
12    essentially say it doesn't matter whether there
13    is a marriage between a man and a woman.  She
14    wouldn't create that speech either.
15              JUSTICE BARRETT:  So it's about the
16    message and not about the sexuality of the
17    couple that asked her to express it that
18    matters?
19              MS. WAGGONER:  Yes, which is exactly
20    how the Court decided the case in Hurley, but
21    it's also in other cases as well, the Pacific
22    Gas and Miami Herald cases.  This Court has
23    routinely looked at compelled speech cases to
24    determine if the message --
25              JUSTICE BARRETT:  And, Ms. Waggoner,
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1   can I just ask you to clarify before we move on?

2   When I first asked you the question about the

3   cisgender heterosexual couple, you said you

4   thought she would publish it, but then it seemed

5   like you wavered and said something different a

6   minute ago.

7   MS. WAGGONER: If I could just clarify

8   the hypothetical. The second part of the

9   statement was that it didn't matter? Is -- is

10   that --

11   JUSTICE BARRETT: That concepts of

12   gender or, you know, sexual orientation were

13   irrelevant to their relationship because they

14   believe that those categories don't matter.

15   What matters is their union of souls.

16   MS. WAGGONER: No, she would not

17   create a -- a website that would say that

18   because that would violate her beliefs about

19   what scripture holds on marriage, in the same

20   way, though, this law and the Compelled Speech

21   Doctrine protects the LGBT website designer, who

22   won't be forced to have to create a website

23   essentially advocating for a view of marriage

24   that they don't hold.

