

No. 21-476

In the Supreme Court of the United States

303 CREATIVE LLC, ET AL., *Petitioners*

v.

AUBREY ELENIS, ET AL.

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

**BRIEF OF *AMICI CURIAE* COUNCIL FOR
CHRISTIAN COLLEGES AND UNIVERSITIES,
THE ASSOCIATION FOR BIBLICAL HIGHER
EDUCATION, AND SEVERAL INDIVIDUAL
RELIGIOUS COLLEGES AND UNIVERSITIES
SUPPORTING PETITIONERS**

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QUESTION PRESENTED

Whether applying a public-accommodation law to compel an artist (or any individual or institution of faith) to speak or stay silent violates the free speech clause of the First Amendment.

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INTRODUCTION AND INTERESTS OF *AMICI*¹

The decision below and arguments advanced by Respondents pose a heightened risk to religious schools which, like Petitioners, offer expressive services guided by religious beliefs. This Court has recognized, for example, that religious schools are “entrusted with the responsibility of instructing their students in the faith.” *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2055 (2020). Indeed, “religious education and formation of students is the very reason for the[ir] existence.” *Ibid.* That mission will not succeed if the government can force religious colleges to “affirm in one breath that which they deny in the next.” *Pacific Gas & Elec. Co. v. Pub. Utilities Comm’n of Cal.*, 475 U.S. 1, 16 (1986) (plurality op.). Yet the decision below, if not reversed, would allow just that.

Forcing religious schools to alter their religious messages to avoid violating anti-discrimination laws would doom American religious higher education. In a typical religious college, all courses and other activities—including those rooted in other academic disciplines—are infused with faith. Thus, while religious schools teach with traditional academic rigor, they do so guided by their beliefs. That is the distinctive promise a typical religious college makes to students and their families: all instruction and other campus activities will be shaped by the school’s theological understandings. Faith, then, is the oxygen that animates all aspects of campus life.

¹ No one other than *amici*, their members and counsel authored any part of this brief or made a monetary contribution to fund it. Counsel for the parties have consented to its filing.

For that reason, deciding what to say and how to say it is central to the mission of religious colleges. Indeed, it is on that understanding that this Court in *Our Lady* upheld the right of religious organizations to complete autonomy over decisions of employment for those tasked with “educating young people in their faith, inculcating its teachings, and training them to live their faith.” 140 S. Ct. at 2064.

To be sure, the decision below does not undermine *Our Lady*; religious schools remain able to pick the employees who spread the faith. But if affirmed, the decision below would allow governments, on pain of liability under public-accommodation laws, to force religious schools and other expressive organizations to either stay silent or to speak contrary to their views—including on such sensitive matters as their religious codes of conduct. Such a coercive choice is a “plain” burden on expressive activity. See *Fulton v. City of Phila.*, 141 S. Ct. 1868, 1876 (2021). And it violates this Court’s long-settled doctrine that the First Amendment forbids a state from requiring expressive groups to “impart[] a message [they] do not wish to convey.” *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 559 (1995).

This case is thus enormously important to *Amicus* Council for Christian Colleges and Universities (CCCU), which represents hundreds of religious colleges across the United States, and *Amicus* the Association for Biblical Higher Education, which comprises a network of more than 150 institutions of biblical higher education. *Amici* also include several individual religious colleges and universities, which are listed in the appendix to this brief. *Amici* provide faith-infused, high-quality education based on a religious belief that, through such efforts, their students will be

better prepared to live their faith in all aspects of life. *Amici* cannot achieve those sacred missions if the government can force them to undermine or even change their messages.

STATEMENT

Lorie Smith, a graphic artist and website designer, runs 303 Creative. Pet. App. 181a. There, she focuses on creating custom websites for the causes and events she's most passionate about. Pet. App. 185a. Smith works with anyone, but, like most creative designers, she can't custom design every website or graphic requested. Pet. 39. Smith decided to expand her design portfolio and custom create websites and graphic art to include weddings. Pet. App. 186a. But she wanted to explain on her website that she can only design custom websites consistent with her faith, which recognizes only traditional marriages between one man and one woman. Pet. App. 187a-188a. Smith, however, quickly learned that Colorado law would force her to design and publish websites celebrating same-sex weddings. Pet. App. 189a.

Accordingly, Smith challenged the law's application to her, bringing—as relevant here—a free-speech claim. The parties stipulated that Smith does not discriminate based on sexual orientation and that her wedding websites are expressive and convey celebratory messages about marriage. Pet. App. 184a. But the court ruled against Smith, holding that the part of the law prohibiting her from publishing a personal statement about her faith survived First Amendment scrutiny. Pet. App. 113a.

On appeal, the 10th Circuit recognized (1) that Smith's websites were “pure speech” and (2) that Colorado law compelled her speech. Pet. App. 20a, 23a-

24a. It still held that Colorado could compel and restrict Smith’s speech because Smith’s services were unique. Pet. App. 20a, 23a. The Court held that, because Smith creates “unique” expression that no one else could replicate, Colorado could force Smith to create websites that violate her faith. Pet. App. 28a.

SUMMARY OF ARGUMENT

I. *Amici* agree with Petitioners that the Tenth Circuit’s strict-scrutiny analysis suffers from significant flaws and that, as applied to the creation of expression like a website or religion-based policies for a religious school, anti-discrimination laws are unconstitutional. Pet. Br. 35-50.

