NO. 21-476

IN THE
Supreme Court of the United States

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

Petitioners,

v.

AUBREY ELENIS, ET AL.,

Respondents.

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

BRIEF OF WALK FOR LIFE WEST COAST, ARIZONA LIFE COALITION, AND COALITION FOR LIFE OF IOWA AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

RENEE K. CARLSON
TRUE NORTH LEGAL
2855 Anthony Ln. S.
Minneapolis, MN 55418
rcarlson@truenorthlegalmn.org

CHARLES D. HURLEY
THE FAMILY LEADER
P.O. Box 42245
Urbandale, IA 50323
chuck@thefamilyleader.com

SAMUEL D. GREEN
Counsel of Record
REASON FOR LIFE
P.O. Box 500040
Palmdale, CA 93550
(661) 524-5770
sgreen@reasonforlife.org

Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

BACKGROUND 2

SUMMARY OF THE ARGUMENT 8

ARGUMENT 10

I. *Hurley* shows that public-accommodations laws cannot apply to speech itself to force speakers to convey messages they oppose 11

A. Like GLIB in *Hurley*, Colorado seeks to use a public-accommodations law in a peculiar way by regulating speech and altering messages 12

B. *Hurley* prohibits compelling speech even when it is framed as requiring "equal treatment" or "equal access" 14

C. *Hurley* allows speakers to make message-based distinctions even when one's identity affects those messages 16

II. *Hurley* applies to expressive services offered to the public in commerce 20

A. *Hurley*'s protections apply to paid speakers 21

B. The Veterans in *Hurley* provided services to the public 23

III. *Hurley* shows that compelling Smith's speech cannot be justified using theories about speech conduits, attribution, or monopolies 24

A. Smith creates speech rather than just serving as a conduit, and her speech is protected regardless of attribution 24

B. Because monopoly concerns did not apply to the parade in *Hurley*, they cannot apply to Smith's websites 28

IV. *Hurley* declined to apply only intermediate scrutiny 29

CONCLUSION 33

TABLE OF AUTHORITIES

Cases

Boy Scouts of America v. Dale,
530 U.S. 640 (2000).....18, 20, 30

Brush & Nib Studio, LC v. City of Phoenix,
448 P.3d 890 (Ariz. 2019) 19

Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston,
515 U.S. 557 (1995).....*passim*

Irish-American Gay, Lesbian & Bisexual Group of Boston v. City of Boston,
No. 92-1518, 1993 WL 818674
(Mass. Super. Ct. Dec. 15, 1993) .....*passim*

Irish-American Gay, Lesbian & Bisexual Group of Boston v. City of Boston,
636 N.E.2d 1293 (Mass. 1994).....6, 21

Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission,
138 S. Ct. 1719 (2018).....20, 22, 28, 31

National Institute of Family & Life Advocates v. Becerra,
138 S. Ct. 2361 (2018).....27

New York County Board of Ancient Order of Hibernians v. Dinkins,
814 F. Supp. 358 (S.D.N.Y. 1993) 3

Pacific Gas & Electric Co. v. Public Utilities Commission of California,
475 U.S. 1 (1986).....27

Riley v. National Federation of the Blind of North Carolina, Inc.,
487 U.S. 781 (1988).....22

Romer v. Evans,
517 U.S. 620 (1996).....7

Telescope Media Group v. Lucero,
936 F.3d 740 (8th Cir. 2019) 26

Turner Broadcasting System, Inc. v. FCC,
512 U.S. 622 (1994).....28

United States v. O'Brien,
391 U.S. 367 (1968).....30

Wooley v. Maynard,
430 U.S. 705 (1977).....26

Other Authorities

100% Irish: Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston,
GLADLAW (Mar. 11, 2013),
https://soundcloud.com/gladlaw/
100-irish-hurley-v-irish 4, 5

A Timeline of the Legalization of Same-Sex Marriage in the U.S., GEORGETOWN UNIV. L. LIBR., https://guides.ll.georgetown.edu/
c.php?g=592919&p=4182201
(last updated Apr. 27, 2022).....2

Appellee's Answer Brief, *303 Creative LLC v. Elenis*, 6 F.4th 1160 (10th Cir. 2021) (No. 19-1413) 12, 15, 20

Bethia Kwak, *LGBT Group Says Float Supporting Trump Rejected for Charlotte Pride Parade*, NBC NEWS (June 9, 2017), https://www.nbcnews.com/feature/nbc-out/lgbt-group-says-float-supporting-trump-rejected-charlotte-pride-parade-n770316 32

Brief for Petitioners, *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995) (No. 94-749), 1995 WL 89280 21

Brief for Respondent, *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995) (No. 94-749), 1995 WL 143532 ..... *passim*

Ciara Nugent, *Jared Polis Makes History as America's First Elected Openly Gay Male Governor*, TIME (Nov. 7, 2018), https://time.com/5447591/jared-polis-openly-gay-governor/ 7

LGBT Rights, GALLUP, https://news.gallup.com/poll/1651/gay-lesbian-rights.aspx 2

Margaret Hartmann, *The Gay Rights Battle Over New York's St. Patrick's Day Parade: A History*, NEW YORK (Mar. 16, 2014), https://nymag.com/intelligencer/2014/03/gay-rights-st-patricks-day-parade.html 3

Paul J. Walkowski & William M. Connolly, *From Trial Court to the United States Supreme Court* (1996) 17, 32

Registration, S. BOS. ALLIED WAR VETERANS COUNCIL, https://southbostonparade.org/registration/ 22

Stephanie Ebbert, *One Route, Two Parades*, BOS. GLOBE (Mar. 20, 2011), http://archive.boston.com/news/local/massachusetts/articles/2011/03/20/on_st_patricks_day_same_route_different_paths/ 4

Transcript of Oral Argument, *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995) (No. 94-749) 15, 21

INTEREST OF *AMICI CURIAE*[1]

Amici curiae are not-for-profit organizations that seek to advance the right to life for children in the womb and cultivate a culture that recognizes the value and dignity of those children. One way *amici* advance those goals is by organizing and running marches on or around the anniversary of *Roe v. Wade* to convey pro-life messages.

Walk for Life West Coast, a dba of Children's Works, Inc., organizes and runs an annual pro-life walk in San Francisco, California. Some of the walks have included around 50,000 participants.

Arizona Life Coalition engages in various pro-life efforts, including organizing and running Arizona's largest pro-life event, the Arizona for Life March & Rally. The event is held in Phoenix, Arizona, and thousands of marchers participate.

