

No. 21-476

IN THE
Supreme Court of the United States

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

Petitioners,

v.

AUBREY ELENIS; CHARLES GARCIA; AJAY
MENON; MIGUEL R. ELIAS; RICHARD LEWIS;
KENDRA ANDERSON; SERGIO CORDOVA;
JESSICA POCOCK; PHIL WEISTER,

Respondents.

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

**BRIEF OF CREATIVE PROFESSIONALS AND
GEORGE AND MAXINE MAYNARD AS *AMICI
CURIAE* IN SUPPORT OF NEITHER PARTY**

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INTEREST OF *AMICI CURIAE*¹

Amici Cyndol McNeil, Sabin Brock, Erum Rizvi, and Maureen Mullarkey (collectively the “creative *amici*”) are creative professionals whose work ranges from cake design to tattoo artistry, from photography to visual arts. They hail from different parts of the country, espouse different religious and political beliefs, and represent different ethnicities. They hold different artistic, aesthetic, and philosophical values that inform and compel their work. Yet, they write together to aid the Court’s analysis of one point on which they all agree: that custom, commissioned, creative work is inherently expressive and, therefore, constitutes protected speech.

Amici George and Maxine Maynard were the prevailing parties in this Court’s seminal case, which bears their name, regarding the doctrine of compelled speech. Forty-five years later, they join this brief to aid the Court’s consideration of the compulsion of speech that would result from the Tenth Circuit’s analysis and holding.

¹ Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission. All parties have consented to the filing of this brief.

SUMMARY OF THE ARGUMENT

Amici are creative professionals of diverse cultural, professional, personal, religious, and geographic backgrounds, joined by George and Maxine Maynard—the prevailing parties in one of the Court’s seminal rulings regarding compelled speech: *Wooley v. Maynard*, 430 U.S. 705 (1977). *Amici* express no opinion on the beliefs that placed Petitioners at odds with the Colorado Civil Rights Commission, and *amici* take no position as to which party should prevail in this specific case. Rather, *amici* write to aid the Court’s understanding of the expressive nature of creative, custom, commissioned work, and the effect that government compulsion has on custom expressive work.

1. The creative *amici* demonstrate the extraordinary diversity of the nation’s creative professionals and the expressive nature of their work. Many of the creative *amici* gladly accept commissions to engage their talents in support of same-sex marriages. All of them, however, decline commissions of various types if the work does not align with their artistic vision, creative philosophy, deeply-held beliefs, or expressive purposes.

Cyndol McNeil, for example, is the owner of a custom bakery in Florida, and declined a request to design a cake with an inscription she found to be demeaning to the LGBTQ community. She did so because the message she was asked to convey using her creative talents diverged from her beliefs and differed from the message that she desires her work to express.

Likewise, Erum Rizvi and Sabin Brock—a Muslim photographer in Washington, D.C., and a Christian tattoo artist in Santa Maria, California, respectively—decline commissions if the proposed work would be

stylistically incompatible with their visions or skills or if the event or tattoo would convey a message they do not wish to convey.

So too Maureen Mullarkey—a writer, artist, and art critic—is selective in the topics she writes about, and has written poignantly and respectfully of a meaningful incident in which her request for a custom ring inscribed with a phrase from the Jewish *Tanakh* was declined by a Jewish jeweler because she did not share his faith.

George and Maxine Maynard know the cost and effect of compelled speech better than most. Prior to this Court’s intervention in their case 45 years ago, the Maynards suffered reputational injury, financial penalties, and jail time rather than “use their private property as a ‘mobile billboard’ for the State’s ideological message” that conflicted with their beliefs. *Wooley*, 430 U.S. at 715. The case that bears their name remains a perennial fixture in this Court’s First Amendment jurisprudence, and they believe it may be instructive to the Court’s analysis of the question presented in this appeal.

2. Though *amici* reflect a diverse array of personal and professional ideals, views, and beliefs, they are united on one thing: whether creative work takes the form of photography, tattoo artistry, cake design, or a hundred other forms, the conception, creation, and execution of a custom product, commissioned by or for a particular person or occasion, is inherently expressive. This Court, the lower courts, scholars, artists, and philosophers have long recognized that creative work is expressive in nature and, therefore, is entitled to the First Amendment’s protection. This principle and protection apply broadly to creative

work, including applied art, nonverbal work, and endeavors in the commercial marketplace.

