No. 21-476

In the Supreme Court of the United States

303 CREATIVE LLC, ET AL.,

Petitioners,

v.

AUBREY ELENIS, ET AL.,

Respondent.

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

BRIEF OF *AMICI CURIAE* PROF. DALE CARPENTER, PROF. EUGENE VOLOKH, ILYA SHAPIRO, AMERICAN UNITY FUND, AND HAMILTON LINCOLN LAW INSTITUTE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Lorie Smith, through her graphic and website design firm, 303 Creative, wants to expand into producing websites for weddings. Although Smith is generally willing to design graphics and websites for lesbian, gay, bisexual, and transgender customers, her religious convictions preclude her from creating graphics and websites announcing and celebrating marriages of same-sex couples. But the Colorado Anti-Discrimination Act requires her to create custom websites celebrating the marriages of same-sex couples if she does so for opposite-sex couples.

The question presented is whether, in applying a public-accommodation law, the state may compel speech through the creation of an expressive product on the grounds that the product is "custom and unique."

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INTEREST OF *AMICI CURIAE*[1]

Professors Dale Carpenter and Eugene Volokh are law professors who specialize in the First Amendment and have written extensively on (among other things) how the First Amendment applies to antidiscrimination law. *See, e.g.*, Dale Carpenter, *Expressive Association and Anti-Discrimination Law After* Dale, 85 Minn. L. Rev. 1515 (2001). (Carpenter is also the Senior Policy Advisor to American Unity Fund.) They believe that (1) antidiscrimination law cannot constitutionally be used to compel web site creators, writers, photographers, painters, singers, and similar speakers to create expression related to weddings, but (2) a line must be drawn between such constitutionally protected expression and distinct activities, such as baking, clothing design, architecture, and other media.

Carpenter and Volokh signed (and Volokh took the lead in drafting) an amicus brief in *Elane Photography, LLC v. Willock*, *cert. denied*, 572 U.S. 1046 (No. 13-585) (2014), arguing for point 1; they did the same in the New Mexico Supreme Court stage of that lawsuit, 309 P.3d 53 (N.M. 2013). They also signed (and together took the lead in drafting) an amicus brief in *Masterpiece Cakeshop Ltd. v. Colorado C.R. Comm'n*, 138 S. Ct. 1719 (No. 16-111) (2018), arguing for point

[1] No counsel for a party authored this brief in whole or part, nor did any person or entity, other than *amicus* or its counsel, make a monetary contribution to the preparation or submission of this brief. Respondent has given blanket consent to the filing of *amicus* briefs, and petitioner has consented to the filing of this brief.

2, and concluding that bakers need not be treated like photographers in all the goods they bake.

Ilya Shapiro is the former vice president for constitutional studies at the Cato Institute, where he filed more than 500 briefs in this Court, including in leading civil rights cases. He is also a member of the Virginia Advisory Committee to the U.S. Commission on Civil Rights. Cato, represented by Shapiro, joined Carpenter and Volokh on their *Elane Photography* brief, but filed opposite to them in *Masterpiece Cakeshop*. Indeed, Shapiro is one of only three lawyers to have filed in support of the petitioners in both *Masterpiece Cakeshop* and *Obergefell v. Hodges*, 576 U.S. 644 (2015).

The American Unity Fund (AUF) is a 501(c)(4) nonprofit organization dedicated to advancing the cause of freedom for LGBTQ Americans by making the conservative case that freedom truly means freedom for everyone. AUF thus believes that the First Amendment protects the rights of both supporters and critics of same-sex relationships. AUF joined Carpenter and Volokh in their *Masterpiece Cakeshop* brief.

The Hamilton Lincoln Law Institute (HLLI) is a nonprofit law firm that litigates for free speech, limited government, and separation of powers. HLLI seeks to protect individuals, consumers, professionals, and shareholders from regulatory abuse and overreach at the state and federal levels.

This case interests *amici* because correctly resolving it would show, contrary to the analysis of the Tenth Circuit, how freedom of speech can be maintained and protected without intruding on gay rights.

SUMMARY OF ARGUMENT

This case is about protecting the constitutional right to free expression while allowing government to generally ensure equal access to commercial goods and services.

"Our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth," this Court wrote in *Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n*, 138 S. Ct. 1719, 1727 (2018), another case involving Colorado's ongoing efforts to eliminate the discrimination it once fostered (*see Romer v. Evans*, 517 U.S. 620 (1996) (invalidating state constitutional amendment denying civil rights protections to homosexuals)). "For that reason," this Court continued, "the laws and the Constitution can, and in some instances must, protect them in the exercise of their civil rights. The exercise of their freedom on terms equal to others must be given great weight and respect by the courts." *Masterpiece Cakeshop*, 138 S. Ct. at 1727.