Coalition for Life of Iowa has a multifaceted approach to promoting life, including organizing an annual pro-life march in Cedar Rapids, Iowa.

Cherishing the freedom to control their expression, *amici* submit this brief to highlight overlap between the troubling arguments to compel speech in this case and those raised—and rejected—in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995).

---

[1] No counsel for a party authored this brief in whole or in part, and no person other than *amici curiae* and their counsel made any monetary contribution intended to fund the preparation or submission of this brief. For full transparency, *amici* note that their counsel of record previously represented Petitioners in this litigation as an attorney at Alliance Defending Freedom (ADF) and resigned from ADF in 2020. Pursuant to Supreme Court Rule 37.3, all parties consented to this brief's filing.

BACKGROUND

In *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995), this Court considered a perceived conflict between a state public-accommodations law banning sexual-orientation discrimination and the First Amendment right to be free from compelled speech. After considering arguments that mirror many presented here, this Court held that the non-discrimination law could not trample the "fundamental rule . . . that a speaker has the autonomy to choose the content of his own message." *Hurley*, 515 U.S. at 573. *Hurley* demands the same result here. Indeed, while this dispute is similar to *Hurley*, the case against allowing government-compelled expression is even stronger here. To appreciate that, consider *Hurley*'s facts and the climate in which the case arose.

1. *Hurley*'s history reminds us that today's America is quite different from the 1990s for those who identify as gay, lesbian, or bisexual. For instance, in 1996, only 27% thought same-sex marriage should be recognized and just 44% believed that "gay or lesbian relations" should be lawful. *LGBT Rights*, GALLUP, https://news.gallup.com/poll/1651/gay-lesbian-rights.aspx (last visited May 31, 2022). Reflecting public sentiments, no state allowed same-sex marriage at that time. *A Timeline of the Legalization of Same-Sex Marriage in the U.S.*, GEORGETOWN UNIV. L. LIBR., https://guides.ll.georgetown.edu/c.php?g=592919&p=4182201 (last updated Apr. 27, 2022) (noting that the first state to "legalize gay marriage" did so in 2003).

The social climate was on display at New York City's St. Patrick's Day parade in 1991, where the

seeds of the *Hurley* case were planted. At first, the parade's organizers declined the Irish Lesbian and Gay Organization's (ILGO) request to march. Margaret Hartmann, *The Gay Rights Battle Over New York's St. Patrick's Day Parade: A History*, NEW YORK (Mar. 16, 2014), https://nymag.com/intelligencer/2014/03/gay-rights-st-patricks-day-parade.html. After Mayor David Dinkins intervened, the organizers allowed ILGO to march—but *without* its own banner. *Id.* Even with that arrangement, ILGO "was booed throughout the parade" and "two beer cans were thrown at the mayor," who was marching alongside the group. *Id.* Mayor Dinkins said that "'[i]t was like marching in Birmingham, Alabama' during the civil rights movement . . . ." *Id.* In 1992, the parade organizers again declined ILGO's request to march behind an identifying banner. *N.Y. Cnty. Bd. of Ancient Ord. of Hibernians v. Dinkins*, 814 F. Supp. 358, 362-63 (S.D.N.Y. 1993).

To "show support for" ILGO and express other messages, three individuals formed the Irish-American Gay, Lesbian and Bisexual Group of Boston (GLIB) in 1992 to march in Boston's St. Patrick's Day/Evacuation Day parade.[2] *Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos. v. City of Bos.* (*GLIB I*), No. 92-1518, 1993 WL 818674, at *1 & n.3 (Mass. Super. Ct. Dec. 15, 1993). But the parade organizers denied GLIB's application to participate. *Id.* at *2. GLIB then obtained a court order allowing

[2] The parade celebrated St. Patrick's Day and Evacuation Day—commemorating "General Washington's initial military victory over the British in 1776, and the British departure from South Boston"—which both fall on March 17. *GLIB I*, 1993 WL 818674, at *4. In Suffolk County, where Boston is located, Evacuation Day is an official holiday. *Id.* at *4 & n.10.

it to march in the 1992 parade. *Id.* This scenario repeated itself in 1993. *Id.* at *2, *6.

Given societal conditions, GLIB's parade participation was risky. "Reporters quoted [South Boston] residents saying GLIB marchers weren't welcome, they'd get whooped, [and] they deserved what was coming to them." *100% Irish: Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, GLADLAW, at 8:05 (Mar. 11, 2013), https://soundcloud.com/gladlaw/100-irish-hurley-v-irish [hereinafter *100% Irish*]. Some GLIB marchers "drew up their first wills" ahead of the march because "they just weren't sure they were going to make it." *Id.* at 8:26.

Uniformed police escorted GLIB, and a box truck carrying a concealed SWAT team drove in front of the contingent. *Id.* at 8:41. As pictured below, GLIB marched behind a banner with text consisting of only the group's name: "Irish American Gay, Lesbian and Bisexual Group of Boston." Stephanie Ebbert, *One Route, Two Parades*, BOS. GLOBE (Mar. 20, 2011), http://archive.boston.com/news/local/massachusetts/articles/2011/03/20/on_st_patricks_day_same_route_different_paths/ (publishing picture from 1992).

GLIB member Cathleen Finn, who was a named plaintiff in the litigation that resulted in this Court's landmark *Hurley* decision, was one of GLIB's marchers in 1992. *100% Irish*, *supra*, at 6:51; *GLIB I*, 1993 WL 818674, at *15. She explained that for many GLIB members, marching "was a traumatic experience," but it was also "exhilarating because [they] were able to really identify [themselves]." *100% Irish*, *supra*, at 9:14. Another marcher recalled that "one person got a stone in the head that required some medical attention," there were several arrests, and it was ultimately "a little more hairy than [he] thought it was going to be." *Id.* at 10:07. But as he saw it, GLIB could not be silent when "these people don't want us to exist."[3] *Id.* at 10:50.

2. After the temporary orders regarding the 1992 and 1993 parades, GLIB obtained a permanent injunction granting it access to the parade. *GLIB I*, 1993 WL 818674, at *15. That injunction followed a four-day bench trial, where the court found that "[t]he evidence establishe[d] that GLIB was excluded from the Parade on account of its members' sexual orientation" in violation of Massachusetts' public-accommodations law. *Id.* at *1-2, *15.