25   JUSTICE JACKSON: Can I ask --

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 1              JUSTICE GORSUCH:  Well, what do we --
 2    what do we do --
 3              JUSTICE KAGAN:  But then -- just --
 4    just -- a -- and this is --
 5              JUSTICE GORSUCH:  -- what do we -- I'm
 6    sorry.  No.
 7              JUSTICE KAGAN:  No, go ahead.
 8              JUSTICE GORSUCH:  No, no, please.
 9              JUSTICE KAGAN:  No, no, no.
10              CHIEF JUSTICE ROBERTS:  Justice --
11    Justice Gorsuch?
12              (Laughter.)
13              JUSTICE GORSUCH:  I -- I -- I -- I'm
14    sorry.
15              JUSTICE KAGAN:  No, no, no.
16              JUSTICE GORSUCH:  One can view these
17    websites, or last time around we had cakes, as
18    either expressing the maker's point of view or
19    the couple's point of view, and -- and that's
20    really at -- at the heart of a lot of this.  And
21    I guess I'm -- I'm a little confused because
22    sometimes, as I -- as I understand it, you're
23    saying inherently here it is my client's point
24    of view and not just the couple's point of view.
25    I'm being compelled to speak.  I get it.
```

1   And sometimes Colorado agrees with

2   you, for example, when it comes to the example

3   you just gave, which is why it popped up. I

4   believe it was William Jack in -- in the

5   Masterpiece Cake example where Colorado said he

6   didn't have to create cakes that -- that spoke

7   against same-sex marriage, that that would be

8   his compelled speech, not just the couple's

9   speech.

10   So what do we do about this level of

11   generality problem, if you will, where people

12   slide back and forth based upon their priors?

13   How do we avoid that as a Court? What rule

14   would you have us draw?

15   MS. WAGGONER: The Court should follow

16   a rule that says, if the speech is being created

17   and there's an objection and that objection is

18   contained in the message, it is protected

19   speech, and the government can't --

20   JUSTICE SOTOMAYOR: So please --

21   MS. WAGGONER: -- slide up and down --

22   JUSTICE SOTOMAYOR: -- tell me why

23   it's not protected speech, the identical message

24   that -- that Justice Barrett put forth but by a

25   disabled couple. And you say, I don't want

1   disabled people to get married. I think

2   propagating a disability is against my personal

3   belief. It doesn't have to be religious because

4   we're not dealing with the religious part of

5   this. I don't want to speak that message. I

6   too believe that two disabled people getting

7   married and telling their story of how they got

8   in love, I'm not going to serve those people

9   because I don't believe --

10   MS. WAGGONER: It's not --

11   JUSTICE SOTOMAYOR: -- that they

12   should be married. What's the difference

13   between that and I don't believe black people

14   and white people should get married?

15   MS. WAGGONER: What matters is what

16   the objection is that the speaker is being asked

17   to create and whether the objection --

18   JUSTICE SOTOMAYOR: But -- but, if I

19   just -- that's my objection. I don't believe

20   they should be telling their story.

21   MS. WAGGONER: If you don't believe

22   they should be telling their story and what

23   they're asking you to do is tell their story,

24   then you don't have to do that, in the same way

25   --

1   JUSTICE SOTOMAYOR: So it doesn't

2   really -- there is no line on race, there is no

3   line on disability, ethnicity, none of the

4   protected categories --

5   MS. WAGGONER: That's --

6   JUSTICE SOTOMAYOR: -- in a public

7   accommodation law?

8   MS. WAGGONER: There is a line.

9   There's a very clear line, and it's worked --

10   JUSTICE SOTOMAYOR: Well, but tell me

11   --

12   MS. WAGGONER: -- very well.

13   JUSTICE SOTOMAYOR: -- what the clear

14   line is. It's compelled --

15   MS. WAGGONER: The clear --

16   JUSTICE SOTOMAYOR: You're saying it's

17   compelled speech, correct, not compelled

18   service?

19   MS. WAGGONER: I'm saying that in the

20   public accommodation cases, this Court has

21   routinely looked at whether there's speech and

22   whether the message is affected and whether the

23   objection lines up with the final speech.

24   JUSTICE SOTOMAYOR: But the one -- one

25   line --

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 1              MS. WAGGONER:  That --

 2              JUSTICE SOTOMAYOR:  -- that you're

 3    missing is Justice Gorsuch's line.  Whose speech

 4    --

 5              MS. WAGGONER:  The --

 6              JUSTICE SOTOMAYOR:  -- is the person

 7    viewing it going to think is talking?  You --

 8              MS. WAGGONER:  The Pulitzer Prize

 9    doesn't go to the customer or to the subject; it

10    goes to the photographer, and there's a reason

11    for that.  That reason is because you are

12    requiring that artist to speak a message.  It is

13    their work.  It might also be the customer's and

14    the customer can use that.

15              But the First Amendment is broad

16    enough to cover the lesbian website designer and

17    the Catholic calligrapher.  The line is that no

18    one on any side of any debate has to be

19    compelled to express a message that violates

20    their core convictions because, as this Court

21    found, it's demeaning to them.

22              JUSTICE SOTOMAYOR:  But the line you

23    want us --

24              JUSTICE JACKSON:  So can I --

25              JUSTICE SOTOMAYOR:  I'm sorry.
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 1          JUSTICE JACKSON:  -- can I ask you a

 2    hypothetical that just sort of helps me to flesh

 3    that out?  Because I also heard you suggest

 4    earlier that there's something different about

 5    race, maybe the person wouldn't sell to someone

 6    of a different race.

 7          So -- so suppose -- you -- you say

 8    that photography is expressive.  Can you give me

 9    your thoughts on a photography business in a

10    shopping mall during this holiday season that

11    offers a product called Scenes with Santa, and

12    this business wants to express its own view of

13    nostalgia about Christmases past by reproducing

14    classic 1940s and 1950s Santa scenes.  They do

15    it in sepia tone and they are customizing each

16    one.  This is not off a rack.  They're really

17    bringing the people in and having them interact

18    with Santa, children, because they're trying to

19    capture the feelings of a certain era.

20          But precisely because they're trying

21    to capture -- capture the feelings of a certain

22    era, their policy is that only white children

23    can be photographed with Santa in this way

24    because that's how they view the scenes with

25    Santa that they're trying to depict.
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1   Now the business will gladly refer

2   families of color to the Santa at the other end

3   of the mall who will take anybody, but -- and --

4   and they will photograph families of color in

5   other scenes -- other scenes, so they're not

6   discriminating against the families. What

7   they're saying is Scenes with Santa is preserved

8   for white families and they want to have a sign

9   next to the Santa that says "only white

10   children."

11   Why isn't your argument that they

12   should be able to do that? And may -- maybe it

13   is.

14   MS. WAGGONER: Because, in the

15   photograph itself, the objection is not

16   contained in that photograph.

17   But, in addition, I think it's

18   important to remind the Court that --

19   JUSTICE JACKSON: No, no, no, don't

20   leave. Sorry. What do you mean? I mean, the

21   objection, just like your client's objection, is

22   to expressions that violate their own views of

23   what is being depicted, and so their view of

24   what is being depicted is that a scene with

25   Santa and a child on the lap and all of that in

 1   sepia tone, trying to harken back to the good

 2   old days, should only have white children in it.

 3   That's their firm belief. They are not willing

 4   to take photographs of black, Hispanic, Asian

 5   children on Santa's lap.

 6   Why is that any different than a

 7   situation like this?

 8   MS. WAGGONER: Because the specific

 9   objection that you're including is not

10   necessarily in that photograph, but even if it

11   were, this Court has protected vile, awful,

12   reprehensible, violent speech in the past, and

13   it has never compelled speech.

14   JUSTICE JACKSON: No, I'm just asking

15   you why is the objection of the web designer, as

16   Justice both Kagan and Sotomayor has pointed

17   out, when we look at your examples, they just

18   say things like "Please come to the wedding on

19   this day."

20   MS. WAGGONER: Precisely. It's an

21   invitation to a wedding --

22   JUSTICE JACKSON: Okay. So I --

23   MS. WAGGONER: -- which --

24   JUSTICE JACKSON: -- so -- so, if --

25   if my hypothetical is an invitation to join me

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 1      in the 1950s through looking at this photo, you

 2      say one is different?

 3              MS. WAGGONER:  I say that that same

 4      clarity of the message isn't in that photo, but

 5      there are difficult lines to draw and that may

 6      be an edge case, but this is not.  We have a

 7      creative -- a creator of speech and a very

 8      clear message --

 9              JUSTICE KAGAN:  It may be an edge case

10      meaning it could fall on either side, you're not

11      sure?

12              MS. WAGGONER:  I am -- I am sure in

13      that the message isn't in the product.  It's not

14      in the photograph.  But even if this Court were

15      to find that it was, the Court would still have

16      to protect the speech, and the Court could draw

17      a line in a different place, as it has

18      juxtaposed Loving and Obergefell in terms of the

19      beliefs between same-sex marriage.  But it --

20              JUSTICE KAGAN:  So just --

21              JUSTICE ALITO:  In --

22              JUSTICE KAGAN:  Sorry.

23              JUSTICE ALITO:  -- in Obergefell, did

24      the Court say that religious objections to

25      same-sex marriage are the same thing as
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 1   religious or other objections to people of

 2   color?

 3   MS. WAGGONER: No. In fact, it said

 4   that decent and honorable people hold beliefs

 5   about marriage, believing that there's a

 6   gender-differentiated marriage and that that's

 7   based on reasonable religious and philosophical

 8   premises.

 9   When we review Loving, there's a very

10   different --

11   JUSTICE SOTOMAYOR: But tell me how to

12   write this decision for you that draws the line

13   just on gay marriage, because that's what you

14   seem to be saying right now, but draws a line

15   that doesn't affect my example of a disabled

16   person or an interracial couple.

17   You're saying it's just because it's

18   compelled speech.

19   MS. WAGGONER: I'm saying that the

20   interracial couple, the disabled person, the

21   lesbian graphic designer, the Democrat, the

22   Republican, no one should be compelled to speak

23   a message. And this Court has never found a

24   compelling interest that was narrowly

25   tailored --

1   JUSTICE SOTOMAYOR: So you -- you're

2   -- you're saying a print shop, a web designer,

3   a -- a cake maker, a --

4   JUSTICE JACKSON: A photographer.

5   JUSTICE SOTOMAYOR: -- a jewelry -- a

6   photographer, a jewelry maker, they can refuse

7   to serve anyone they want to refuse because they

8   have a deeply felt belief that serving -- taking

9   pictures of black couples, black and white

10   couples, taking pictures of disabled people,

11   people are going to believe that they're

12   speaking that message?

13   MS. WAGGONER: I'm not saying that at

14   all. What I'm saying is that in every free

15   speech case the Court looks first is there

16   speech. In many of the situations you've

17   raised, there would not be speech.

18   JUSTICE SOTOMAYOR: But why not? I'm

19   saying your identical website, and I don't see a

20   page in here where it says I am speaking, 303.

21   That's on your personal website. It's not on

22   the wedding website. I've asked you to show me

23   where, in which pages, it's your message as

24   opposed to the couple's message.

25   MS. WAGGONER: Every page is my

1   client's message --

2   JUSTICE SOTOMAYOR: But that --

3   MS. WAGGONER: -- just as in a

4   newspaper that hosts an op-ed written by someone

5   else --

6   JUSTICE SOTOMAYOR: So why doesn't the

7   --

8   MS. WAGGONER: -- or Hurley, the

9   parade.

10   JUSTICE SOTOMAYOR: But then why does

11   an off-the-shelf website -- the creator of an

12   off-the-shelf website is then speaking? That's

13   what you're saying.

14   MS. WAGGONER: No, because the

15   Compelled Speech Doctrine doesn't apply once

16   you've entered that speech into the stream of

17   commerce. When the speech is completed, the

18   Compelled Speech Doctrine no longer applies.

19   But, in addition, there are 20 states

20   that have filed an amicus brief in this case and

21   said they are right now using their public

22   accommodation laws to allow message-based

23   protections, as Hurley would require, and

24   they're not experiencing these issues. And in

25   --

 1   JUSTICE SOTOMAYOR: But you're not

 2   asking for that. You're saying, I don't want to

 3   serve a particular person, a disabled person, a

 4   black and white couple, a disabled couple, a --

 5   a -- a gay couple. You're basing it not on the

 6   nature of the message, you're basing it on who

 7   you're serving.

 8   MS. WAGGONER: That's -- I don't think

 9   that's a fair characterization. The stipulated

10   facts in this case are that Ms. Smith has LGBT

11   clients. She serves them regularly. She has

12   all kinds of clients.

13   JUSTICE SOTOMAYOR: Tell me how that's

14   different, by the way. What you're basically

15   saying is, in our Ollie's Barbecue case, the

16   company there said, I'll serve blacks but only

17   on a takeout window, not inside my restaurant

18   because that sends a message that I endorse

19   integration.

20   MS. WAGGONER: Ms. Smith isn't looking

21   to send a message through her conduct. She's

22   look --

23   JUSTICE SOTOMAYOR: No, she -- what

24   you're saying is, I want to give gay couples a

25   limited menu, not a full menu, just the way that

1   luncheonette said.

2   MS. WAGGONER: No. Just as this Court

3   found in Hurley, she's being asked to shape her

4   speech by a third party, and it's -- again, it's

5   about what messages she is creating. In Ollie's

6   Barbecue, they weren't engaging --

7   JUSTICE SOTOMAYOR: Well, when I sit

8   down to eat a meal by a full chef who creates

9   this beautiful picture on a plate, why can't he

10   say, I make specialized meals for my clients. I

11   will not serve a black person. I won't serve a

12   disabled person because they can't appreciate

13   fully what I'm creating. That's basically what

14   you're saying.

15   MS. WAGGONER: No, I don't think it is

16   what I'm saying. We're conflating service and

17   speech in that instance. A chef isn't --

18   JUSTICE SOTOMAYOR: But why is yours

19   not a service?

20   MS. WAGGONER: May I answer the

21   question?

22   CHIEF JUSTICE ROBERTS: Yes.

23   MS. WAGGONER: Because it is creating

24   speech. And the public accommodation law is

25   broad enough to ensure that we're not crushing

1   consciences not just of Ms. Smith but of her

2   LGBT friends.

3   CHIEF JUSTICE ROBERTS: Thank you,

4   counsel. If -- if your client's website --

5   MS. WAGGONER: Sorry.

6   CHIEF JUSTICE ROBERTS: Yeah, you

7   don't go. Not so fast.

8   (Laughter.)

9   MS. WAGGONER: New way of doing it.

10   CHIEF JUSTICE ROBERTS: If your -- if

11   your client's website was the same as it is, but

12   the only indication of any limitation was a tag

13   line at the end saying these services are for

14   heterosexual couples only, could that

15   constitutionally be applied under the Colorado

16   statute?

17   MS. WAGGONER: The speech could be

18   compelled if you're suggesting that she

19   essentially has a "no customers only" sign. And

20   that's exactly --

21   CHIEF JUSTICE ROBERTS: No, no. Well,

22   no -- as in your case, no websites. No websites

23   are available for -- except for heterosexual

24   couples.

25   MS. WAGGONER: For marriage?

1   CHIEF JUSTICE ROBERTS: Yeah, same

2   thing.

3   MS. WAGGONER: Generally speaking, no.

4   In Ms. Smith's particular case, all of her

5   websites are created, they're original,

6   customized to the story, and so, in that

7   instance, she believes same-sex marriage to be

8   false and couldn't create the speech.

9   CHIEF JUSTICE ROBERTS: Okay. What if

10   it said, I -- I won't provide websites for

11   anything other than heterosexual marriages

12   because of religious reasons? Could that be

13   covered, or is it simply the invocation of

14   religious basis for the objection that protects

15   it from coverage under the statute?

16   MS. WAGGONER: The religious basis is

17   not determinative here. This Court has provided

18   broad protection for religious speech, but it --

19   it wouldn't matter. This -- this Compelled

20   Speech Doctrine applies in a host of situations

21   and cases that are not religious.

22   CHIEF JUSTICE ROBERTS: I -- I guess I

23   don't understand that answer. In other words,

24   is it simply adding for religious reasons to the

25   label that would change whether it's -- could be

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 1    regulated or not?
 2              MS. WAGGONER:  I think what's
 3    important is that the objection is to the
 4    message she's being asked to create.  And so, if
 5    she believes she's being asked to create a
 6    message that violates her convictions, whether
 7    those convictions are based on a moral reason or
 8    a religious reason, it would be protected.
 9              CHIEF JUSTICE ROBERTS:  Okay.  Thank
10    you.
11              Justice Thomas?
12              Justice Alito?
13              Justice Sotomayor?
14              Justice Kagan?
15              JUSTICE KAGAN:  Yeah.  I -- I wanted
16    to take you back to my opening questions and
17    then Justice Alito's question about how your
18    case is different from my hypothetical, and
19    maybe the way to sort of cut through some of
20    this is to not make it a hypothetical and just
21    ask about your client.
22              So Mike and Mary go into your client,
23    we love your graphics, we saw them someplace
24    else, we love how this looks.  Here's what we
25    want.  We want a standard site, our names, our
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1   -- the picture, the hotels, the registry, you

2   know, just -- just that.

3   And you say okay, don't you?

4   MS. WAGGONER: Yes, assuming all the

5   details line up with the message that she's

6   willing to create.

7   JUSTICE KAGAN: Yeah. I mean, and

8   they say we don't want your scripture. That's

9   all right with you? They don't have to have

10   scripture?

11   MS. WAGGONER: No, they do not have

12   to.

13   JUSTICE KAGAN: Yeah. They can just

14   have a standard site, right? Okay.

15   So now it's not Mike and Mary. Now

16   it's Mike and Mark, and they want the identical

17   site. We saw Mike and Mary's site. We loved

18   it. We're getting married. You know -- you

19   know, all they want to change is the date maybe

20   or, you know, their names, whatever. We loved

21   it. And -- and they don't get it.

22   And the -- and -- and you say no,

23   right? You -- you -- you wouldn't be up there

24   if you weren't going to say no, right? They

25   can't get that site?

1   MS. WAGGONER: Yes, because the same

2   words can even convey different meanings.

3   JUSTICE KAGAN: Yeah. So then -- I

4   mean, the difference is one couple is opposite

5   sex, one couple is same sex. How is this -- you

6   know, what -- what are the different meanings?

7   What is the speech that your client is

8   expected -- is -- is required to provide in the

9   way I expressed it to you?

10   MS. WAGGONER: The purpose of the

11   websites is to celebrate an upcoming wedding.

12   It's to announce a wedding. And --

13   JUSTICE KAGAN: It is to announce a

14   wedding. I mean, let's -- this is a standard

15   site. You know, there's not a whole lot of,

16   gosh, isn't this great? It's just like here's

17   the registry, you know. It's announcing the

18   wedding. It's announcing where to get the hotel

19   reservations and so forth, right?

20   So what speech is being -- I mean,

21   that's -- that's what -- that's what websites

22   do, just like it's what invitations do, right?

23   So, you know, next, we'll have the stationer up

24   there saying, you know, we print the station --

25   the stationery, right? I mean, it would be the

 1   same. It is announcing the wedding.

 2   What's the speech that's been required

 3   of your client that we -- I mean, I'm going to

 4   have lots of questions for these guys too, but,

 5   in -- in that context, what is the speech that

 6   is required of your client that would violate

 7   the First Amendment?

 8   MS. WAGGONER: She believes that

 9   same-sex weddings contradict scripture and she's