At the same time, the First Amendment freedom not to speak must include the freedom not to create speech, and the freedom to choose which speech to engage in or create based on the religious, political, or sexual-orientation-related content of the speech. A freelance writer cannot be punished for refusing to write press releases for the Church of Scientology, even if he is willing to work for other religious groups. A musician cannot be punished for refusing to play at Republican-themed events, even if he will play at other political events, and even if the jurisdiction bans discrimination based on political affiliation in public accommodations. *See* Eugene Volokh, *Bans on Political*

Discrimination in Places of Public Accommodation and Housing, 15 NYU J. L. & Liberty 490 (2021). Likewise, a photographer or a wedding singer should not be punished for refusing to take photographs celebrating a same-sex wedding, or for refusing to sing at such a wedding.

Indeed, this Court has generally recognized that the First Amendment protects the right of individuals to speak, or to refrain from speaking, even when the government cites a compelling interest in forbidding discrimination. In *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995), for example, this Court held that a state public accommodations law could not constitutionally require that organizers of a St. Patrick's Day Parade let an Irish gay, lesbian, and bisexual contingent march behind a banner merely proclaiming their presence.

Of course, the First Amendment shields refusals to speak, but does not extend to refusals to do things that are not a form of speech. Limousine drivers, hotel operators, and caterers should not have a Free Speech Clause right to exempt themselves from antidiscrimination law in their professional activities, because in those cases the law is not compelling them to speak or to create First Amendment-protected expression. Likewise, though the First Amendment shields refusals to participate as a co-creator in others' speech—say, as an actor or a musical accompanist or a singer—again the limousine driver, hotel operator, or caterer would not qualify as co-creators of the speech involved in the wedding. This Court has rejected "the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *United*

States v. O'Brien, 391 U.S. 367, 376 (1968). There must also be limits set on the variety of conduct compulsions that can be labeled "speech compulsions," and on the degree and quality of involvement that can be labeled compelled "participation" in a ceremony.

Fortunately, this case does not call on this Court to define such limits with precision, because there is no serious question that it involves compelled speech. The Tenth Circuit recognized that Smith's "creation of wedding websites"—through her sole proprietorship, 303 Creative—"is pure speech." Pet. 20a. It acknowledged specifically that the Accommodations Clause of the Colorado Anti-Discrimination Act ("CADA") "compels [Smith] to create speech" celebrating marriages that her conscience tells her she cannot celebrate and understood that such compulsion necessarily "works as a content-based restriction." Pet. 22a–23a. The lower court even recognized that Smith is willing to work with, and design websites for, LGBT customers in nearly all other circumstances. Pet. 6a.

Yet the Tenth Circuit failed to follow this Court's speech-protective lead in *Hurley* and other decisions. Pet. 19a–34a. If Smith sells graphic designs celebrating the marriages of some couples, according to the Tenth Circuit, Colorado can demand that she create and sell similar graphic designs to celebrate the marriages of all couples. Pet. 27a–28a. In essence, even though comparable website-design services are widely available, the lower court believed that the harm of being denied access to a single person's creative designs is sufficient to let the government compel that person to speak in ways that violate her conscience. *See* Pet. 26a–32a. That cannot be correct.

Because it is easy to appreciate how this case implicates speech rights—as even the Tenth Circuit did—it affords this Court a prime opportunity to affirm the basic holding of *Hurley*, *Wooley v. Maynard*, 430 U.S. 705 (1977), and *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974): the First Amendment's protections for the "individual freedom of mind" mean that the government may not require people to create and distribute speech with which they disagree and cannot force them to change their message because they have decided to speak. *Wooley*, 430 U.S. at 714.

In *Masterpiece Cakeshop*, this Court expressly recognized the "authority of a State and its governmental entities to protect the rights and dignity of gay persons who are, or wish to be, married but who face discrimination when they seek goods or services." 138 S. Ct. at 1723. This case allows this Court to add that, despite their importance, state laws prohibiting discrimination in such public accommodations are subject to the First Amendment's limits on governmental power. And it provides this Court the opportunity to reject the corrosive version of strict scrutiny applied by the Tenth Circuit, which defers to the state's choice of means in any case involving custom expressive products in the commercial marketplace.