The trial court explained that the parade was "a public celebration of longstanding." *Id.* at *4. In 1947, Boston's mayor granted the South Boston Allied War Veterans Council "authority to organize and conduct the Parade." *Id.* In organizing the parade, the Veterans had "no written procedures, criteria, or standards for selecting participants or

---

[3] Perhaps because there were not more serious issues, this Court said that GLIB "marched 'uneventfully'" in 1992. *Hurley*, 515 U.S. at 561 (citation omitted).

sponsors." *Id.* The Veterans voted on the applications of new groups "in batches" and did "not generally inquire into the specific messages or views of each applicant." *Id.*

The Veterans' "lack of selectivity in choosing participants and failure to circumscribe the marchers' messages" resulted in an "eclectic" parade "composed of diverse groups espousing myriad themes and values." *Id.* at *13. So the trial court found it "impossible to discern any specific expressive purpose" to trigger First Amendment protection. *Id.* But even if there were "some slight infringement" on expressive rights, the law did "not seek to suppress speech" and "any incidental abridgement of the Veterans' speech [was] no greater than necessary" to "eliminate discrimination." *Id.*

3. The Veterans obtained direct appellate review at the state's highest court, which affirmed the trial court's judgment. *Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos. v. City of Bos.*, 636 N.E.2d 1293, 1295 n.5 (Mass. 1994). The court held that the trial court was not clearly erroneous in finding that "GLIB was excluded from the parade because of the sexual orientation of its members." *Id.* at 1295. After all, when the Veterans declined GLIB's application in 1992, they cited "safety reasons and insufficient information regarding [the] social club." *Id.* (alteration in original). But in 1993, the Veterans said they were excluding groups with "sexual themes" because "the Parade expresses traditional religious and social values." *Id.* The trial court had found that the Veterans' John Hurley "equivocated about his reasons for excluding GLIB" and that "the inconsistent and changing explanations for

excluding GLIB demonstrated the 'pretextual nature' of those explanations." *Id.*

The Supreme Judicial Court of Massachusetts also affirmed the trial court's finding that the Veterans "did not prove that they truly were exercising First Amendment rights" because they did not use the parade "for expressive purposes." *See id.* at 1300. Given those findings, the Veterans "could not cloak their discriminatory acts in the mantle of the First Amendment." *Id.*

A vehement dissent argued that compelling the Veterans to allow GLIB to march went "beyond merely regulating discriminatory conduct" and unconstitutionally forced the Veterans "to promote GLIB's ideals." *Id.* at 1302 (Nolan, J., dissenting). In a unanimous decision, this Court agreed.

4. Since *Hurley*, our nation has experienced seismic societal shifts in favor of lesbian, gay, and bisexual relationships. Colorado is paradigmatic of that change. In 1992, the year that GLIB first sought to march in Boston, Colorado voters passed a referendum that this Court condemned as "born of animosity" and "depriv[ing] gays and lesbians even of the protection of general laws and policies that prohibit arbitrary discrimination in governmental and private settings." *See Romer v. Evans*, 517 U.S. 620, 623, 630, 634 (1996). In contrast, Coloradans elected an "openly gay man" as their governor in 2018. Ciara Nugent, *Jared Polis Makes History as America's First Elected Openly Gay Male Governor*, TIME (Nov. 7, 2018), https://time.com/5447591/jared-polis-openly-gay-governor/.

If the law in *Hurley* prohibiting sexual-orientation discrimination could not compel speech despite GLIB's desire to participate in a significant public event in a very challenging social climate, there is certainly insufficient justification for such compulsion today.

SUMMARY OF THE ARGUMENT

While many precedents support a holding protecting Lorie Smith and her design studio, 303 Creative, this Court's decision in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995), is uniquely helpful. Indeed, *Hurley* confronted the precise question here: whether a public-accommodations law prohibiting sexual-orientation discrimination can compel a speaker to express a message the speaker finds objectionable. *Hurley* held that it cannot. But now, in an effort to compel Smith's speech, Colorado repeats many of the arguments considered—and rejected—in *Hurley*. There are countless reasons to reject Colorado's coercive effort.

I. While public-accommodations laws may be valid in most applications, *Hurley* shows that they cannot be applied to speech itself—like Smith's wedding websites—to change a speaker's desired message. That is true even when the effort to compel speech is framed as requiring only "equal treatment." If a speaker's decision to decline to speak is based on the message requested—rather than the requestor's status/identity—the speaker is entitled to First Amendment protection. That principle applies even in the rare instances when a requestor's status/identity affects the message conveyed.

II. *Hurley*'s holding cannot be confined to private, noncommercial activities. After all, *Hurley* involved a public parade serving thousands, and the decision explained that corporations are protected from compelled speech.

III. As one who designs and creates custom websites, Smith engages in direct expression rather than serving as a mere conduit for the speech of others. And while speakers are protected regardless of attribution, those who view Smith's wedding websites will know that Smith is the speaker because her design-studio's name will appear on all her wedding websites. A disclaimer is impractical, would undermine Smith's desired message because she would need to include it on *all* her wedding websites, and would not remedy the compelled-speech violation.

The Tenth Circuit's theory that Smith's speech is a type of monopoly that justifies compelling Smith's speech conflicts with *Hurley*. Indeed, those wishing to celebrate same-sex weddings via websites have far better alternatives than those denied access to the massive and highly desirable parade in *Hurley*.

IV. *Hurley* shows that because Colorado applies its law to directly regulate speech itself—Smith's websites—intermediate scrutiny is inapplicable. Instead, at least strict scrutiny is required.

In sum, *Hurley* shows that Smith must prevail because Colorado seeks to compel her speech in violation of the First Amendment.

ARGUMENT

The attempt to use a public-accommodations law to compel speech is nothing new. Thirty years ago, certain "gay, lesbian, and bisexual descendants of the Irish immigrants" and "other supporters" formed the Irish-American Gay, Lesbian and Bisexual Group of Boston (GLIB) to march in a South Boston parade. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 561 (1995). That parade celebrated "the apostle to Ireland," Saint Patrick, and "the evacuation of royal troops and Loyalists" from Boston. *Id.* at 560. The South Boston Allied War Veterans Council, which ran the parade, denied GLIB's application. *Id.* at 560-61. GLIB then tried to force their way into the parade via Massachusetts' public-accommodations law prohibiting sexual-orientation discrimination. *Id.* at 561. This Court unanimously rejected that effort, holding that requiring the Veterans to include "a group imparting a message [they] do not wish to convey . . . violates the First Amendment." *Id.* at 559.