10   announcing a concept of marriage that she

11   believes to be false.

12   And, in addition to that, even --

13   JUSTICE KAGAN: I mean, but that just

14   sounds to me like I would be participating in a

15   wedding, I would be, you know, lending my

16   services to a wedding. You know, as Justice

17   Sotomayor suggested, the florist, the baker, and

18   the guy who provides the chairs are also

19   providing the services in a wedding that they

20   don't like. So why are they any different?

21   MS. WAGGONER: The person providing

22   the chairs isn't providing speech, but when you

23   are engaging in symbolic speech, whether that be

24   through the creation of a custom wedding cake or

25   a custom wedding website, you are creating

1   speech. I can't --

2   JUSTICE KAGAN: Even though the site

3   doesn't say anything about that? It doesn't

4   say, wow, gay marriage is a wonderful thing. It

5   doesn't say -- it doesn't even say, you know,

6   we're here to celebrate this wonderful marriage

7   in my hypothetical. It doesn't even say that.

8   MS. WAGGONER: Again, the announcement

9   of the wedding itself is a concept that she

10   believes to be false. And the entire purpose

11   behind the Compelled Speech Doctrine is to avoid

12   these ends by avoiding these beginnings. It's

13   to ensure that individuals don't speak messages

14   that betray their conscience. And that applies

15   just as much to the Democrat as to the LGBT or

16   the black cross sculptor.

17   JUSTICE KAGAN: Thank you.

18   CHIEF JUSTICE ROBERTS: Justice

19   Gorsuch?

20   JUSTICE GORSUCH: So, counsel, we've

21   -- we've spoken a little bit about how Colorado

22   has handled this compelled speech question

23   differently with respect to different messages,

24   some that it prefers, others that it dislikes.

25   I'm curious how other states have

 1   dealt with this conundrum besides Colorado and

 2   how you -- which ones of those you think we

 3   should take account of.

 4   MS. WAGGONER: Twenty states filed an

 5   amicus brief in support of Ms. Smith

 6   and expressed to this Court that they're

 7   applying their public accommodation law to

 8   provide message-based object -- protections,

 9   just like the Court did in Hurley, following the

10   same test that's being articulated today, and

11   they've been doing it successfully.

12   Yes, there are difficult line-drawing

13   questions, but those are in every speech case,

14   whether it's sleeping in the park or putting on

15   an arm band. The Court doesn't have to resolve

16   every single one of them, but we do have the

17   rules, and we need the Court to provide

18   guidance, again, reaffirming public

19   accommodation laws cannot compel speech

20   creators, whether that's artistic expression

21   with symbols or pure speech.

22   JUSTICE GORSUCH: And just so I make

23   sure I understood your colloquy with Justice

24   Barrett, the objections to compelled speech on

25   religious grounds could include, in fact, do

 1   include, some objections with respect to certain

 2   heterosexual marriages, that there are certain

 3   heterosexual unions that your client would not

 4   speak in -- toward either, is that correct?

 5   MS. WAGGONER: Certainly, and that's

 6   in the stipulated facts in terms of she declines

 7   messages based on the message, and she has

 8   declined other projects based on the message

 9   that have nothing to do with same-sex marriage.

10   JUSTICE GORSUCH: So the question

11   isn't who, it's what?

12   MS. WAGGONER: Always.

13   JUSTICE GORSUCH: Thank you.

14   CHIEF JUSTICE ROBERTS: Justice

15   Kavanaugh?

16   JUSTICE KAVANAUGH: From the briefs, I

17   saw a lot of agreement actually between the

18   parties in this case on basic legal principles.

19   In your reply brief at page 15, you say that

20   hairstylists, landscapers, plumbers, caterers,

21   tailors, jewelers, and restaurants ordinarily

22   wouldn't have First Amendment free speech right

23   to decline to serve a same-sex wedding. At

24   least that's how I read that reference in your

25   brief. But you say artists are different, like

1   publishing houses. And I think the other side

2   -- I'll hear from them -- but agree that artists

3   are different because of the First Amendment

4   rights that artists possess.

5   But then, as least as I read the

6   briefs, the case comes down to a fairly narrower

7   -- narrow question of, how do you characterize

8   website designers? Are they more like the

9   restaurants and the jewelers and the tailors, or

10   are they more like, you know, the publishing

11   houses and the other free speech analogues that

12   are raised on the other side?

13   That's what I took away from the

14   briefs. A lot of agreement on broad legal

15   principles and some disagreement about how to

16   characterize the website designers. So why are

17   you right about how you characterize website

18   designers or, put another way, why are they

19   different -- and you've gotten this question --

20   but why are they different from, say,

21   restaurants or caterers, for example?

22   MS. WAGGONER: Because they're

23   creating speech. In those other examples,

24   speech is not at issue, that is creating speech,

25   announcing a wedding, or announcing anything.

 1 　And art is different. And so, while there may

 2 　be agreement on that, well there also is a

 3 　problem with Colorado's advancing theories that

 4 　keep narrowing and providing alternatives.

 5 　　　　　But, in the end, one thing is certain:

 6 　Those who object to same-sex marriage and

 7 　creating messages about them, those are the ones

 8 　that can't speak, but everyone else seems to be

 9 　able to do so under Colorado's theory.

10 　　　　　In addition, this Court has already

11 　articulated how we determine whether speech is

12 　involved for an artist, and I think the Court

13 　could follow those tests here, with words,

14 　graphics, videos, and, again, symbolic speech.

15 　　　　　JUSTICE KAVANAUGH: So, for you, as --

16 　as there's a effort to protect both the equal

17 　rights of gay and lesbian people and same-sex

18 　couples at the same time protect free speech

19 　rights, your line is look at whether the action

20 　of the business involves speech?

21 　　　　　MS. WAGGONER: And the second line

22 　would be to look at what is the objection that

23 　the creator is asserting and would that actually

24 　be in the final product, because that's how this

25 　Court has ferreted out pretextual objections.

1   So, if a -- if a -- a speech creator articulates

2   an objection and it's not in that final

3   photograph, the objection or the -- the message

4   isn't in there, that's one way we can know.

5   Another is if they're refusing to serve an

6   entire class of people and design other

7   messages, none of which are true here. But I do

8   --

9   JUSTICE KAVANAUGH: So, if you win

10   this case, if you prevail here, you know, and

11   the next case involves a caterer, at least your

12   position here is that's different.

13   MS. WAGGONER: I won't be coming back

14   with the caterer, but I will be coming back with

15   perhaps a custom wedding cake or a cake --

16   JUSTICE KAVANAUGH: I understand that,

17   but the --

18   MS. WAGGONER: -- that has a symbolic

19   meaning to it.

20   JUSTICE KAVANAUGH: Okay. But the --

21   the caterer, the -- the list of things that you

22   had on page 15 of the reply brief, at least

23   ordinarily -- you had a caveat in there -- but

24   ordinarily wouldn't -- wouldn't have the same

25   right that your client here does, who's a

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 1    website designer?
 2              MS. WAGGONER:  They wouldn't have a
 3    free speech right.  And as -- in terms of your
 4    initial statement about the parties agreeing, I
 5    do think it's important, on pages 17 and 32 of
 6    the United States' brief, they're even conceding
 7    that it's a burden on a speaker to have to
 8    express a message that violates their
 9    convictions.  They're just simply relabeling
10    this or repackaging speech as a sale or conduct.
11              JUSTICE KAVANAUGH:  Thank you.
12              CHIEF JUSTICE ROBERTS:  Justice
13    Barrett?
14              JUSTICE BARRETT:  So I think the
15    questions that Justice Kagan asked you are hard
16    because they seem like they're not creating.  I
17    mean, you're on your strongest ground when
18    you're talking about her sitting down and
19    designing and coming up with the graphics to
20    customize them for the couple.  So let me just
21    clarify exactly what your position is on things
22    that are already created in the past.
23              What if it is plug-and-play?  I don't
24    know that much about website design, so I don't
25    know how it could be plug-and-play.  I'm -- I'm
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1   sure it can be. She -- she does the

2   programming, the coding. She has stock

3   pictures. And she sells that as a product, and

4   the customers, you know, Mike and Henry or, you

5   know, Lilly and Luke, fill it in themselves. Is

6   that protected?

7   MS. WAGGONER: It is not protected in

8   the same way that if you sold a Bible

9   commentary, you wouldn't be able to decide

10   whether the Bible commentary will be burned or

11   it will be used in a church service. The stream

12   of commerce, it's been put in the stream of

13   commerce at that point.

14   JUSTICE BARRETT: Okay. So why is it

15   different? Justice Kagan said, so maybe you do

16   create customized websites and you've created

17   one for, you know, Lilly and Luke, and then, you

18   know, Mike and Henry see it and say, you've

19   created that already, we love it, we want to buy

20   it. Don't create anything new for us. Just

21   give us exactly what you did for them.

22   Why is that different than

23   plug-and-play, or is it?

24   MS. WAGGONER: It is different. I

25   mean, first of all, if I take your hypothetical

             1   on its face, we would be selling essentially a

             2   -- she would be creating a website that's

             3   exactly the same with the same pictures and text

             4   and graphics and videos of an opposite-sex

             5   couple and selling it to a same-sex couple,

             6   which seems highly unlikely they wouldn't use

             7   that to celebrate their wedding.

             8   So, in terms of, if you're asking her

             9   to change the text, to change the logistics, to

            10   change the names, you're changing bride and

            11   groom. You're changing the couple's name.

            12   You're changing -- we know context changes

            13   meaning.

            14   Justice Ginsburg said that in Yates

            15   versus United States. Even the same words have

            16   different meaning. "God bless this marriage"

            17   means something different. "My body, my choice"

            18   means something different to an anti-vaxxer or a

            19   pro-abortion opponent -- or proponent.

            20   So, in -- in that sense, that's why

            21   she would object if she were changing the words

            22   in the text, but, of course, she would sell the

            23   same website celebrating an opposite-sex wedding

            24   to a same-sex couple.

            25   JUSTICE BARRETT: Okay. So context

 1   changes meaning. What if, instead of a graphic

 2   designer, she's a songwriter and she writes a

 3   song, you know, let's say "At Last" or "Wind

 4   Beneath My Wings" or something that people want

 5   to dance to at their wedding, and the lyrics are

 6   out there. You know, it could be played at a

 7   heterosexual wedding or it could be played at a

 8   gay wedding. Once the artist has created that

 9   song, can the artist say, but I'm not licensing

10   it to be played at certain kinds of weddings?

11   MS. WAGGONER: No, I don't think the

12   artist could. I'm not familiar with the

13   licensing rules and how all that would apply in

14   terms of a contractual relationship, but in

15   terms of just having a song used at a wedding,

16   assuming that would otherwise be okay, there's

17   no other legal rights, she couldn't. That was

18   in the stream of commerce.

19   But I think it's important to point

20   out that if that artist were being asked to

21   perform that song in a live way, for example,

22   sang at a Democratic inauguration and they were

23   asked to perform at the Republican one, under

24   Colorado's theory, they could be compelled to do

25   so in a number of jurisdictions. Nineteen

 1   jurisdictions have political ideology. And when

 2   we think about that, there's no limit to what

 3   the government could compel.

 4   JUSTICE BARRETT: Thank you.

 5   CHIEF JUSTICE ROBERTS: Justice

 6   Jackson?

 7   JUSTICE JACKSON: But isn't an artist

 8   typically sort of a -- a freelancer and they are

 9   selling their own messages? They're not

10   purporting to be a business for hire in -- in --

11   in any meaningful sense. And so I -- I want to

12   kind of go back to Justice Kavanaugh's thought

13   of, like, where do we place your client as

14   between, you know, restaurants and artists.

15   I thought that there really isn't that

16   clear a distinction in a situation like this

17   because your client is an artist for hire

18   essentially. Yes, she does customize things,

19   they're not off the shelf, but she purports to

20   be a public accommodation providing customized

21   things to anyone who pays her, except for people

22   whose messages are those that she disagrees

23   with.

24   And I just don't know that I've ever

25   seen that kind of scenario, even in the cases

 1 that you're talking about, because sort of what

 2 Justice Gorsuch was saying, it's -- it's relying

 3 on the implicit message that she does not want

 4 to convey by supporting this person.

 5   There's an explicit message in the

 6 actual work, but to the extent that actual work

 7 is identical to the -- to the work that she

 8 would otherwise sell to the gay couple except

 9 for their names, then she is implicitly saying,

10 you know, by selling this, I'm going to be

11 violating my own beliefs.

12   So let me just ask you another quick

13 hypo. So I -- I'm trying to understand the

14 extent to which this matters that she's a

15 speaker as opposed to a restaurant. So I sell

16 food, and one line of products that I make is

17 from scratch for particular customers that are

18 based on my grandmother's cherished family

19 recipes.

20   My dearly departed grandmother was

21 clear that she only wanted to provide this kind

22 of nourishment for people who share our same

23 religious heritage. So I call these products

24 Grandma Helen's Protestant Provisions. And I

25 sit with each customer who comes in and I hear

 1   about their faith and their family, and I

 2   customize the recipe for them after having this

 3   discussion.

 4   So the food is not expressive, right?

 5   I'm not speaking in my food, but I am trying to

 6   convey that only certain people get to partake

 7   in this product. Can I do that consistent with

 8   the First Amendment or not?

 9   MS. WAGGONER: No, and in -- and in a

10   situation as you said, in terms of a caterer,

11   the caterer is not engaging in speech. In terms

12   of your initial statements or questions, speech

13   is speech whether it's paid or pro bono.

14   JUSTICE JACKSON: But -- but aren't --

15   don't we have cases that suggest that people's

16   conduct can be expressive? I thought there was

17   a whole line of cases that said you didn't have

18   to actually have an express message, you could

19   be acting in such a way as to express a message.

20   And in my restaurant hypo, I'm saying,

21   if I sell to non-Protestants, I'd be expressing

22   a message contrary to Grandma Helen's core

23   beliefs.

24   MS. WAGGONER: You're speaking through

25   conduct at that point, and that is a different

     1   analysis. In terms of the expressive conduct

     2   test, the Court has already articulated what

     3   those tests are and what a reasonable person

     4   would observe.

     5   But, in that case, you're talking

     6   essentially about status discrimination.

     7   There's no message that she is creating that

     8   would be compelled in that way. That would

     9   simply be service.

    10   In addition, though, I think it's

    11   important to recognize the breadth of the public

    12   accommodation law. You've started with a

    13   statement about freelance writers. At oral

    14   argument at the Tenth Circuit, my friend in

    15   Colorado admitted that freelance writers are

    16   considered to be public accommodations under

    17   this law as --

    18   JUSTICE JACKSON: All right. Well,

    19   I'll ask them about that. But what about my

    20   photographer? My photographer is speaking

    21   through photography, yes?

    22   MS. WAGGONER: In -- in your

    23   photography, yes, photography is speech --

    24   JUSTICE JACKSON: Is speech.

    25   MS. WAGGONER: -- just as websites are

1   under the Court's decision in Reno.

2   JUSTICE JACKSON: All right. So my

3   photographer could -- is speaking by -- by being

4   forced to create a Santa photo with minority

5   children in it that they don't want to, they

6   don't think that should be there?

7   MS. WAGGONER: The issue in that

8   hypothetical isn't whether there is speech. The

9   issue is, in that context, are they otherwise

10   serving those and expressing other messages and

11   does the objection that they're asserting line

12   up with the message.

13   The Court in Hurley did the exact same

14   analysis to say is the parade organizers

15   otherwise in -- otherwise --

16   JUSTICE JACKSON: But Hurley was a

17   private association. It wasn't a public

18   business. What I'm asking you is I have a

19   public business. I'm a photographer. My belief

20   is that -- you know, I'm doing "It's a Wonderful

21   Life" scenes. That's what I'm offering, okay?

22   I want to do video depictions of "It's a

23   Wonderful Life."

24   And I -- knowing that movie very well,

25   I want to be authentic, and so only white

1   children and families can be customers for that

2   particular product. Everybody else can -- I'll

3   -- I'll give to everybody else, I'll sell them

4   anything they want, just not the "It's a

5   Wonderful Life" depictions.

6   I'm expressing something, right? For

7   your purposes, that's speech. What about --

8   what's the other step? It's speech, and I can

9   say anti-discrimination laws can't make me sell

10   the "It's a Wonderful Life" package to nonwhite

11   individuals.

12   MS. WAGGONER: In the same way -- I --

13   I would say, first of all, in the same way that

14   this Court, when there is a message and a status

15   and it's overlapping, the Court would say that

16   message wins in that instance.

17   JUSTICE JACKSON: So -- so -- so --

18   MS. WAGGONER: I don't think that the

19   message --

20   JUSTICE JACKSON: -- I don't have to

21   sell it to --

22   MS. WAGGONER: -- I don't think that

23   that message is in that hypothetical. But take

24   the example of the musical of "Hamilton."

25   There's a direct overlap in the musical of

1   "Hamilton." And, in that case, we know that

2   they're expressing a preference for who they're

3   hiring in terms of race. Yet we would say that

4   --

5   JUSTICE JACKSON: No, I'm not talking

6   about -- you're -- you're sort of slipping into,

7   like, a thousand different analogies. I just

8   want -- I just want you to focus on whether or

9   not I am -- I have speech when I am a

10   photography business and I hang out my shingle.

11   Everybody can come. But I have certain products

12   that I'll only sell to non -- to -- to white

13   individuals because the speech that I'm trying

14   to depict is the authentic depiction of that

15   scene as I understand it and that I want to put

16   out there in the world and it has my signature

17   on the bottom of it, so people are seeing my

18   photos, and I want my photos of "It's a

19   Wonderful Life" to be as authentic as possible,

20   meaning no people of color.

21   MS. WAGGONER: It seems, in each

22   iteration of the hypothetical, the objection is

23   changing. What I can articulate is the test.

24   And I can also say that when there's an overlap

25   between message and status, message does win.

1   And "Hamilton" provides an example of that.

2   JUSTICE JACKSON: All right. Thank

3   you.

4   MS. WAGGONER: But I -- I would --

5   CHIEF JUSTICE ROBERTS: Thank you,

6   counsel.

7   Mr. Olson.

8   ORAL ARGUMENT OF ERIC R. OLSON

9   ON BEHALF OF THE RESPONDENTS

10   MR. OLSON: Mr. Chief Justice, and may

11   it please the Court:

12   The central dispute here is what

13   public accommodations law target when they

14   require a business to provide equal access to

15   its services. The company claims that because

16   it wants to sell websites, the law somehow

17   targets expression and therefore violates the

18   First Amendment.

19   But, because Colorado law targets the

20   commercial conduct of discriminatory sales and

21   its effect on expression is at most incidental,

22   it easily satisfies the framework set out in