ARGUMENT

I. The First Amendment Prohibition Against Speech Compulsions Is a Critical and Expansive Protection

The government generally may not compel people to speak. Likewise, the government may not compel people to create speech or other protected expression,

because that too violates their "individual freedom of mind," *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). For this reason, the government cannot compel photographers, videographers, graphic designers, printers, painters, or singers to record, celebrate, or promote events they disapprove of, including same-sex weddings. It does not matter whether the government wants to force Smith to display the compelled speech on her vehicle, *Wooley*, 430 U.S. at 715, or to force her to create a film or a website containing the speech. *See Reno v. ACLU*, 521 U.S. 844, 870 (1997) (finding "no basis for qualifying the level of First Amendment scrutiny that should be applied to [the internet]"). Films and graphic designs published on websites are a "significant medium for the communication of ideas" ranging from "direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression." *See Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501–02 (1952).

Nor does it matter that Smith is producing the message for profit and through her business. Speech in commercially distributed works is fully protected. *See, e.g.*, *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 789 (2011) (commercial video games); *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991) (books); *Joseph Burstyn*, 343 U.S. at 502 (films). Such commercially distributed speech—no less than speech distributed for free—may "contribute to the discussion, debate, and the dissemination of information and ideas that the First Amendment seeks to foster." *See Pacific Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 8 (1986) (plurality opinion). And Smith's deciding to speak on a given topic (here, by creating speech related to opposite-sex

marriages) does not forfeit her right not to say other things on the topic. *See, e.g.*, *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 257 (1974) (holding that a newspaper could publish criticisms of a candidate without forfeiting its right not to publish replies to such criticisms).

Laws that require Smith to speak are coercing her into "betraying [her] convictions," which "is always demeaning." *Janus v. American Fed'n of State, Cty. & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2464 (2018). But it is not merely "demeaning"; it is also invasive. To compel speech is to conscript the individual's mind in the service of the state. And when Colorado demands that Smith design a website with a message she opposes, it also prohibits her from using that time and creative energy on other expression. A society that strives for "[c]ompulsory unification of opinion achieves only the unanimity of the graveyard." *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 641 (1943). Our First Amendment is "designed to avoid these ends by avoiding these beginnings." *Id.*; *Chelsey Nelson Photography LLC v. Louisville/Jefferson Cnty. Metro Gov't*, 479 F. Supp. 3d 543, 557 (W.D. Ky. 2020) (Walker, J.). Individuals must have the power to preserve their integrity as speakers and thinkers, by ensuring that their expression, and the expression that they "foster" and for which they act as "courier[s]," *Wooley*, 430 U.S. at 715, dovetails with what they believe.

Indeed, because any design created by 303 Creative stems directly from the mind of Smith herself, the concern for the individual's freedom of conscience is exceptionally striking here. Smith's designs are far "more than a passive receptacle or conduit" for others'

messages on a website she creates. *Cf. Tornillo*, 418 U.S. at 258. Smith "actively create[s] each website, rather than merely hosting customer-generated content on [her] online platform." Pet. 21a. Colorado's law would thus demand that Smith not only promote a customer's specific message, if customers sought out her services, but also that she design many details of the message. As the Eighth Circuit correctly wrote, requiring individuals or companies "to use their own creative skills to speak in a way they find morally objectionable" "may well be more troubling from a First Amendment perspective" than laws that only require the more passive act of, for example, mandating that a media company "reproduce verbatim an opinion piece written by someone else" (though even such a verbatim publication mandate was struck down in *Tornillo*). *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 754 n.4 (8th Cir. 2019).

The principle that protects Smith's freedom of speech applies beyond the specific context of 303 Creative's views on same-sex marriages. The First Amendment protects speech regardless of whether it involves matters of religion, sexual orientation, sex, race, national origin, or other classifications. Web designers should be free to choose not to speak for any movement, no matter how laudable or condemnable it is. They should be free not to create websites or graphic designs proclaiming "White Lives Matter," "The Nation of Islam Is Great," "KKK," "There Is No God but Allah," "Jesus Is the Answer," or any other message that they cannot in good conscience convey.

Of course, web designers, like other businesses, are subject to antidiscrimination requirements in various aspects of their business activities. The First

Amendment protects them only if they are in some meaningful sense "speaking" or refusing to speak. For example, the same-sex couple that wants merely to purchase a publicly displayed ready-made print from a photographer's shop must be treated like other customers under an applicable antidiscrimination law. This is true even if the photographer somehow learns they plan to use the print to decorate their wedding reception hall.

With respect to the sale of existing wares available to the public, the antidiscrimination requirement to complete the sale would not itself involve a requirement to speak, even if speech was involved in the original creation. Any speech would have already occurred; constraining a customer's intended use would not be a further exercise of the artist's speech.

