No. 21-476

In the Supreme Court of the United States

303 CREATIVE LLC, ET AL.,
Petitioners,
v.
AUBREY ELENIS, ET AL.,
Respondents.

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

BRIEF OF ARIZONA, NEBRASKA, ALABAMA, ALASKA, ARKANSAS, GEORGIA, IDAHO, INDIANA, KANSAS, KENTUCKY, LOUISIANA, MISSISSIPPI, MISSOURI, MONTANA, OHIO, OKLAHOMA, SOUTH CAROLINA, TENNESSEE, UTAH, AND WEST VIRGINIA AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE

Amici curiae are the States of Arizona, Nebraska, Alabama, Alaska, Arkansas, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Ohio, Oklahoma, South Carolina, Tennessee, Utah, and West Virginia. They file this brief in support of the Petitioners.

Amici States have an interest in ensuring that this Court affirms the constitutional constraints applying to public-accommodation laws. Those statutes are important tools to eliminate specific kinds of invidious discrimination. But the First Amendment's Free Speech Clause forbids government from using public-accommodation laws to compel the expression of citizens who create and sell custom speech. The Free Speech Clause further prohibits government from forcing citizens to choose between expressing sincerely held beliefs and participating in the market for expressive goods and services. And the Free Speech Clause prohibits the government from using the unique nature of custom art as the very reason why its creator must express the government's preferred message.

Amici States have nearly all enacted laws restricting discrimination by places of public accommodation. And each Amici State is home to individuals and businesses that participate in the market for expressive goods and services. Amici States, therefore, share an interest in striking the proper (and constitutional) balance between eliminating invidious discrimination in the marketplace and respecting citizens' fundamental right to be free from compelled speech. Colorado and the Tenth Circuit failed to achieve the proper equilibrium here.

SUMMARY OF ARGUMENT

Petitioner 303 Creative LLC and its owner Lorie Smith (collectively, "Smith") design custom websites and write the messages that appear on those sites. Smith wants to start creating websites that announce and tell the stories of her clients' weddings. She desires to do this so that she can celebrate what she believes to be God's design for marriage—the uniting of a husband and a wife. But a corollary of that belief, which this Court has called "decent and honorable," *Obergefell v. Hodges*, 576 U.S. 644, 672 (2015), is that Smith cannot create websites that celebrate same-sex weddings, though she otherwise serves LGBT customers "regardless of ... sexual orientation[.]" Pet.App.184a. This distinction is based on a *message* Smith cannot convey and not on the *status* of any customer. Pet.App.6a ("Appellants' objection is based on the message of the specific website; Appellants will not create a website celebrating same-sex marriage regardless of whether the customer is the same-sex couple themselves, a heterosexual friend of the couple, or even a disinterested wedding planner requesting a mock-up.").

Colorado interprets its public-accommodation law to forbid Smith from expressing her desired messages about marriage. In its view, graphic artists who create websites celebrating opposite-sex marriages must do the same for same-sex marriages, and refusing to do so subjects those artists to punishment. By adopting this position, Colorado violates the constitutional rights of its citizens, because the First Amendment prohibits States from forcing individuals, including people who create custom speech for a living, to speak in favor of same-sex marriage. Indeed, numerous courts—including the Eighth Circuit and

the Arizona Supreme Court—have affirmed that very point. *See Telescope Media Grp. v. Lucero*, 936 F.3d 740 (8th Cir. 2019) (Minnesota cannot compel wedding videographers' speech); *Brush & Nib Studio, LC v. City of Phoenix*, 448 P.3d 890 (Ariz. 2019) (Phoenix cannot compel speech from artists who craft custom wedding invitations); *see also Chelsey Nelson Photography LLC v. Louisville/Jefferson Cnty. Metro Gov't*, 479 F.Supp.3d 543 (W.D. Ky. 2020) (Louisville cannot compel wedding photographer's speech).

The freedom against compelled speech applies in this case because Smith's custom websites are her constitutionally protected speech. The parties agree that "[a]ll of [her] website designs are expressive in nature, as they contain images, words, symbols, and other modes of expression that [Smith] use[s] to communicate a particular message." Pet.App.181a. And the Tenth Circuit recognized that Smith's "creation of wedding websites is pure speech." Pet.App.20a. Because Smith speaks through her custom design work, Colorado cannot force her to address the topic of same-sex marriage—let alone to "express approval and celebration" of same-sex marriage, as the Tenth Circuit's decision would force her to do. Pet.App.20a.

