No. 21-476

In the
Supreme Court of the United States

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

Petitioners,

v.

AUBREY ELENIS; CHARLES GARCIA; AJAY MENON; MIGUEL RENE ELIAS; RICHARD LEWIS; KENDRA ANDERSON; SERGIO CORDOVA; JESSICA POCOCK; PHIL WEISER,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF *AMICI CURIAE* MOUNTAIN STATES LEGAL FOUNDATION AND SOUTHEASTERN LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

1. Whether applying a public-accommodation law to compel an artist to speak or stay silent violates the Free Speech Clause of the First Amendment.

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IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

Mountain States Legal Foundation ("MSLF") is a nonprofit, public-interest law firm organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts issues vital to the defense and preservation of individual liberties, the right to own and use property, the free enterprise system, and limited and ethical government. Since its creation in 1977, MSLF attorneys have been active in litigation regarding the proper interpretation and application of statutory, regulatory, and constitutional provisions. *See*, *e.g.*, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995) (MSLF serving as lead counsel); *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067 (2019) (*amicus curiae* in support of petitioner); *Kennedy v. Bremerton Sch. Dist.*, —S. Ct.— (2022) (*amici curiae* in support of petitioner).

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[1] Pursuant to Supreme Court Rule 37.6, the undersigned affirm no counsel for a party authored this brief in whole or in part, and no person or entity made a monetary contribution for the preparation or submission of this brief. The docket for this matter reflects that all parties have consented to the filing of *amicus* briefs in support of either or neither party.

Founded in 1976, Southeastern Legal Foundation ("SLF") is a national nonprofit legal organization that advocates to protect individual rights and the framework set forth to protect such rights in the Constitution. For 46 years, SLF has advocated, both in and out of the courtroom, for the protection of our First Amendment rights. This aspect of its advocacy is reflected in regular representation of those challenging overreaching governmental actions in violation of their freedom of speech and religion. *See, e.g.*, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018); *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334 (2014); *Boy Scouts of Am. v. Dale,* 530 U.S. 640 (2000).

MSLF and SLF have an abiding interest in the protection of the freedoms set forth in the First Amendment—specifically the freedom of speech and the freedom to exercise one's religion. This is especially true when the law suppresses free discussion and debate on public issues that are vital to America's civil and political institutions, and when the law suppresses one from expressing his or her religious beliefs. MSLF and SLF are profoundly committed to the protection of American legal heritage, which includes all of those protections provided for by our Founders in the First Amendment.

To secure these interests, MSLF and SLF file this *amici curiae* brief urging this Court to reverse the holding of the Tenth Circuit Court of Appeals.

SUMMARY OF THE ARGUMENT

"[W]here the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message." *Wooley v. Maynard*, 430 U.S. 705, 717 (1977).

In this case, the Tenth Circuit correctly found that Petitioner was being forced to engage in pure speech against her will, in order to convey a viewpoint approved by the State of Colorado, under a law whose very purpose is to eliminate Petitioner's ideas from public dialogue. *See 303 Creative LLC v. Elenis*, 6 F.4th 1160, 1176 (10th Cir. 2021) ("Appellants' creation of wedding websites is pure speech."); *id.* at 1177 ("The Accommodation Clause also 'compels' Appellants to create speech that celebrates same-sex marriages."); *id.* at 1178 (noting that not only is there "more than a substantial risk of excising certain ideas or viewpoints from the public dialogue[,]" but that "[e]liminating such ideas is CADA's very purpose") (internal quotation marks and citation omitted).

Nevertheless, instead of applying *Wooley*, the Tenth Circuit cited *Reed v. Town of Gilbert*, 576 U.S. 155, 164 (2015), for its holding that compelled speech may be permissible if the state can meet the strict scrutiny standard. See *303 Creative*, 6 F.4th at 1178 ("Whether viewed as compelling speech or as a content-based restriction, the Accommodation Clause must satisfy strict scrutiny—i.e., Colorado must show a compelling interest, and the Accommodation Clause must be narrowly tailored to satisfy that interest.").