Petitioners’ response to an alternative argument made by Respondents in the Tenth Circuit is also correct. According to Respondents’ argument, in this and similar cases the government merely seeks to govern the “conduct” of accepting or rejecting business; any impact on a business that provides expressive services is thus merely incidental to the conduct of choosing a customer, and for that reason is not subject to strict First Amendment scrutiny. The Tenth Circuit was right to reject that argument when it held that the “creation of wedding websites is pure speech.” Pet. App. 20a. After all, creating a website, “whether through words, pictures, or other media,” “implicates” the “unique creative talents” of the creator “and is thus inherently expressive.” *Id.* at 21a.

To protect such speech, this Court should reiterate that, when services are inherently expressive, like creating a website or developing religion-based policies for a religious school, compelled speech cannot merely be incidental to the conduct of doing business. See, *e.g.*, *National Inst. of Fam. & Life Advoc. v. Becerra*, 138

S. Ct. 2361, 2372 (2018) (*NIFLA*). When the government compels a person to create speech—even when they oppose that speech—or forbids them from spreading a message they want to spread, those government actions run directly into the First Amendment and are subject to strict scrutiny.

That conclusion flows directly from this Court’s decisions. The Court has repeatedly explained that, when an activity is either “speech” or “inherently expressive,” government regulations that alter the message relayed by that speech or expressive conduct is unconstitutional. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557 (1995); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994); *Pacific Gas & Elec. Co. v. Public Utilities Comm’n of Cal.*, 475 U.S. 1 (1986); *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241 (1974). It is that principle—not the holding of *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 64 (2006)—that governs this case, and requires reversal.

II. The decision below—and others like it around the country—represents a serious, even existential threat to religious higher education. For if the First Amendment allows a government to coerce Smith to speak in ways contrary to her religious beliefs, or to forbid her from expressing those beliefs, it is a small step to concluding that religious colleges have no defense under the Free Speech Clause when the government coerces them to speak contrary to *their* beliefs or teachings. And if religious colleges could no longer speak and act in harmony with their religious missions—including on such sensitive matters as religious codes of conduct—they would quickly lose the trust and support of students, parents, faculty, and donors.

The resulting weakening of religious higher education would be an enormous loss to the Nation. As Congress has recognized, religious colleges provide unique social benefits. Beyond academic excellence, these institutions offer opportunities to learn in an atmosphere of greater philosophical and political diversity than that offered in many secular institutions, to enjoy greater physical and emotional safety, and to more fully integrate community service into their educations. See, *e.g.*, 154 Cong. Rec. H7658-03 (2008) (community service); 20 U.S.C. §1011a(a)(2) (diversity). Accordingly, the mere existence of religious colleges and universities enhances student choice by adding valuable diversity to higher education.

Unfortunately, the decision below, if affirmed, would serve as a license for governments to coerce both individuals *and* institutions of faith to speak contrary to, or refrain from expressing, their fundamental beliefs on a range of issues. The Court should reverse the decision below and disavow the Tenth Circuit's misguided First Amendment analysis.

ARGUMENT

I. *Hurley*, Not *Rumsfeld*, Governs Laws That Burden Or Compel The Creation Of Expressive Content.

In the Tenth Circuit, Respondents argued that this Court's decision in *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006), "provides the relevant analysis." CA10 Appellee. Br. 44. The Colorado Anti-Discrimination Act, they argued, does no more than "require[] businesses that willingly offer particular goods and services for sale to the public to make those goods and services available to all customers regardless of protected class status." *Id.* at 46-47.

But that is wrong: *Rumsfeld* does not control here, *Hurley* does. And any finding that *Rumsfeld* provides the relevant analysis would expand that decision well beyond its proper bounds. Such an expansion would also come at a steep price: it would require this Court to narrow its compelled-speech decisions, which have historically applied to the government’s attempts to force citizens to express a message with which they disagree. Those cases, including *Hurley*, should govern here and anywhere else a government seeks to coerce the adoption of an ideological message.

A. *Rumsfeld* applies only to regulated conduct that is not inherently expressive.

Rumsfeld does not govern the resolution of this case because it involved a statute that was applied to a school’s non-expressive conduct.

1. *Rumsfeld* is part of a long line of cases concluding that the government’s ability to regulate “symbolic speech” is limited, 547 U.S. at 65 (quoting *United States v. O’Brien*, 391 U.S. 367, 376 (1968)), because in that setting the First Amendment’s free-speech protections extend “only to conduct that is inherently expressive.” *Id.* at 66. On that limited understanding of when conduct—not speech—could receive protection under the Free Speech Clause, this Court upheld the Solomon Amendment, a law that “denies federal funding” to any school that “prevents the military from gaining access to campuses” or students on campuses “for purposes of military recruiting.” *Id.* at 55 (cleaned up). And the Court did so despite a group of law schools claiming that the Solomon Amendment forced them to host military recruiters even though they “object to the policy Congress ha[d] adopted with respect to homosexuals in the military.” *Id.* at 52.

The *Rumsfeld* Court rejected the law schools' invocation of this Court's "compelled-speech" decisions. It explained that those cases were not implicated because they dealt with issues where the "complaining speaker's own message was affected by the speech it was forced to accommodate." *Id.* at 63. The Court reasoned that "schools are not speaking when they host interviews and recruiting receptions" and therefore "accommodation of a military recruiter's message is not compelled speech because the accommodation does not sufficiently interfere with any message of the school." *Id.* at 64.