While the First Amendment prohibits Colorado from applying its public-accommodation law to compel Smith to speak, that happens only in limited commercial circumstances involving expressive products or services. Compelled-speech protection is implicated only when, as here, a business owner creates custom speech for her clients, a prospective client requests custom speech, and the owner declines because she objects to the message that the speech would express (and not the status of the customer being served). The

compelled-speech doctrine is thus irrelevant to sales involving the "innumerable goods and services that no one could argue implicate" speech. *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S.Ct. 1719, 1728 (2018). Nor, under this Court's precedents, does that First Amendment protection apply when a (1) public-accommodation law has only an incidental effect on speech, (2) a business owner objects merely to providing a forum for another's speech (rather than to altering her own speech), or (3) a business owner flatly refuses to work for a protected class of people. Given these limits on compelled-speech protection, a ruling in favor of Smith would be "sufficiently constrained" to ensure that States can still effectively enforce public-accommodation laws. *Id.*

To satisfy strict scrutiny, Colorado would have to show that its law compelling Smith's speech furthers a compelling interest and is narrowly tailored to that interest. Colorado did not (and cannot) satisfy that stringent standard. Colorado's interest—forcing Smith to engage in expression that she deems objectionable—is not compelling. And the Tenth Circuit's assumption that if Smith prevails, States will be unable to protect their consumers from discrimination in commercial transactions is disproved by the many states that have enacted and enforced less restrictive means. For example, binding caselaw precludes States like Arizona and Nebraska from compelling speech through public-accommodation laws. *See Telescope Media*, 936 F.3d 740 (8th Cir. 2019); *Brush & Nib Studio*, 448 P.3d 890 (Ariz. 2019). Despite this, those States are still able to robustly enforce their public-accommodation laws and effectively punish invidious status-based discrimination. Also, many States allow other

exemptions to their public-accommodation laws with no ill effects. All this shows that States can respect compelled-speech rights without compromising their nondiscrimination goals.

In short, the compelled-speech doctrine protects people on all sides of polarizing issues. Just as it prevents Colorado from forcing Smith to speak *in favor* of same-sex marriage, it also prevents Colorado from compelling another graphic designer to create a website promoting a religious organization's event *opposing* same-sex marriage if that graphic designer does not want to speak that message. But if it does not protect Smith from speaking a message, neither does it shield the other graphic designer from doing so. Thus, by ruling for Smith, the Court will ensure freedom of speech for all.

ARGUMENT

I. This Court's Precedents Have Banned Compelled Speech Without Nullifying Public-Accommodation Laws.

The Court has squarely held that public-accommodation laws cannot be applied in a manner that results in compelled speech. *See Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 572–73 (1995). The Court, on the other hand, has also emphasized that rulings for litigants like Smith—people who make their living creating custom art—must be "sufficiently constrained" to ensure that public-accommodation laws do not lose their vitality in most commercial contexts. *Masterpiece Cakeshop*, 138 S.Ct. at 1728.

Rather than ensure this balance between public-accommodation laws and free speech, the Tenth Circuit analyzed the law in a manner that ensures it will

almost always override compelled-speech protections. Through its distorted strict-scrutiny analysis, the Tenth Circuit ensured that the more unique the expression at issue is, the more power the government has to use a public-accommodation law to compel its preferred message. Pet.App.28a. Because Mozart wrote the Marriage of Figaro, the Tenth Circuit would allow Colorado to sanction him for refusing to create an opera centered around a same-sex wedding. This turns the First Amendment on its head.

Unfortunately, the Tenth Circuit is not alone in trampling First Amendment rights in the name of public accommodation. At least the Tenth Circuit recognized that the compelled-speech doctrine applied and required Colorado to satisfy strict scrutiny. Other courts have taken a different tack, going so far as to withhold constitutional protection completely by concluding that the compelled-speech doctrine does not apply to commercial speakers. *See Elane Photography, LLC v. Willock*, 309 P.3d 53, 66 (N.M. 2013) (holding that the compelled-speech doctrine does not protect "a clearly commercial entity that sells goods and services to the public") (cleaned up); *see also State v. Arlene's Flowers, Inc.*, 441 P.3d 1203, 1228 (Wash. 2019) (rejecting compelled-speech claim on the basis that the sale of floral arrangements is not speech or expressive conduct).

These decisions all miss the mark—as explained below, the proper balance between public-accommodation laws and speech is already built into the compelled-speech doctrine, which applies only, like in this case, to expressive products or services. The compelled-speech doctrine will play no role in the vast majority of commercial transactions, and certainly not in those situations where alleged discrimination

stems from the identity of the customer rather than the message to be conveyed.