3. The creative *amici's* work—just like Petitioners' and other creative professionals' creative work—is not stripped of its expressive or protected quality by its availability in the marketplace. The First Amendment protects both the creation and dissemination of material for profit. See *Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 801 (1988).

4. Colorado's public-accommodation law is laudable in its aims, but the Tenth Circuit's application of that law to creative professionals and individuals like the creative *amici* would compel speech in an unprecedented way. And while *amici* express no opinion whether Colorado's law is narrowly tailored to achieve a compelling State interest, they note that the Tenth Circuit's reasoning, if applied to the creative *amici* and others like them, would have wide-ranging deleterious results.

Ms. McNeil, for example, would be compelled to inscribe the cake with the message she found distasteful and demeaning towards the LGBTQ community. Ms. Rizvi could be penalized if, with merely artistic motivations, she declined to shoot a Roman Catholic wedding celebrating the Sacrament of Holy Matrimony, and, instead, accepted a booking that aligned with her artistic niche of luxury South Asian weddings. Mr. Brock would no longer be at liberty to select or decline the tattoo projects he wishes. Ms. Mullarkey could, one supposes, get the inscription she wanted on her ring, but at a price she is unwilling to pay, namely the jeweler's abandonment of either his convictions or his livelihood.

ARGUMENT

I. The creative *amici* accept commissions for custom, creative work only when the work is consistent with their artistic vision, creative philosophy, and expressive aims.

Amici illustrate the broad diversity of the nation's creative professionals and citizenry. The creative *amici* hail from different parts of the country, hold different religious and political beliefs, trace their family roots to different people groups or countries of origin, and seek to convey different artistic, aesthetic, or philosophical values in their work. The Maynards, though not creative professionals by training or by trade, likewise hold yet another set of beliefs, views, and expressive aims, and they believe deeply that they cannot and will not convey a message at the government's behest if the message expresses a view or belief they do not share. *Amici's* stories are shared briefly below.

A. *Cyndol McNeil declined to design a cake with a message she felt was demeaning to the LGBTQ community, and, as a result, was subjected to a civil rights complaint.*

Cyndol McNeil owns a bakery in Florida. She was previously the co-owner, along with her mother, Sharon Haller, of Cut the Cake Bakery ("Cut the Cake") in Longwood, Florida. *See Mannarino v. Cut the Cake Bakery*, Case No. 16-3465, 2017 WL 601408, at *2–3 (Fla. Div. Admin. Hrgs. Feb. 9, 2017). Cut the Cake was a custom bakery that specialized in cakes, cupcakes, and desserts, and mainly sold its baked goods for offsite events such as weddings and parties. *Id.* at *3.

On April 14, 2015, Robert Joseph Mannarino called Cut the Cake to order a cake with the following quote from Leviticus 20:13: “Homosexuality is an abomination unto the Lord.” *Id.* at *1–2. Ms. McNeil, believing that this was a tasteless prank, responded that Cut the Cake would charge him \$150 a letter, or approximately \$5,850 to make the cake. *Id.* at *2. Mr. Mannarino immediately exclaimed that it was illegal for Cut the Cake to knowingly discriminate against him due to his religious beliefs and that he was prepared to take legal action against Cut the Cake. *Id.* Ms. McNeil promptly hung up the phone. *Id.*

About a month later, Mr. Mannarino again called Cut the Cake, and Ms. Haller answered. *Id.* This time, affecting Asian accent, he requested a birthday cake with the message: “Happy Birthday Big Boy.” *Id.* Ms. Haller quoted a price of \$35, and Mr. Mannarino hung up the phone. *Id.*

On July 30, 2015, Mr. Mannarino filed a Complaint of Discrimination with the Florida Commission on Human Relations (the “Commission”), alleging that Cut the Cake discriminated against him based on his Christian religion. *Id.* at *1. At the final hearing, Ms. Haller and Ms. McNeil explained that they too are Christians and that they frequently make baked goods displaying religious themes and Bible verses. *Id.* at *4. They also testified that they serve customers of any sexual orientation, race, or religion. *Id.*

According to Ms. Haller and Ms. McNeil, Cut the Cake did not want to make the cake Mr. Mannarino requested because of the message it conveyed. *See id.* at *4, *10. The Commission thus concluded that the evidence did not support a finding that Cut the

Cake refused to make the cake that Mr. Mannarino requested based on his religion. *Id.* at *11.