23   O'Brien.

24   The company can choose to sell

25   websites that only feature biblical quotes

 1   describing a marriage as between a man and a

 2   woman, just like a Christmas store can choose to

 3   sell only Christmas-related items. The company

 4   just cannot refuse to serve gay couples, as it

 5   seeks to do here, just as a Christmas store

 6   cannot announce no Jews allowed.

 7   Here, the company seeks a

 8   pre-enforcement order allowing it to turn away

 9   all gay couples, even if, as we've discussed,

10   the wedding website they request is identical to

11   one the company would sell to a heterosexual

12   couple. Granting such a license to discriminate

13   would empower all businesses that offer what

14   they believe to be expressive services, from

15   architects to photographers to consultants, to

16   refuse service to customers because of their

17   disability, sexual orientation, religion, or

18   race.

19   The Free Speech Clause exemption the

20   company seeks here is sweeping because it would

21   apply not just to sincerely held religious

22   beliefs, like those of the company and its

23   owner, but also to all sorts of racist, sexist,

24   and bigoted views. This rule would allow

25   another web design company to say no interracial

 1   couples served, an ad agency could refuse

 2   women-led businesses, and a tech consulting

 3   company could refuse to serve 303 Creative

 4   itself because it disagreed with the owner's

 5   religion.

 6   This Court should not upend

 7   long-settled law that protects the full and

 8   equal access of all Americans to our public

 9   marketplace.

10   I welcome the Court's questions.

11   JUSTICE THOMAS: Counsel, you have

12   spent quite a bit of your brief talking about

13   the -- the tradition of public accommodations

14   laws. Would you just spend a few minutes or

15   whatever amount of time you can explaining

16   whether there is a similarly long tradition of

17   public accommodations laws applying to speech --

18   MR. OLSON: Well --

19   JUSTICE THOMAS: -- or expressive

20   conduct?

21   MR. OLSON: -- well, certainly,

22   Justice Thomas. The history of public

23   accommodation law shows that when those held

24   themselves open to the public, they were

25   required to serve everybody.

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 1          JUSTICE THOMAS:  I understand that.  I
 2   understand -- the complicating factor here --
 3   fact here is this is not a hotel, this is not a
 4   restaurant, this is not a riverboat or a train.
 5   I'm interested in the intersection of public
 6   accommodations law and speech.
 7          MR. OLSON:  I -- I think we see some
 8   public accommodation law being applied to
 9   examples that are speech today, tailors,
10   barbers, et cetera.  But what we don't see over
11   the long history of public accommodation laws in
12   this country is people raising First Amendment
13   speech objections to those laws applying to it.
14          JUSTICE THOMAS:  Well, I think that in
15   part depends upon whether or not you're engaging
16   in speech.  If you're running a train business
17   or a riverboat business, that's not exactly --
18   doesn't implicate speech.  So those are
19   straightforward.  I understand that.
20          What I'm interested in is, when you
21   are talking about public accommodations laws
22   directly or indirectly regulating speech, is
23   there a tradition of that?  Can you point to
24   cases?  Can you point to common law treatises,
25   et cetera?
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1   MR. OLSON: So I think that the

2   historical record is sparse on both sides, but

3   the two things I would say, Justice Thomas, is

4   what we don't see is a history of public

5   accommodation laws carving out speech. They all

6   are laws of general applicability that apply to

7   all those operating a trade to the public. They

8   don't say except those engaged in expressive

9   conduct.

10   And, with that framework, we do not

11   see a history of cases where people raise their

12   hand and say it shouldn't apply to me because

13   I'm speaking. And so I think the public

14   accommodations brief on our side in this case

15   sets that out quite nicely. But -- but there is

16   no case from 150 years ago that comes out either

17   way with this exact issue.

18   JUSTICE GORSUCH: Mr. Olson, I --

19   CHIEF JUSTICE ROBERTS: Well, just --

20   JUSTICE GORSUCH: I'm -- I'm sorry,

21   Chief.

22   CHIEF JUSTICE ROBERTS: Not -- not 150

23   years ago, but I think it's 10 or -- or -- or 12

24   years ago, in City of Fulton, which you cite in

25   your brief, it sort of follows up on Justice

 1   Thomas's question, although you don't even get

 2   to speech. I think the Court in that case said,

 3   when you're looking at some of the concerns that

 4   you're talking about, that a individualized,

 5   subjective, multifactor, whatever,

 6   determination, in that case foster care and --

 7   and adoption, is -- is not the same as a seat on

 8   the bus or a room in the hotel.

 9   How -- how does your argument fit with

10   that position that was articulated in the Court

11   with respect to the nature of individual

12   speakers' message?

13   MR. OLSON: Well, I think those

14   questions are not presented in this case because

15   most artists are not public accommodations. But

16   my friend stipulated that the company was a

17   public accommodation. And often a lot of the

18   hypotheticals that we've been talking about,

19   about artists, and -- and, certainly, Lin-Manuel

20   Miranda, who is writing the play "Hamilton," is

21   not a --

22   CHIEF JUSTICE ROBERTS: But, in terms

23   of -- in terms of the concern expressed in a lot

24   of our cases about compelled speech and the

25   distinction of others where you can have a

1   requirement of serving people without regard to

2   certain characteristics, the case did make the

3   point that to the extent there's subjective,

4   individualized determinations that go into the

5   decision about placing children, that it did

6   not -- that those cases were not, at least not

7   directly, applicable?

8   MR. OLSON: That's correct, Chief

9   Justice Roberts. And I think, here, again, the

10   record is entirely devoid of those factors

11   because the company chose to litigate this case

12   as a public accommodation. I think a lot of the

13   description that we heard today would be

14   powerful arguments that they may not be a public

15   accommodation in what they do. But we simply

16   don't have those facts here. But, certainly,

17   the level of selectivity, the -- the -- the way

18   in which the -- the potential customer engages

19   with the -- the client -- I'm sorry, with the

20   service provider, and how the service provider

21   makes their product available or -- or known to

22   the public all factor in that analysis.

23   CHIEF JUSTICE ROBERTS: Yeah, and I'd

24   like to ask you a question about one other case.

25   It's the one you rely on most heavily in your

 1   brief, Rumsfeld against FAIR. And it seems to

 2   me that a distinction you have to deal with in

 3   that case is that the speech there was not

 4   compelled, or what was compelled was not

 5   considered speech. It -- it involved the

 6   schools providing rooms for the military

 7   recruiter, and when it came to the question of

 8   compelled speech, what the Court said is empty

 9   rooms don't speak.

10   But, here, of course, the whole

11   argument is that the speech is being compelled.

12   So -- so how does the either holding or analysis

13   in FAIR help you?

14   MR. OLSON: Two responses, Chief

15   Justice. First is, in FAIR, it recognized that

16   there was some speech by the schools. There

17   were e-mails, posters on bulletin boards, et

18   cetera. So there was some speech, but it said

19   it was incidental, like in O'Brien, to the

20   purpose of the regulation, which was ensuring

21   equal access, similar to Colorado's law here.

22   And -- and the second point I would

23   make, and it comes from the -- the example of

24   the identical website being turned away for the

25   same-sex couple but provided to the opposite-sex

 1   couple, here, sometimes the speech itself does

 2   not change. And what this company seeks, if you

 3   look at the -- the specific prayer for relief in

 4   the complaint, is a total permission to turn

 5   away every same-sex couple, even if they seek

 6   exactly the same website that an opposite-sex

 7   couple that they will provide.

 8   CHIEF JUSTICE ROBERTS: Well, just to

 9   -- just to stop you, their point is they do not

10   turn away same-sex couples who want the service

11   that they're providing. They just won't provide

12   that service with respect to a particular type

13   of wedding.

14   MR. OLSON: I respectfully disagree,

15   Your -- Your Honor. What the company said is

16   under no circumstances will they provide a

17   wedding website for a same-sex wedding, period.

18   CHIEF JUSTICE ROBERTS: Correct.

19   MR. OLSON: Right. And --

20   CHIEF JUSTICE ROBERTS: But that --

21   I'm sorry.

22   MR. OLSON: -- and that is

23   status-based discrimination when -- and it

24   doesn't matter whose credit card is used for

25   that transaction. What -- what -- the -- the

1   sole basis that the company seeks relief from

2   this Court is they would like an injunction that

3   says so long as -- if -- if this is going to be

4   used for a same-sex wedding, then we need not

5   provide it. And -- and so it's a status-based

6   discrimination that they seek from this Court.

7   JUSTICE ALITO: Let me see if I

8   understand your argument. I understand you to

9   be arguing that a website designer can put

10   anything it wants on a standardized website,

11   even if that includes a denunciation of same-sex

12   marriage. Is that correct?

13   MR. OLSON: Yes.

14   JUSTICE ALITO: So, if the -- to pick

15   up on Justice Kagan's hypothetical from earlier

16   this morning, if the standard announcement is

17   "Made With Love by Amber, who believes that a

18   valid marriage is a union between one man and

19   one woman," that's okay?

20   MR. OLSON: If that's on every

21   website, yes.

22   JUSTICE ALITO: Then this is -- your

23   argument is -- you're making kind of a sliver of

24   an argument, right? What is the difference

25   between that and what you think is a violation

1   of your law?

2   MR. OLSON: Two things, Justice Alito.

3   The first --

4   JUSTICE ALITO: I mean, you're not --

5   that website designer is not going to be serving

6   a same-sex couple if the website designer puts

7   that on the website. They're turning away

8   same-sex couples by doing that, are they not?

9   MR. OLSON: No, they're -- they're not

10   turning away same-sex couples. They are

11   defining their -- they are able to choose what

12   services they offer, and that is the service

13   they are choosing to offer.

14   The state does not regulate that at

15   all. All that the state says is whatever you

16   choose to sell --

17   JUSTICE ALITO: No, I understand that.

18   Does it make any difference in the real world as

19   a practical matter?

20   MR. OLSON: Well, it -- it does in the

21   real world because a -- a -- my second point is

22   that a website designer like that will lose a

23   lot of opposite-sex couples as potential clients

24   as well because they don't want to be seen with

25   that message.

1   And what the company wants to do here

2   is take advantage of the public marketplace, go

3   out and sell their wares to everyone and have

4   control over -- and change what they sell to

5   different people based on the status of -- of

6   what they have.

7   JUSTICE ALITO: Okay. To --

8   MR. OLSON: And -- and --

9   JUSTICE ALITO: Yeah, I understand

10   that. So to sell to everyone. So this goes to

11   your -- to the interpretation of your statute,

12   and I'm not quite clear what your position is on

13   it. If a business provides a service that is

14   "open to the public," it's a public

15   accommodation, right?

16   MR. OLSON: Yeah. You have to engage

17   in sales or offering services to the public,

18   yes.

19   JUSTICE ALITO: Okay. So what does

20   "open to the public" mean? Does that mean no

21   selectivity whatsoever? Anybody who wants this

22   service can get it and it may be, if there's a

23   -- a greater demand, then the demand exceeds the

24   supply, you've got to wait in line. But, if

25   there's any selectivity at all, they're out?

1   MR. OLSON: Well, again, it's not

2   presented in this case. The way that Colorado

3   has historically addressed that question is --

4   are, say, golf clubs who had limited their

5   membership to one gender, you know, did they

6   make money from public coming to their courses,

7   did they -- did you have to be a member to dine

8   in the restaurant, et cetera.

9   So selectivity as the Court discussed

10   in Fulton certainly is a factor, but it -- but

11   it is a -- a fact-specific determination that --

12   that awaits more facts than we have here because

13   it can --

14   JUSTICE ALITO: Well, you should

15   understand what your statute means. So suppose

16   a website designer says, I'm -- I'm offering my

17   services, but I'm really in -- I -- I'm in a lot

18   of demand for my services and I -- I reserve the

19   right to decide who I will provide a website for

20   and who I will not.

21   Is it a public accommodation then?

22   MR. OLSON: If that's the only factor,

23   then yes, but it can make decisions about who to

24   supply that -- that aren't based on protected

25   characteristics and choose its clientele just

1   fine.

2   What it can't do is say I reserve the

3   right to refuse service which means in practice

4   I will not serve black people.

5   JUSTICE JACKSON: And isn't the --

6   part of the problem here in terms of trying to

7   answer Justice Alito's various hypotheticals

8   that we're presented with a record of stipulated

9   facts and that the opposing -- your friend on

10   the other side actually stipulated to the

11   application of the statute?

12   So it's really hard for us to know and

13   figure out and determine in this context how the

14   statute would actually apply because we don't

15   really have a real record on that -- on that

16   score.

17   MR. OLSON: That's correct. And --

18   and I would say that we've -- we've heard some

19   discussion from my friend about sort of

20   Colorado's history, but what we haven't heard is

21   any specific example since this Court announced

22   Masterpiece of Colorado enforcing this law, the

23   state enforcing this law against anyone to --

24   JUSTICE ALITO: Well, my question

25   really was not whether this website is a public

         1   accommodation. I understand that's been

         2   stipulated. That wasn't my question.

         3   What -- what I'm trying to understand

         4   is the breadth of your argument, and what I get

         5   is that you're making a -- a -- a tiny sliver of

         6   an argument. So the website can put anything on

         7   its website, even something that will blatantly

         8   or subtly tell a same-sex couple, well, this is

         9   not a service that I want. They can do that.

        10   And a website can also potentially get

        11   itself out from being a public accommodation

        12   simply by reserving a degree of selectivity.

        13   That's what you've told me so far.

        14   MR. OLSON: No, I -- I don't think

        15   it's just by reserving a degree -- degree of

        16   selectivity, but I think it -- the more

        17   selective and sort of curated the process is, it

        18   makes it less likely to be a -- a public

        19   accommodation, as the Court recognized in -- in

        20   Fulton.

        21   JUSTICE ALITO: All right.

        22   JUSTICE KAGAN: General --

        23   JUSTICE ALITO: Let me ask you a --

        24   a -- and then I'll finish this line -- some

        25   hypotheticals in a brief submitted by Josh

1   Blackman, okay?

2   A -- a Jewish man and a Jewish woman

3   who are engaged to be married ask a Jewish

4   website designer to build a website to celebrate

5   their upcoming -- their -- their nuptials. No

6   problem. Okay.

7   Another Jewish man and a Christian

8   woman who are engaged to be married ask a Jewish

9   website designer to build a website to celebrate

10   their -- their nuptials. Big problem. "Many

11   Jews consider intermarriage an existential

12   threat to the future of Judaism."

13   Does that website have to accept the

14   second couple?

15   MR. OLSON: Again, as we talked about

16   before, if the Jewish website designer has, you

17   know, very explicitly Jewish themes on the --

18   the wedding, they don't need to -- on the

19   website, they don't need to take that down for

20   the -- the -- the interreligious couple that

21   comes. But they -- if they offer a general

22   service to the public, they need to offer that

23   regardless of the customer's religion.

24   JUSTICE ALITO: So the fact that they

25   offer this to -- that this is a Jewish -- that

1   -- that it's offered mostly to Jews, that's

2   enough to make it -- or exclusively to Jews,

3   that's enough to make it sufficiently selective

4   to get them out from your --

5   MR. OLSON: No. I'm -- I'm drawing a

6   distinction between what the website designer

7   chooses to put on the website and who the

8   website designer sells the website to.

9   The website designer can choose to put

10   on their websites whatever they want, but they

11   just can't refuse to sell -- if they're a public

12   accommodation, they can't refuse to sell that

13   website to someone solely because of their --

14   customer's or the couple's religion.

15   JUSTICE ALITO: Okay. An unmarried

16   Jewish person asks a Jewish photographer to take

17   a photograph for his Jdate dating profile. It's

18   a -- a dating service, I gather, for Jewish

19   people.

20   JUSTICE KAGAN: It is.

21   (Laughter.)

22   JUSTICE ALITO: All right. Maybe

23   Justice Kagan will also be familiar with the

24   next website I'm going to mention.

25   So, next, a Jewish person asks a

1   Jewish photographer to take a photograph for his

2   ashleymadison.com dating profile.

3   (Laughter.)

4   JUSTICE ALITO: I'm not suggesting

5   that. I mean, she knows a lot of things. I'm

6   not suggesting -- okay. Does he have to do it?

7   MR. OLSON: Well, again, it would --

8   it would -- what Colorado look -- it depends.

9   What Colorado looks to is what services the

10   photographer makes available to the public. And

11   if -- if the photographer makes that service

12   available to -- to others, taking pictures, you

13   know, for use on websites, then probably yes,

14   but it -- it depends on --

15   JUSTICE ALITO: Okay, Justice -- then

16   I really will stop.

17   Justice -- Justice Jackson's example

18   of the -- the Santa in the mall who doesn't want

19   his picture taken with black children. So, if

20   there's a -- a black Santa at the other end of

21   the mall and he doesn't want to have his picture

22   taken with a -- a child who's dressed up in a

23   Klu Klux Klan outfit, that -- that black Santa

24   has to do that?

25   MR. OLSON: No, because Ku Klux Klan

1   outfits are not protected characteristics under

2   public accommodation laws.

3   JUSTICE KAGAN: And, presumably, that

4   would be the same Ku Klux Clan outfit regardless

5   whether the child was black or white or any

6   other characteristic.

7   JUSTICE ALITO: You do see -- you do

8   see a lot of black children in Ku Klux Klan

9   outfits, right? All the -- all the time.

10   Suppose that -- I -- I -- I mean --

11   JUSTICE KAGAN: Can I -- can I -- can

12   I --

13   JUSTICE ALITO: Yeah.

14   JUSTICE KAGAN: Yeah? Is that all

15   right?

16   JUSTICE ALITO: Sure.

17   JUSTICE KAGAN: I have one, I -- I

18   hope, easy question for you and then a more

19   difficult question.

20   So, as I understand your argument, the

21   kind of you can say anything you want as long as

22   you say it to everybody or not say anything you

23   want as long as you don't say it to anybody.

24   So, gay couple walks in to Ms. Smith's

25   office and says, we want a quote from

 1   Obergefell, and she says, I don't do that.

 2   That's okay with you, yes?

 3   MR. OLSON: Yes.

 4   JUSTICE KAGAN: Because she doesn't do

 5   it for anybody, yeah?

 6   MR. OLSON: Correct.

 7   JUSTICE KAGAN: Okay. Gay couple

 8   walks in and says -- this is the harder one, all

 9   right? Gay couple walks in and says, I'd like

10   the standard website, you know, everything

11   standard, the kind of website we were talking

12   about before, but I want something in addition

13   to that. I want -- I want in the -- on the home

14   page the website to say "God blesses this

15   union." All right?

16   And Ms. Smith says -- well, that's a

17   problem, Ms. Smith says. And the gay couple

18   says, well, you would say that if -- if we were

19   an opposite-sex couple, right? And -- and she

20   says, we -- I would say that if you were an

21   opposite-sex couple.

22   And the gay couple says, well, what's

23   the big deal then? I don't know, I think that

24   that kind of is different, so I'm wondering