Now history repeats itself. Through her design studio, Lorie Smith desires to "design, create, and publish" wedding websites "celebrating and promoting God's design for marriage as the lifelong union of one man and one woman." Pet. App. 186a. But Colorado—recycling many of GLIB's arguments—asserts that its public-accommodations law can hijack Smith's mind and expression and force her to convey messages that violate her core convictions. Pet. App. 189a; Opp'n Br. 30-31.

Under *Hurley*, Colorado's effort—which is even more troubling than GLIB's—must fail. Once again, this Court should reject the attempt to use a public-

accommodations law to violate "the fundamental rule" that speakers have "the autonomy to choose the content of [their] own message." *Hurley*, 515 U.S. at 573.

I. *Hurley* shows that public-accommodations laws cannot apply to speech itself to force speakers to convey messages they oppose.

In *Hurley*, this Court explained that the challenged public-accommodations law prohibiting sexual-orientation discrimination was "well within the State's usual power to enact" to protect groups that are a "target of discrimination." *Hurley*, 515 U.S. at 572. Its provisions did not violate the First Amendment "as a general matter." *Id.*

In GLIB's view, the Veterans were demanding "a First Amendment exemption" from this generally valid law by asserting arguments that were just "old wine in new bottles." Br. for Resp't, *Hurley*, 515 U.S. 557 (No. 94-749), 1995 WL 143532, at *24, *39 [hereinafter GLIB Br.]. GLIB warned that those like "the manager of Ollie's Barbeque," who "[p]resumably . . . had a point of view about serving African-Americans," and employers who "refuse[] to hire Jews," might make similar arguments. *See id.* at *24.

But unlike efforts to regulate conduct to ensure that people can eat at restaurants or gain employment regardless of race or religion, GLIB sought to use Massachusetts' law to regulate "speech itself" and require speakers "to modify the content of their expression." *Hurley*, 515 U.S. at 573, 578. So it was GLIB that sought an exemption *from* the First Amendment. Now, Colorado seeks an even more

expansive exemption that would eviscerate protections that Americans have long cherished. As in *Hurley*, this Court should reject that request.

A. Like GLIB in *Hurley*, Colorado seeks to use a public-accommodations law in a peculiar way by regulating speech and altering messages.

The public-accommodations law in *Hurley* did "not, on its face, target speech or discriminate on the basis of its content." *Hurley*, 515 U.S. at 572. Instead, its "focal point" was prohibiting "the act of discriminating." *Id.* That was not "unusual in any obvious way." *Id.* The unusual aspect was that it was "applied in a *peculiar* way," declaring "speech itself to be the public accommodation" and requiring speakers to "alter [their] expressive content." *Id.* at 572-73 (emphasis added). That is precisely what Colorado has done.

Of course, Colorado argues that requiring Smith to design and create custom websites celebrating and promoting marriages between people of the same sex just regulates "what commercial actors do (and not what they say)." Appellee's Answer Br. at 4, 42, *303 Creative LLC v. Elenis*, 6 F.4th 1160 (10th Cir. 2021) (No. 19-1413) [hereinafter Colo. CA10 Br.]. But even the Tenth Circuit recognized that Colorado's argument that it "only regulates [Smith's] *conduct* in picking customers and does not regulate [Smith's] *speech* . . . is foreclosed by *Hurley*." Pet. App. 22a (emphasis added).

In *Hurley*, the fact that GLIB sought to regulate speech itself was "apparent" from "the expressive character of both the parade and the marching GLIB

contingent." 515 U.S. at 573. That was true even though the parade "may not produce a particularized message" and "GLIB's point . . . [was] not wholly articulate." *Id.* at 574.

As for altering expressive content, this Court explained that even if the Veterans did not exercise the most "considered judgment" when choosing which groups could march, they "clearly decided to exclude a message [they] did not like from the communication [they] chose to make." *Id.* That was "enough to invoke [their] right as a private speaker to shape [their] expression by speaking on one subject while remaining silent on another." *Id.*

The analysis is even simpler here. The parties stipulated that Smith's websites "are expressive in nature" and that she uses them "to communicate a particular message." Pet. App. 181a. That means that Colorado has made "speech itself . . . the public accommodation." *Hurley*, 515 U.S. at 573.

And the alteration to Smith's expressive content is evident. Unlike the Veterans, Smith is quite particular about her messages. She engages in a "vetting process" before accepting expressive projects, and even if that process fails to detect a problematic message, Smith's "Contract for Services" allows her to abandon a project if she discovers that it "communicates ideas or messages . . . inconsistent with [her] religious beliefs." Pet. App. 184-85a.

Through wedding websites, Smith desires "to promote God's design for marriage in a compelling way." *Id.* at 186a. For Smith, that "design for marriage" is a "lifelong union of one man and one woman." *Id.* Yet Colorado seeks to force Smith to design and create custom websites that "celebrate"

and "promote" a view of marriage that violates Smith's beliefs and conflicts with her desired message. *Id.* at 187-88a. *Hurley* established that such coercion violates the First Amendment. *See Hurley*, 515 U.S. at 573.

B. *Hurley* prohibits compelling speech even when it is framed as requiring "equal treatment" or "equal access."

Colorado argues that it must compel Smith to design and create websites celebrating same-sex marriage to ensure "equal access" to Smith's expressive services. Opp'n Br. 30-31. And it suggests that this focus on "equal access" dispels any notion that it is requiring Smith to speak. *Id.* In Colorado's view, requiring Smith "to produce the same services for same-sex couples that [she] produces for opposite-sex couples does not require [her] to speak in favor of same-sex marriage." *Id.* at 31. After all, Colorado asserts, Smith "has complete control over what commissioned services [she] offers" and she just has to provide those services "on the same basis regardless of the commissioning couple's sexual orientation." *Id.* at 30.

This argument replicates GLIB's argument in *Hurley*. As GLIB saw it, the Veterans had "not been 'compelled' to say anything. [They had] been required only to treat GLIB like any other group . . . ." GLIB Br., 1995 WL 143532, at *15. So allowing GLIB to march was just an "obligation of equal treatment." *Id.* at *28. After all, "[i]f GLIB is permitted to march behind an identifying banner, it is only because the [Veterans] permit[] other groups to identify themselves by carrying banners." *Id.* at *29; *see also id.* at *26 (noting that the

Massachusetts law had "not prescribed or dictated any specific message that the [Veterans were] required to display"). If the Veterans "wanted to exclude all signs, they could have done so." Transcript of Oral Argument at 27, *Hurley*, 515 U.S. 557 (No. 94-749).