B. Sabin Brock will not create tattoo designs that are contrary to his religious beliefs.

Sabin Brock is a Christian tattoo artist who chooses not to create or apply certain tattoo designs that are contrary to his religious beliefs. Located in Santa Maria, California, Mr. Brock has been tattooing for twenty-four years, which includes many years of tattoo artistry before his conversion to Christianity, and many years after it. His design portfolio changed following his conversion as a result of his new and deeply-held conviction that everything he creates should be “honorable.” Accordingly, while he gladly works with any customer, he will not create tattoos that are vulgar or obscene, sexually explicit, depict nudity, or include demonic or satanic themes.

Likewise, while he does not turn away individuals seeking tattoos expressing facets of their personal identities, including religious or LGBTQ-related tattoos, he refuses to create tattoos that depict or symbolize the worship of another deity or religion. And because he disapproves of any form of hate or violence, he will not create tattoos that express white supremacist or racially disparaging views or sentiments demeaning toward or disparaging of the LGBTQ community.

Ultimately, Mr. Brock views his tattoo artistry as an extension of himself and as an expression of his beliefs. Thus, he will “not do anything that’s not [his] idea,” because he believes his faith and convictions should inform the creative decisions that comprise his profession.

C. Erum Rizvi photographs weddings and events for clients of all cultural back-grounds, but selects the commissions that best align with her artistic vision and expressive aims.

Erum Rizvi is an award-winning Muslim photographer, born and raised in England but now living in Washington, D.C. She photographs weddings for couples from all cultural backgrounds and walks of life, including traditional Anglo-American weddings, religious weddings, non-religious weddings, opposite-sex weddings, and same-sex weddings. Her artistic vision, creative excellence, and cultural and personal background have made her one of the most sought-out photographers for luxury South Asian weddings in the District and worldwide. Accordingly, while she gladly serves clients of all kinds, she chooses to focus her craft on photographing Indian, Pakistani, Bengali, Arab, and Sikh weddings. Accordingly, there are times when, without animus or discriminatory intent, she declines a commission for one job so she can accept another commission that falls more squarely in her niche.

In such instances, the fact that her artistic and business decisions may also reflect the ethnic, cultural, or religious identity of the prospective clients is not motivated by malice nor does it constitute invidious discrimination that should be actionable under the law. Again, Ms. Rizvi gladly photographs weddings for any couple. But caught between high demand for her award-winning services and the finitude of time, she should be free to choose the commissions for bespoke work that best reflect her artistic vision, skill, and expressive aims, even when doing so means declining other prospective clients whose wedding celebrates or

symbolizes a different religious or cultural event and message.

D. Maureen Mullarkey is a writer, artist, and art critic who is selective in her own work and who has herself experienced the denial of custom work on the basis of religion.

Maureen Mullarky is a creative professional who personally has experienced—and respected—another creative professional’s decision to decline her request because she did not share his faith. In August 2021, she wrote an article describing an incident ten years prior in which a Jewish jeweler refused to inscribe a particular passage from the Jewish Scriptures on a wedding band for her and her then-fiancé because they were not Jewish. See Maureen Mullarkey, *What Happened When A Craftsman Refused To Sell Me The Wedding Ring Of My Dreams*, THE FEDERALIST (Aug. 11, 2021), <https://thefederalist.com/2021/08/11/what-happened-when-a-craftsman-refused-to-sell-me-the-wedding-ring-of-my-dreams/>.