25   whether you think it's different.

1   MR. OLSON: Well, I -- I think it's

2   different in part because it implicates the very

3   compelling free exercise concerns of the vendor,

4   which aren't present in this case, right? This

5   is just a procedure --

6   JUSTICE KAGAN: Yeah, possible. I get

7   the -- I get the idea that there's a kind of

8   religious element to it. And I wish I could

9   think of one that didn't have that component

10   because I feel like there's something else going

11   on there as well, that it is a statement of

12   opinion about the nature of this marriage,

13   which, you know, in my earlier hypotheticals I

14   took care to remove.

15   But now there's a kind of statement of

16   opinion about the nature of this marriage, and

17   unlike the kind of "our story" things, which is

18   like -- obviously, it's their story, it's not

19   the designer's story. You know, unlike that, it

20   feels a little bit to me as though it could be a

21   kind of third person saying God blesses this

22   union. And who would the third person be other

23   than the person who's put the whole websites

24   together? So I have difficulty with that

25   hypothetical, and I'm wondering what you think

1   about it.

2   MR. OLSON: So I agree, Justice Kagan,

3   and -- and I think -- imagine a statement that

4   says something along the lines of -- you know,

5   there's a dating website that meets people and

6   then the people that they connect through it

7   says, you know, this is a wonderful marriage

8   that we support. No religion, right?

9   And -- and then where you have that

10   direct speech, it does get a little trickier,

11   but -- but I -- but what I would say is this

12   is -- you know, the default rule would still

13   apply even though that is an edge case, I agree,

14   because the question is what services does the

15   company choose to provide and, if it chooses to

16   provide that service to some -- here, it's --

17   you know, it may be that -- that looking at the

18   service is, well, I evaluate your marriage and I

19   give it a thumbs-up or a thumbs-down, and, you

20   know, I assume you don't want the thumbs-down on

21   the website, so if you get a thumbs-up, you get

22   on the website. So that's a fact question I

23   think that would be hard.

24   But, if it was a statement that was

25   made solely based on the status of the person

1   seeking the website, in other words, thumbs-up

2   for all opposite-sex couples, thumbs-down for --

3   for same-sex couples, then it's an easier --

4   easier question.

5   JUSTICE JACKSON: Isn't Justice --

6   JUSTICE KAGAN: Yeah, I --

7   CHIEF JUSTICE ROBERTS: Thank -- thank

8   you, counsel.

9   Justice Thomas, anything further?

10   Justice Alito?

11   JUSTICE ALITO: Well, back to my black

12   Santa example, suppose it's a state that defines

13   a -- a public accommodate -- prohibits a public

14   accommodation to discriminate on the basis of

15   political ideology. So then -- then the -- the

16   picture has to be taken?

17   MR. OLSON: I -- I think that is

18   likely -- those political ideology distinctions

19   face much more difficult constitutional scrutiny

20   and I -- I think are separate in kind from the

21   kind of characteristics that we're talking about

22   here, which are categories of invidious

23   discrimination. I can only think, in most

24   circumstances, political ideology did not

25   satisfy the constitutional requirements.

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 1              JUSTICE ALITO:  So it has to satisfy a
 2    constitutional requirement?  Your argument is
 3    dependent on that?
 4              MR. OLSON:  Yes, because even under
 5    O'Brien, there's -- there's -- we have to show a
 6    basis for what we're doing.
 7              JUSTICE ALITO:  In light of what
 8    Justice Kennedy wrote in Obergefell about
 9    honorable people who object to same-sex
10    marriage, do you think it's fair to equate
11    opposition to same-sex marriage with opposition
12    to interracial marriage?
13              MR. OLSON:  Yes, because -- in how the
14    law applies, not in -- in the -- the discussion
15    with folks because, of course, honorable people
16    have different views on this issue.  But I
17    think, when you look at what Justice Kennedy
18    said there, the way to honor that requirement
19    is, as this Court has set forth in Fulton, in
20    Masterpiece, of having a rigorous interrogation
21    to make sure that there are neutral and
22    generally applicable laws applied in fact that
23    way that don't single out religion.
24              And then the very next sentence of
25    what Justice Kennedy said in Obergefell talked
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 1   about, when -- when it transformed, that honest

 2   and decent disagreement transformed into enacted

 3   law and policy, the necessary consequence is to

 4   put the imprimatur of the state on that

 5   exclusion. And I think, if this Court were to

 6   say that the imprimatur of this Court would

 7   allow a web designer to say no same-sex people

 8   allowed or allow a school photographer to say,

 9   you know, no pictures of --

10   JUSTICE ALITO: Well, do you think

11   Justice Kennedy would have said that there are

12   -- that it's honorable to oppose -- to

13   discriminate on the basis of race?

14   MR. OLSON: No, I don't think so.

15   JUSTICE ALITO: Let me just give you

16   one -- one more hypothetical. Suppose someone

17   offers the service of writing customized wedding

18   vows or customized speeches to be given at a

19   wedding by people who have an idea what they

20   would like to say about a family member or a

21   good friend, but they just don't feel they're

22   very good with words. They can't put it into

23   words.

24   And let's say that this -- this outfit

25   is just starting up. They don't have a lot of

1   clients. They're sitting at the -- you know,

2   they're sitting by the phone and their computer

3   waiting for somebody to show up, so they will

4   take anybody. All right? Can -- can they be

5   forced to write vows or speeches that espouse

6   things they loathe?

7   MR. OLSON: No, they cannot be forced

8   to -- to write vows or speeches that espouse

9   things they loathe because that's not a

10   protected characteristic. But they cannot -- I

11   assume in your example --

12   JUSTICE ALITO: Well, is -- is -- is

13   the prohibition or the limitation against

14   compelled speech limited to things that are

15   unconstitutional?

16   MR. OLSON: No. I think -- I think

17   there are --

18   JUSTICE ALITO: So why does it matter?

19   MR. OLSON: Well, because, here,

20   things they loathe is not a protected

21   characteristic anywhere I know -- anywhere that

22   I know of, but on the constitutional limit, it

23   -- it doesn't have --

24   JUSTICE ALITO: Okay. It doesn't fall

25   within -- you say -- you say it doesn't fall

 1   within your statute. But maybe it's going to

 2   fall within the statute -- it may fall within

 3   another statute.

 4   MR. OLSON: Under -- under any level

 5   of scrutiny here, you look at the state's

 6   compelling interest in -- in -- in determining

 7   the -- the -- the -- the incidental burden on

 8   the -- in our example, the vow writer's rights,

 9   and -- and I don't know of any state that has

10   sort of a compelled -- it has the same

11   compelling interest as they -- as they do for,

12   you know, protecting things that other people

13   loathe as they do for sex, gender, religion

14   discrimination. So I -- I think it would be a

15   different analysis.

16   CHIEF JUSTICE ROBERTS: Justice

17   Sotomayor?

18   JUSTICE SOTOMAYOR: This would be the

19   first time in the Court's history, correct, that

20   it would say that a business open to the public,

21   as this Petitioner has said it is, that it's

22   open -- a commercial business open to the

23   public, serving the public, that it could refuse

24   to serve a customer based on race, sex,

25   religion, or sexual orientation, correct?

1   MR. OLSON: Yes.

2   CHIEF JUSTICE ROBERTS: Kagan?

3   Justice Gorsuch?

4   JUSTICE GORSUCH: Good morning,

5   Mr. Olson.

6   MR. OLSON: Is it still morning?

7   JUSTICE GORSUCH: Just barely.

8   (Laughter.)

9   JUSTICE GORSUCH: It must not feel

10   like it standing where you are.

11   (Laughter.)

12   MR. OLSON: I'm here all day, Justice

13   Gorsuch.

14   (Laughter.)

15   JUSTICE GORSUCH: It's good to see

16   you. We -- we've had some discussion about

17   whether websites are speech or whether they are

18   some -- a service off the shelf. And I -- I --

19   I -- I like a lot of my colleagues, don't

20   profess to know much about this. But I do know

21   that there are some stipulations that you made

22   in paragraphs 81, 82, 83, which say that this is

23   customized, personalized, and expressive

24   activity in each and every circumstance.

25   What do we do about that from your

 1   perspective? Don't we have to take that as

 2   given?

 3   MR. OLSON: Yes, but it doesn't change

 4   the analysis, I think.

 5   JUSTICE GORSUCH: Why not? Because I

 6   do see a -- a thing very different if I put a

 7   cake on display, it's been made, it is what it

 8   is, or a website that you can then go customize

 9   yourself, and another thing to commission an

10   expressive activity and -- and -- and to require

11   somebody to create an expression. Those are two

12   different things analytically in our law. So

13   help me out.

14   MR. OLSON: Well, I -- I think, along

15   with the stipulations, we need to look at the

16   specific relief that the company seeks.

17   JUSTICE GORSUCH: But those are the

18   stipulations.

19   MR. OLSON: They are the stipulations.

20   And -- and the specific relief that the company

21   seeks is the ability to turn away every single

22   same-sex customer.

23   JUSTICE GORSUCH: Well, they can ask

24   for what they want. What they get might be

25   another thing, Mr. Olson. But how we analyze

 1   the case depends upon those stipulations.

 2   MR. OLSON: Of course, it does. And

 3   -- and --

 4   JUSTICE GORSUCH: Okay. Okay. And

 5   then, separately, I -- I -- I was intrigued by

 6   your answer before my friends at the Tenth

 7   Circuit about freelance writers and people like

 8   that and the notion that Colorado could compel,

 9   for example, an individual to write a speech or

10   a press release on behalf of, say, a religious

11   entity with whom he or she disagrees.

12   Does -- does every press release

13   writer, freelance writer have to write a press

14   release for the Church of Scientology, say, even

15   though the beliefs of that institution may be

16   inimical to that person?

17   MR. OLSON: Not at all. And -- and I

18   admit I don't have firmly in mind the exact

19   contours of my answer a couple years ago to the

20   Tenth Circuit, but I -- I will tell you what

21   Colorado law says, which is you -- a freelance

22   writer may or may not be a public accommodation

23   --

24   JUSTICE GORSUCH: Well, let's -- let's

25   assume they -- they are --

1   MR. OLSON: Okay.

2   JUSTICE GORSUCH: -- under your

3   definition, pretty broad, very different than

4   the historical understanding of public

5   accommodation, but we've gone over that.

6   MR. OLSON: So -- so assuming away

7   that hard part of the question, getting to -- to

8   what limitations, all that Colorado law requires

9   is that if you choose to offer a service to

10   someone, you need to offer that service to --

11   JUSTICE GORSUCH: I offer to write

12   press releases for anyone. It's not who, but it

13   is a what. And the what is, I won't write a

14   press release that expresses religious views or

15   that I disagree with.

16   MR. OLSON: Well -- well, I think,

17   certainly, a -- a freelance writer who is a

18   public accommodation could say, I don't write

19   press releases that express religious views,

20   full stop, I won't write that for anybody.

21   Right? You -- you can --

22   JUSTICE GORSUCH: No, no, no, I'm --

23   I'm happy to do it generally speaking but just

24   not ones I disagree with. There are many I

25   would agree with across a wide variety of

1   religious faiths, but I'm not going to do it for

2   some with whom I disagree.

3   MR. OLSON: Well -- well, even in that

4   circumstance, what Colorado looks to is the

5   service you actually provide, and you choose the

6   service so long as -- you -- you could say I --

7   I --

8   JUSTICE GORSUCH: So the answer is

9   yes, Colorado would compel that person?

10   MR. OLSON: No, no, the answer is no.

11   JUSTICE GORSUCH: Okay, why?

12   MR. OLSON: Because Colorado could say

13   you as a -- as a speech writer could say, I

14   write -- you know, the religious speeches that I

15   write touch on a few traditions that I have

16   knowledge of and I don't write speeches that

17   touch on other knowledges. But you --

18   JUSTICE GORSUCH: Well, no, no, no.

19   It's not on -- you're changing my hypothetical,

20   Mr. Olson --

21   MR. OLSON: Well --

22   JUSTICE GORSUCH: -- that I disagree

23   with, that --

24   MR. OLSON: Okay.

25   JUSTICE GORSUCH: -- that I find

1   offensive to my religious beliefs. That's the

2   hypothetical.

3   MR. OLSON: So long as you would sell

4   that to everyone, not based on their religion,

5   but you -- you can define the contours of the

6   product, you can choose the contours of the

7   product that you sell, but you --

8   JUSTICE GORSUCH: I call it -- I call

9   it speech, but you can call it a product if you

10   want.

11   MR. OLSON: Well, we'll -- we'll call

12   it speech. You -- you can choose the content

13   of -- of what you sell. You just can't --

14   JUSTICE GORSUCH: What you say.

15   MR. OLSON: -- choose who you sell to.

16   JUSTICE GORSUCH: Okay.

17   MR. OLSON: Right? And so you could

18   say, I'm going to -- I'm going to focus on these

19   things and -- but I need to sell that to

20   everyone, even if the person who wants to buy it

21   is a member of a religious faith that I disagree

22   with. That gets by --

23   JUSTICE GORSUCH: So I will -- I will

24   write a press release for many faiths and many

25   belief systems that are -- but they have to be

1   consistent with mine and I won't do it if it --

2   if it offends my religious faith. Good to go?

3   MR. OLSON: So long as you sell that

4   to everybody.

5   JUSTICE GORSUCH: Yes. Okay. All

6   right. What's different about this case?

7   Because -- I'll just finish the question. I --

8   I know you're already ready to answer it. But

9   we have an individual who says she will sell and

10   does sell to everyone all manner of websites.

11   But she won't sell a website that

12   requires her to express a view about marriage

13   that she finds offensive to her religious

14   beliefs. What's the difference between the two

15   cases? I'm struggling to understand.

16   MR. OLSON: The difference is, and,

17   again, looking at the specific relief the

18   company seeks, is --

19   JUSTICE GORSUCH: Put -- put aside the

20   specific relief the company seeks because it's

21   up to courts to fashion relief.

22   MR. OLSON: Yeah.

23   JUSTICE GORSUCH: So that's -- that's

24   not going to persuade me. Work on something

25   that might.

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1              MR. OLSON:  The difference is, is that

2       that distinction the -- well, the -- the company

3       has chosen to say they want to provide wedding

4       websites generally and they will not provide --

5              JUSTICE GORSUCH:  Well, all manner of

6       websites.

7              MR. OLSON:  Well --

8              JUSTICE GORSUCH:  The -- the -- this

9       individual will provide all manner of websites,

10      just not one that celebrates -- requires her to

11      write something, words on a page, customizable,

12      all the stuff you stipulated to, that celebrate

13      a particular thing that she finds offends her

14      religious beliefs.

15             I -- I still -- I'm -- I'm looking for

16      the distinction between the two cases.  One you

17      say is okay and the other one not okay.

18             MR. OLSON:  Because the company,

19      unlike our first example of the -- the speech

20      writer --

21             JUSTICE GORSUCH:  Yeah.

22             MR. OLSON:  -- the company here says

23      in no uncertain terms will they ever sell a

24      company -- a -- a -- a -- a product or a service

25      to a same-sex couple permitting that --
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1   JUSTICE GORSUCH: No, what they say is
2   we will not sell to anyone -- anyone a -- a
3   message that I disagree with as a matter of
4   religious faith, just as a speech writer says or
5   the press release writer, the freelance writer,
6   says I will not sell to anyone a speech that
7   offends my religious beliefs.
8   MR. OLSON: But, here, they are
9   defining their service by excluding someone
10   based on their --
11   JUSTICE GORSUCH: That's their
12   religious belief.
13   MR. OLSON: Well, in Colorado --
14   JUSTICE GORSUCH: You can't change
15   their religious belief, right?
16   MR. OLSON: No, but -- but -- well,
17   two --
18   JUSTICE GORSUCH: And you protect
19   religious beliefs under the statute, right?
20   That is one of the protected characteristics in
21   theory.
22   MR. OLSON: Yes, and in practice. If
23   it wasn't in practice, we'd have heard about it
24   over -- over the past several years, and -- and
25   my friend has pointed to no example where this

1   has been applied in a --

2   JUSTICE GORSUCH: Mr. Phillips did go

3   through a re-education training program pursuant

4   to Colorado law, did he not, Mr. Olson?

5   MR. OLSON: He -- he went through a --

6   a process that ensured he was familiar with --

7   JUSTICE GORSUCH: It was a

8   re-education program, right?

9   MR. OLSON: It was not a re-education

10   program.

11   JUSTICE GORSUCH: What do you call it?

12   MR. OLSON: It was a process to make

13   sure he was familiar with Colorado law.

14   JUSTICE GORSUCH: Someone might be

15   excused for calling that a re-education program.

16   MR. OLSON: I strongly disagree,

17   Justice Gorsuch.

18   JUSTICE GORSUCH: Thank you, Mr.

19   Olson.

20   CHIEF JUSTICE ROBERTS: Justice

21   Kavanaugh?

22   JUSTICE KAVANAUGH: I'm interested in

23   picking up on those questions and -- and what

24   Colorado's position on the First Amendment could

25   lead to, not what you would do based on your

 1   representation, but what your theory of the

 2   First Amendment could lead to in thinking about

 3   the proper analogy to a website designer.

 4   So I've been thinking about a

 5   publishing house that says, we're not going to

 6   publish -- we support pro-choice positions.

 7   We're not going to publish books that support a

 8   pro-life position or that we support same-sex

 9   marriage and we're not going to publish books

10   that take a different position on same-sex

11   marriage.

12   Does the publishing house have a First

13   Amendment ability to select the kinds of books

14   that it will publish along the lines of my

15   hypotheticals there?

16   MR. OLSON: Of -- of course, it does,

17   and I think a publishing house is not a public

18   accommodation for precisely the level of

19   selectivity and choice that -- that it goes

20   into, just like the Court recognized in Fulton.

21   JUSTICE KAVANAUGH: Right. But, if it

22   were a public accommodation, it would still have

23   a First Amendment right, correct?

24   MR. OLSON: Yes.

25   JUSTICE KAVANAUGH: You sure about

1   that?

2   MR. OLSON: Yes, because what -- all

3   the public accommodation law says is you can't

4   turn someone away because of who they are.

5   And -- and it would be different if your

6   hypothetical was they will not publish gay

7   authors. If -- if they were -- if they were a

8   -- a publishing house who said they will -- will

9   not --

10   JUSTICE KAVANAUGH: Right. That's the

11   distinction right there.

12   MR. OLSON: Yes.

13   JUSTICE KAVANAUGH: You put your

14   finger on it, I think. So the website designer

15   is different from the publishing house how?

16   MR. OLSON: Because the website

17   designer is refusing to -- to publish gay

18   authors using the publishing house example.

19   They are saying, I will not provide this service

20   to someone because of who they are, period.

21   JUSTICE KAVANAUGH: They say it's

22   because of the message.

23   MR. OLSON: I -- I -- I understand,

24   but they define the service in a way that

25   excludes people based on who they are, and that

1   violates Colorado law.

2   And to the extent there's some

3   incidental impact on their message, it's the

4   kind of incidental impact that this Court held

5   in O'Brien as to be appropriate, where a law is

6   focused on conduct and not the -- the message

7   itself.

8   JUSTICE KAVANAUGH: And I thought the

9   amicus brief of Professors Carpenter and Volokh

10   was fairly interesting. They supported the

11   same-sex position in Masterpiece but that they

12   say they're on the opposite side in this case

13   and they say that the reason is because this

14   case involves speech.

15   They say a website designer is unlike

16   a baker and that Hurley therefore is the key