The law schools also claimed that the decision to refuse military recruiters was inherently expressive because it showed their opposition of the military's then-extant "Don't Ask, Don't Tell" policy. This Court, however, rejected that argument. It explained that, to the extent the schools' refusal to host sent any message, the message was "only" discernable "because the law schools accompanied their conduct with speech explaining it." *Rumsfeld*, 547 U.S. at 66. Anyone who saw the recruiters interviewing on the main campus would thus, without more, have "no way of knowing" why they were interviewing there instead of at the law schools. *Ibid.*

Because more speech was necessary before the law schools' reasons for banning military recruitment could be understood, the Court held that the refusal was not "inherently expressive." *Id.* at 64. The Court explained that "combining speech and conduct" was not "enough to create expressive conduct"—if it were, "a regulated party could always transform conduct into 'speech' simply by talking about it." *Id.* at 66.

Rumsfeld thus stands for two main propositions. *First*, the Court’s compelled-speech cases apply only when the government, by compelling or forbidding speech, would alter a person’s chosen message. *Second*, the Free Speech Clause shields against government regulation of conduct only where the conduct is “inherently expressive,” i.e., where the conduct by itself sends a message that, without more, is discernable to the listener.

B. *Hurley* governs when a service being provided creates speech.

Rumsfeld thus does not apply to the regulation of speech itself or to inherently expressive conduct, and it did not change this Court’s decisions forbidding compelled speech. Whether the government is compelling speech itself or just expressive conduct, the case that governs is *Hurley*.

In *Hurley*, this Court unanimously reversed the Supreme Judicial Court of Massachusetts’s holding that a public-accommodation law could require the organizers of a private parade to allow a gay-pride group to participate in the parade. 515 U.S. at 564. The Court explained that the parade was “the presentation of an edited compilation of speech generated by other persons” that expressed a message and thus fell “squarely within the core of First Amendment security.” *Id.* at 570. The Court then rejected the application of Massachusetts’s public-accommodations statute because “the expressive character of both the parade and the marching [gay-rights] contingent” made it “apparent that the state courts’ application of the statute had the effect of declaring the sponsors’ speech itself to be the public accommodation.” *Id.* at 573.

Because both the parade and the gay-rights group were seeking to express messages, the Court observed that allowing the state to mandate inclusion of the gay-rights group would “violate[] the [First Amendment’s] fundamental rule,” namely “that a speaker has the autonomy to choose the content of his own message.” *Id.* at 573. Further, because the parade was expressive, the parade sponsors’ decision to “exclude a message it did not like from the communication it chose to make” was “enough to invoke its right as a private speaker to shape its expression by speaking on one subject while remaining silent on another”—a choice “presumed to lie beyond the government’s power to control.” *Id.* at 574-575.

Hurley thus stands for a different proposition than *Rumsfeld*: The government cannot compel a person or group to change their message or to adopt a message they do not want to adopt by coercing speech or expressive conduct. At a minimum, any such compulsion is subject to the demands of strict scrutiny. See, e.g., *Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm’n*, 138 S. Ct. 1719, 1745-1746 (2018) (Thomas, J., concurring in part and concurring in the judgment).

C. Forcing others to express a message contrary to their mission violates *Hurley*.

Turning back to Respondents’ arguments in the Tenth Circuit, there is ample reason why this case is more *Hurley* than *Rumsfeld*.

1. Applying Colorado’s Anti-Discrimination Act here to require Smith to create a website affirming same-sex marriages would do far more than giving Smith’s would-be customers a platform to spread their own message. In *Rumsfeld*, the Court observed that merely hosting military recruiters was not enough to

change the law schools' message. 547 U.S. at 64. The Court explained that the presence of those recruiters did not, by itself, say anything about the law school's rejection of the military's "Don't Ask, Don't Tell" policy. *Id.* at 65.

It is different here. Even the Tenth Circuit recognized that the "creation of wedding websites is pure speech." Pet. App. 20a. After all, creating a website, "whether through words, pictures, or other media," "implicates" the "unique creative talents" of the creator "and is thus inherently expressive." *Id.* at 21a.

Moreover, as Smith engaged in that design, she would be forced to type celebratory messages about a union that she believes sinful. Much less egregious instances of compelled speech, such as merely being required to drive with a license plate containing a state message, ring the Free Speech Clause's alarm. See, e.g., *Wooley v. Maynard*, 430 U.S. 705, 714-715 (1977). Here, Smith would not just be uploading a message or serving as the state's billboard—she would be affirmatively creating the message through her own "unique creative talents." Pet. App. 21a.

2. *Rumsfeld* also fails to shield the Commission from constitutional scrutiny for forbidding from posting a message about her faith on her website as an explanation for why she would not design some websites. The Solomon Act at issue in *Rumsfeld* did not limit what the law schools could say about military recruiters while they were there. The case might well have come out the other way if the Solomon Act not only required the law schools to provide a place for recruiters, but also forbade the law schools from speaking out against the military's policy.

Yet that is what applying the Anti-Discrimination Act here would do. Not only would it force Smith to create speech, it would also prevent her from explaining why her conscience forbade her to comply. To state that limitation is to explain why it offends the First Amendment. As this Court has recognized, “[a]t the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence.” *Turner Broad. Sys.*, 512 U.S. at 641.

3. That the Anti-Discrimination Act can prevent a person who offers expressive services to the public from providing such an explanation or force her to spread a message with which she disagrees, thus shows why applying *Rumsfeld* in this setting would be so problematic. When services offered are inherently expressive, any resulting compelled speech cannot be considered incidental.

For that reason, in *NIFLA*, this Court, despite recognizing that “[t]he First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech,” *NIFLA*, 138 S. Ct. at 2373, nevertheless held that California’s FACT Act, which required pro-life pregnancy centers to inform women in their care about how to obtain an abortion, violated the First Amendment, *id.* at 2378.