In her article, she describes searching Manhattan’s diamond district as a “young and broke” couple nearly a decade ago, optimistic of her intended husband’s ability to negotiate a deal. *Id.* After hours of hunting for the perfect ring, finally, “[i]n the showcase of an older jeweler, his forearm tattooed with numbers from a concentration camp, were simple gold bands embossed with phrases from the Tanakh.” *Id.* She immediately knew that this was her ring, and after a “spirited match” of discussion of the cost, her fiancé and the jeweler settled on a price. *Id.* For the inscription, she requested the phrase “whither thou goest . . . ,” taken from the hauntingly beautiful passage in the Book of Ruth in which the protagonist pledges her

fealty to the Jewish people and their faith, proclaiming: “whither thou goest I will go, where thou lodgest, I will lodge; thy people shall be my people and thy God my God.” *Id.* Ms. Mullarkey was moved by the sentiment reflected in the statement, and she “ached to claim it for [herself] and wear it for the rest of [her] life.” *Id.* When she requested it, however, the jeweler stopped and asked if either of them was Jewish. *Id.* They answered no, and he told them he could not make her that ring. *Id.*

Instead of pressing, the couple deferred to his prohibition. *Id.* She recognized that the story of Ruth was deeply important to the Jewish community, and “the intensity of this man’s concern to honor the sacred core of the text moved us.” *Id.*

In her article, Ms. Mullarkey reflects that they could have challenged the denial as anti-Christian, or they could have demanded their rights as customers or under the law. *Id.*² But “at what cost to the common good?” *Id.* In the absence of a shared moral code that allows for such differences and denials, courts are left to “wrestle to accommodate malcontents who are not satisfied with the freedom to *live* differently [but who] demand assent, even obeisance, to their difference.” *Id.* (emphasis added).

E. The State of New Hampshire could not compel George and Maxine Maynard to convey a message contrary to their beliefs.

George and Maxine Maynard are followers of the Jehovah’s Witnesses faith. At their request, this Court once declared unconstitutional a New Hampshire

² The jeweler’s refusal seems contrary to the City’s Human Rights Law. See New York City Admin. Code § 8-101 *et seq.*

statute that made it a crime to obscure the motto “Live Free or Die” on passenger vehicle plates. The Court held that New Hampshire could not compel the Maynards to display the motto, which was repugnant to their moral and religious beliefs, without violating the First Amendment. *Wooley*, 430 U.S. at 707, 717. Forty-five years ago, the Court recognized that “[t]he right to speak and the right to refrain from speaking are complementary components of the broader concept of ‘individual freedom of mind.’” *Id.* at 714 (internal citation omitted).

In the Maynards’ case, when “faced with a state measure which forces an individual, as part of his daily life . . . to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable,” *id.* at 715, this Court found that “the State ‘invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.’” *Id.* (internal citation omitted). The Court concluded, “The First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster, in the way New Hampshire commands, an idea they find morally objectionable.” *Id.*

II. Though of diverse personal, professional, and cultural backgrounds, *amici* all agree that custom creative work is inherently expressive.

Amici represent a diverse array of views, beliefs, and ideals, both personally and professionally, all of which are informed by their differing backgrounds, life experiences, and contexts. On one thing, however, they can agree: whether creative work takes the form of wedding photography, tattoo artistry, cake design, or a hundred other forms, the conception, creation,

and execution of a custom product, commissioned by or for a particular person or occasion, is by nature expressive. This is especially (though not exclusively) true when—as is true of the creative *amici*'s crafts—the creative process or final product requires aesthetic judgment, creative vision, or an uncommon mastery of some technical or imaginative skill or ability.

This Court has long recognized that creative work is expressive, and, therefore, is entitled to First Amendment protection. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234 (2002) (holding that the Constitution protects artistic expression as pure speech); *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569 (1998) (holding that “artistic speech” qualifies for full First Amendment protection); *Miller v. California*, 413 U.S. 15 (1973) (finding that works which, taken as a whole, possess artistic value are protected under the First Amendment).

Courts do not limit this protection to traditional or fine art forms, but have found a wide variety of creative formats and mediums to fall within the realm of Constitutional protection. *See Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786 (2011) (video games); *Gordon v. Drape Creative, Inc.*, 909 F.3d 257 (9th Cir. 2018) (videos and greeting cards); *Twentieth Century Fox Television v. Empire Distrib., Inc.*, 875 F.3d 1192 (9th Cir. 2017) (TV series, radio play, live events, online advertising, merchandise, promotion, songs and soundtrack, consumer goods); *Buehrle v. City of Key W.*, 813 F.3d 973 (11th Cir. 2015) (tattooing); *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1062 (9th Cir. 2010) (same); *Sapieyevski v. Live Nation Worldwide, Inc.*, No. 18-cv-00830, 2019 WL 1284302 (D.D.C. 2019) (content production services, online music services, in-person music, and

promotional music materials); *Dr. Seuss Enters., L.P. v. ComicMix LLC*, No. 16-CV-2779-JLS, 2018 WL 2306733 (S.D. Cal. 2018) (title, lettering, fonts, and illustrations); *Fortres Grand Corp. v. Warner Bros. Ent. Inc.*, 947 F. Supp. 2d 922 (N.D. Ind. 2013), *aff'd*, 763 F.3d 696 (7th Cir. 2014) (fictional computer program in Batman film).