A. The First Amendment Generally Forbids States From Compelling Speech.

"Compelling individuals to mouth support for views they find objectionable violates [a] cardinal constitutional command" and is "universally condemned." *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S.Ct. 2448, 2463 (2018). The rule against compelled speech forbids government from forcing citizens to express messages they deem objectionable or from punishing them for declining to express such messages. *See, e.g.*, *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795–801 (1988) (fundraisers cannot be forced to disclose the percentage of money that they give to their clients); *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 20–21 (1986) (*PG&E*) (plurality opinion) (business cannot be forced to include another's speech in its mailing); *Wooley v. Maynard*, 430 U.S. 705, 717 (1977) (citizens cannot be forced to display state motto on their license plate); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (newspaper cannot be forced to print politician's writings); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (students cannot be forced to recite pledge or salute flag).

Not even public-accommodation laws, as important as they are, can override this freedom. *See, e.g.*, *Hurley*, 515 U.S. at 572–73 (parade organizers cannot be forced to include LGBT group's message); *see also Boy Scouts of Am. v. Dale*, 530 U.S. 640, 659 (2000) (Boy Scouts cannot be forced to keep leader who contradicts group's messages).

The right to be free from compelled speech protects each person's conscience by shielding "'the sphere of intellect'" and the "'individual freedom of mind.'" *Wooley*, 430 U.S. at 714–15. It ensures that the government cannot force individuals to be "instrument[s] for fostering public adherence to an ideological point of view [they] find[] unacceptable." *Id.* at 715. And it protects "individual dignity," *Cohen v. California*, 403 U.S. 15, 24 (1971), because "[f]orcing free and independent individuals to [express] ideas they find objectionable"—to "betray[] their convictions" in that way—"is always demeaning," *Janus*, 138 S.Ct. at 2464.

This Court's decision in *Hurley* demonstrates that public-accommodation laws must give way to freedom of expression. There, the organizers of Boston's St. Patrick's Day Parade qualified as a public accommodation because they invited members of the public to participate in their parade and accepted nearly every group that applied. *Hurley*, 515 U.S. at 561–62. Despite allowing members of the LGBT community to participate as individuals, the organizers declined an LGBT advocacy group's request to march as a contingent behind a banner. *Id.* at 572. The organizers did so because of a "disagreement" with the group's message rather than an "intent to exclude homosexuals as such[.]" *Id.*; *see also Dale*, 530 U.S. at 653 (organizers in *Hurley* did not exclude LGBT group "because of their [members'] sexual orientations," but because of what the group expressed "march[ing] behind a ... banner").

While the Massachusetts courts held that the parade organizers had engaged in unlawful discrimination and ordered them to include the LGBT group (along with its message), *Hurley*, 515 U.S. at

561–65, this Court unanimously reversed, *id.* at 581. The Court explained that the State applied its public-accommodation law "in a peculiar way," *id.* at 572, effectively declaring the parade organizers' "speech itself to be the public accommodation" and requiring them to alter their expression to accommodate "any contingent of protected individuals with a message," *id.* at 573. This violated the First Amendment right of the parade organizers "to choose the content of [their] own message," *id.*, and decide "what merits celebration," even if those choices are "misguided" or "hurtful," *id.* at 574.

In short, *Hurley* establishes that States cannot apply public-accommodation laws to force individuals engaged in expression to alter the message they communicate.

B. The First Amendment's Freedom Against Compelled Speech Protects Smith's Creation Of Custom Websites.

The First Amendment's freedom against compelled speech applies in this case because, as the Tenth Circuit correctly recognized, Smith's creation of custom-websites is pure speech. Pet.App.20a. The particular medium through which speech is conveyed—here, a website—does not impact its First Amendment protection. *See Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 790 (2011) (holding that "video games," no less than "books, plays, and movies," "qualify for First Amendment protection"); *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1061 (9th Cir. 2010) (holding that tattoos are speech and explaining that "a form of speech does not lose First Amendment protection based on the kind of surface it is applied to"); *cf. Wooley*, 430 U.S. at 717 (holding that First Amendment barred state from requiring

citizens to display "Live Free or Die" motto on vehicle license plates).