This case thus raises the question of whether compelling speech that expresses an ideological message contrary to the speaker's wishes—indeed, by engaging in viewpoint discrimination as part of the compulsion—is either (1) *per se* unconstitutional; or, (2) if the government may attempt to establish the validity of compelling the expression of specific viewpoints by satisfying strict scrutiny, whether forcing speakers to engage in ideological speech can ever be a narrowly-tailored means of furthering a compelling state interest.

The Tenth Circuit chose the second option, but it was egregiously wrong regarding the test it applied. It held, "Appellants' Free Speech and Free Exercise rights are, of course, compelling[,] [b]ut so too is Colorado's interest in protecting its citizens from the harms of discrimination." *303 Creative*, 6 F.4th at 1190. This was error. A wealth of this Court's

authority shows that viewpoint discrimination against protected speech is *per se* unconstitutional, and that compelled ideological speech (which is necessarily viewpoint-discriminatory), is the most repugnant form of viewpoint discrimination.

The compulsion of private, non-governmental speech expressing an ideology can *never* pass strict scrutiny. It is conceptually impossible for compulsion of ideological speech—which necessarily entails viewpoint discrimination—to satisfy strict scrutiny, because strict scrutiny of content-based restrictions *exists* to identify viewpoint discrimination and ensure that it is thwarted. A court holding that such viewpoint discrimination survives strict scrutiny has failed to apprehend the very purpose of that scrutiny.

Thus, the Tenth Circuit improperly concluded that compulsion of ideological speech can (and here does) survive strict scrutiny. That conclusion is incorrect and should be reversed. This Court should take this opportunity to reaffirm and clarify the principle that viewpoint discrimination against protected private speech is *always* unconstitutional, and thus the compulsion of private ideological speech is *always* unconstitutional.

Separately, even if the Tenth Circuit was correct to apply strict scrutiny in the case of compelled speech, it erred by considering an interest that fundamentally requires the compulsion of speech as a compelling state interest. Even if this Court is inclined to allow government compulsion of speech upon a showing of a compelling need and narrow tailoring—which it should not—it should at least make clear that Colorado's effort to squelch offensive viewpoints may never serve as a compelling interest.

ARGUMENT

I. COMPELLING PETITIONER TO SPEAK SHOULD BE TREATED AS *PER SE* UNCONSTITUTIONAL, AS OPPOSED TO ONLY TRIGGERING STRICT SCRUTINY.

"Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 640 (1943).

Justice Jackson's famous formulation in *Barnette*, is nearly a cliché by now:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in

> politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. *If there are circumstances which permit an exception, they do not now occur to us*.

Id. at 642 (emphasis added); *id.* at 634 ("Whether the First Amendment to the Constitution will permit officials to order observance of ritual of this nature *does not depend upon whether as a voluntary exercise we would think it to be good*, bad or merely innocuous.") (emphasis added).

Indeed, this Court in *Barnette* was clear that it needed to separate the question of: (1) whether forcing students to recite the Pledge of Allegiance was of value, from (2) the question of whether doing so was constitutional. *Id.* ("[V]alidity of the asserted power to force an American citizen publicly to profess any statement of belief or to engage in any ceremony of assent to one presents questions of power that must be considered *independently of any idea we may have as to the utility of the ceremony in question*.") (emphasis added).

Distinguishing between the *constitutionality* of compelled speech from the *value* of the speech at issue was not merely an organizational convenience in *Barnette*. Rather, this Court pointed to historical examples of such compulsion's leading to disaster and tragedy:

> Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the fast failing efforts of our present totalitarian enemies. Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. *Compulsory unification of opinion achieves only the unanimity of the graveyard*.

Id. at 641 (emphasis added); *see also id.* ("It seems trite but necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings.").

At most, *Barnette* alluded only to potential "grave and immediate" dangers to the public. *Id.* at 639 ("[F]reedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent *grave and immediate danger* to interests which the state may lawfully protect.") (emphasis added). But even with this potential class of needs in mind, this Court dismissed the idea that it could think of *anything*, even hypothetically, that would satisfy this test. *Id.* at 642 ("If there

are any circumstances which permit an exception, they do not now occur to us.").