The overlap of Colorado's and GLIB's arguments are further evidenced by their efforts to distinguish impermissible compelled speech from their views of "equal treatment." For instance, GLIB argued that forcing the Veterans to let GLIB carry a sign of self-identification when "[e]verybody else self-identified" is distinct from an order allowing GLIB to carry signs saying "Gay is Good," "repeal the sodomy laws," or "we question your traditional values." Transcript of Oral Argument at 23-24, 30-33, *Hurley*, 515 U.S. 557 (No. 94-749). Similarly, Colorado argues that compelling Smith "to design a website that says 'Gay Pride Forever'" is "very different" from forcing her "to design a website for a same-sex couple that says 'Alex and Taylor Invite You to Share Their Joy,' when [she] would design the same website for an opposite-sex couple." Colo. CA10 Br. 36-37.

Ultimately, *Hurley* refused to mandate GLIB's notion of equal treatment because it "compel[led] the speaker to alter the message." 515 U.S. at 581. Because Colorado's version of "equal treatment" requires Smith to not just alter—but completely contradict—her desired message, *Hurley* dooms Colorado's approach.

C. *Hurley* allows speakers to make message-based distinctions even when one's identity affects those messages.

As *Hurley* teaches, message-based distinctions are different from invidious discrimination against people or groups because of their status/identity. And because context can affect messages, there are rare instances when status/identity will impact a message. Consider these examples:

- A Muslim wearing a burka versus a Jew wearing a yarmulke holding a sign saying "Join my Religion" at a parade promoting Islam.
- At a "Black Lives Matter" march, a black person versus a white person holding a sign saying "My Life Matters."
- At a pro-life march, a prominent pro-life politician versus a prominent pro-choice politician holding a sign saying "Vote for Me."
- A female versus a male holding a sign saying "Stop Oppressing Us" at a rally promoting equal rights for women.

Even in these unusual instances, the person orchestrating the expressive event must be able to control the message. For instance, the person organizing the hypothetical rally for women's rights may welcome men joining their cause but also determine that a man holding a "Stop Oppressing Us" sign communicates that men—rather than women—are oppressed. As explained below, *Hurley* prevents that man from using a sex-discrimination claim to compel the rally organizer to communicate his message.

1. In *Hurley*, GLIB wanted to march behind a banner that stated only their identity: "Irish American Gay, Lesbian and Bisexual Group of Boston." 515 U.S. at 570. Other groups were able to identify themselves; banners the Veterans allowed included those saying "Cork City Fire Brigade" and "Boston Police Patrolmen's Association."[4] And the objectionable aspects of GLIB's banner were just names of sexual orientations—"gay," "lesbian," and "bisexual."

But this Court recognized that the self-identifying banner also carried a message. It "would at least bear witness to the fact that some Irish are gay, lesbian, or bisexual." *Hurley*, 515 U.S. at 574. But, this Court explained, the Veterans "may not believe these facts about Irish sexuality to be so." *Id.* The banner could also "suggest [GLIB's] view that people of their sexual orientations have as much claim to unqualified social acceptance as heterosexuals and indeed as members of parade units organized around other identifying characteristics"—characteristics those others groups were permitted to identify with banners. *See id.* But this Court recognized that the Veterans "may object to unqualified social acceptance of gays and lesbians." *Id.* at 574-75. Ultimately, this Court held that regardless of the particular message the Veterans objected to, it was their First Amendment right to exclude it. *Id.* at 575.

Smith's claim to protection is even stronger than the Veterans'. "[T]he purpose of the St. Patrick's Day

---

[4] Paul J. Walkowski & William M. Connolly, *From Trial Court to the United States Supreme Court* (1996) (providing pictures of banners in the "photo history" section following chapter six).

parade in *Hurley* was not to espouse any views about sexual orientation, but [this Court] held that the parade organizers had a right to exclude certain participants nonetheless." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 655 (2000). But here, Colorado goes beyond requiring Smith to speak about a subject where she wished to remain silent. Instead, it requires her to directly contradict the message about marriage that she desires to convey. Such coercion has no place under the First Amendment.

2. To distinguish invidious status-based discrimination from legitimate message-based distinctions, it is always helpful to have evidence about how the objecting speaker treats the relevant class of people when an objectionable message is *not* at issue.

In *Hurley*, the trial court conflated message and status, saying that the Veterans excluded GLIB "because of its values and its message, *i.e.*, its members' sexual orientation." *Hurley*, 515 U.S. at 562 (citation omitted). But this Court noted that the Veterans "disclaim[ed] any intent to exclude homosexuals as such"; if individual GLIB members wished to march with a group the Veterans had approved, they could. *See id.* at 572. The Veterans' objection was to admitting "GLIB as its own parade unit carrying its own banner." *Id.* That objection received First Amendment protection because "every participating unit affects the message conveyed" by the Veterans. *Id.*

Here, Colorado stipulated that Smith is "willing to work with all people regardless of classifications such as . . . sexual orientation" and that she "will gladly create custom graphics and websites for gay, lesbian, or bisexual clients" when those "graphics

and websites do not violate [her] religious beliefs"—a qualifier that applies to "all customers." Pet. App. 184a. Smith simply will not convey a range of messages *for anyone*, including messages supporting abortion, encouraging "sexual immorality," demeaning others, or promoting "any conception of marriage other than marriage between one man and one woman." *Id.* Thus, Smith's determinations are based on *message*, not status, and *Hurley* establishes that those decisions are protected. *See Brush & Nib Studio, LC v. City of Phx.*, 448 P.3d 890, 910-11 (Ariz. 2019) (explaining that artists who would not create "custom wedding invitations celebrating a same-sex marriage" were *not* declining "based on a customer's sexual orientation" and received free-speech protection even though their decision "may, like *Hurley*, primarily impact same-sex couples").

3. Some may argue that *Hurley* is distinguishable because the Veterans excluded a banner that they would not allow anyone to carry. In contrast, Smith will create wedding websites for opposite-sex couples, but not for same-sex couples, even if very similar textual content is desired in each instance. Even setting aside that none of Smith's websites are identical—they are *custom*—this theory stretches too far. Just consider its implications. It would mean that if the Veterans in *Hurley* allowed a women's group to march with a banner saying "We Love Irish Men," the Veterans would also need to allow a men's group to march with the same banner. Or if a man and a woman carried a banner together saying "We're Irish Sweethearts," the Veterans would have to allow two men or two women to carry an identical banner.