Art, including applied art and artistic endeavors in the commercial marketplace, is considered pure speech under the First Amendment because it is self-expressive and communicative. *See, e.g., Cressman v. Thompson*, 798 F.3d 938, 954 (10th Cir. 2015) (“Pure-speech treatment is only warranted for those images whose creation is itself an act of self-expression”). In *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp. of Boston*, for example, this Court found that “the Constitution looks beyond written or spoken words as mediums of expression” in holding that a public parade was expressive speech and entitled to First Amendment protection. *See* 515 U.S. 557, 569 (1995). To qualify for First Amendment protection, artistic expression need not contain a “succinctly articulable” or “particularized message,” but, instead, must simply be used by a person as a means of self-expression. *Id.* at 569, 576. According to this Court, self-expression exists when the speaker is “intimately connected with the communication advanced.” *Id.* at 576.

Philosophers, artists, and aesthetes confirm the Court’s view of art as expression. The famed American philosopher and scholar, John Dewey, for example, opined that “because the objects of art are expressive, they communicate.” John Dewey, *Art as Experience*, 104 (New York: Capricorn, 1958); *see also* Edward S. Casey, *Expression and Communication in*

Art, 30(2) J. AESTHETICS AND ART CRITICISM, 97 (1971) (opining that expression in art is a form of communication); *Philosophy of art: Art as expression*, BRITANNICA, <https://www.britannica.com/topic/philosophy-of-art/Art-as-expression> (explaining the dominant theory that art is expression because “art is held to reflect the inner state of the artist.”).

Russian novelist and philosopher Leo Tolstoy likewise recognized that “art, like speech, is a means of communication,” and that the work of art is, “by means of movements, lines, colors, sounds, or forms expressed in words, so to transmit [a] feeling [so] that others may experience the same feeling.” *Tolstoy on Art*, 173, 278 (trans. and ed. Aylmer Maude) (Oxford Univ. Press, 1924). Edward Hopper, a renowned American realist painter, opined, “Great art is the outward expression of an inner life in the artist, and this inner life will result in his personal vision of the world.” *Oral History Interview with Edward Hopper, 1959 June 17*, Smithsonian, <https://www.aaa.si.edu/collections/interviews/oral-history-interview-edward-hopper-11844>.

In sum, this Court, the lower courts, the art world, and *amici* all agree: custom creative work is inherently expressive. Because of its expressive and communicative nature, custom creative work is as entitled to First Amendment protection as pure speech.

III. Custom creative work does not lose its First Amendment protection merely because it is commissioned.

The creative *amici*'s creative works, like those of Petitioners and other creative professionals, are not stripped of their expressive or protected qualities by their entry into the marketplace. The

First Amendment protects both the creation and dissemination of material for profit. *See Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 801 (1988) (“It is well settled that a speaker’s rights are not lost merely because compensation is received.”); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991) (holding that the First Amendment protects an author who writes for money); *United States v. Stevens*, 559 U.S. 460, 465–70 (2010) (striking down a restriction on the commercial creation and distribution of material depicting animal cruelty).

The Tenth Circuit recognized this in its opinion below: “Nor does a profit motive transform [303 Creative LLC’s] speech into ‘commercial conduct.’” *303 Creative LLC v. Elenis*, 6 F.4th 1160, 1177 (10th Cir. 2021). The lower court likewise acknowledged that creative works remain the creator’s speech even when made for hire. *Id.* (recognizing that 303 Creative LLC’s “own speech is implicated even where [its] services are requested by a third-party”). The First Amendment also protects speech that incorporates or includes others’ materials, since the First Amendment does not require a speaker to generate, as an original matter, each item featured in the communication. *Hurley*, 515 U.S. at 570. For instance, cable operators enjoy First Amendment protection even when they broadcast programming originally produced by others. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994). And newspapers, which select and publish content generated by others, “fall squarely within the core of First Amendment security.” *Hurley*, 515 U.S. at 570 (citing *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S.