There, as here, the service offered, though commercial, was expressive. The *NIFLA* court explained that, because the pro-life centers exist to “discourage and prevent women from seeking abortions,” the California law that required them to “disseminate a government-drafted notice” about the availability of “immediate

free or low-cost access” to, among other things, “abortion for eligible women,” *id.* at 2369, violated the First Amendment. The Court would not allow the State to “alter[] the content” of pregnancy centers’ speech by requiring them to tell women “how they can obtain state-subsidized abortions—at the same time [they] try to dissuade women from choosing that option,” *id.* at 2371.

The same is true here. A law limiting the speech Smith may disseminate or compelling her to create speech with which she disagrees is doing far more than incidentally burdening her speech. It is altering it. That is another reason why this Court’s compelled-speech cases, including *Hurley*, govern.

4. Once this Court concludes, as it should, that *Hurley*, not *Rumsfeld*, provides the proper framework for answering the question presented, the proper resolution of this case is plain.

For decades, the Court has held that the First Amendment protects “both the right to speak freely and the right to refrain from speaking at all.” *Wooley*, 430 U.S. at 714. Included in that right is the recognition that the “government may not prohibit the dissemination of ideas that it disfavors, nor compel the endorsement of ideas that it approves.” *Knox v. Service Emps. Int’l Union, Loc. 1000*, 567 U.S. 298, 309 (2012).

These principles, the Court has explained, ensure that the First Amendment’s protections are not rendered “empty” by allowing the government to force speakers to “affirm in one breath that which they deny in the next.” *Pacific Gas & Elec.*, 475 U.S. at 16 (plurality op.). That principle applies to companies. *Ibid.* (“It is therefore incorrect to say * * * that our decisions do not limit the government’s authority to compel

speech by corporations.”). But it also applies to “ordinary people engaged in unsophisticated expression.” *Hurley*, 515 U.S. at 574. By extension, it should apply equally to expressive groups, including artists like Smith, who want to benefit from their artistic expression, and to religious colleges, whose entire “reason for the[ir] existence” is providing “religious education and formation of students.” *Our Lady*, 140 S. Ct. at 2055.

5. Respondents were also wrong, in opposing certiorari, to suggest that this Court’s speechwriter hypothetical in *Janus Capital Group, Inc. v. First Derivative Traders*, 564 U.S. 135, 143 (2011), provided a “useful analogy.” Br. in Opp’n 29. Even if the content of a speech is usually attributable not to the speechwriter but to the “person who delivers” the speech, under this Court’s precedents, the government would still be forbidden from *requiring* the speechmaker to draft the speech. *Janus Cap. Grp.*, 564 U.S. at 143. This Court has explained that the decision to push “the speech of third parties” is itself a “communicative act[.]” *Arkansas Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 674 (1998).

This Court’s precedents also make clear that the First Amendment forbids compelled speech even where the person or group forced to speak is only spreading the speech of another. In *Miami Herald*, for example, the Court invalidated a statute creating a “right” for a person criticized in the press “to reply to [that] criticism.” *Miami Herald Publ’g*, 418 U.S. at 247. The Court explained that the First Amendment brooked no exception that would allow the government to intrude on what is a newspaper’s “exercise of editorial control and judgment.” *Id.* at 258. The *Miami Herald* court thus made clear that it did not matter that

any response to media criticism would be expressly attributed to the author, rather than the paper. *Ibid.* The First Amendment still forbade the compulsion of speech, as the “presentation of an edited compilation of speech generated by other persons” also falls “squarely within the core of First Amendment security.” *Hurley*, 515 U.S. at 570; accord, *Rumsfeld*, 547 U.S. at 63 (“We have also in a number of instances limited the government’s ability to force one speaker to host or accommodate another speaker’s message.”).

Together, these cases “establish that a private entity’s decisions about whether, to what extent, and in what manner to disseminate third-party-created content to the public are editorial judgments protected by the First Amendment.” *NetChoice, LLC v. Attorney Gen.*, __ F.4th __, 2022 WL 1613291, at *9 (11th Cir. May 23, 2022) (Newsom, J.). So even if it were true that the message a customer wants to spread through a website or otherwise is her own message, the government still cannot compel speech. The right to be free from compelled speech applies even if the speaker did not “generate, as an original matter, each item featured in the communication.” *Hurley*, 515 U.S. at 570.

The same is true here. Even if the message a customer wants to spread through a website is the customer’s alone, the First Amendment still does not allow the government to force anyone—be they artists or schools—to further a message they “do not wish to convey.” *Id.* at 559. So understood, either (1) forbidding Smith from conveying her religious beliefs because they implicate Colorado’s Anti-Discrimination Act or (2) requiring her, under the Act, to create a website that conveys a message with which she disagrees “necessarily alters the content of [her] speech.” *Riley v. National Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781,

795 (1988). It is as clear a violation of the First Amendment as they come. See *Wooley*, 430 U.S. at 714.

II. Religious Schools, Which Benefit Society In Countless Ways, Would Suffer Serious Harm If This Court Determined That *Rumsfeld* Controls Here.

Proper resolution of the issue presented here is also necessary to protect American religious education, including religious higher education. Hundreds of religious colleges and universities, representing the beliefs of various religions and sects, call this country home.² Largely because of their religious character, these institutions serve important societal purposes. If Respondents are correct that expressive activities that businesses or other organizations undertake is merely the *conduct* of “accepting or rejecting business”—meaning that *Rumsfeld* applies—it would unfairly burden the ability of religious colleges and universities to act consistently with their religious missions.

A. Religious colleges and universities bring unique benefits—including much-needed diversity—to American higher education.