Moreover, it has been "long recognized that [the First Amendment's] protection does not end at the spoken or written word." *Texas v. Johnson*, 491 U.S. 397, 404 (1989). "[T]he Constitution looks beyond written or spoken words as mediums of expression," *Hurley*, 515 U.S. at 569, and protects genuine artistic expression, *see Miller v. California*, 413 U.S. 15, 22–23 (1973) ("[C]ourts must always remain sensitive to any infringement on genuinely serious … artistic … expression."). To qualify for First Amendment protection, artistic expression must convey some message, but it need not express a "succinctly articulable" or "particularized message." *Hurley*, 515 U.S. at 569; *see also Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 602–03 (1998) (Souter, J., dissenting) (First Amendment protection "turns not on the political significance" a particular work may express, but rather simply on the "expressive character" of the work itself).

This Court has thus recognized that First Amendment speech protection extends to art in its various forms. *See, e.g.*, *Hurley*, 515 U. S. at 569 ("painting of Jackson Pollock, music of Arnold Schöenberg, [and] Jabberwocky verse of Lewis Carroll"); *Kaplan v. California*, 413 U.S. 115, 119 (1973) ("pictures, films, paintings, drawings, and engravings"); *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989) (music without words); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 66 (1981) (nude dancing); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952) (movies); *Brown*, 564 U.S. at 790 (video games).

The Tenth Circuit concluded that Smith's "creation of wedding websites is pure speech." Pet.App.20a. That conclusion was correct. Smith's custom websites fit squarely within this Court's cases protecting pure speech and artistic expression. Those websites are undeniably "expressive in nature," as Colorado concedes. Pet.App.181a; *see also* Pet.App.187a ("[Smith's] custom wedding websites will be expressive in nature[.]"). When Smith is commissioned to create a custom website, she "creates and designs original text and graphics[.]" Pet.App.183a. She "devotes considerable attention to color schemes, fonts, font sizes, positioning, harmony, balance, proportion, scale, space, interactivity, movement, navigability, and simplicity." Pet.App. 182a. Smith's websites contain "images, words, symbols, and other modes of expression" that Colorado stipulates Smith "use[s] to communicate a particular message." Pet.App.181a. "Every aspect of the websites and graphics [Smith] design[s] contributes to the overall messages" that Smith conveys through the websites, Pet.App.182a, which is to "promote and celebrate the unique beauty of God's design for marriage between one man and one woman," Pet.App.186a. The First Amendment, therefore, extends to the creation of Smith's custom websites.

The Court should reject Respondents' suggestion that the First Amendment does not shield Smith's custom websites because their creation is non-expressive commercial conduct. All businesses, including those marketing and selling speech, engage in certain activities that are non-expressive. Government is not prohibited from regulating those non-expressive activities. *See Okla. Press Publ'g Co.*

v. Walling, 327 U.S. 186, 192–93 (1946) (holding that the Fair Labor Standards Act applies to all businesses and that there is no First Amendment exemption from the Act for newspaper publishing and distribution companies). One does not, however, forfeit First Amendment protections by using speech to turn a profit. *See City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 756 n.5 (1988) ("[T]he degree of First Amendment protection is not diminished merely because … speech is sold rather than given away."). "[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*, 487 U.S. at 801; *see also Hurley*, 515 U.S. at 573–74 (explaining that the freedom from compelled speech is "enjoyed by business corporations generally," including "professional publishers").

Thus, when it comes to people who create speech for customers, the First Amendment's application turns on whether the government regulation touches upon speech or non-expressive conduct. As explained, Colorado's public-accommodation law, as applied here, strikes at the core of Smith's speech by compelling her to create expression that Colorado desires but with which she disagrees. Allowing Smith to participate in the market for custom expression, even if for profit, only if she expresses messages with which she disagrees squarely implicates the First Amendment. The Court should reject Respondents' contrary argument.

C. It Is Only In Narrow Circumstances, Like Those Here, That Commercial Applications Of Public-Accommodation Laws Implicate Compelled-Speech Protection.

While the First Amendment protects Smith from being compelled to speak through her custom websites, it is only in narrow circumstances that commercial applications of public-accommodation laws will implicate compelled-speech protection. *See Telescope Media*, 936 F.3d at 758 ("[O]ur holding leaves intact other applications of [Minnesota's public-accommodation law] that do not regulate speech based on its content or otherwise compel an individual to speak."). Indeed, public-accommodation laws "do not, as a general matter, violate the First or Fourteenth Amendments," *Hurley*, 515 U.S. at 572, which means that "most applications of antidiscrimination laws ... are constitutional." *Chelsey Nelson Photography*, 479 F.Supp.3d at 564. But when a business owner creates custom speech for clients, a prospective client requests custom speech, and the owner declines because she objects to the message that the speech would communicate, the First Amendment's compelled-speech protection applies.