241 (1974) and *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)).

Like Petitioners, *amici* have an even stronger claim to First Amendment protection than did the parade organizers in *Hurley* because *amici* “actively create” each commissioned work. *303 Creative LLC*, 6 F.4th at 1177. Thus, *amici*, as creative professionals who, like Petitioners, create custom commissioned work, are “no less [] speaker[s] because [they are] paid to speak.” *Riley*, 487 U.S. at 801.

IV. The Tenth Circuit’s reasoning, if applied to individuals like *amici*, would compel speech in a way not yet countenanced by this Court’s precedent.

Amici express no view as to which party should prevail in this appeal, nor do they take a position as to whether the Court should, as a matter of constitutional law, announce a rule subjecting custom, commissioned, creative works to non-discrimination requirements found in public-accommodation laws. Leaving aside the merits or demerits of such a pronouncement, *amici* merely note that it would differ qualitatively from this Court’s prior holdings.

This Court has in past cases—including in *amici* George and Maxine Maynard’s case—looked to precedent when considering whether and how to apply the compelled speech doctrine in new factual scenarios. See *Wooley*, 430 U.S. at 714–15 (comparing the facts giving rise to the compelled speech claim in *Maynard* to the facts giving rise to *Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) and noting that although “[c]ompelling the affirmative act of a flag salute involved a more serious infringement upon personal liberties than the passive act of carrying the state motto on a license

plate, . . . the difference is essentially one of degree”). A similar consideration of precedent is instructive here as well.

The government “may not compel affirmance of a belief with which the speaker disagrees,” no matter if “business corporations,” “ordinary people,” or “professional publishers” are speaking. *Hurley*, 515 U.S. at 573, 574. This applies with equal force to *amici*, who convey messages through their commissioned, custom creations, because the compelled speech doctrine protects those engaging in commercial businesses. See, e.g., *Pac. Gas & Elec. Co. v. Pub. Util. Comm’n*, 475 U.S. 1 (1986) (non-media corporations); *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241 (1974) (newspapers).

When public accommodation laws change the “expressive content” of a creative professional’s work, strict scrutiny applies. *Hurley*, 515 U.S. at 572–73. Strict scrutiny, therefore, applies when reviewing public accommodation laws through which the government attempts to compel individuals or entities to create expressive works that they otherwise would not, because a government act *compelling* speech is no less violative of the First Amendment than one *restricting* speech. See *Agency for Int’l Dev. v. All. for Open Soc’y Int’l*, 570 U.S. 205, 213 (2013) (“It is . . . a basic First Amendment principle that ‘freedom of speech prohibits the government from telling people what they must say.’” (internal citation omitted)).

This is because “[t]he right to speak and the right to refrain from speaking are complementary components of the broader concept of ‘individual freedom of mind.’” *Wooley*, 430 U.S. at 714 (quoting *Barnette*, 319 U.S. at 637). And “the right of freedom

of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all.” *Id.*

In *Wooley*, the Court found that there is a “First Amendment right to avoid becoming the courier” for expression that one does not desire to communicate. *Id.* at 717. Thus, speakers have the “right to decline to foster . . . concepts” with which they disagree, even when the law “only” requires one to display a slogan on a state-issued license plate. *Id.* at 714. The Court reasoned that “the passive act of carrying the state motto on a license plate,” *id.* at 715, may not be compelled by the State because such compulsion “invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.” *Id.* (quoting *Barnette*, 319 U.S. at 642). When the Court’s reasoning in *Wooley* is applied to *amici* here, it underscores how public accommodations laws require artists to “becom[e] the courier[s] for . . . message[s]” with which they disagree, *id.* at 717, by compelling *amici* to create artistic expressions that contradict their beliefs.

Tornillo provides another analogue. In *Tornillo*, the Court invalidated a law that required newspapers to publish replies from political candidates to the same extent that the newspaper had criticized the candidate. 418 U.S. at 243. The Court rejected the notion that the government could compel the newspaper to convey additional expression merely because it had previously expressed a contrary idea voluntarily. The Court reasoned that forcibly placing the candidate’s right of access on the same footing as the newspaper’s protected speech would “exact[] a

penalty on the basis of the content” of the newspaper’s protected speech. *Id.* at 256.