If it were otherwise, every commercial sale could be said to involve speech if only because the business objected to the purpose to which the customer might put the sold item. Because such a commercial transaction is not itself speech it would not draw heightened First Amendment scrutiny. *See Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1151 (2017) ("[T]he law's effect on speech would be only incidental to its primary effect on conduct.") As this Court noted in *Masterpiece Cakeshop*, even the petitioner there conceded that "if a baker refused to sell any goods or any cakes for gay weddings, that would be a different matter"—"the State would have a strong case under this Court's precedents that this would be a denial of goods and services that went beyond any protected rights of a baker who offers goods and services to the general public and is subject to a neutrally applied and

generally applicable public accommodations law." 138 S. Ct. at 1728.

But in this case, there is no refusal to sell fungible goods or even publicly displayed, ready-made creations. Smith's role is to create custom speech for every customer, and thus, to speak. Requiring her to create speech that she does not wish to create is thus a presumptively unconstitutional speech compulsion.

Smith's role also helps explain why this case is governed by *Wooley* rather than by *Rumsfeld v. FAIR*, 547 U.S. 47 (2006). *Rumsfeld* held:

> Compelling a law school that sends scheduling e-mails for other recruiters to send one for a military recruiter is simply not the same as forcing a student to pledge allegiance, or forcing a Jehovah's Witness to display the motto "Live Free or Die," and it trivializes the freedom protected in *Barnette* and *Wooley* to suggest that it is.

Id. at 62. (Citations omitted). This distinction between the situation in *Rumsfeld* and the situations in *Barnette* and *Wooley* necessarily rested on the conclusion that requiring an institution to send scheduling emails does not interfere with anyone's "individual freedom of mind." *Wooley*, 430 U.S. at 714 (citing *Barnette*, 319 U.S. at 637). For the reasons detailed above, requiring Smith to personally create expressive works does interfere with that freedom, indeed even more so than requiring an individual to display a motto on his car.

II. This Case Provides a Chance to Affirm That the First Amendment Applies to "Unique" and Expressive Goods and Services

Though they may serve compelling interests, Pet. 24a, antidiscrimination laws violate the First Amendment: (1) when they are applied to require individuals (or organizations) to "alter the expressive content of their [message]," *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 572–73 (1995), (2) when they "interfere" with the choice of individuals "not to propound a point of view contrary to [their] beliefs[,]" *Boy Scouts of America v. Dale*, 530 U.S. 640, 654 (2000), or (3) when they otherwise "target speech." *Hurley*, 515 U.S. at 572. Antidiscrimination laws are constitutional, "as a general matter," given that they generally do not restrict speech. *See id.* at 572; *Roberts v. U.S. Jaycees*, 468 U.S. 609, 626–27 (1984). But, as with other laws, they can become unconstitutional when they do restrict speech. *See Hurley*; *Boy Scouts*.

Together, *Roberts* and *Hurley* delineate the First Amendment boundary with respect to antidiscrimination law. Both cases involved state laws designed to combat invidious discrimination—including discrimination based on sex or sexual orientation in places of public accommodation. *Roberts*, 468 U.S. at 615, 628; *Hurley*, 515 U.S. at 572–73. In both cases, would-be members believed that an organization was treating them differently based on a protected characteristic. In *Roberts*, the Jaycees would not permit women to be full voting members of the organization. 468 U.S. at 612. In *Hurley*, the South Boston Allied War Veterans Council denied GLIB—a group formed to "express pride in their Irish heritage as openly gay, lesbian, and

bisexual individuals"—a spot in its St. Patrick's Day-Evacuation Day Parade. 515 U.S. at 560–61. And both cases addressed the organizations' beliefs that the First Amendment protected their actions. The Jaycees argued that they had a right to engage in "expressive association." *Roberts*, 468 U.S. at 622. The Council asserted its right to control the content of its parade message. *Hurley*, 515 U.S. at 574.

But the cases reached opposite outcomes for the organizations, because of the difference in the sort and magnitude of burden on the groups' expression. The Jaycees excluded women altogether from full membership regardless of what they did or said, and this Court found no basis to believe that admitting women as full members would itself impede the Jaycees' own message or coerce them to display someone else's message. By contrast, gay men, lesbians, and bisexuals were allowed to participate as individuals in the parade; the Boston Council only barred them from marching behind a banner that identified their group's sexual orientation. *Compare Roberts*, 468 U.S. at 614–16, *with Hurley*, 515 U.S. at 572–74. This Court thus determined that forcing the Council to permit GLIB to march and carry a banner would affect the Council's ability to control its own expression of "traditional religious and social values." *Compare Roberts*, 468 U.S. at 627–28, *with Hurley*, 515 U.S. at 562, 568–70.

Those distinctions made all the difference: the application of antidiscrimination laws in *Roberts* was consistent with the First Amendment; their application in *Hurley* was not. *Compare Roberts*, 468 U.S. at 628–29, *with Hurley*, 515 U.S. at 581. This Court has thus been willing to draw careful lines between the expressive and nonexpressive elements of otherwise

expressive activities and organizations. The details matter. *Cf. Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n*, 138 S. Ct. 1719, 1723 (2018) ("In defining whether a baker's creation can be protected, these details might make a difference.").