17   precedent here, and they say there is no serious

18   question, their words, no serious question that

19   this case involves compelled speech.

20   Do you agree it involves compelled

21   speech?

22   MR. OLSON: No.

23   JUSTICE KAVANAUGH: Even though they

24   say there's no serious question that it does,

25   you disagree with that?

 1   MR. OLSON: We disagree with that.

 2   JUSTICE KAVANAUGH: Okay. Thank you.

 3   CHIEF JUSTICE ROBERTS: Justice

 4   Barrett?

 5   JUSTICE BARRETT: How can you disagree

 6   with that in light of the stipulations that

 7   Justice Gorsuch reviewed with you? Because, if

 8   it's speech, you know, as the stipulations

 9   Justice Gorsuch read did, and she has to say it,

10   why isn't it compelled speech?

11   MR. OLSON: Because, on the

12   stipulations and -- and where we are here, the

13   company would refuse to provide the same

14   identical speech to a customer solely because of

15   who they are.

16   And if a company is going to -- is

17   going to provide speech, already said they're

18   going to do it, the website I think was the --

19   the colloquy with Your Honor, Justice Barrett,

20   where someone comes in and says, I want the

21   exact same website as you gave to my friends,

22   and the company says, no, I will not provide

23   that to you and the only reason is because of

24   who -- who you are, that's not compelled speech.

25   Certainly, there are some

1   circumstances where there may be more of this,

2   you know, tell the story, et cetera, but the

3   company can choose to determine the services

4   that it wants. Here, it has chosen to say that

5   I will not provide the exact same website for

6   one couple that I would for another solely based

7   on the identity of the couple.

8   JUSTICE BARRETT: Okay. I want to

9   give you a hypothetical that doesn't rely on

10   disagreement, philosophical or otherwise, with

11   speech but just a desire to promote a different

12   kind of speech.

13   So let's say a newspaper is running --

14   as many newspapers do, runs marriage

15   announcements. And so, you know, The New York

16   Times says that such announcements which it

17   picks have to satisfy its normal editorial

18   standards.

19   Let's just say that the newspaper for

20   gay pride month decides that it's going to run

21   to promote and recognize same-sex marriage only

22   same-sex marriage announcements, turns away

23   heterosexual announcements, not because it

24   disparages or disagrees with opposite-sex unions

25   but because it's trying to promote something

1   else.

2   Can it do that? That's a protected

3   characteristic under the law?

4   MR. OLSON: Well, that's a hard

5   hypothetical because, normally, the marriage

6   announcements are considered to be a public

7   accommodation, but your -- hypothetical

8   introduces a layer of editorial discretion in --

9   JUSTICE BARRETT: Well, you can't run

10   every marriage announcement that comes. There

11   would be too many. So you're necessarily going

12   to pick and choose, just like every business is

13   going to have to pick and choose based on

14   resources.

15   MR. OLSON: Right -- right -- well,

16   and I think -- but, in that circumstances, if

17   the sole basis for picking and choosing is a

18   protected characteristic, The New York Times

19   couldn't say that we're -- we're going to have

20   -- this month we're just going to run

21   opposite-sex weddings, next month we're just

22   going to run white people weddings, next month

23   we're just going to run --

24   JUSTICE BARRETT: So, for gay pride

25   month, a newspaper can't choose to try to

 1   celebrate that and communicate a message by

 2   running only gay marriage announcements?

 3   MR. OLSON: Well, again, I think the

 4   answer is no, but that's an unusual case because

 5   a newspaper obviously typically has great

 6   discretion.

 7   JUSTICE BARRETT: Well, it might be an

 8   unusual case, but the problem and -- and what a

 9   lot of the hypotheticals are getting at is

10   however we decide this case obviously applies to

11   others. And what if we say it's not The New

12   York Times, but what if we say that it's a gay

13   rights group that wants to publish gay rights

14   announcements online all year round, not just

15   for gay pride month, because it wants to

16   celebrate love in that community, and so it

17   publishes only same-sex marriage announcements

18   and turns away opposite sex.

19   MR. OLSON: Well --

20   JUSTICE BARRETT: Can the gay rights

21   organization do that?

22   MR. OLSON: Right. I think there

23   that's very unlikely to be a public

24   accommodation, so the answer is likely yes, but

25   --

 1   JUSTICE BARRETT: Well, they're paid.

 2   Why? I mean, they're paid. I mean, they --

 3   they craft these for -- it's a business, it's a

 4   commercial enterprise, but they craft these

 5   announcements for the gay community.

 6   MR. OLSON: I guess -- who crafts the

 7   announcements? I thought it was --

 8   JUSTICE BARRETT: So it's a -- it's a

 9   -- it's a -- it's a gay rights enterprise. It's

10   a -- it's a group run by, you know, people who

11   are interested in promoting gay rights, and it's

12   a forum to celebrate gay marriage. They charge.

13   You make money, and you run marriage

14   announcements that have our story, et cetera,

15   but it's done specifically to celebrate love in

16   that community. Can they turn away opposite-sex

17   marriage announcements?

18   MR. OLSON: So, in this unusual

19   hypothetical, assuming they're a public

20   accommodation, they cannot turn away

21   announcements based on a protected

22   characteristic. So they couldn't turn around --

23   turn away opposite-sex announcements or

24   interracial marriages, I -- I think, if they're

25   a public accommodation. But I think the --

1   JUSTICE BARRETT: So they can be

2   compelled to -- it's not -- it's not that they

3   have anything against opposite-sex unions, but

4   they can be compelled to give their, you know,

5   web space to those -- to those announcements

6   even though it's not consistent with the message

7   of their organization?

8   MR. OLSON: Again, assuming they're a

9   public accommodation and opening themselves to

10   the public --

11   JUSTICE BARRETT: Yes, assuming

12   they're --

13   MR. OLSON: Yes, they -- they can --

14   JUSTICE BARRETT: -- a public

15   accommodation.

16   MR. OLSON: -- they can be -- do that,

17   but I think what makes the hypothetical

18   difficult is that that assumption likely does --

19   does not apply to most organizations like that

20   that we talked --

21   JUSTICE BARRETT: But it seems like

22   you can't get out of everything by defining

23   public accommodation narrowly or broadly

24   depending on it. I mean, you agree that in

25   Hurley the parade was a public accommodation, as

1   we held? Because Hurley is your hardest case,

2   right?

3   MR. OLSON: It's a difficult case, but

4   it -- it -- but we are different than Hurley,

5   and I'm happy to talk about why. But the public

6   accommodation law was applied to the parade in

7   -- in Hurley, and the Court said that was --

8   because of the peculiar circumstances there, it

9   -- it was inappropriate.

10   But, importantly, in Hurley, everyone

11   could march in the parade. The only issue was

12   who could carry the banner in the parade. And,

13   in this case, people can't march in the parade.

14   The -- the company is turning away people for

15   their products based solely on who they are, and

16   that's the big difference from here and Hurley.

17   JUSTICE BARRETT: Thank you.

18   CHIEF JUSTICE ROBERTS: Justice

19   Jackson?

20   JUSTICE JACKSON: Yes. So I just

21   wanted to say how perplexed I was about the

22   questions that seemed to distinguish this kind

23   of sexual orientation refusal to provide

24   services from the race discrimination. And

25   there were some questions raised about, you

1   know, religion being the basis, but I -- I

2   guess -- and -- and you might be able to help me

3   with this and you might not, but I -- I was

4   fairly certain that, historically, opposition to

5   interracial marriages and to integration in many

6   instances was on religious grounds.

7   So I don't know that we can say that

8   just because we have a religious objection to

9   same-sex marriage in this situation, that

10   wouldn't necessarily implicate religious

11   objections to other kinds of situations.

12   Am I right about that?

13   MR. OLSON: Absolutely correct about

14   that. I mean, Bob Jones University is a good

15   example of that case --

16   JUSTICE JACKSON: All right. So --

17   MR. OLSON: -- where there was a

18   religious basis --

19   JUSTICE JACKSON: -- so whatever we

20   decide here, as Justice Barrett suggested, could

21   have implications for other kinds of

22   categorizations and First Amendment -- strongly

23   religious held First Amendment invocations of

24   rights?

25   MR. OLSON: Absolutely, and I think

 1   the -- the reason my friend was having such

 2   difficulty giving clear answers to some of these

 3   hard questions was because there is no way to

 4   cabin this to -- under the Free Speech Clause

 5   exemption they seek, just to weddings or --

 6   sexual orientation is involved.

 7   JUSTICE JACKSON: All right. So can I

 8   just direct your attention back to Justice

 9   Kagan's question? Because I think she -- she

10   made good points about, you know, the "God bless

11   this union" hypothetical. And I guess I was

12   thinking, isn't part of the problem trying to

13   figure out whose statement of opinion it is when

14   you have a public accommodation?

15   When you have an artist for hire,

16   right, ordinarily, you would have an artist who,

17   even though they're making custom, you know,

18   things, they're making custom things based on

19   their own views and opinions and this is my art.

20   But, when you have an artist for hire and people

21   come to them and say here's what I'd like you to

22   make, there's a question about whether what they

23   make is their statement or the customer's

24   statement.

25   So, if it was clear that it was not

 1   their statement, let's say the gay couple comes

 2   and they say we want "God bless this union" on

 3   our website, and the web designer says that's

 4   fine, but you understand under our name at the

 5   bottom we say on every website we believe that

 6   marriage is only between one man and one woman

 7   and we're going to put that on your website?

 8   Justice Alito says maybe that person will walk

 9   away, and maybe they will.

10   But the point is, if they do that in

11   every situation and it's clear that it's not

12   their statement, then do we solve the -- the --

13   the -- the difficult Justice Kagan problem of,

14   like, who's -- who's making an expression here?

15   MR. OLSON: I think we -- we make

16   progress towards solving it. And I think, back

17   to the stipulations, I think it's notable that

18   the stipulations here do not address that

19   question that you raise, Justice Jackson.

20   What the company says is, well, every

21   website has "Designed by 303 Creative" at the

22   bottom. That's paragraph 83 of the

23   stipulations. And then they say: And, if a

24   viewer of a wedding website goes to 303

25   Creative, then they will understand our

 1   philosophy -- our -- our own website, then they

 2   will understand our philosophy and understand

 3   that there's some implicit, you know,

 4   recognition or endorsement -- what -- whatever,

 5   of the wedding.

 6   But, on the stipulated facts here, the

 7   question you pose is totally wide open. There's

 8   no evidence in the record whatsoever and no

 9   websites in the record to look at to see whether

10   this -- anyone would attribute the speech about

11   the couple on the wedding website to the

12   designer as opposed to the couple.

13   JUSTICE JACKSON: Should -- should we

14   have that as part of our standard in the

15   holding? Like let's say we -- we don't want to

16   go as far as you're suggesting perhaps with the

17   holding in this case. Could -- could it be that

18   we would say, you know, the First Amendment

19   protects the web designer's abilities to, you

20   know, not have this kind of a -- a same-sex

21   wedding website only if it would be clear from,

22   you know, a neutral observer or from the

23   audience that having that website is their own

24   expression?

25   MR. OLSON: So two things to say on

 1 that, Your Honor. First is I think both Spence

 2 and Hurley itself talked about the importance of

 3 how an onlooker would look at the message and --

 4 and who the onlooker would attribute the message

 5 to. So I think you certainly could -- could --

 6 could build on that. And, again, here, there's

 7 no evidence whatsoever that -- that anyone would

 8 look at a wedding website designed by 303

 9 Creative and say, oh, that is, you know, the --

10 the speech and beliefs of the designer as

11 opposed to the couple getting married.

12   JUSTICE JACKSON: Thank you.

13   CHIEF JUSTICE ROBERTS: Thank you,

14 counsel.

15   MR. OLSON: Thank you.

16   CHIEF JUSTICE ROBERTS: Mr. Fletcher.

17   ORAL ARGUMENT OF BRIAN H. FLETCHER

18   FOR THE UNITED STATES, AS AMICUS CURIAE,

19   SUPPORTING THE RESPONDENTS

20   MR. FLETCHER: Thank you, Mr. Chief

21 Justice, and may it please the Court:

22   My friend, Ms. Waggoner, offered a

23 two-part test this morning for when a commercial

24 business is entitled to an exemption from a

25 generally applicable public accommodations law.

 1   She said, number one, is their product speech,

 2   and, number two, does serving a particular

 3   customer change the message in the view of the

 4   business.

 5   Now, as the questions today have

 6   already explored, that leads to extremely

 7   sweeping results. It means that any provider of

 8   expressive services is entitled to put up a sign

 9   saying we do not serve people with particular

10   characteristics whenever they believe that

11   serving those people would change their message.

12   What I want to begin with today is to

13   explain why that way of approaching the problem

14   is also inconsistent with this Court's cases,

15   most notably Rumsfeld versus FAIR, which you

16   mentioned, Mr. Chief Justice. That case was not

17   just about access to the law schools' rooms.

18   The law schools had a separate claim that said

19   we provide other services to recruiters in the

20   form of e-mails, newsletters, other things of

21   that nature. And this Court did not disagree.

22   It said those things are clearly

23   speech. And the law schools also said, when we

24   are required to provide those services to the

25   military, it changes our message because it

 1   forces us to support a cause we deeply oppose.

 2   And this Court did not disagree.

 3   Instead, it said that compulsion of

 4   speech is permissible because is it incidental

 5   to a content-neutral regulation of conduct and

 6   that law schools are required to speak only if

 7   and to the extent they would provide the same

 8   speech for others.

 9   I welcome the Court's questions.

10   CHIEF JUSTICE ROBERTS: I do think the

11   Court in -- in Rumsfeld was dealing with the

12   sort of compulsion that is significantly

13   different from the compulsion here. In what

14   other case have we upheld compelling speech, in

15   other words, not simply just restricting speech

16   but actually compelling an individual to engage

17   in speech contrary to her beliefs?

18   MR. FLETCHER: So I think, Mr. Chief

19   Justice, Rumsfeld really is one of those cases.

20   And I want to emphasize that the law schools

21   there really did have a very credible claim, I

22   think, that they deeply opposed the military's

23   policies and that --

24   CHIEF JUSTICE ROBERTS: Well, they

25   opposed the military's policies, but all they

 1   really had to do was give them an empty room.

 2   MR. FLETCHER: Mr. Chief Justice,

 3   that's not correct. At pages 60 to 62, the

 4   Court acknowledges that there were things that

 5   the law schools were required to do, like

 6   sending e-mails, coordinating meetings,

 7   including announcements in their newsletters

 8   that were clearly speech. The court below had

 9   held that that --

10   CHIEF JUSTICE ROBERTS: Advising --

11   advising people that the military recruiters

12   were available in a particular room, right?

13   MR. FLETCHER: And including their

14   announcements, distributing the announcements on

15   behalf of the military, including the military's

16   announcements in the law school's own

17   newsletter. The court below held and the law

18   schools --

19   CHIEF JUSTICE ROBERTS: Of the -- of

20   the fact that they would be recruiting on campus

21   pursuant to the Solomon amendment. Do you think

22   that's the same as the speech that's compelled

23   here, which is directly opposite to the beliefs

24   that the -- Ms. Smith is -- is seeking to

25   convey?

1   MR. FLETCHER: So I think it depends

2 very much about what type of speech we're

3 talking about here. I don't know that it is

4 different in a constitutional sense from the

5 sort of speech that was described in what

6 Justice Kagan, I think, called the basic

7 website, where we're talking about a website

8 that presents in an attractive way the details

9 of the couple's wedding.

10   I think it might be a very different

11 case if she were compelled, if Colorado ever

12 applied its law to compel her to create messages

13 or express religious reviews about marriage or

14 to do some of the opinion-based statements that

15 Justice Kagan described, but I think that case

16 might well come out differently.

17   JUSTICE KAGAN: In other words, you

18 would say that here is where the military

19 recruiters are going to be, with those

20 recruiters, of course, using a discriminatory

21 policy that the law schools deeply objected to.

22 Here is where the military recruiters are going

23 to be is very similar to here is where the

24 wedding is going to take place, which is what

25 standard websites do.

1   MR. FLETCHER: Exactly. And in saying

2   that, I don't want to at all minimize Ms.

3   Smith's sincere religious objection to saying

4   that for a wedding that she opposes. I'm just

5   making the point that the law schools also had

6   sincere moral objections to making those

7   statements to facilitate recruiting that they

8   found deeply objectionable.

9   JUSTICE BARRETT: What if the law

10   schools also had to make available their CDO to

11   sit down with the military and help them craft,

12   you know, in a -- a statement that would be

13   attributable to the military, you know, this is

14   why a career with the military -- this is what

15   it would be, this is why it's attractive, and

16   then post it? Would that change Rumsfeld?

17   MR. FLETCHER: So there was actually

18   evidence that those sorts of services were

19   offered, that the law schools were pressing that

20   are referenced in the Third Circuit's opinion

21   but not specifically referenced in its Court's

22   cases.

23   I think what that starts to get into

24   is how do you draw the line between are you

25   providing -- is it really the same speech that

 1   you would provide for someone else and are you

 2   being required to do something that goes beyond

 3   that to express the sort of opinion-related

 4   statements that Justice Kagan espoused.

 5   JUSTICE BARRETT: What if they do it

 6   for everyone? The Career Development Office

 7   will do that for, you know, law firms, this is

 8   the job of an associate, and here is why it

 9   would appealing, what you'd be getting out of

10   it? If they do that, then they would have had

11   to do that for the military, or would that make

12   that case more like Hurley?

13   MR. FLETCHER: So I guess here is the

14   way I'd answer the question, is -- is the way

15   that Hurley did. We read Hurley to ask is the

16   compulsion, is the burden on speech, is it truly

17   incidental to the content-neutral regulation of

18   conduct.

19   And what Hurley started with on pages

20   572 to 573 is being emphatic in saying this

21   parade is not excluding people because they are

22   gay and lesbian. It is excluding them solely

23   because of the message that they want to send.

24   And so the Court said applying the public

25   accommodations law to them is not incidental,

 1   it's not serving the content-neutral regulation

 2   of conduct because they're not discriminating on

 3   the basis of status.

 4   Instead, the law in Hurley, the Court

 5   said, was equivalent to a law saying that the

 6   parade had to include any message that any

 7   protected group wanted to offer. That is not an

 8   incidental burden on speech. That is a direct

 9   burden on speech.

10   And the reason why we view this case

11   as being like FAIR and not like Hurley is

12   because Colorado is not asking Ms. Smith to say

13   messages or to speak messages that she would not

14   speak for anybody. The only thing that it is

15   saying is you can't discriminate based on status

16   and you can't define your services based on

17   protected status, so that you can't say the

18   thing, the message that I object to that I won't