Those alternative banners would have done as much—or more—to convey the various messages that this Court said the Veterans had a right to exclude. It is unreasonable to conclude that the First Amendment sheltered the Veterans' decisions about what messages to convey simply because GLIB was not clever enough. Core First Amendment protections cannot be so easily evaded—or destroyed.

* * *

Put simply, Colorado seeks to compel Smith to create custom wedding websites that, "at the very least, acknowledge that same-sex weddings are 'weddings' and suggest that they should be celebrated." *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n*, 138 S. Ct. 1719, 1744 (2018) (Thomas, J., concurring in part and concurring in the judgment). But "[t]he First Amendment prohibits Colorado from requiring [Smith] to 'bear witness to [these] fact[s]' or to 'affir[m] . . . a belief with which [she] disagrees.'" *Id.* (quoting *Hurley*, 515 U.S. at 573-74). That is because "the choice of a speaker not to propound a particular point of view . . . is presumed to lie beyond the government's power to control." *Hurley*, 515 U.S. at 575.

II. *Hurley* applies to expressive services offered to the public in commerce.

Desperate to evade *Hurley*'s holding, Colorado seeks to distinguish *Hurley* by arguing that it involved a "private, noncommercial" entity while this case involves the "commercial conduct" of one offering "services to the public." Colo. CA10 Br. 47; *see also* Opp'n Br. 27 (arguing that *Hurley* and *Dale* "hinged on the organizations being 'expressive

association[s]' rather than 'commercial entities' or 'places where the public is invited'" (citation omitted) (alteration in original)). But the facts and reasoning of *Hurley* reject those distinctions.

A. *Hurley*'s protections apply to paid speakers.

Speakers often require payment so they can fund their expression. The Veterans in *Hurley* may have done likewise in certain instances. According to the trial court, some marched in the parade "by making a contribution to the Parade rather than filling out an application form." *GLIB I*, 1993 WL 818674, at *4. Based on this finding, the Supreme Judicial Court of Massachusetts said that those wishing to march "most likely would have been able to join if they had applied or appeared at the start of the parade and *paid a fee*." *Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos. v. City of Bos.*, 636 N.E.2d 1293, 1298 n.13 (Mass. 1994) (emphasis added).

At oral argument before this Court, the Veterans' counsel made a comment suggesting that perhaps fees were not paid to march.[5] This Court did

[5] The Veterans' counsel said: "A great deal has been made about the factual situation relating to people showing up and paying to join in the parade. Well, this is not supported at all in the evidence . . . ." Transcript of Oral Argument at 14, *Hurley*, 515 U.S. 557 (No. 94-749). It is unclear whether counsel was disputing that fees were paid or the implication that the Veterans did not exercise selectivity when fees were paid. In its briefing, the Veterans said that "the trial court could not point to a single case where a person or group showed up, paid a fee and marched *without the Veterans' permission*." Br. for Pet'rs, *Hurley*, 515 U.S. 557 (No. 94-749), 1995 WL 89280, at *16 (emphasis added).

not seek to resolve the potential fact dispute, perhaps because it was irrelevant. After all, it was already "well settled that a speaker's rights are not lost merely because compensation is received; a speaker is no less a speaker because he or she is paid to speak." *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 801 (1988).

If this Court wished to confine *Hurley*'s prohibition of compelled expression to those speaking outside the commercial context, it could have done so explicitly. It did not. Instead, *Hurley* went out of its way to emphasize that a speaker's "right to tailor the speech" and *not* convey messages "the speaker would rather avoid" is "enjoyed by business corporations generally" and even "professional publishers" who, like Smith, are paid to speak. *Hurley*, 515 U.S. at 573-74.

For good reason, "this Court has repeatedly rejected the notion that a speaker's profit motive gives the government a freer hand in compelling speech." *Masterpiece Cakeshop*, 138 S. Ct. at 1745 (Thomas, J., concurring in part and concurring in the judgment). It should not reverse course now. *See id.* (noting free-speech interests of a for-profit business that declined to create custom cakes celebrating same-sex weddings). If it did, perhaps even the Veterans would be unprotected because they currently request hefty payments from many wishing to march. *Registration*, S. BOS. ALLIED WAR VETERANS COUNCIL, https://southbostonparade.org/registration/ (last visited June 1, 2022) (requesting "that businesses and political organizations" wishing to march "contribute to the parade infrastructure with the following pricing," and specifying fees of

$500 to $2,500—depending on the nature of the unit marching).

B. The Veterans in *Hurley* provided services to the public.

Although Colorado tries to distinguish *Hurley* as *not* involving a "place[] where the public [was] invited," the opposite is true. *See* Opp'n Br. 27 (citation omitted). The Veterans' parade had at times "included as many as 20,000 marchers and drawn up to 1 million watchers." *Hurley*, 515 U.S. at 560-61. "The Parade celebrate[d] a public holiday," and provided "entertainment, amusement, and recreation to participants and spectators alike." *GLIB I*, 1993 WL 818674, at *3, *13. The "diverse groups" composing the parade ranged from companies like Budweiser and Pepsi to "candidates for city council" to various civic organizations. *Id.*

With these facts, the trial court "rejected the [Veterans'] contention that the parade was 'private' (in the sense of being exclusive)." *Hurley*, 515 U.S. at 562. Instead, the trial court held that the parade was "a public event." *GLIB I*, 1993 WL 818674, at *4.

Compared to the Veterans' parade with tens of thousands of participants, Smith's services appear rather private. As one who "does not employ or contract work to any other individuals" and ensures that each website "is an original, customized creation for each client," Smith undoubtedly serves far fewer members of the public than the Veterans did. Pet. App. 181a. But even if she matched or exceeded the Veterans' massive reach, she would still deserve protection as a speaker.

As this Court recognized, the Veterans were "rather lenient in admitting participants" to their parade, and the parade's "size and success" made it "an enviable vehicle" to disseminate views. *Hurley*, 515 U.S. at 569, 577. But even "[a]ssuming the parade to be large enough and a source of benefits (apart from its expression) that would *generally justify a mandated access provision*," the Veterans could still decline to include GLIB's "own message" in its parade. *Id.* at 580-81 (emphasis added). Similarly, Smith—despite offering the public an opportunity to join her in certain expression—must have "the autonomy to choose the content of [her] own message." *Id.* at 573.