Later, in *Wooley*, this Court made particularly clear that an interest in spreading an ideology cannot serve as a compelling interest where the state seeks to compel speech: "[W]here the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest *cannot* outweigh an individual's First Amendment right to avoid becoming the courier for such message." 430 U.S. at 717 (emphasis added).[2]

In *Wooley*, appellees objected to New Hampshire license plates that read "Live Free or Die" because "that motto [was] repugnant to their moral and religious beliefs." *Id.* at 707. This Court stated:

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[2] Of course, the bar on viewpoint discrimination against citizens' speech does not apply "where the government itself is speaking or recruiting others to communicate a message on its behalf." *Matal v. Tam*, 137 S. Ct. 1744, 1768 (2017) (Kennedy, J., concurring in part). Thus, the government may speak "to enlist the assistance of those with whom it already agrees." *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 218 (2013). "[T]he government may enlist the assistance of those who believe in its ideas to carry them to fruition[,]" *id.* at 221 (Scalia, J., dissenting), but it "may not . . . compel the endorsement of ideas that it approves." *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 309 (2012). This case, of course, does not fall within that category.

> Here, as in *Barnette*, we are faced with a state measure which forces an individual, as part of his daily life indeed constantly while his automobile is in public view to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable. In doing so, the State "invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."

Id. at 715 (quoting *Barnette*, 319 U.S. at 642). This is precisely what Colorado proposes to do to Lorie Smith and her company: press them into service as "an instrument for fostering public adherence to [the] ideological point of view" that same-sex marriages and traditional marriages are indistinguishable, a view that they "find[] unacceptable." *Id.*

Petitioners' case is also comparable to *Hurley*. *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp. of Bos.*, 515 U.S. 557 (1995). There, the issue was "whether Massachusetts may require private citizens who organize a parade to include among the marchers a group imparting a message the organizers do not wish to convey." *Id.* at 559. This Court held that the government's compulsion of speech violated the fundamental protections of the First Amendment. *Id.* at 573 ("[T]his use of the State's power violates the fundamental rule of protection under the First Amendment, that a

speaker has the autonomy to choose the content of his own message."); *see also Knox* 567 U.S. at 309 ("The government *may not* prohibit the dissemination of ideas that it disfavors, nor compel the endorsement of ideas that it approves.") (emphasis added). The First Amendment shields Petitioner from service as the State's messenger of a viewpoint she believes to be false, no matter how acceptable the state deems the message.

This Court has repeatedly struck down government efforts to compel speech *without reference* to whether the government might establish that it meets strict scrutiny, as it did in *Barnette*. In *Wooley*, this Court did not apply a rigorous strict scrutiny analysis to reject mandated government authorship or modification of an individual's message; it construed the First Amendment broadly to "forbid" compelled speech like that at issue in *Hurley*. Instead, this Court stated unambiguously:

> When the law is applied to expressive activity in the way it was done here, its apparent object is simply to require speakers to modify the content of their expression to whatever extent beneficiaries of the law choose to alter it with messages of their own. *But in the absence of some further, legitimate end, this object is merely to allow exactly what the general rule of speaker's autonomy forbids.*

Hurley, 515 U.S. at 578 (emphasis added).

Hurley also implied that setting the terms of public debate is *never* a "legitimate end" sufficient to squelch Constitutional rights. *Id.* at 581 ("Disapproval of a private speaker's statement does not legitimize use of the Commonwealth's power to compel the speaker to alter the message by including one more acceptable to others.").

Similarly, in *National Institute of Family and Life Advocates v. Becerra*, this Court determined that California's law compelled certain clinics to provide state-sponsored messages contrary to their beliefs. 138 S. Ct. 2361, 2371 (2018) (quoting *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988) ("By requiring petitioners to inform women how they can obtain state-subsidized abortions—at the same time petitioners try to dissuade women from choosing that option—the licensed notice plainly 'alters the content' of petitioners' speech.")).