19   speak for anybody is a message that is tied to

20   the customer's status.

21   JUSTICE KAGAN: But what -- what --

22   JUSTICE SOTOMAYOR: Well, I -- I -- I

23   don't know how many of my colleagues have looked

24   at the actual website. I don't even see

25   celebration of marriage in any of the examples.

 1   Exhibit A, page 51, says Save The

 2   Date, Lilly and Luke, November 20, you're

 3   invited. And it says Lilly and Luke and the

 4   date and place, the town. The Exhibit 52 is

 5   counting down the days. Doesn't even say what

 6   it's counting down for, except the -- "our

 7   special day," which everybody has to assume is

 8   the couple's.

 9   Fifty-three is an RSVP with pictures.

10   Fifty-four is "Our Blog, Bring Your Dancing

11   Shoes." Fifty-five is their date, "It all began

12   seven years ago," Lilly's version and Luke's

13   version. It's clearly not 303's version. "We

14   love each other and coffee" -- I don't even know

15   what CO -- "Colorado, Jesus, dogs, and diving.

16   We love each other" is the couple who loves

17   Jesus. I assume your adversary won't say Jesus

18   doesn't love them back, but it doesn't say that.

19   The 57 is the ceremony. Fifty-eight

20   is the reception, location, spirits, dinner menu

21   and dancing. Fifty-nine is location. I don't

22   see anywhere I'm celebrating the marriage or God

23   loves anyone or anything to do with anything

24   like that. So have you reviewed this website?

25   MR. FLETCHER: I have, Justice

1   Sotomayor.

2   JUSTICE SOTOMAYOR: Do you believe

3   that there's any page that says celebrate the

4   marriage?

5   MR. FLETCHER: I -- honestly, to -- as

6   I stand here today, I can't remember whether

7   there is or not. I don't think it would make a

8   difference if there were. And I think what the

9   examples that you just read highlight is that

10   there is a lot of websites or content on

11   websites that is properly within this case

12   because it is consistent with the stipulations

13   Justice Gorsuch and with the scope of relief

14   that they're asking for and with the type of

15   services that Ms. Waggoner has described this

16   morning.

17   JUSTICE SOTOMAYOR: What they're

18   asking for is a status-based exemption to

19   accommodate.

20   MR. FLETCHER: That -- that's exactly

21   right.

22   JUSTICE GORSUCH: Well, on that --

23   CHIEF JUSTICE ROBERTS: I thought --

24   JUSTICE SOTOMAYOR: Not a speech-based

25   exemption.

1   CHIEF JUSTICE ROBERTS: Just I -- I

2 thought at pages 188A and 189A, the stipulation

3 below said that the additions to the web page

4 stated, and then it lists the firm belief in God

5 that they, Ms. Smith, subscribed to. Is that --

6 do you understand that to be part of the

7 stipulations or not?

8   MR. FLETCHER: I do, Mr. Chief

9 Justice, but that's referring to her website,

10 her business's own website, not the websites

11 that she would create for clients and not the

12 websites that would be subject to the public

13 accommodations law.

14   JUSTICE GORSUCH: We also --

15   CHIEF JUSTICE ROBERTS: And -- I'm

16 sorry, go ahead.

17   JUSTICE GORSUCH: No, no. Please,

18 Chief.

19   CHIEF JUSTICE ROBERTS: I was just

20 going to say also on page 188A is the determine

21 -- determined -- the stipulation that -- that

22 her religious beliefs will be unmistakable to

23 the public after viewing the addition to the web

24 page.

25   MR. FLETCHER: Yes. Once again,

1   that's describing her website, not the websites

2   that she would create for clients or the

3   Colorado law might her -- might require her to

4   provide on a nondiscriminatory basis.

5   JUSTICE GORSUCH: And, counsel, we --

6   we also have stipulations from Colorado that the

7   plaintiff is willing to work with all people,

8   regardless of classifications such as race,

9   creed, sexual orientation, and gender, right?

10   MR. FLETCHER: In some respects, yes,

11   but not --

12   JUSTICE GORSUCH: No, that -- that is

13   the -- I -- I -- I just read it. Do you

14   disagree with that? It's a stipulated fact in

15   this case.

16   MR. FLETCHER: That is stipulated, but

17   it's also clear that she will not provide any

18   wedding website for a same-sex couple.

19   JUSTICE GORSUCH: Well, for a same-sex

20   wedding --

21   MR. FLETCHER: For a same-sex wedding,

22   yes.

23   JUSTICE GORSUCH: -- and she wouldn't

24   provide it to a heterosexual couple either,

25   right?

1   MR. FLETCHER: But that's still

2   discrimination within the meaning of --

3   JUSTICE GORSUCH: Just as she wouldn't

4   sell a -- a website that celebrates a

5   heterosexual union that she disagreed with to

6   anyone regardless of their sexual orientation,

7   right?

8   MR. FLETCHER: That may be right,

9   Justice Gorsuch, but I think Masterpiece

10 couldn't have been clearer in saying that

11 declining to sell goods or services, even

12 expressive goods and services, for a same-sex

13 wedding is a form of status-based discrimination

14 properly within the scope of public

15 accommodations laws.

16   JUSTICE GORSUCH: And, on -- on that,

17 I just want to make sure I understand. Do we

18 agree as well that this is -- this work that the

19 plaintiff performs is expressive in nature?

20   MR. FLETCHER: We do.

21   JUSTICE GORSUCH: Okay. Thank you.

22   JUSTICE JACKSON: And if it's

23 expressive, what -- what about my photograph

24 hypothetical?

25   MR. FLETCHER: So I didn't belabor

1   this at the beginning, Justice Jackson, but your

2   photograph hypothetical is exactly the sort of

3   implication of the arguments that Petitioners

4   are advancing that are of concern to the United

5   States.

6   We really do think it's very difficult

7   if you accept her principle, is it speech and

8   does the speaker believe the message has

9   changed, to say that someone who is doing that

10   would not be entitled under her theory to an

11   exemption from the public accommodations laws.

12   And we think that's a very sweeping

13   accommodation that's inconsistent with the

14   Court's admonition in Masterpiece Cakeshop that

15   any sorts of carveouts in these areas have to be

16   carefully cabined to avoid undermining the

17   government's compelling interest in ensuring

18   that all Americans have equal access to the

19   public marketplace.

20   JUSTICE JACKSON: And so just to be

21   clear, right, it -- it's the same photograph for

22   both customers, that this expression in my

23   example is classic Scenes with Santa, "It's a

24   Wonderful Life," 1940s, and we want -- the --

25   the artist, the photographer, wants Santa with

1   the kinds of depictions that are in that movie,

2   and he wants to sell that to everybody, but what

3   that means is only some people can be depicted

4   in that picture.

5   Is that -- that's -- I'm just trying

6   to make it -- because we've heard a lot of

7   questions about, well, isn't she customizing it?

8   I mean, he's customizing each photo, but what

9   he's saying is, I won't do the customization for

10   these folks who want depictions with Santa

11   because that is inconsistent with my beliefs

12   about how that scene should be depicted, and I'm

13   an artist, and you'd be forcing me to put out

14   into the world pictures of Santa with children

15   that I think are inconsistent with my view of

16   how Santa should be depicted.

17   MR. FLETCHER: We agree, Justice

18   Jackson. We think, if you accept Petitioners'

19   theory, the upshot is that that photographer or

20   a photographer who says, I won't take corporate

21   head shots for women because I don't want to

22   send the message that women should be leaders in

23   the workplace, can deny service to a class of

24   people.

25   JUSTICE BARRETT: Mr. Fletcher, what

1   if you have a gay couple who runs a web design

2   business in a college town, and, you know, a big

3   part of their business is developing websites

4   for student organizations, the environmental

5   organization, like, different rec club leagues,

6   whatever. And then you have a Christian

7   organization or a Catholic organization that

8   basically stands for and advocates traditional

9   views of marriage. This is the raison d'etre

10   for the club. They host debates, invite

11   speakers, and they want the standard website

12   that this couple provides in their business,

13   which is, you know, graphics that make it look

14   appealing, kind of an About Us page that

15   describes what they do and what their beliefs

16   are. And let's say that this couple, like 303

17   Creative, has on the bottom of every page like,

18   you know, "Designed" -- "Designed by," you know,

19   "Jack and Michael." Everything this club wants

20   to say is an anathema to this couple.

21   Do they have to -- can you compel that

22   speech? Do they have to publish it?

23   MR. FLETCHER: I don't think they do

24   --

25   JUSTICE BARRETT: Why?

1   MR. FLETCHER: Because I don't think
2   that's a refusal based on status.
3   JUSTICE BARRETT: Okay. This is my
4   question, that's why I asked it, because I
5   think, here, there's a -- a difference of
6   opinion about whether turning down the same-sex
7   couple simply for purposes of a marriage
8   announcement is a turn-down based on status or
9   message. And it seems to me in my hypothetical
10   that the status of the club is inextricably
11   intertwined with the message they want to speak.
12   So why is it different?
13   MR. FLETCHER: For a couple of
14   reasons. I think, first of all, just to -- to
15   start with same -- the same-sex marriage
16   context, this Court has recognized that that's a
17   circumstance where status and conduct are
18   inextricably intertwined. In Lawrence and
19   Masterpiece, the Court has said refusing to
20   serve for same-sex marriages is discrimination
21   against same -- gays and lesbians because status
22   and conduct is inextricably intertwined.
23   The public accommodations laws and the
24   anti-discrimination laws generally don't work
25   that way in general. We don't think that the

 1   expression of particular views is inextricably

 2   intertwined with having a particular religion or

 3   being a Democrat or a Republican.

 4   In general, in public accommodations

 5   laws, we say, when you discriminate against

 6   someone because you -- they want you to print a

 7   website or serve an event or cater an event for

 8   something that you disagree with, we wouldn't

 9   say that that's a status-based refusal. And I

10   think that's correct. I -- I don't think --

11   JUSTICE BARRETT: So this is a

12   carveout that's applicable just to the same-sex

13   context?

14   MR. FLETCHER: I think it's a context

15   -- it's like the Court's recognition in Bray

16   that a tax on yarmulkes is a tax on Jews. There

17   are certain rare contexts where status and

18   conduct are inextricably intertwined, and I

19   think the Court has rightly recognized that

20   same-sex marriage is one of them.

21   JUSTICE BARRETT: Thank you.

22   CHIEF JUSTICE ROBERTS: Justice

23   Thomas?

24   Justice Alito?

25   JUSTICE ALITO: I want to make sure I

 1   understand some of the contours of your

 2   argument. So my first question is whether you

 3   believe that speech can be compelled so long as

 4   the person who is compelled to speech -- to

 5   speak is -- is not associated with the compelled

 6   speech.

 7   MR. FLETCHER: That's not the line

 8   that we draw, Justice Alito. I think we focused

 9   on is it being compelled pursuant -- incidental

10   to a content-neutral regulation of conduct as in

11   FAIR or is it not.

12   JUSTICE ALITO: Well, outside of that

13   context, in general, does the prohibition or

14   restriction of compelled speech apply only where

15   there is no danger of attribution?

16   MR. FLETCHER: I don't think so, no.

17   I would imagine it applying in other contexts

18   too.

19   JUSTICE ALITO: Okay. Do you agree

20   with Mr. Olson that a -- a website for marriages

21   can tailor the website in a way that makes the

22   website unacceptable to same-sex couples?

23   MR. FLETCHER: By saying, for

24   instance, we -- on every website, we believe

25   that marriage is only between one man and one

      1   woman or something like that, yes, we do.

      2   JUSTICE ALITO: You believe that's --

      3   that's permissible?

      4   MR. FLETCHER: We understand that to

      5   be permissible as a matter of Colorado law, and,

      6   also, we think that's consistent with the way

      7   the public accommodations laws usually work.

      8   JUSTICE ALITO: Mr. Olson's answer to

      9   that was if a website -- or part of the answer

     10   at least was that if a website included

     11   something like that, that would cause the

     12   website to lose a significant amount of business

     13   because some opposite-sex couples wouldn't want

     14   that. But that's dependent on the views of the

     15   community about opposite-sex -- about

     16   same-sex -- I'm sorry, about same-sex marriages.

     17   What if it's in a community where 99

     18   percent of the public agree with that view, that

     19   same-sex marriages are -- are bad, and they're

     20   happy to have that associated with it?

     21   MR. FLETCHER: So I don't think my

     22   answer changes, Justice Alito, because I think

     23   that imposing a requirement or prohibiting that

     24   inclusion on a website is directly targeting the

     25   expressive content of the website.

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 1          JUSTICE ALITO:  Isn't that kind of a
 2    silly distinction?
 3          MR. FLETCHER:  Justice Alito,
 4    respectfully, no, I -- I don't think it is.  I
 5    think it's one that's familiar both to public
 6    accommodations laws and to the First Amendment.
 7    So, in the public accommodations context, as Mr.
 8    Olson said, you could have a store that can say
 9    we sell products that are solely for -- related
10    to Judaism, and it's not likely to be appealing
11    to Christians or Hindus, but no one thinks the
12    store is violating the public accommodations
13    laws unless it says no Christians or Hindus may
14    enter, and then it is violating the public
15    accommodations laws.
16          JUSTICE ALITO:  Is there any limit to
17    how broadly a state can define a public
18    accommodation?  So suppose a state defines it as
19    any business an -- it provide -- a business that
20    provides services to a significant portion of
21    the public.
22          MR. FLETCHER:  I --
23          JUSTICE ALITO:  Would that make --
24    mean it's no -- it can't be regarded as a public
25    accommodations anymore?
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1   MR. FLETCHER: I don't know about that

2   line specifically, Justice Alito. I -- I will

3   accept the premise of the question. I do think

4   there are limits as to how far the state can go

5   at least when we're talking about what's a

6   sufficiently substantial interest to justify or

7   to pass scrutiny under the O'Brien test.

8   JUSTICE ALITO: Well, I -- I ask this

9   because a lot of the arguments on your side

10   seemed to view public accommodations -- that if

11   it's a public accommodations law, it's generally

12   okay, there's no problem with it. And that's

13   why I want to know how far that can be expanded.

14   So some selectivity would not

15   necessarily take a business outside of the --

16   the definition of public accommodations? The

17   same arguments would apply?

18   MR. FLETCHER: Some selectivity

19   wouldn't take them out, but I think the farther

20   the state wanders from the sort of traditional

21   core of commercial establishments that hold

22   themselves out as serving the public, the weaker

23   the state interest is.

24   JUSTICE ALITO: What about the

25   characteristics that form the basis for an

1 impermissible denial of service? Any limit to

2 those?

3 MR. FLETCHER: I think there, the same

4 answer. So not in the sense that a state can

5 define its public accommodations laws however it

6 wants. But, yes, when it starts to bump up

7 against the First Amendment and you're

8 applying the O'Brien standard, protection for

9 some characteristics, you know, things that go

10 beyond the traditional things, like race, sex,

11 sexual orientation, religion, those at issue

12 here, and get out into political affiliation or,

13 you know --

14 JUSTICE ALITO: It can't decline it as

15 political affiliation?

16 MR. FLETCHER: I --

17 JUSTICE ALITO: It can't define it to

18 include political affiliations --

19 MR. FLETCHER: I'm not saying it can't

20 --

21 JUSTICE ALITO: -- or ideology?

22 MR. FLETCHER: -- I'm not saying it

23 can't define it that way. I'm just saying that

24 the interests supported by such a prohibition

25 would be weaker than the really core ones like

 1   those that we see at issue here.

 2   JUSTICE ALITO: Along -- okay. So how

 3   much selectivity do you think is required?

 4   MR. FLETCHER: So that's going to be,

 5   I think, in the first instance, as a state law

 6   matter or as a constitutional sort of backstop

 7   matter, I think it's hard to give a precise

 8   answer. I think the Court's opinion in Fulton

 9   gives some guidance and says more selectivity,

10   more individualized review is less likely to be

11   a public accommodation, and in contrast, an

12   entity that generally holds itself out as open

13   to the public can't escape the public

14   accommodations laws just by imposing a

15   discriminatory limitation or some pretense of

16   selectivity. And I -- I know I can't give you a

17   bright line, but I think this is a familiar

18   problem in public accommodations law.

19   JUSTICE ALITO: Okay. Suppose -- last

20   -- I -- I think my last question. Suppose 303

21   Creative says that there's so much demand for

22   our services that we have to be selective in who

23   we choose. Would this be -- would that make

24   this case -- would this case come out

25   differently then?

1   MR. FLETCHER: I don't think so,

2   Justice Alito. I think that a business that is

3   open to the public and serves the public but has

4   more business than it can handle and so has to

5   be selective is still a public accommodation.

6   JUSTICE ALITO: Thank you.

7   CHIEF JUSTICE ROBERTS: Justice

8   Sotomayor?

9   Justice Kagan?

10   JUSTICE KAGAN: Mr. Fletcher, when I

11   read your brief, I had the sense that you and

12   General Olson, Colorado, parted ways on -- on --

13   on some matters, and I'll just -- on my

14   hypothetical, God blesses this union, I thought

15   that you might find -- find that more difficult

16   than General Olson, and I'm wondering if I'm

17   right about that and -- and if I am right why

18   and what that says about your argument

19   generally.

20   MR. FLETCHER: So let me give you the

21   answer I'd give today. I'd start with just the

22   same observation that General Olson gave you,

23   which is that I think there are free exercise

24   clause issues might come into play. I'll put

25   those to the side because this is a speech case,

1   right?

2   And I think what that pushes on is can

3   the person who's providing services credibly say

4   I'm not denying service just because of status,

5   I'm denying service because there's some message

6   that's not just tied to status that I'm not

7   willing to speak for anybody.

8   And, to me, some --

9   JUSTICE KAGAN: Gay marriages are

10   wonderful to take the religion out of it.

11   MR. FLETCHER: Right. Right. So,

12   obviously, Ms. Smith can say, I will not make

13   any wedding website for anyone that says gay

14   marriages are wonderful. She can refuse on that

15   ground. Colorado agrees. We agree. Right?

16   JUSTICE KAGAN: Right. I get the "God

17   bless this union" was -- was supposed to be so

18   that it would be, she would be, like, perfectly

19   fine with saying it for some couples and not

20   fine with saying it for other couples.

21   MR. FLETCHER: Correct, yes. And I --

22   I guess I -- it's -- it's a harder case. You

23   know, I think it's one of the reasons why this

24   case is frustrating, is because we don't have

25   any concrete facts.

 1   I think my inclination on that case is

 2   that I think she has a strong argument to say,

 3   really, that is making me send a different

 4   message because of the context. It's not a

 5   literal test. It's not just are the words

 6   exactly the same, right?

 7   We acknowledge that context matters.

 8   And so, in a case like that, I think she has a

 9   much stronger claim to say, if Colorado applied

10   its law to make me say that, and I -- I think

11   it's far from clear that Colorado would, then it

12   wouldn't be imposing the sort of incidental

13   burden the Court saw in FAIR. Then it's

14   imposing the sort of direct burden you saw in

15   Hurley, and the analysis looks very different.

16   JUSTICE KAGAN: Yeah. So what you

17   said is part of what frustrates me about this

18   case, because, you know, I guess my view when

19   I'm trying to think up hypotheticals for myself

20   is a little bit it depends.

21   On the first set of hypotheticals I

22   gave, I would come out one way, and on the

23   second set of hypotheticals I gave -- I hope I'm

24   not giving too much away -- I think it's much

25   tougher and I might come out the other way.