III. *Hurley* shows that compelling Smith's speech cannot be justified using theories about speech conduits, attribution, or monopolies.

A. Smith creates speech rather than just serving as a conduit, and her speech is protected regardless of attribution.

Colorado argues that messages communicated by expressive businesses are "attributable to the customer, not the business." Opp'n Br. 2. In *Hurley*, GLIB advanced a similar argument, suggesting that the Veterans were not speakers themselves, but just "a conduit through which groups enter the Parade." GLIB Br., 1995 WL 143532, at *21. According to GLIB, the Veterans opened the parade as "a forum" for "virtually all comers," so there was "no danger" that GLIB's participation in the parade would "be mistaken for an endorsement by the [Veterans] of

openly expressed same-sex sexual orientation." *See id.* at *26-27.

1. Regarding conduits, *Hurley* explained that "First Amendment protection" does *not* "require a speaker to generate, as an original matter, each item featured in the communication." 515 U.S. at 570. Moreover, Smith is not a mere conduit of speech for others. Instead, she "designs and creates . . . an original, customized creation for each client," devoting "considerable attention" to various design elements and even creating original "textual content." Pet. App. 181-83a. To put this case in *Hurley*'s terms, Colorado is not just forcing Smith to display an objectionable banner, but to design and create the banner as well. Even the Tenth Circuit admitted this much. *See id.* at 21a ("The speech element is even clearer here than in *Hurley* because [Smith] actively create[s] each website, rather than merely hosting customer-generated content . . . .").

As *Hurley* explained, "when dissemination of a view contrary to one's own is forced upon a speaker intimately connected with the communication advanced, the speaker's right to autonomy over the message is compromised." 515 U.S. at 576. That is the untenable situation here.

2. In protecting the Veterans' freedom to refuse GLIB's parade participation, this Court declined to decide "on the precise significance of the likelihood of misattribution." *Hurley*, 515 U.S. at 577. But Colorado seems to think that attribution is key and that those viewing Smith's websites will not see them as Smith's speech. *See* Opp'n Br. 29-31.

This argument fails for at least three reasons. First, Colorado stipulated that "[v]iewers of the

wedding websites will know that the websites are [Smith's] original artwork because all of the wedding websites will say 'Designed by 303Creative.com.'" Pet. App. 187a.

Second, if attribution were dispositive, the government could compel *any* speech where the speaker's identity is concealed. Even Colorado's effort to support its attribution theory hints at such an Orwellian future. Specifically, Colorado mentions speechwriters as an example of those who convey messages that are not attributed to them. Opp'n Br. 29. But as one court warned in a similar case, if Colorado prevails and later declares "political affiliation or ideology to be a protected characteristic" as other jurisdictions have, Colorado "could force a Democratic speechwriter to provide the same services to a Republican." *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 756 (8th Cir. 2019).

Finally, this Court's precedents already show that Smith is entitled to protection even if Colorado could show that people will not attribute Smith's speech to her. For instance, prior to *Hurley*, this Court provided protection from compelled speech even when no reasonable person would view the speech as conveying the objector's own message. *See Wooley v. Maynard*, 430 U.S. 705, 715-17 (1977) (holding that a state could not require a driver to display the state's motto on a vehicle license plate where the driver objected to the motto's message); *see also id.* at 720-21 (Rehnquist, J., dissenting) (arguing that the "State has not forced [the driver] to 'say' anything" by requiring "license tags . . . known to all as having been prescribed by the State"). And after *Hurley*, this Court protected objecting speakers who could have easily ensured that the objectionable

message was not viewed as their own. *See, e.g.*, *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2368-69, 2376 (2018) (stating that "California cannot co-opt" licensed pro-life centers to "disseminate a government-drafted notice" about abortion services).

3. As an addendum to its attribution theory, Colorado argues that Smith "remains free to disclaim [her] customers' views." Opp'n Br. 31. In *Hurley*, this Court noted that a disclaimer "would be quite curious in a moving parade." 515 U.S. at 576-77. Yet a disclaimer there would have been far more practicable than one here. Nothing stopped the Veterans from carrying a disclaimer banner in the parade. But Smith will likely lose opportunities to speak if she insists on adding a clause to wedding websites saying that she does not necessarily approve of the wedding. Even more troubling, a disclaimer will diminish the strength of Smith's desired message. That is because, to provide what Colorado considers the *same* service to opposite-sex and same-sex couples, Smith would need to include a disclaimer even on websites she created in order to "promote and celebrate the unique beauty of God's design for marriage between one man and one woman." *See* Pet. App. 186a.

Ultimately, the notion of using a disclaimer to remedy compelled-speech violations fails because the government cannot "require speakers to affirm in one breath that which they deny in the next." *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 16 (1986) (plurality opinion). Indeed, if a disclaimer could excuse Colorado's speech compulsion, it would also "justify any law compelling speech"—completely gutting a cherished freedom.

See Masterpiece Cakeshop, 138 S. Ct. at 1745 (Thomas, J., concurring in part and concurring in the judgment) (stating that a lower court erred by saying that a cake designer "could simply post a disclaimer" to disassociate himself "from any support for same-sex marriage").

B. Because monopoly concerns did not apply to the parade in *Hurley*, they cannot apply to Smith's websites.

In ruling that Colorado may compel Smith to express messages that violate her convictions, the Tenth Circuit analogized Smith's "unique" services to a monopoly and explained that "monopolies present unique anti-discrimination concerns." Pet. App. 28-29a. GLIB tried a similar tactic, arguing that entities "may be subjected to governmental regulation that would otherwise be invalid[] if they control a 'critical pathway of communication' and are thus in a position to 'silence the voices of competing speakers.'" GLIB Br., 1995 WL 143532, at *20-21 (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 656-57 (1994)).

In considering GLIB's monopoly argument, this Court acknowledged that the "size and success" of the Veterans' parade made it "an enviable vehicle for the dissemination of GLIB's views." *Hurley*, 515 U.S. at 577. But "that fact, without more," fell "far short" of triggering the monopoly concerns in *Turner*. *Id.* at 577-78. That is because *Turner* involved concern about cable operators having such a powerful monopoly that "some speakers [would] be destroyed in the absence of the challenged law." *Id.* at 577.

GLIB would not be silenced or destroyed if it could not march in the Veterans' parade. After all, it could seek "a parade permit of its own." *Id.* at 578. Would GLIB's parade be identical to the Veterans' parade? Of course not. But could GLIB speak without requiring the Veterans to speak? Absolutely.