The same is true for *amici* here. When public-accommodations laws like Colorado’s force creative professionals like *amici* to create works that convey messages, even nonverbally, that contradict the viewpoints or messages that he or she wishes to express, it inflicts a penalty as a direct result of the creator’s entry into the field of expressive endeavor. Thus, these statutes inflict a content-based penalty on *amici* for engaging in creative expression. Because such laws, as applied, are content-based, they cannot compel artists to create works that convey messages that they wish not to convey unless the laws pass strict scrutiny—*i.e.*, they promote a compelling governmental interest and are narrowly tailored to satisfy that interest. *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 164 (2015).

This Court has never before found a governmental interest compelling enough to justify the compulsion of speech. Nevertheless, the lower court here authorized compelled speech under strict scrutiny, holding that Colorado’s public accommodations law furthered a compelling interest and is narrowly tailored to Colorado’s interest in ensuring that LGBT consumers have “equal access to publicly available goods and services.” *303 Creative LLC*, 6 F.4th at 1179. The Tenth Circuit reasoned that, “[f]or the same reason that [303 Creative LLC’s] custom and unique services are speech, those services are also inherently not fungible”; therefore, while LGBT consumers are able to obtain wedding-website design services from other businesses, they will never be able to obtain services of the exact same quality and nature as those that 303 Creative

LLC offers. *Id.* at 1180. The Tenth Circuit thus concluded that “there are no less intrusive means of providing equal access to those types of services.” *Id.*

The Tenth Circuit’s reasoning breaks new ground and does so in a way that lacks any limiting principle. *Every* creative professional, by definition, has a unique combination of skill, experience, aesthetic judgment, technique, and artistry that cannot be exactly duplicated by any other person offering comparable goods or services. Under the Tenth Circuit’s reasoning, then, every creative professional would be subject to public-accommodation non-discrimination laws like Colorado’s, regardless of the person’s decent and honorable artistic, cultural, religious, personal, or philosophical beliefs.

Consider the effect on the creative *amici* and others like them. Ms. Rizvi, for example, gladly photographs weddings of all sorts—gay or straight, Asian or western, traditional or contemporary—but she specializes in luxury South Asian weddings. If she were to receive more booking requests than she could accommodate, she would (under the Tenth Circuit’s reasoning) be *forbidden by law* from accepting the commission to shoot the South Asian weddings while respectfully declining the request to shoot an Anglo-American couple’s ceremony celebrating the Roman Catholic Sacrament of Holy Matrimony.

In addition, the Tenth Circuit would force Ms. McNeil to bake the cake with the inscription she found demeaning to the LGBTQ community, but which purportedly reflected the prospective customer’s creed. If she declined to design and bake that cake,

she could be hauled into court, again, and punished for her violation of public-accommodations laws.

Or what of Mr. Brock, who gladly serves customers of any race, color, national origin, ethnicity, or sexual orientation, but who respectfully declines to ink tattoos depicting deities or objects of veneration of other religions? If he were to decline a booking from a prospective customer wishing for such a tattoo, Mr. Brock would, according to the Tenth Circuit, be in violation of public-accommodations laws that prohibit discrimination on the basis of religion.

Ms. Mullarkey, one supposes, might have gotten the ring with the inscription she wanted from the Jewish Scriptures if the Tenth Circuit had a say in the matter. But perhaps instead the jeweler would have already closed his shop to pursue a different vocation in which the State did not seek to control his message.

The same story could, and would, be repeated a thousand times over if the Tenth Circuit's reasoning were to stand and, eventually, be adopted in other jurisdictions. Colorado's public-accommodations law and the Tenth Circuit's reasoning arise from an admirable and well-intentioned aim. Their effect, however, on creative professionals and individuals like *amici* would permit the State to compel speech in a way and to an extent not previously countenanced by this Court's precedent.

CONCLUSION

For the foregoing reasons, this Court should make clear in its opinion—regardless of which party prevails in this specific appeal—that creative professionals who create commissioned works are engaged in *expressive* activity and are entitled to the same treatment under the First Amendment that is afforded to other types of expressive speech and activities.

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