This protection implicates few business transactions because only a small percentage of commercial exchanges revolve around the creation of custom speech. *See Brush & Nib Studio*, 448 P.3d at 907 ("[S]imply because a business creates or sells speech does not mean that it is entitled to a blanket exemption for all its business activities."). The vast majority of transactions will have no basis to claim compelled-speech protection. *See Masterpiece Cakeshop*, 138

S.Ct. at 1728 (recognizing that there are "innumerable goods and services that no one could argue implicate the First Amendment"). Even among wedding vendors, many of them do not ordinarily create speech for their customers. *See Chelsey Nelson Photography*, 479 F.Supp.3d at 558 n.118.

Nor does this Court's existing compelled-speech precedents shield a public accommodation that objects merely to "provid[ing] a forum for a third party's speech." *Masterpiece Cakeshop*, 138 S.Ct. at 1744–45 (Thomas, J., concurring) (discussing *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 62 (2006) and *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980)); *see also Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 140 S.Ct. 2082, 2098 (2020) (Breyer, J., dissenting) ("Requiring someone to host another person's speech is often a perfectly legitimate thing for the Government to do."). Compelling a public accommodation to host another's speech is a far cry from "forc[ing] speakers to alter their *own* message," as Colorado threatens to do in this case. *See Masterpiece Cakeshop*, 138 S.Ct. at 1745 (Thomas, J., concurring); *accord Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 457 n.10 (2008) (forcing the "[f]acilitation of speech" is unlike the compelled "co-opt[ing]" of a person's "own conduits for speech"); *Telescope Media*, 936 F.3d at 758 ("Rather than serving as a forum for the speech of others, [a wedding videographer's] videos will carry their 'own message.'").

Finally, the compelled-speech doctrine applies only when the compelled speaker objects to the message communicated through her expression. *See Hurley*, 515 U.S. at 580 (noting the absence of compelled-speech protections when allegedly compelled speakers do not "object[] to the content"); *PG&E*, 475 U.S. at 12

(plurality opinion) (same). Thus, if a graphic designer flatly refuses to work for a protected class, regardless of the message that her speech would convey, she finds no refuge in compelled-speech principles. This, of course, does not describe Smith at all. While she cannot celebrate same-sex weddings through her custom websites because of the messages that those websites would express about marriage, she otherwise "works with all people regardless of ... sexual orientation." Pet.App.184a. She "will gladly create custom graphics and websites for gay, lesbian, or bisexual clients[.]" *Id.*

In sum, the compelled-speech protection that Smith seeks is limited, and a ruling for her would not be "a license to discriminate." *Chelsey Nelson Photography*, 479 F.Supp.3d at 564; *see also Brush & Nib Studio*, 448 P.3d at 916 ("Nothing in our holding today allows a business to deny access to goods or services to customers based on their sexual orientation or other protected status."). Thus, the necessary constraints on a ruling for Smith already exist in the compelled-speech doctrine itself.

II. Colorado Cannot Satisfy Strict Scrutiny Here.

Strict scrutiny is the appropriate constitutional standard in this case because Colorado applies its public-accommodation law to compel speech and it applies that law in a content-based manner. Under strict scrutiny, Colorado must show that requiring Smith to provide custom websites for same-sex weddings "'[1] furthers a compelling interest and [2] is narrowly tailored to achieve that interest.'" *Reed v. Town of Gilbert*, 576 U.S. 155, 171 (2015). But Colorado cannot satisfy either requirement.

A. Colorado Does Not Have A Compelling Interest In Forcing Smith To Create Speech Expressing Messages That Violate Her Religious Beliefs.

Strict scrutiny requires a particularized analysis. *See Fulton v. City of Philadelphia*, 141 S.Ct. 1868, 1881 (2021) ("The [government] states [its] objectives at a high level of generality, but the First Amendment demands a more precise analysis."). That demanding level of scrutiny "look[s] beyond broadly formulated interests justifying the general applicability of government mandates" to see whether its standard "is satisfied through application of the challenged law" to "the particular" party. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430–31 (2006). As *Hurley* illustrates, the analysis here focuses not on the public-accommodation law's general purpose of preventing "denial[s] of access to (or discriminatory treatment in) public accommodations," but on its "apparent object" when "applied to [the] expressive activity" at issue. 515 U.S. at 578. Put differently, "[t]he question … is not whether [Colorado] has a compelling interest in enforcing its non-discrimination [laws] generally, but whether it has such an interest in denying an exception to [Smith]" in particular. *Fulton*, 141 S.Ct. at 1881.