The present case diverges from *Roberts*, and is more similar to *Hurley*. As in *Hurley*, Smith would serve a "gay man" in nearly all circumstances to the same extent she would serve a "straight man." Pet. 6a, 12a. Because of Smith's faith, however, she simply will not design a website announcing the marriage of a same-sex couple. Pet. 6a. The Tenth Circuit spent several pages saying so. *See generally* Pet. 19a–24a (detailing how "compelled speech" doctrine is implicated in this case). The result should be the same as it was in *Hurley*: The First Amendment forbids applying Colorado's antidiscrimination law to Smith's specific case.

Unfortunately, both federal and state courts have provided uncertain and conflicting guidance on how to apply this Court's decisions in cases like Smith's. The Eighth Circuit faithfully applied *Hurley*, recognizing that the First Amendment limits antidiscrimination laws. *See, e.g.*, *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 758–60 (8th Cir. 2019). Other courts have determined the asserted expressive components of a business's product do not warrant First Amendment protection. *See, e.g.*, *Elane Photography, LLC v. Willock*, 309 P.3d 53, 63–64 (N.M. 2013). And now the Tenth Circuit has ruled that, even if a law forces an individual to create and promote a message to which she objects, the law can be enforced so long as courts characterize the expressive product or service denied as unique. *See* Pet. 19a–34a.

This Court should reaffirm *Hurley*, remind the lower courts that state antidiscrimination laws are subject to the First Amendment's protections, and clarify the circumstances in which heightened judicial scrutiny may be met. It can allow states to pursue compelling antidiscrimination interests without letting the states eviscerate vital protection for expression. *Cf.* Carpenter, *Expressive Association*, 85 Minn. L. Rev. at 1587 (suggesting approach preserving both "core First Amendment values about expression" and "core equality values about access to economic success").

III. This Court Should Repudiate the Tenth Circuit's Dangerous Version of Strict Scrutiny

As the Tenth Circuit acknowledged, Smith's creation of wedding websites is pure speech. Forcing her to create websites to which she objects is a speech compulsion. The law cannot force her to speak in this way unless the law is narrowly tailored to a compelling state interest.

Declaring that a unique and customized expressive product is irreplaceable and that therefore a requirement to provide it is narrowly tailored, as the Tenth Circuit did, is to end free-speech protection for providers of expressive products. Instead, this Court should make clear that speakers retain the right to choose what speech to create, at least when consumers remain free to access comparable goods from a wide range of vendors.

A. Through excessive deference to Colorado's choice of means, the Tenth Circuit effectively allows Smith's speech to be a target of CADA.

The Tenth Circuit observed that Colorado has a compelling interest in preventing discrimination against LGBT persons in places of public accommodation, and that this interest will be substantially undermined unless speech like Smith's is compelled. Pet. 25a, 29a–30a. To reach this conclusion, the court first emphasized the uniqueness of Smith's services, Pet. 28a, and "imagine[d]" a world in which LGBT persons lack access to "a wide range of custom-made services" and are "relegated to a narrower selection of generic services." Pet. 30a. Instead of looking to the nationwide, ultra-competitive market for wedding-website design, the Tenth Circuit determined that it was dealing with the "monopoly" market of "websites of the same quality and nature" as Smith's. Pet. 29a. And so, Smith's "unique goods and services" are "where public accommodation laws are most necessary to ensuring equal access." Pet. 30a.

The lower court claimed that this was merely "the *consequence* of enforcing CADA." Pet. 27a (emphasis in original). But this reasoning improperly defers to the state's choice of means in the enforcement of an acknowledged speech compulsion—the state's choice to categorically demand that people create even speech of which they disapprove.

B. Under strict scrutiny, Colorado cannot rely on hypothetical and "imagined" harm.

Instead of this deferential approach, to satisfy strict scrutiny Colorado must bear the burden of

demonstrating the peculiar need to compel speech by compelling the creation of expressive products. *See Nat'l Inst. of Fam. and Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2377 (2018) (rejecting California's justifications for its compelled disclosures in part because they were "purely hypothetical"). Courts cannot simply presume—indeed, "imagine"—the existence of such facts, and dismiss the reasonable prediction that "exempting custom [products] from a public accommodations law would not undermine the law's purpose." Pet. 30a (disagreeing with *Brush & Nib Studio, LC v. City of Phoenix*, 448 P.3d 890, 910, 916 (Ariz. 2019)).

C. By failing to distinguish between expressive and non-expressive goods and services, Colorado has impermissibly made speech itself the public accommodation.