1   And -- and it really depends on the

2   facts and on what exactly Ms. Smith is being

3   asked or compelled to do and that matters. And

4   we have a case without any of that in it. And

5   what should I do with that?

6   MR. FLETCHER: So I think you should

7   take the case as it comes to you. And as it

8   comes to you, it's Ms. Smith saying, I want to

9   post a sign saying, I will not provide any

10   websites for any same-sex marriages. That's

11   Pet. App. 7A.

12   JUSTICE KAGAN: Categorical rule.

13   MR. FLETCHER: Categorical rule based

14   on status. And at page 303 to 304 in the -- of

15   the Joint Appendix, which General Olson referred

16   to, that's the relief that she's seeking, how

17   she's framed her claim. What she wants is an

18   injunction that says you can't make --

19   JUSTICE KAGAN: Justice Gorsuch says

20   we don't want to do things based on relief

21   because courts are in control of relief, so take

22   out that part of your -- I mean, whether he

23   might be right, he might not be right, but would

24   it matter if we took that out?

25   MR. FLETCHER: I -- I don't -- I don't

1   think it would because what I heard Ms. Waggoner

2   to say this morning when she was asked about

3   what her client wants to do is that the services

4   she'd provide are not limited to the ones that

5   are described in the stipulations. She would

6   provide something that wasn't so customized as

7   long as it was to an opposite-sex couple, but

8   she wouldn't provide it to a same-sex couple.

9   That is what she is asking the courts to

10   validate.

11   And I think the Court can take that

12   claim as she presents it and say on that level

13   of generality she is not entitled to

14   pre-enforcement relief.

15   But I think it can also do to --

16   because I -- I recognize there are harder

17   questions out there. It could and should do

18   what it did in Holder versus Humanitarian Law

19   Project and Doe versus Reed and say, in

20   rejecting this facial challenge in part -- or,

21   I'm sorry, pre-enforcement challenge, in part

22   because we need more facts and we don't have

23   them, we are not foreclosing the possibility

24   that there is narrow relief in future cases with

25   concrete facts.

1   JUSTICE KAGAN: Last question. You

2   said to Justice Jackson that you didn't want to

3   belabor the point, but her hypothetical is

4   exactly the kind of hypothetical that you're

5   concerned about.

6   You must have done many moots of this

7   case and thought of many hypotheticals. What

8   are your two ones that you're like killers?

9   (Laughter).

10   JUSTICE KAGAN: If we rule for Ms.

11   Waggoner and her client, what happens? Give me

12   two hypotheticals.

13   MR. FLETCHER: That's a lot of

14   pressure on my mooters. My -- my favorite one

15   is this Court's decision in Runyon versus

16   McCrary, which was about a school that wanted to

17   exclude children of particular races, and it

18   said the reason we want to do this is because

19   segregation is important to our beliefs and

20   that's what we want to teach. And this Court

21   said, you are free to teach segregation in your

22   school, but you can't act on that belief by

23   excluding children of particular races.

24   And I think -- this is a private

25   school obviously. And I think, if Petitioners

1   are right, that case comes out differently as

2   long as the school can come in and say, when we

3   teach, we are expressing messages and those

4   messages change when we express them to students

5   of different races.

6   I think that's very troubling. And I

7   guess I take Justice Alito's point that I do not

8   mean to equate those who have different views

9   about marriage to racists, but the reason why I

10   rely on those hypotheticals is because this

11   Court's First Amendment jurisprudence does not

12   distinguish between views we find odious and

13   those we respect. The same principles apply in

14   both cases, and if the principles lead to

15   unacceptable places when we consider them in

16   light of odious views, then I think we have to

17   reject those principles even in a case where we

18   sympathize with and respect the views.

19   JUSTICE KAGAN: Thank you.

20   CHIEF JUSTICE ROBERTS: Justice

21   Gorsuch?

22   JUSTICE GORSUCH: I think, at the end

23   of two hours -- we are now in the afternoon, by

24   the way.

25   MR. FLETCHER: Good afternoon.

1   JUSTICE GORSUCH: That there --

2   there's actually radical agreement on -- on how

3   we should analyze this case legally. Tell me if

4   I'm wrong.

5   MR. FLETCHER: I -- I disagree, but go

6   ahead.

7   JUSTICE GORSUCH: You haven't even

8   given me a chance.

9   (Laughter.)

10   JUSTICE GORSUCH: That -- that -- that

11   what -- what would be impermissible is

12   discrimination on the basis of status, but what

13   would be permissible is -- is refusing service

14   because of a disagreement about views.

15   MR. FLETCHER: So I guess I -- what

16   I -- the reason I disagreed at first is to say I

17   think there is general agreement that that's

18   about the right outcome.

19   JUSTICE GORSUCH: That that's about

20   the right way to think about this case.

21   MR. FLETCHER: But great difference of

22   opinion about how legally you get there, and

23   that leads to difference of opinion about how

24   you answer it.

25   JUSTICE GORSUCH: But -- but -- but --

1   but -- but I -- I -- I was about -- you just

2   steal my thunder, counsel.

3   (Laughter.)

4   JUSTICE GORSUCH: You think this is a

5   status case. The other side thinks it's a -- a

6   viewpoint case. Is that fair too?

7   MR. FLETCHER: I -- I wouldn't say

8   that. I acknowledge that this is a status and a

9   message case.

10   JUSTICE GORSUCH: Okay. It's both --

11   MR. FLETCHER: Yes.

12   JUSTICE GORSUCH: -- in your view, I'm

13   sorry, whereas they would say it's a message

14   case.

15   MR. FLETCHER: Correct.

16   JUSTICE GORSUCH: But to think about

17   it, the status versus message, is -- I just want

18   to make sure we all agree that that's the right

19   way to think about this case.

20   MR. FLETCHER: Correct. And can I

21   explain why we think --

22   JUSTICE GORSUCH: Sure. Sure.

23   MR. FLETCHER: -- that's the right to

24   think about the case? Because we think the

25   first question is, is the burden that's being

1   imposed on Ms. Smith incidental to a

2   content-neutral regulation of conduct that says

3   you can't turn people away because of status.

4   JUSTICE GORSUCH: Right.

5   MR. FLETCHER: So, to us, the first

6   question is, is what she's doing status-based

7   discrimination?

8   JUSTICE GORSUCH: Right.

9   MR. FLETCHER: And if the answer is

10   yes, then the burden is incidental even if she

11   thinks it affects her --

12   JUSTICE GORSUCH: No, I -- I -- I -- I

13   -- I got that about an hour ago, but thank you.

14   MR. FLETCHER: I -- I -- I -- I

15   apologize.

16   JUSTICE GORSUCH: Now the -- the --

17   the other question I had is, in your view, this

18   is status-based, but Justice Barrett's

19   hypothetical of the inverse situation is

20   message-based.

21   MR. FLETCHER: I wouldn't describe it

22   as the inverse situation because I didn't

23   understand the hypothetical to say that the

24   campus print -- website design company was

25   turning people away because of their status. I

 1   understood it to be turning them away because

 2   they wanted to say things that the company would

 3   not say.

 4   JUSTICE GORSUCH: That's one way of

 5   describing it, or one might describe it as

 6   turning away those with traditionalist views of

 7   marriage based on their religious beliefs,

 8   conservative Christians, for example.

 9   MR. FLETCHER: So I guess I just

10   disagree with that, Justice Gorsuch. I think

11   the way we answer any status-based

12   discrimination question is we change the

13   protected status, we hold everything else

14   constant, and we ask does the outcome change.

15   And in Ms. Smith's case, you change

16   the protected status, it's, you know, Jack and

17   Taylor, and you ask will she make the website --

18   JUSTICE GORSUCH: Except for that runs

19   into all those stipulated facts in which the

20   plaintiff has said repeatedly that she will

21   serve everyone and she would deny everyone this

22   kind of website.

23   MR. FLETCHER: But denying everyone,

24   whether it -- it -- it's --

25   JUSTICE GORSUCH: Everyone, regardless

1   of status.

2   MR. FLETCHER: Right, but it -- it's

3   --

4   JUSTICE GORSUCH: Right?

5   MR. FLETCHER: -- race discrimination

6   to say I won't serve interracial -- I won't

7   create -- websites for interracial marriage and

8   I won't sell them even to a white wedding

9   planner. That's still race discrimination.

10   JUSTICE GORSUCH: It can be -- it can

11   be status or it can be message, and we have to

12   figure that out in this case, right?

13   MR. FLETCHER: What I -- but the way

14   you would figure it out is, does -- has Colorado

15   validly defined it as status-based

16   discrimination, and I think the answer that the

17   Court gave at pages 1727 to 1729 in Masterpiece

18   is yes.

19   JUSTICE GORSUCH: Okay. Got it.

20   Thank you.

21   CHIEF JUSTICE ROBERTS: Justice

22   Kavanaugh?

23   JUSTICE KAVANAUGH: I just want to

24   follow up there and ask about one thing in your

25   brief. On page 32 of your brief, you deal with

1   a few hypotheticals. The hypotheticals you

2   dealt with were requiring Muslim filmmakers to

3   promote Scientology, compelling lesbian artists

4   to design church websites criticizing same-sex

5   marriage, or -- and the third one I really want

6   to focus on -- or forcing writers to write

7   speeches that violate their most deeply held

8   convictions.

9   So those are the three hypotheticals

10   you posit responding to the other side. And

11   then you say those hypotheticals, unlike this

12   case, involve direct burdens on speech because

13   they contemplate speakers being forced to create

14   and convey ideological messages they would not

15   create for anyone.

16   And I think the other side would say

17   that's exactly this case too to take that third

18   category. These are writers, in essence, being

19   asked to write speeches that violate their most

20   deeply held convictions.

21   So I'm trying to figure out given what

22   you say there how you would say this case does

23   not involve the same thing as a writer being

24   forced to write speeches that violate their most

25   deeply held convictions.

1   MR. FLETCHER: Because, in each of

2   those hypotheticals, you can't posit a

3   content-neutral law like a public accommodations

4   law that would validly require the writer or the

5   speaker or the filmmaker to do what the

6   hypothetical has posited.

7   It's because, in those cases, as we

8   say, it's a direct burden on speech. The

9   regulation is compelling you to write something

10   you deeply disagree with because of the message.

11   It's not incidental to a content-neutral

12   regulation of conduct like the Court confronted

13   in FAIR and like we believe it's confronted with

14   here.

15   JUSTICE KAVANAUGH: You don't think

16   applying a public accommodations law to a

17   speech-writing business that offers to do

18   speeches or PR releases for anyone, but they

19   say, oh, we're not going to do this message --

20   MR. FLETCHER: That's --

21   JUSTICE KAVANAUGH: -- you don't think

22   that's this --

23   MR. FLETCHER: I -- I --

24   JUSTICE KAVANAUGH: They would say

25   that's this case, and you say it's not because?

1   MR. FLETCHER: I think they'd be

2   wrong. I -- so, first of all, at a couple of

3   levels.

4   JUSTICE KAVANAUGH: Yeah.

5   MR. FLETCHER: Speech writers aren't

6   likely to be public accommodations. Set that

7   aside.

8   JUSTICE KAVANAUGH: Yeah, but --

9   MR. FLETCHER: Suppose you have one

10   that was one, right?

11   JUSTICE KAVANAUGH: -- until they are,

12   after this case if you prevail, I mean, that's

13   -- that's -- that's what states could do.

14   MR. FLETCHER: But -- but I've tried

15   to give you -- in response to Justice Alito,

16   there is, I think, a constitutional backstop

17   about, you know, core public accommodations laws

18   we think satisfy O'Brien scrutiny. If a state

19   wanders from that, not so -- not so much.

20   But, again, just to get to the nub of

21   your hypothetical, we think, if the speech

22   writer says here's a speech that expresses views

23   that I abhor and I won't write the speech, they

24   wouldn't do that for anybody, regardless of

25   status. Now it may be that the status of the

 1   person who's asking them to write the speech is

 2   somehow correlated with the message in some way,

 3   but that's still not status-based discrimination

 4   in the way that the law regards discrimination

 5   against people who are entering into a same-sex

 6   marriage as status-based discrimination.

 7   JUSTICE KAVANAUGH: Okay. Thank you.

 8   CHIEF JUSTICE ROBERTS: Justice

 9   Barrett?

10   Justice Jackson?

11   JUSTICE JACKSON: Can I just say that

12   I'm sort of trying to think about what you've

13   just said in your exchange with Justice

14   Kavanaugh -- it's late -- by wondering whether

15   or not it has something to do with the message

16   being implicitly provided in a situation in

17   which the -- what's actually being stated is the

18   same.

19   So, you know, it -- what would you

20   think of a holding that says that the First

21   Amendment protects this designer's right to

22   provide products that explicitly express her

23   beliefs about marriage, so she absolutely has

24   the right to say one man, one woman, in every

25   website, and she has the right to refuse to say

1   gay marriage is great in any website, but what

2   she's really asking for in this case, I think,

3   is the right to say the same thing, here's the

4   wedding, it's at this place, et cetera, et

5   cetera, but she's afraid that if she says it for

6   gay people that that will be sort of like an

7   implicit endorsement of their wedding, and so

8   she wants to be able to protect against

9   implicitly endorsing, right, in a way that we've

10   never really recognized before in the same way,

11   when it isn't really clear that that's her

12   message, when we don't -- when an objective

13   observer would know that she was really trying

14   to do that? Am I right in trying to think about

15   explicit versus implicit in this way?

16   MR. FLETCHER: I think that basically

17   maps onto the test that we're trying to give

18   you, which is to say, if she's discriminating

19   based on status, and that includes if she's

20   defining the message or the product based on the

21   status, defining the what by the who, that's not

22   okay. But, other than that, she has the freedom

23   to define her own product.

24   And I think I'd agree with you

25   entirely that the Court has never recognized

1   that sort of implicit problem as being

2   sufficient. And, in fact, I would say, in FAIR,

3   the Court squarely rejected it, where the law

4   schools had a claim that was very, very similar

5   in structure, to say we don't want to implicitly

6   support these policies we deeply, deeply oppose.

7   No one doubted there was implicit support, and

8   no one doubt it was speech, but because it was

9   incidental, the Court upheld it.

10   JUSTICE JACKSON: Thank you.

11   CHIEF JUSTICE ROBERTS: Thank you,

12   counsel.

13   Rebuttal, Ms. Waggoner?

14   REBUTTAL ARGUMENT OF KRISTEN K. WAGGONER

15   ON BEHALF OF THE PETITIONERS

16   MS. WAGGONER: Mr. Chief Justice, the

17   United States says that you can refuse to

18   express messages unless those messages are about

19   marriage and unless those views on marriage have

20   to do with believing that marriage is between a

21   man and a woman. That's a significant

22   concession that the government has made.

23   In terms of this issue of categorical

24   denial, the only categorical denial that Ms.

25   Smith seeks or a categorical request she seeks

1   is to have message-based protection that the

2   First Amendment already provides. It's based on

3   the message. And, in that way, this Court

4   decides every speech case based on the message.

5   We can look at FAIR. We can look at Miami

6   Herald, Tornillo. All of the Court's cases on

7   speech where compelled speech is applied, you

8   will see the "affect or alter the message" test,

9   including in Hurley. And in order to rule

10   against Ms. Smith in this particular case, it

11   does seem that the Court would essentially have

12   to overrule that Hurley framework.

13   Second, Chief Justice Roberts raised

14   the issue of FAIR and how FAIR applies, and the

15   United States has suggested that somehow this

16   case is closer to that. But, in FAIR itself,

17   FAIR was about a duty to give access to empty

18   rooms. The logistical e-mails that were to send

19   directions to how go to those rooms was a duty

20   that was required to facilitate legal conduct.

21   This case is speech that's only

22   incidental to speech. When you have a speech

23   corrector -- creator, you're in a very different

24   space, as the Court articulated in FAIR itself.

25   Looking at Wooley and Barnette, where you are

1   intruding on the mind and the spirit to force

2   someone to create a message that violates their

3   convictions. FAIR would be a very different

4   case if the law schools were to have advocated

5   for the "don't ask, don't tell" policy.

6   In terms of whose speech it is, that's

7   come up a few times, at worst, it's both.

8   Third-party perceptions cannot possibly matter

9   to this case, or we wouldn't have any of the

10   other compelled speech doctrine cases.

11   Barnette, Wooley, the newspaper cases, all of

12   those, you wouldn't have any. And the

13   government would have unfettered authority to

14   compel speech because we would all know it was

15   the government that was doing it.

16   In addition to that, the definition of

17   public accommodation, my friends on the other

18   side are playing a little fast and loose with

19   what the statute says and how they've

20   interpreted it in the past. The statute says a

21   place of public accommodation. On page 41 of

22   Colorado's brief, they say that applies to

23   virtual sales as well, meaning the soccer mom

24   earning some extra income trying to sell her

25   handmade sign. She's a public accommodation

1   under this law. It is broad, and it would take

2   away First Amendment rights just for opening a

3   business. Certainly, Michelangelo's speech was

4   sold and commissioned, but we would all say it

5   had protection.

6   In addition, the idea that we can't

7   give a bright line, the bright line we give is

8   the line that this Court has consistently

9   followed, and I find it ironic in the United

10   States also having to concede they can't give a

11   bright line. For some reason, political speech

12   is protected, but religious speech is not

13   protected under this law. The bright line is,

14   is the message affected? And, as Justice

15   Gorsuch brought up, that line is massive when it

16   comes to the distinction between pre-made

17   speech, plug-and-play, and speech that you are

18   creating in a custom way.

19   In conclusion, Ms. Smith's speech has

20   been chilled for over six years, and the record

21   demonstrates every website she would create

22   would create a custom message that is

23   celebratory. Colorado asked this Court for the

24   power to drive views like Ms. Smith's from the

25   public square, views about marriage that this

 1   Court has held are honorable and decent,

 2   promises that it has provided that the

 3   government would not mandate orthodoxy.

 4   Cultural winds may shift, but the

 5   Compelled Speech Doctrine should not. Compelled

 6   speech crushes the speaker's conscience, and it

 7   is the tool of authoritarianism, which is why

 8   this Court has never allowed it.

 9   In the end, it is not Ms. Smith who is

10   asking you to change the law but Colorado. This

11   Court should affirm, again, that public

12   accommodation laws cannot be used to compel

13   speech, and this includes artistic expression,

14   photography, painting, calligraphy, and films,

15   forms of media that the lower courts have

16   shockingly refused -- refused to recognize as

17   speech when it comes to marriage. And, yes,

18   this Court should give guidance to limit the

19   cruelty that has been imposed by endless

20   litigation on artists like Jack Phillips.

21   One need not agree with a particular

22   belief to affirm that law-abiding people have a

23   right to speak their conscience, including on a

24   controversial subject like marriage, and that

25   noble principle is rooted in love of neighbor,

1 extending the same rights to others that we want

2 for ourselves. This right to be free from

3 government coercion of speech is also

4 foundational to our self-government and to the

5 free and fearless pursuit of truth.

6   Thank you. This Court should reverse.

7   CHIEF JUSTICE ROBERTS: Thank you,

8 counsel. The case is submitted.

9   (Whereupon, at 12:26 p.m., the case

10 was submitted.)

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