Colorado, therefore, must show that it has a compelling interest in forcing Smith to violate her conscience by creating custom websites that celebrate same-sex weddings. Unlike most applications of Colorado's public-accommodation law, this has the "apparent object" of forcing a website designer and graphic artist to create speech and thus to "modify the content of [her] expression." *Hurley*, 515 U.S. at 578.

But as *Hurley* said, permitting that would "allow exactly what the general rule of speaker's autonomy forbids." *Id.* Colorado thus cannot satisfy strict scrutiny because its particularized interest—namely, its interest in forcing Smith to engage in expression that she deems objectionable—is not compelling.

Colorado's interest in protecting the dignity of patrons does not change the analysis. *Hurley* established that this kind of concern, no matter its strength in other contexts, is *not* a compelling state interest when the harm is caused by a decision not to express a message. "[T]he point of all speech protection," *Hurley* explained, "is to shield just those choices of content that in someone's eyes are … hurtful." *Id.* at 574. Because the offensiveness of a decision to refrain from speaking cannot be the reason both "'for according it constitutional protection'" and for removing that protection, *Johnson*, 491 U.S. at 409, these dignitary concerns are not a compelling basis for infringing this First Amendment freedom, *see Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 55 (1988) ("The fact that society may find speech offensive is not a sufficient reason for suppressing it.") (cleaned up); *Masterpiece Cakeshop*, 138 S.Ct. at 1746–47 (Thomas, J., concurring) (collecting cases).

Another aspect of the *Hurley* opinion is instructive on this point. The LGBT group there argued that the public-accommodation law advanced the State's "compelling interest" of "deter[ring] the deprivation of personal dignity[.]" Brief for Respondent at 22, *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557 (1995) (No. 94-749), 1995 WL 143532. But the Court necessarily rejected that interest as sufficient to compel speech when it concluded that no "legitimate interest [had] been

identified" to justify requiring speech. *Hurley*, 515 U.S. at 578; *see also Masterpiece Cakeshop*, 138 S.Ct. at 1737 (Gorsuch, J, concurring) ("[N]o bureaucratic judgment condemning a sincerely held religious belief as 'irrational' or 'offensive' will ever survive strict scrutiny under the First Amendment.").

The Tenth Circuit's compelling-interest analysis is flawed because it characterized the relevant state interest at "a high level of generality[.]" *See Fulton*, 141 S.Ct. at 1881. The court broadly framed Colorado's interest as ensuring "'equal access to publicly available goods and services.'" Pet.App.26a; *see also id.* at 28a (analyzing "Colorado's interest in ensuring access to the marketplace *generally*"). But it should have focused, as the analysis did above, specifically on the State's interest in compelling speech from graphic designers like Smith. *See Fulton*, 141 S.Ct. at 1881; *Hurley*, 515 U.S. at 578.

When the Tenth Circuit narrowed its analysis to business owners who create custom speech for a living, it suggested that their "unique goods and services are where public accommodation laws are *most necessary*[.]" Pet.App.30a (emphasis added). This has it exactly backward. States have the strongest interest in ensuring access not to custom artistic creations but to *essential* goods and services such as food, shelter, healthcare, and transportation. That is why some States follow the example of federal law and narrowly define public accommodations as places that provide these kinds of essential services. *E.g.*, Fla. Stat. § 760.02(11); S.C. Code § 45-9-10(B); 42 U.S.C. § 2000a(b). States' particularized interest in forcing business owners to create custom art—rather than compelling them to provide essential services—is of reduced importance and of questionable constitu-

tional legitimacy. *See Hurley*, 515 U.S. at 578 (explaining that no "legitimate interest [had] been identified in support of applying [the public-accommodation] statute in this way to expressive activity"). The Tenth Circuit thus erred in raising that goal to an impenetrable interest of the highest order.

The Tenth Circuit also used "the commercial nature of [Smith's] business" to elevate Colorado's interest. Pet.App.26a. It claimed to do this while admitting that this same commercial aspect of Smith's operations "does not diminish [her] speech interest[.]" *Id.*; *see also City of Lakewood*, 486 U.S. at 756 n.5 ("[T]he degree of First Amendment protection is not diminished merely because the … speech is sold rather than given away."). But as the dissent below recognized, it cannot be that "the commercial nature of [Ms. Smith's] business does not diminish [her] speech interest," yet that "same commercial nature allows Colorado to regulate it." Pet.App.77a n.8 (Tymkovich, C.J., dissenting). Courts applying strict scrutiny cannot use a specific feature of speech that the First Amendment promises to protect—here, the speech's for-profit creation—as a tool to strip away that constitutional shield.