Beyond academic excellence competitive with secular schools, religious colleges and universities offer students advantages that often are not as readily available in secular institutions. These include not only the opportunity to study academic disciplines through the standpoint of faith, but also the opportunity to naturally integrate community service into

² See *Colleges And Universities With Religious Affiliations*, Encyclopedia.com (last visited June 2, 2022), <https://tinyurl.com/zvwjcsnj> (recognizing “nearly 1,000 colleges and universities with religious affiliation”).

higher education; to experience greater physical safety; and to learn in an environment with broader diversity of philosophical and political perspectives among professors and students than secular institutions.

1. As noted earlier, the promise a religious college or university makes to students and their families is the opportunity to study academic disciplines of interest to the student through the lens of faith. For Christian colleges, for example, faith, learning, life and work all come under “the Lordship of Jesus Christ,” as famously discussed by statesman, journalist and theologian Abraham Kuyper.³ Religious colleges from other faith traditions also strive for a similar integration of faith and learning.⁴ And for religious students and families, that integration is immensely valuable.

2. Religious colleges and universities offer other benefits as well.

Congress recognized one such benefit in the Higher Education Opportunity Act of 2008—helping students integrate community service into their educational pursuits. Pub. L. 110-315, 122 Stat. 3078. That is one reason why, among other things, that Act requires accrediting bodies to “respect[] the * * * religious missions” of such institutions. 154 Cong. Rec. H7668 (2008). Noting that “[t]he time to recognize and encourage an increased commitment to public service is now,” the House Report on this Act specifically men-

³ *Abraham Kuyper: A Centennial Reader* 488 (James D. Bratt ed., 1998).

⁴ *About*, Yeshiva Univ., <https://tinyurl.com/f333jjmw> (last visited May 31, 2022).

tioned, as a reason for congressional protection, the increasing number of students at religious colleges who serve religious missions or perform other kinds of service. 154 Cong. Rec. H7661 (2008). These observations reflect that community service is one important way in which those colleges contribute to society.

Religious colleges foster community service intentionally. Students and professors in these institutions are typically encouraged by their foundational religious texts, traditions, and teachings to take care of the foreigner, the poor, and the needy.⁵ And they are consequently more likely to embrace the challenging principle that the value of one's life is measured not by what one achieves in a secular occupation, but by how well one serves others.⁶

Thus, for instance, a sociology major in a Jewish college might find inspiration in the Book of Exodus to study and address the plight of refugees from war-torn lands.⁷ Or the Qur'an might lead a student in a Mus-

⁵ See, e.g., *Deuteronomy* 10:18-19 ("Love the sojourner, therefore, for you were sojourners in the land of Egypt."); *Matthew* 25:40 (King James) ("Inasmuch as ye have done it unto one of the least of these my brethren, ye have done it unto me."); *The Qur'an* 16:90 (Sahih International) ("Allah orders justice and good conduct and giving to relatives and forbids immorality and bad conduct and oppression."); *Mosiah* 2:17 (from the Book of Mormon) ("[W]hen ye are in the service of your fellow beings ye are only in the service of your God.").

⁶ See, e.g., *Luke* 12:15 (ESV) ("[O]ne's life does not consist in the abundance of his possessions.").

⁷ See, e.g., *Exodus* 22:20, Chabad.org, <https://tinyurl.com/ChabadExodus> ("And you shall not mistreat a stranger, nor shall you oppress him, for you were strangers in the land of Egypt.").

lim school to investigate the factors influencing immigration, then look for opportunities to serve local immigrants.⁸ Or a student at a Catholic law school might be moved by the New Testament to provide *pro bono* assistance to unwed mothers or foster children.⁹

Indeed, studies show that more students at religious colleges devote time in community service than students at secular colleges, public or private. At schools that belong to *Amicus* CCCU, for example, 35.2 percent of students participate in community service compared to only 25.7 percent of college students generally.¹⁰

Students at such colleges also often pause their formal educations for domestic or overseas public service.¹¹ This too is by design: Institutional policies and accommodations provide deferment options to encourage such service without detrimentally affecting the

⁸ See, e.g., *The Qur'an* 17:26 (“Give * * * to the needy and the wayfarer.”).

⁹ See, e.g., *Matthew* 25:35-40; *James* 1:27.

¹⁰ CCCU, *The Case for Christian Higher Education 2* (2020), <https://tinyurl.com/39sjcb4a>; see also Elizabeth Weiss Ozorak, *Love of God and Neighbor: Religion and Volunteer Service among College Students*, 44 *Rev. Religious Rsch.* 285, 289-291 (2003) (religious college students were far more likely to engage in volunteer activity).

¹¹ Stephen Thomas Beers, *Faith Development of Christian College Students Engaged in a One-Month Study Abroad Mission Trip* (1999) (Ph.D. dissertation, Ball State Univ.); see Kathryn A. Tuttle, *The Effects of Short-term Mission Experienced on College Students' Spiritual Growth and Maturity*, 4 *Christian Educ. J.* 123 (2000); Tad Walch, *BYU sees dramatic jump in number of returned missionaries*, *Deseret News* (Apr. 4, 2016, 11:40 AM), <https://tinyurl.com/yc356x6c>.

student's education.¹² It is also common for students who don't serve traditional (evangelizing) missions to serve as humanitarian volunteers in foreign countries while studying abroad.¹³ All such humanitarian work not only benefits the religious groups of which the students are a part, but also reduces cultural divides between nations and religions. Students and the world community benefit from these ongoing humanitarian activities.