The Tenth Circuit's monopoly argument is much weaker than the one that *Hurley* rejected. Smith's one-person business does not have a "monopolistic opportunity to shut out some speakers." *Id.* at 577; Pet. App. 181a. So those wishing to celebrate same-sex weddings will not "be silenced" absent Colorado compelling Smith's speech. *Hurley*, 515 U.S. at 577. Certainly, the "numerous companies . . . that offer custom website design services" will not speak *exactly* as Smith does. Pet. App. 190a. But under *Hurley*, that does not change the analysis.

The fact that *Hurley* rejected monopoly concerns when GLIB could not march in an "enviable," massive parade "broadcast over Boston television," 515 U.S. at 560-61, 569, 577, shows that the Tenth Circuit's monopoly concerns are unfounded. Coloradans wishing to celebrate same-sex weddings have far better alternatives than GLIB had.

IV. *Hurley* declined to apply only intermediate scrutiny.

In *Hurley*, GLIB argued that because it sought to enforce a "generally applicable statute . . . targeted at conduct, not speech," strict scrutiny did not apply. GLIB Br., 1995 WL 143532, at *16. Instead, GLIB argued that "the appropriate standard is an 'intermediate level of scrutiny applicable to content-neutral restrictions that impose an incidental

burden on speech.'" *Id.* (citation omitted). The trial court agreed that any "abridgment of the Veterans' speech" was just "incidental" to prohibiting discrimination. *GLIB I*, 1993 WL 818674, at *13.

But applying the public-accommodations law to the Veterans' parade did not just *incidentally* burden speech. It applied directly to "speech itself," requiring the Veterans "to alter the expressive content of their parade." *Hurley*, 515 U.S. at 572-73. Under those circumstances, this Court rejected GLIB's request for intermediate scrutiny. Instead, "*Hurley* . . . applied traditional First Amendment analysis . . . ." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 659 (2000).

As this Court has explained, the "intermediate standard of review" set out in *United States v. O'Brien*, 391 U.S. 367 (1968), "is inapplicable" to public-accommodations laws applied to "directly and immediately affect[]" expressive rights. *See Dale*, 530 U.S. at 659 (looking to *Hurley*'s analysis to evaluate a law affecting "associational rights that enjoy First Amendment protection"). But here, as the Tenth Circuit recognized, Colorado seeks to apply the Colorado Anti-Discrimination Act (CADA) to directly compel Smith's "pure speech"—requiring her "to create custom websites [she] otherwise would not" that "express approval and celebration" of same-sex marriages. Pet. App. 20a, 23a. That is not an incidental burden on speech; there is not even conduct to which it could be incidental. Rather, it is an egregious content-based speech regulation. *See id.* at 23a ("Because [CADA] compels speech in this case, it also works as a content-based restriction.")

Thus, "[w]hether viewed as compelling speech or as a content-based restriction," Colorado must at least "satisfy strict scrutiny." *See id.* at 24a; *see also Masterpiece Cakeshop,* 138 S. Ct. at 1745-46 (Thomas, J., concurring in part and concurring in the judgment) (explaining that strict scrutiny, rather than *O'Brien*'s intermediate scrutiny, applies to using CADA to compel creation of "custom wedding cakes that express approval of same-sex marriage"). But *Hurley* shows that Colorado cannot satisfy strict scrutiny here. Indeed, Colorado's goal of requiring Smith "to modify the content of [her] expression to whatever extent beneficiaries of the law choose"—that is, to celebrate same-sex weddings in addition to opposite-sex weddings—is not even a "legitimate interest," much less a compelling one. *See Hurley*, 515 U.S. at 578. In fact, the object of "[r]equiring access to a speaker's message" is "exactly what the general rule of speaker's autonomy forbids." *See id.* at 578-79.

* * *

The *Hurley* decision meant that the Veterans could make a choice about their speech that some would find "misguided, or even hurtful." *See id.* at 574. But "shield[ing] just those choices of content" is precisely "the point of all speech protection." *Id.*

Even when experiencing the sting of a "hurtful" speech decision, those with foresight recognize that the alternative—government coercion—comes at too high a cost. For when the winds of change blow, the formerly aggrieved may find that their own conscience needs protection from those seeking to compel speech—speech that may have even become "orthodox expression." *Id.* at 579.

Some had that foresight when this Court decided *Hurley*. Right after the opinion issued, "a group of Gay and Lesbian libertarians warmly applauded the decision, noting: 'True freedom means we respect the rights of others as much as our own rights.'"[6] Unsurprisingly, an LGBT parade eventually found itself exercising the freedom that *Hurley* recognized by declining to allow a contingent supporting President Trump to join the parade. This serves as a reminder that the First Amendment's protection against compelled expression is a right that protects us all.[7]

As in *Hurley*, this Court should hold that a public-accommodations law cannot be applied to speech itself to force speakers to convey messages they find objectionable. Adhering to this fundamental principle does not reflect "any particular view about the [speaker's] message," but rests "on the Nation's commitment to protect freedom of speech." *Hurley*, 515 U.S. at 581. That commitment must endure.

---

[6] Dwight G. Duncan, *Forward* to Paul J. Walkowski & William M. Connolly, *From Trial Court to the United States Supreme Court*, at x (1996) (citation omitted).

[7] Bethia Kwak, *LGBT Group Says Float Supporting Trump Rejected for Charlotte Pride Parade*, NBC NEWS (June 9, 2017), https://www.nbcnews.com/feature/nbc-out/lgbt-group-says-float-supporting-trump-rejected-charlotte-pride-parade-n770316 ("A pro-Trump LGBT group said their float was recently denied a spot in a gay pride parade . . . .").

CONCLUSION

This Court should reverse the judgment below.

Respectfully submitted,

SAMUEL D. GREEN
Counsel of Record
REASON FOR LIFE
P.O. Box 500040
Palmdale, CA 93550
(661) 524-5770
sgreen@reasonforlife.org

RENEE K. CARLSON
TRUE NORTH LEGAL
2855 Anthony Ln. S.
Minneapolis, MN 55418
rcarlson@truenorthlegalmn.org

CHARLES D. HURLEY
THE FAMILY LEADER
P.O. Box 42245
Urbandale, IA 50323
chuck@thefamilyleader.com

Counsel for Amici Curiae

JUNE 2, 2022