Courts should also reject attempts to make speech itself the public accommodation. It is true that a "statute is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." *Frisby v. Schultz*, 487 U.S. 474, 485 (1988). But a state cannot be allowed just to "take[] the effect of the statute and posit[] that effect as the State's interest." *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 120 (1991). "If accepted, this sort of circular defense can sidestep judicial review of almost any statute, because it makes all statutes look narrowly tailored." *Id.* The Tenth Circuit thus erred in simply defining the state's antidiscrimination interest as sufficient to warrant mandating that people create any "custom and unique" expressive goods and services that are demanded of them. Pet. 27a–28a.

Instead, the compelling interest here is in making sure that people have access to goods and services generally regardless of their identities. And, indeed, CADA serves that interest even when a First Amendment right to decline to create custom expression is recognized. The great bulk of goods and services are not speech, because they are not "inherently expressive," *Rumsfeld v. FAIR*, 547 U.S. 47, 66 (2006)—which, generally speaking, means that they "inten[d] to convey a particularized message . . ., and . . . the likelihood [is] great that the message would be understood by those who viewed it." *Texas v. Johnson*, 491 U.S. 397, 404–05 (1989).

Thus, for instance, even after substantially reducing ordering complexity in 2009, Ford made its popular F-150 truck available for order by individual buyers "in nearly 10 million combinations of trim series, colors, engines, body styles and options."[2] It does not follow that every Ford F-150 bears a message protected by the First Amendment, much less that an order requiring Ford to sell trucks without discrimination to gay and straight car buyers would be a speech compulsion. The Free Speech Clause right would only be implicated when any customization communicates protected expression.

As noted above, the Tenth Circuit spent several pages acknowledging that Smith's "creation of wedding websites is pure speech." *See generally* Pet. 19a–24a. Smith's intended product is uncontroversially

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[2] Amy Wilson, *Ford Reins in F-150 Order Combinations*, Automotive News (Aug. 19, 2008, 12:01 am), http://www.autonews.com/article/20080819/ZZZ_SPECIAL/113735/ford-reins-in-f-150-order-combinations.

speech: wedding websites "express approval and celebration of the couple's marriage, which is itself often a particularly expressive event." Pet. 19a. The creation of elaborate and customized wedding cakes is perhaps a harder case. *See, e.g.*, *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 288 (Colo. App. 2015), *rev'd on other grounds sub nom. Masterpiece Cakeshop v. Colorado C.R. Comm'n*, 138 S. Ct. 1719 (2018). But there would ordinarily be no discernible message conveyed, by either party, when a tailor fits bespoke suits for a same-sex couple.

Distinguishing expressive from non-expressive products in some contexts might be hard, but the Tenth Circuit agreed that Smith's product does not present a hard case. Yet that court (and Colorado) declined to recognize any exemption for products constituting speech. The Tenth Circuit has effectively recognized a state interest in subjecting the creation of speech itself to antidiscrimination laws. It compounded the error by declaring that that interest definitionally satisfies strict scrutiny if the speech is "unique." This deference to the government's claims is contrary to this Court's precedents and warrants reversal. *See, e.g.*, *Hurley*.

D. Smith does not have a "monopoly" on her expressive product such that compelling her to provide it satisfies strict scrutiny.

This Court has suggested that, to prevent speakers with monopolistic power from silencing "the voice of competing speakers with the mere flick of a switch," the government may have greater flexibility under the First Amendment in regulating companies possessing monopoly control over a market. *Turner Broad. Sys. v.*

FCC, 512 U.S. 622, 656 (1994). Perhaps seizing on that idea, the Tenth Circuit concluded that Colorado's speech compulsion was justified because Smith possesses a monopoly over her specific designs. Pet. 29a.

Smith's wedding websites are "custom and unique." And, because the Tenth Circuit defined the relevant market as Smith's particular wedding website designs, rather than wedding website designers generally—or all website designers—the court concluded that Smith has monopolistic power in the market for her specific designs. *Id.* To the Tenth Circuit, that tautology constitutionally justified Colorado's compelling Smith to create messages with which she cannot agree. *See id.* The court erred.

First, the Tenth Circuit misapplied the function monopolistic power has played in this Court's First Amendment analysis. Merely characterizing a business as having a monopoly is not sufficient to deny that business's protections under the First Amendment. *Turner Broad.*, 512 U.S. at 656 (concluding that a newspaper's "enjoy[ing] monopoly status in a given locale" is constitutionally insignificant); *Consol. Edison Co. v. Pub. Serv. Comm'n*, 447 U.S. 530, 534 n.1 (1980) ("Nor does Consolidated Edison's status as a privately owned but government regulated monopoly preclude its assertion of First Amendment rights."). Instead, this Court has recognized only the state's interest in preventing entities from leveraging monopoly power to silence other speakers. *Turner Broad.*, 512 U.S. at 656 ("A cable operator, unlike speakers in other media, can thus silence the voice of competing speakers with a mere flick of the switch."); *see also Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 577 (1995) ("This power gives rise to the

Government's interest in limiting monopolistic autonomy in order to allow for the survival of broadcasters who might otherwise be silenced and consequently destroyed. The Government's interest in *Turner Broadcasting* was not the alteration of speech, but the survival of speakers.").