Often, the schools themselves provide key services to the less fortunate to help better their communities. Multiple religious schools, including several schools belonging to *Amicus* CCCU—Campbell University, Indiana Wesleyan University, and Southern Wesleyan University,¹⁴ are now participating in a program administered by the Department of Education that serves to “help incarcerated individuals access educational programs * * * to support reentry, empower formerly incarcerated persons, enhance public safety,

¹² See *Center for Outreach & Mission Service*, La Sierra Univ., <https://tinyurl.com/2p8wnhmc> (last visited May 31, 2022); *Center for Faith Engagements, Missions*, Andrews Univ., <https://tinyurl.com/2nwdyac9> (last visited May 31, 2022); Enrollment Services, *Missionaries*, Brigham Young Univ., <https://tinyurl.com/5d6597bs> (last visited May 31, 2022).

¹³ See R. Michael Paige et al., *Study Abroad for Global Engagement: The Long Term Impact of Mobility Experiences*, 20 *Intercultural Educ.* S29 (2009); *The Gap Year Experience: A Life-Changing Opportunity*, Princeton Rev., <https://tinyurl.com/365fk53s> (last visited May 31, 2022).

¹⁴ Experimental Sites Initiative, *New Institutions Invited to Participate in the Second Chance Pell (SCP) experiment*, Dep't of Educ. (Apr. 26, 2022), <https://tinyurl.com/ymf8xkuj>.

and strengthen our communities and our economy.”¹⁵ Many other religious colleges have participated in the program.¹⁶

3. Religious colleges and universities also provide increased physical safety for learning and academic inquiry. For instance, in a 2016 study of campus safety, Regent University, Summit University and Brigham Young University—all private, religious institutions—were named the safest in the nation.¹⁷ Indeed, in that study of the top twenty-five safest universities, eighteen (or 72 percent) were religious.¹⁸ Such trends continue even today.¹⁹ Indeed, religious colleges consistently report much lower rates of sexual assault than secular schools.²⁰

¹⁵ U.S. Department of Education Announces Expansion of Second Chance Pell Experiment and Actions to Help Incarcerated Individuals Resume Educational Journeys and Reduce Recidivism, U.S. Dep’t of Educ. (Apr. 26, 2022), <https://tinyurl.com/3se7ccph>.

¹⁶ Experimental Sites Initiative, *New Institutions Invited to Participate in the Second Chance Pell (SCP) experiment*, Dep’t of Educ. (Apr. 24, 2020), <https://tinyurl.com/25datmsk> (Calvin University, Eastern University, and University of the Southwest); *Institutions selected for participation in the Second Chance Pell experiment in the 2016-2017 award year*, U.S. Dep’t of Educ. (July 8, 2016), <https://tinyurl.com/nzt59kvb> (North Park University and Nyack University).

¹⁷ Tanza Loudonback, *The 25 safest college campuses in America*, Bus. Insider (Jan. 12, 2016), <https://tinyurl.com/5fwnmsvb>.

¹⁸ *Ibid.*

¹⁹ See also *2022 Safest College Campuses in America*, Niche, <https://tinyurl.com/5n8wuex4> (last visited May 31, 2022).

²⁰ *E.g.*, James R. Vanderwoerd & Albert Cheng, *Sexual Violence on Religious Campuses*, 47 Canadian J. of Higher Ed. 1, 9

Accordingly, for students and parents concerned about physical safety, religious colleges and universities are an attractive option.²¹ And the mere existence of such options in the higher education market helps ensure that other institutions place greater emphasis on student safety.

4. Religious colleges also contribute substantially to the diversity of American higher education. In most religious traditions, the call to faith is a challenge to think and live differently from the rest of society. From the Islamic command to “[b]e in the world as if you were a stranger or traveler” to Jesus’s command that his disciples be “a light to the world,”²² people of faith are encouraged to transcend the cultures in

(2017) (multiple studies of secular schools showed “average incidence of unwanted sexual contact at higher rates” than a study of the same topic at religious schools).

²¹ Indeed, though there are few American colleges in the Islamic faith tradition, Muslim students are increasingly flocking to universities run by other faiths. See, e.g., Richard Pérez-Peña, *Muslims From Abroad Are Thriving in Catholic Colleges*, N.Y. Times (Sept. 2, 2012), <https://tinyurl.com/mrycnyn4>.

²² See also *Sahih al-Bukhari* 6416, Sunnah.com, <https://tinyurl.com/3ay964y4> (last visited May 31, 2022) (“Be in this world as if you were a stranger or a traveler.”); Avi Lazerson, *Holiness and Judaism*, Jewish Mag. (Jan. 2001), <https://tinyurl.com/2p8nb3ph> (last visited May 31, 2022) (directing Jews to “liv[e] in this world, marrying, procreating, working and at the same time not to be affected by the daily worldly occurrences”); *Matthew* 5:14-15 (Christians are to be a “light” to the world); David Peterson, *Worship and Ethics in Romans 12*, 44 Tyndale Bull. 271, 282 (1993), <https://tinyurl.com/2eejmtj7> (directing Christians to “yield to the power of God and his norms, rather than to the influence of this age and its norms”); Chris Wright, *What Difference Does Religion Make?* 14 (2002) (instructing Buddhists that the “way to end unhappiness and suffering is to stop clinging to things [of the world]”).

which they live. Throughout the Nation's history, this effort to live differently has compelled numerous religious schools to serve their communities by, for example, leading the fight against slavery.²³ Thus, it should come as no surprise that educational institutions founded and run by religious groups offer perspectives and emphases that differ, sometimes dramatically, from those offered by other educational institutions.