B. The Experiences Of Other States Prove That Colorado Cannot Establish Narrow Tailoring.

To satisfy narrow tailoring, a State must demonstrate that it has no "less restrictive alternative[.]" *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 813 (2000). But Amici States can attest that less restrictive alternatives exist. The most obvious is that Colorado can continue to apply its public-accommodation law to the vast majority of commercial transactions but refrain from applying it

to force its citizens to create custom speech expressing messages that they deem objectionable. *See* Pet.App.78a (Tymkovich, C.J., dissenting) ("Colorado could allow artists—those who are engaged in making expressive, custom art—to select the messages they wish to create[.]").

Recent history has proven that observing this constitutionally required restriction on public-accommodation laws is a workable alternative. Existing circuit-level precedent already prohibits some States from applying their public-accommodation laws to compel a business owner to create custom speech, and no evidence suggests that the enforcement of those laws has been compromised in those States. For example, it has been clear for almost three years that the States in the Eighth Circuit cannot apply their public-accommodation laws to force businesses to create custom speech. *See Telescope Media*, 936 F.3d at 758 (holding that a public-accommodation law cannot force a videographer to create films commemorating same-sex marriages). Despite this, Eighth Circuit States like Nebraska have not had any difficulty continuing to protect their citizens against invidious status-based discrimination.

It has also been clear for almost three years that Arizona, and its political subdivisions, cannot apply public-accommodation laws to force businesses to create custom speech. *Brush & Nib Studio*, 448 P.3d at 916 (holding that the City of Phoenix cannot compel artists who create custom wedding invitations to craft invitations celebrating same-sex marriage). Yet Arizona continues to vigorously protect its citizens against invidious status-based discrimination in commercial transactions. *See, e.g.*, *Attorney General*

Brnovich Settles Race Discrimination Allegations with Uber, Postmates, DoorDash, Ariz. Att'y Gen. Mark. Brnovich (June 2, 2021), https://www.azag.gov/press-release/attorney-general-brnovich-settles-race-discrimination-allegations-uber-postmates.

More generally, other narrow exemptions to States' public-accommodation laws have not hampered enforcement efforts. Consider a few examples. For decades, many States' public-accommodation laws have exempted "private club[s]." *E.g.*, Neb. Rev. Stat. § 20-138. Other States such as Colorado and New York have exempted religious organizations. *E.g.*, Colo. Rev. Stat. § 24-34-601(1) ("'Place of public accommodation' shall not include a church, synagogue, mosque, or other place that is principally used for religious purposes."); N.Y. Dom. Rel. Law § 10-b(1) (exempting from liability religious entities that decline "to provide services" and "goods"—even publicly available goods and services—"for the solemnization or celebration" of same-sex marriage). And for nearly the last six years, Mississippi has exempted businesses that "decline[] to provide" marriage-related services including photography, videography, and publishing for "the solemnization, formation, [or] celebration" of same-sex marriages because their owners believe that "[m]arriage is ... the union of one man and one woman." Miss. Code Ann. §§ 11-62-3(a) & 11-62-5(5)(a); *see also* Pet.App.78a (Tymkovich, C.J., dissenting) ("Or Colorado could exempt ... artists who create expressive speech about or for weddings, as Mississippi does.").

These exemptions are part of States' efforts to balance their goal of eradicating specific forms of invidious discrimination with other important interests. That States have had these kinds of

statutory exemptions for many years with no ill effects proves that recognizing the narrow compelled-speech protection discussed above will not sacrifice public-accommodation laws. And these existing exemptions flatly disprove Colorado's stringent and unrealistic position that no exceptions are possible, even those designed to safeguard bedrock constitutional liberties.

The Tenth Circuit was not persuaded that Colorado can allow business owners who create speech for a living to decline when asked for custom expression they deem objectionable. Pet.App.28a. It reasoned that same-sex wedding customers cannot "obtain wedding-related services of the same quality and nature as those [Smith] offer[s]" and so Colorado must compel all providers of "unique services" to ensure "equal access to those types of services." *Id.* This way of thinking is deeply flawed. It paradoxically invokes "the very quality that gives [Smith's] art value—its expressive and singular nature—to cheapen it." Pet.App.79a (Tymkovich, C.J., dissenting). The Tenth Circuit essentially held that "the *more* unique a product, the more aggressively the government may regulate access to it—and thus the *less* First Amendment protection it has." Pet.App.79a–80a (Tymkovich, C.J., dissenting). That cannot be right. *Cf. Johnson*, 491 U.S. at 409 (explaining that "[i]t would be odd indeed to conclude" that the offensiveness of certain speech is both "a reason for according it constitutional protection" and a reason for "ban[ning]" it).