The Tenth Circuit did not even attempt to describe a comparable danger if customers are not allowed to compel Smith's designs. *See* Pet. 28a–29a. Indeed, because of the decentralized and competitive market for website design, the court had to concede that LGBT consumers would have the option to obtain products through other wedding-website services. Pet. 28a. To assert that Smith can be forced to speak simply to provide speech of her own particular "quality and nature" is antithetical to the First Amendment.

Second, this Court's decision in *Hurley* is irreconcilable with the Tenth Circuit's definition of a "monopoly." The parade in *Hurley* was undoubtedly "unique": The South Boston Allied War Veterans Council was the only organization for nearly 50 years to conduct it. *Hurley*, 515 U.S. at 560. The parade "has included as many as 20,000 marchers and drawn up to 1 million watchers." *Id.* The parade was undoubtedly special and quite large, but the *Hurley* court disavowed the view that *Turner Broadcasting*'s monopoly rationale applied. *Id.* at 577. The Tenth Circuit failed to explain how its definition of a "monopoly" would not apply to the parade in *Hurley*. It is similarly unclear how the Tenth Circuit could distinguish *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), under its "monopoly" rationale—surely, the Boy Scouts is a "unique" organization.

Third, the Tenth Circuit's definition of a "monopoly" would strip the term of all useful meaning. Under the court's approach, any business that produces a good or service that is not literally identical to the good or service of another business could be said to have a "monopoly." Of course, that encompasses nearly all businesses, large or small. Honda and Volkswagen do not have a monopoly over the automotive industry, but Honda has a "monopoly" over the Civic and Volkswagen has a "monopoly" over the Jetta. A local surveyor may not have a monopoly over the surveying industry, but that surveyor has a "monopoly" over the specific skills and talents that make her competitive in the marketplace. The court's methodology for defining a "monopoly" is foreign to any existing antitrust law; it is little more than a word game.

E. The Tenth Circuit's deference to Colorado's choice of means would allow the state to punish providers with unpopular views.

The Tenth Circuit recognized that, as a "content-based restriction," Pet. 23a, application of CADA is "justified only if [Colorado] proves that [CADA is] narrowly tailored to serve compelling state interests." *Nat'l Inst. of Fam. and Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2371 (2018) (internal quotation marks omitted). Here, as noted above, the creation of speech itself is declared to be the "public accommodation" to which access must be granted without discrimination on forbidden grounds.

Judicial review of such content-based regulations of pure speech cannot be strict in theory, but feeble in fact. *Fisher v. Univ. of Texas at Austin*, 570 U.S. 297, 314 (2013). Among other things, strict scrutiny serves

as an "evidentiary device" to filter out improper motives of silencing a particular view. Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. Chi. L. Rev. 413, 453–54 (1996). Underinclusive or overinclusive laws—those that are not "narrowly tailored"—raise "serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint." *Becerra*, 138 S. Ct. at 2371, 75–76 (striking down a law for being underinclusive); *accord Simon & Schuster*, 502 U.S. at 108, 121, 122 n.2 (overinclusive).

1. Customers' dignitary interests cannot justify Colorado's means.

This Court has recognized a legitimate role for state power "to prevent a community-wide stigma inconsistent with the history and dynamics of civil rights laws that ensure equal access to goods, services, and public accommodations." *Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n*, 138 S. Ct. 1719, 1727 (2018). First Amendment objections should be resolved "without subjecting gay persons to indignities when they seek goods and services in an open market." *Id.* at 1732 (addressing a religious objection to providing cake for a same-sex wedding).

Nevertheless, avoidance of such dignitary harm must be achieved through narrowly tailored means. The Tenth Circuit freely conceded that the dignitary interests of same-sex couples cannot justify compelling Smith's pure speech. The requirement to create wedding websites for same-sex couples, the court correctly held, "is not narrowly tailored to preventing dignitary harm." Pet. 25a–26a. The insult of being refused

service is no doubt real, but that does not justify "'interfer[ing] with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government.'" *Id.* (quoting *Hurley*, 515 U.S. at 579).

Indeed, if official suppression of certain disfavored ideas is afoot, that cuts into the heart of freedom of speech. That much of the decision below is surely right.