Indeed, the most comprehensive study addressing the political leanings of university faculties to date confirms that religious colleges and universities have value in part because they attract professors and students from across the political spectrum. The study found that, at non-religious, public universities, 65.7 percent of faculty across disciplines self-identify as either "liberal" or "far left," while only 7.8 percent identify as "conservative" or "far right."²⁴ By contrast in religious colleges (excluding Catholic institutions),²⁵ only 42.6 percent identify as "liberal" or "far left" while 25.9 percent of professors identify as "conservative" or

²³*The Story of Yale Abolitionists*, Yale, Slavery & Abolition (last visited May 31, 2022), <https://tinyurl.com/4r5mjx4w>; see also Bertram Wyatt-Brown, *American Abolitionism and Religion*, Divining Am., Nat'l Humanities Ctr., <https://tinyurl.com/2azj8vpe> (last visited May 31, 2022) (religious involvement in the fight against slavery).

²⁴ Ellen B. Stolzenberg et al., *Undergraduate Teaching Faculty: The HERI Faculty Survey, 2016-2017*, at 38, Higher Educ. Rsch. Inst. at UCLA (2019), <https://tinyurl.com/428n8t93>.

²⁵ The study does not explicitly provide a category for non-Catholic religious *universities*. *Ibid. Amici* have no reason to believe that the ideologies of professors at non-Catholic religious *universities* differ in any meaningful respect from those at non-Catholic religious *colleges*.

“far right”²⁶—nearly four times the percentage of faculty at non-religious institutions.

As a result, religious colleges are more likely than others to provide students extensive exposure to divergent political views. And that includes not only the more “conservative” views that, for whatever reason, are largely missing in many secular institutions, but also more progressive views, leavened by religious perspectives.²⁷

The diversity that religious colleges add has long been understood and valued by Congress. As it said in the Higher Education Opportunity Act, “[i]t is the sense of Congress that * * * the diversity of institutions and educational missions is one of the key strengths of American higher education.” 20 U.S.C. §1011a(a)(2). Consistent with that view, the provision further urged that “individual institutions of higher education have different missions and each institution should design its academic program in accordance with its educational goals.” *Id.*

In short, Congress has recognized that viewpoint diversity *among* educational institutions is valuable in higher education. And, as explained below, each of these unique benefits of religious higher education

²⁶ *Id.* at 38. Professors in Catholic colleges more closely align with national ideological averages, with 57.5 percent identifying as “liberal” or “far left” and 13.5 percent identifying as “conservative” or “far right.” *Ibid.*

²⁷ CCCU, *The Case for Christian Higher Education* 12 (2018), <https://tinyurl.com/4yw2spb5> (67 percent of CCCU students report that their courses “often” or “very often” provide “diverse perspectives (political, religious, racial/ethnic, gender, etc.)” compared to a national average of only 56 percent).

would be imperiled by the Tenth Circuit’s absurd finding that the government can, to combat discrimination, compel either the creation of speech or forbid messages that it finds unorthodox. And the harm imposed by that holding would only be heightened if the Court agrees with Respondents that forcing the creation of a website is really just conduct properly analyzed under *Rumsfeld*.

B. Applying antidiscrimination laws to expressive services would allow the government to impede the ability of religious schools to further their religious missions.

Not only do the unique policies and practices of religious colleges constitute the exercise of religion, but they are also often a form of speech. Here again, the decision below and similar decisions elsewhere undermine the protection of those practices the First Amendment’s Free Speech Clause demands.

1. Religious colleges take seriously their pedagogical obligation not just to convey knowledge, but to equip adults to fulfill their callings as members of their religious traditions. Fulfilling that obligation requires *telling* students, before they apply and after they arrive, what is expected of them in their academic and personal lives. And that is why most religious colleges have written faith-forming policies (or conduct codes) to better help them live faithfully within their religious communities.²⁸ These policies are as important

²⁸ *E.g.*, *Human Sexuality*, Azusa Pac. Univ. (last accessed May 31, 2022), <https://tinyurl.com/yfnptj46> (“We hold that the full behavioral expression of sexuality is to take place within the context of a marriage covenant between a man and a woman and that individuals remain celibate outside of the bond of marriage.”); *Statement on Human Sexuality*, Baylor Univ. (last updated Oct.

to faith-integrated institutions as classes and extra-curriculars.

All such policies necessarily implicate free-speech considerations. Thus, even if a court were to disagree that college policies amount to religious *exercise*, it should still treat them as speech, because of their expressive quality. Indeed, if anything, religious speech is protected twice over, first because it is expressive, and second because it is religious.

In short, to prohibit a religious college from expressing its moral views by making internal policies is, quite simply, to forbid speech. What’s more, to coerce a college into maintaining different policies more congenial to the government is akin to compelling speech. See, e.g., *Agency for Int’l Dev. v. Alliance for Open Soc’y Int’l, Inc.*, 570 U.S. 205, 218 (2013).

2. Like other recent decisions involving wedding vendors, see, e.g., *Washington v. Arlene’s Flowers, Inc.*, 193 Wash. 2d 469, 518, 441 P.3d 1203 (Wash. 2019) (floral arrangements), *cert denied*, 141 S. Ct. 2884 (2021) (mem.); *Elane Photography, LLC v. Willock*, 309 P.3d 53, 63 (N.M. 2013) (photography), a decision finding that the creation of a website is governed by *Rumsfeld* would cast this Court’s decisions forbidding compelled speech into doubt—thereby raising the

2, 2009), <https://tinyurl.com/5n7uys3y> (affirming as “the biblical understanding of sexuality” “singleness and fidelity in marriage between a man and a woman”); *Campus Policies, Sexuality & Relationships*, George Fox Univ., <https://tinyurl.com/3zndpr5n> (“George Fox University accepts the biblical standards that prohibit all sexual immorality.”).

specter of a religious college's being forced (for example) to amend or repeal core elements of its conduct codes.²⁹

Indeed, even in *rejecting* Respondents' arguments that coercing website design or forbidding Petitioners from putting a disclaimer about Smith's religious beliefs on the website was just conduct governed by *Rumsfeld*, the Tenth Circuit upheld the Anti-Discrimination Act's application. If this Court were to instead accept Respondents' arguments, the threat of compelled speech would be all the greater, given *Rumsfeld*'s less stringent standard of review.