Notice the Tenth Circuit's sleight of hand when moving from compelling interest to narrow tailoring. For a compelling interest, it identifies the generic interest in ensuring "equal access to publicly available goods and services." Pet.App.26a. It needed this

broad framing because, as explained above, a particularized interest in forcing Smith to create speech she deems objectionable is not compelling. Yet the Tenth Circuit's narrow-tailoring analysis focuses specifically on access to Smith's custom websites rather than goods and services in general. Pet.App.29a (identifying the "product at issue" as "custom-made wedding websites of the same quality and nature as those made by [Smith]"—a market in which "only [Smith] exist[s]"). The court cannot have it both ways. Applying such a "Goldilocks rule" to strict-scrutiny analysis—in which courts "play with the level of generality" to yield a desired result—is improper. *Masterpiece Cakeshop*, 138 S.Ct. at 1738 (Gorsuch, J., concurring).

The key question under narrow tailoring is whether Colorado has shown that "its non-discrimination [law] can brook no departures" for Smith. *Fulton*, 141 S.Ct. at 1882. Colorado has not made that showing. As mentioned, many Amici States apply their public-accommodation laws to allow business owners to decline to create custom speech, and they have not seen any ill effect. Nothing in the record suggests that Colorado is unable to follow the same course. Moreover, Colorado itself admits that it "does not interpret [its public-accommodation law] to require any business owner ... to produce a message it would decline to produce for any customer." Pet.App.91a (Tymkovich, C.J., dissenting) (quoting Colorado's Tenth Circuit brief). The State thus concedes that it may allow what the court below called "message-based refusals" without sacrificing its asserted interests. Since this is all Smith seeks to do, Colorado must extend the same treatment to her. It "offers no compelling reason" for allowing other message-based

refusals while denying them to her. *Fulton*, 141 S.Ct. at 1882.

The Tenth Circuit supported its narrow-tailoring analysis by "imagin[ing] the problems created where a *wide range* of custom-made services" are unavailable to customers celebrating same-sex marriages. Pet.App.30a (emphasis added). This reasoning fails on two fronts.

First, it is not enough under strict scrutiny to "imagine" that "a wide range" of custom wedding photography services will be unavailable for same-sex weddings. Evidence must support it—a mere "predictive judgment" "will not suffice." *Brown*, 564 U.S. at 799–800. This Court should thus reject here, as it has done time and time again, the speculative and unsupported slippery-slope concern that many businesses will follow in a plaintiff's footsteps. *E.g.*, *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 732 (2014) (rejecting the government's argument about "a flood of religious objections" because it "made no effort to substantiate [its] prediction"); *Gonzales*, 546 U.S. at 435–36 (rejecting the government's "slippery-slope" argument that "[i]f I make an exception for you, I'll have to make one for everybody, so no exceptions"). Judges must "not assume a plausible, less restrictive alternative would be ineffective[.]" *Playboy*, 529 U.S. at 824.

Second, it is unreasonable to speculate that droves of business owners will decline services for same-sex weddings. An overwhelming majority of the population supports same-sex marriage. *See* Justin McCarthy, *Record-High 70% in U.S. Support Same-Sex Marriage*, Gallup (June 8, 2021), https://bit.ly/3tBAeFZ. And many people who do not personally believe in same-sex marriage are nonetheless willing

to provide services for it. In addition, strong "[m]arket forces" typically "discourage" business owners from declining their customers' requests, including marriage-related requests. *Att'y Gen. v. Desilets*, 636 N.E.2d 233, 240 (Mass. 1994). This is particularly true given the harassment, boycotts, and reprisals that many businesses face when they decline to help celebrate same-sex weddings. *See* Brief of Amici Curiae Law and Economics Scholars in Support of Petitioners at 16–18, *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S.Ct. 1719 (2018) (No. 16-111), 2017 WL 4118065. Speculating that people seeking services for same-sex marriages in Colorado will be relegated to an inferior market is simply unsupportable. *See* Pet.App.190a (stipulating that an online directory "lists 245 web design companies in Denver alone"). The Tenth Circuit's narrow-tailoring analysis is thus unpersuasive from top to bottom.

CONCLUSION

For the foregoing reasons, the Court should confirm Petitioners' First Amendment rights and reverse the Tenth Circuit.

June 2, 2022

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