2. Customers' material interests cannot justify Colorado's means.

The Tenth Circuit next held that the state has a compelling interest in protecting the interests of same-sex couples in accessing goods and services in the commercial marketplace. *Amici* do not challenge that holding, but the Tenth Circuit's version of strict scrutiny is so deferential as to the state's means that it is hard to discern whether a state might be acting with an improper purpose to suppress unpopular views. While harm to dignitary interests would indeed be hard to quantify, harm to material interests should not be.

Here, for example, the state's choice of means is presumptively overinclusive because it heavily burdens Smith's speech while accomplishing comparatively little to give same-sex couples wider access to wedding website services. Such services can readily be obtained from many other providers, so, as a practical matter, compelling Smith's speech adds *de minimis* additional access. Nor does the Tenth Circuit provide any reason to think that given her personal objections, Smith could create a product for same-sex weddings of the same quality as her product for opposite-sex

weddings. Such over-inclusiveness—burdening much, benefiting little—cannot satisfy strict scrutiny.

The Tenth Circuit concluded that compelling Smith's speech is narrowly tailored to the material interest of same-sex couples in accessing publicly available goods and services. Pet. 26a–32a. However, the state, bearing the burden of persuasion under strict scrutiny, does not present any data on barriers to material access in the website-design marketplace.

Instead, Colorado's only argument for narrow tailoring is a strained analogy. Colorado likens Smith's proffered list of willing same-sex wedding service providers to the hotel guidebooks referenced in *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 253 (1964). Resp. Br. 33-34. In *Heart of Atlanta*, this Court upheld the public accommodations provision of the Civil Rights Act of 1964. This Court noted that Black Americans could not stay in any hotel they came across, but instead relied on guidebooks to find safe lodging. This fact helped establish the government's argument that the public accommodations provision was related to the government's interest in promoting interstate commerce. *Heart of Atlanta*, 379 U.S. at 258.

When compared to the facts in the present case, Colorado's analogy fails. First, this Court decided *Heart of Atlanta* under deferential rational basis review, while here even the Tenth Circuit agreed that strict scrutiny should apply.

Second, the guidebooks in *Heart of Atlanta* were just part of the congressional record supporting a rational basis review standard for antidiscrimination protection. By contrast, the availability of a long list of willing suppliers of customizable wedding website

designs for same-sex couples constitutes all of Colorado's "evidence" for narrow tailoring.

Third, same-sex couples looking for website design services do not confront the pervasive dignitary assault and material burden encountered by Black people trying to find places to eat and sleep in the South of the 1960s. Instead, same-sex couples need only click the next website appearing in a lengthy list generated by an instantaneous Google search. This fact does not deny the reality that a refusal of service can occasion a personal affront. Instead, it goes to the comparative magnitude of the material injury and to whether there is a compelling need to avoid it by measures seriously burdening constitutional rights.

The Tenth Circuit did not concern itself with any of that analysis. Instead, the court in circular fashion simply defined the relevant market as the very expression Smith refuses. Under that approach, no means chosen by the state could be regarded as underinclusive or overinclusive. Any speech regulation would be perfectly tailored to achieve what the state says it is designed to do: compel the expression of the particular speaker's "unique" speech. If that version of strict scrutiny were to migrate into other First Amendment doctrines, it would be the end of meaningful judicial review of free-speech regulation.

Because the Tenth Circuit essentially surrendered to the state's choice of means, it flipped the purpose of strict scrutiny on its head. This Court has the opportunity to reject such a dangerous development in First Amendment doctrine.

CONCLUSION

The First Amendment has historically protected the rights of Americans to organize politically and to advocate unpopular causes. This protection has been especially critical for the LGBT-rights movement. *See* Dale Carpenter, *Born in Dissent: Free Speech and Gay Rights*, 72 SMU L. Rev. 375 (2019); Carpenter, *Expressive Association,* 85 Minn. L. Rev. at 1525-33. With such expressive freedom secure, "[m]illions of gay and lesbian Americans have worked hard for many decades to achieve equal treatment in fact and in law. They have exhibited extraordinary vision, tenacity, and grit—battling often steep odds in the legislative and judicial arenas, not to mention in their daily lives." *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1837 (2020) (Kavanaugh, J., dissenting).

At the same time, just as drivers' "individual freedom of mind," *Wooley v. Maynard*, 430 U.S. 705, 714 (1977), permits them to refuse to display speech they disapprove of, so creators' freedom of mind permits them to refuse to create speech they disapprove of, including that related to same-sex marriage. The Tenth Circuit failed to recognize this point. This Court should reaffirm all Americans' right to choose what speech they will create.

Respectfully Submitted,

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