Indeed, if *Rumsfeld* controls, a future court could well conclude that no message would be conveyed by changes in a college's policies on, for example, sexual relationships or contraception, or that any such message would more likely be attributable to students themselves or to the government. That could spell the

²⁹ To be sure, many statutes expressly exempt religious organizations or schools from their reach. *E.g.*, 42 U.S.C. §2000e-1(a) (Title VII doesn't apply to religious organizations "with respect to the employment of individuals of a particular religion to perform work connected with the carrying on" of their missions); 20 U.S.C. §1681(a)(3) (Title IX doesn't apply to religious schools "if [its] application *** would not be consistent with the[ir] religious tenets"). Religious schools may also invoke the Free Exercise Clause if the government substantially burdens their religious beliefs or exercise. But as long as this Court's decision in *Employment Division v. Smith* remains good law, that protection is limited, requiring only rational-basis review if a law is neutral and generally applicable. 494 U.S. 872, 879 (1990). Thus, notwithstanding statutory exemptions and the Free Exercise Clause, it is imperative that this Court continue ensuring robust constitutional protections under the Free Speech Clause, as Free Exercise Claims often fail and not all statutes include exemptions.

end of religious colleges' ability to express their moral perspectives through their *policies*.

But the harm could foreseeably go further. If *Rumsfeld* controls here, it also could alter the messages that religions and religious institutions are able to teach. Website design, like teaching itself, is clearly expressive. If anti-discrimination laws can compel website design or forbid a person from expressing her religious beliefs because such activities are just conduct, then such laws could also alter the content of school curricula too. And if religious schools are unable to even teach consistently with their beliefs, then the inherently religious benefits they provide to students will largely be lost.

It would be no answer to say, in response to such coercion, that an entity such as a religious school remains free to *express* its own views even while complying with contrary direction from the government. Such an argument “begs the core question.” *Miami Herald Publ'g*, 418 U.S. at 256. As the plurality in *Pacific Gas & Electric* explained—and as Justice Gorsuch later reaffirmed in his concurrence in *Masterpiece Cakeshop*, just as “the government cannot compel speech, it cannot ‘require speakers to affirm in one breath that which they deny in the next.’” *Masterpiece Cakeshop*, 138 S. Ct. at 1745 (Gorsuch, J., concurring) (citing *Pacific Gas & Elec.*, 475 U.S. at 16).

From the perspective of a religious college, devoted to encouraging religious virtue in all aspects of life, the notion that a religious institution can follow one set of rules and preach another is not merely, as the Colorado Court of Appeals found in *Masterpiece*, “a reflection of its desire to conduct business in accordance

with [State] public accommodations law”—it is hypocrisy. *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 287 (Colo. App. 2015), *rev’d sub nom. Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm’n*, 138 S. Ct. 1719 (2018). For Christian colleges, such hypocrisy would come at an enormous price.³⁰

A legal regime that could so compel a religious college to be hypocritical in any of its core teachings as a precondition to operating is a regime that has lost sight of—if not completely abandoned—the First Amendment. As this Court has explained elsewhere, “a person may not be compelled to choose between the exercise of a First Amendment right and participation in an otherwise available public program.” *Thomas v. Review Bd. of Indiana Emp. Sec. Div.*, 450 U.S. 707, 716 (1981); accord, *Fulton v. City of Phila.*, 141 S. Ct. 1868, 1876 (2021) (“[I]t is plain that the City’s actions have burdened CSS’s religious exercise by putting it to the choice of curtailing its mission or approving relationships inconsistent with its beliefs.”). To preserve religious higher education, the same principle that applies to funding or contracts should apply equally to the “benefit” of operating while espousing or spreading views that depart from the prevailing government dogma.

³⁰ *E.g.*, *Matthew 6:25* (ESV) (“For what will it profit a man if he gains the whole world and forfeits his soul?”).

CONCLUSION

The Tenth Circuit's misguided strict-scrutiny analysis improperly allows government to curtail or compel speech contrary to religious belief. In reversing the Tenth Circuit, this Court should make clear that expressive conduct or messages are speech, not merely incidentally related to it. They are thus governed by *Hurley*, not *Rumsfeld*. Only then will the Free Speech Clause continue to serve its vital purpose of protecting the expressive missions of all expressive groups, including religious organizations like *Amici*.

Respectfully submitted,

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June 2, 2022

APPENDIX

**APPENDIX
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List of *Amici*..... 1a

1a

**LIST OF AMICI
(with links to their mission statements)**

Associations

Council for Christian Colleges and Universities

<https://tinyurl.com/2u39skn8>

Association for Biblical Higher Education

<https://tinyurl.com/5n97rzny>

Individual Universities and Colleges

Cedarville University

<https://tinyurl.com/ybtwa7up>

Dordt University

<https://tinyurl.com/2mejbytj>

Northpoint Bible College & Graduate School

<https://tinyurl.com/3v5dzct8>

Oklahoma Wesleyan University

<https://tinyurl.com/yckudff7>

Union University

<https://tinyurl.com/yx52ktfw>