This Court did not analyze the strict scrutiny standard in *Becerra*, noting only that the Ninth Circuit was wrong to apply a lesser standard to professional speech, and that the law failed even intermediate scrutiny. *Id.* at 2375. Nevertheless, in his concurrence, Justice Kennedy seemed to embrace a *per se* rule that would have invalidated the law. *Id.* at 2379 (Kennedy, J., concurring) ("Governments *must not be allowed* to force persons to express a

message contrary to their deepest convictions. Freedom of speech secures freedom of thought and belief.") (emphasis added).[3]

Several of the Courts of Appeals have understood this Court's guidance to establish that an individual's right *not* to be forced to speak is absolutely protected by the First Amendment, without regard to the interests the government purports to further by compelling speech. *See Oliver v. Arnold*, 3 F.4th 152, 159–60 (5th Cir. 2021) (applying *Barnette* in school case involving compelled writing of the Pledge of Allegiance, without either the majority or dissent referring to strict scrutiny); *Coral Ridge Ministries Media, Inc. v. Amazon.com, Inc.*, 6 F.4th 1247, 1255–56 (11th Cir. 2021) (quoting *Hurley*, 515 U.S. at 578,

[3] In *Janus*, this Court also cited language from *Barnette* that seemed to suggest that compelled speech might be subject to a more rigorous test than suppression of speech, although not to a *per se* rule against such compulsion. *Janus v. Am. Fed'n of State, Cty., and Mun. Emps., Council 31*, 138 S. Ct. 2448, 2464 (2018) (quoting *Barnette*, 319 U.S. at 633 ("Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning, and for this reason, one of our landmark free speech cases said that a law commanding 'involuntary affirmation' of objected-to beliefs would require *'even more immediate and urgent grounds' than a law demanding silence*.")) (emphasis added). Yet this Court in *Janus*, 138 S. Ct. at 2463, also cited *Riley*, which stated, "[t]here is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is *without constitutional significance*[.]" 487 U.S. at 796 (emphasis added).

573) (second brackets in 11th Cir. opinion) ("In the same way that the Council's choice of parade units [in *Hurley*] was expressive conduct, so too is Amazon's choice of what charities are eligible to receive donations through AmazonSmile. Applying Title II in the way Coral Ridge proposes would . . . instead 'modify the content of [Amazon's] expression'—and thus modify Amazon's 'speech itself[.]'")); *R.J. Reynolds Tobacco Co. v. FDA*, 845 F. Supp. 2d 266, 275 n.14 (D.D.C. 2012) ("The Government's interest in advocating a message *cannot* and does not outweigh plaintiffs' First Amendment right to not be the Government's messenger.") (emphasis added); *Cressman v. Thompson*, 798 F.3d 938, 951 (10th Cir. 2015) (quoting *Rumsfeld v. Forum for Acad. and Institutional Rights, Inc.*, 547 U.S. 47, 61 (2006) (brackets in 10th Cir. opinion) ("Thus, the Supreme Court, starting with *Barnette*, has consistently '*prohibit[ed]* the government from telling people what they must say.")) (emphasis added).

In other First Amendment contexts too, this Court has not paused to consider whether the importance of the government's preferred message could allow it to co-opt a person's expressive conduct. For instance, in *Boy Scouts of America v. Dale*, this Court engaged in an extensive analysis of compelled association. 530 U.S. 640, 659 (2000). Without referring to strict scrutiny, it seemed to quickly weigh, but also quickly dismiss, the state's purported interest in compelling the Boy Scouts to convey a

message contrary to their organization. *See id.* ("The state interests embodied in New Jersey's public accommodations law do not justify such a severe intrusion on the Boy Scouts' rights to freedom of expressive association."). There was no analysis of whether New Jersey's efforts were narrowly tailored, nor of whether some other asserted interest could have justified New Jersey's "severe intrusion" into free association.

In another part of the opinion, this Court seemed to suggest that it might consider compelling state interests so long as the interest was "'unrelated to the suppression of ideas.'" *Id.* at 648 (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984)). It did not return to this standard, however, when it evaluated the constitutionality of New Jersey's public accommodations law. Here again, though, this Court suggested that the "suppression of ideas" is an illegitimate interest. In Petitioners' case, the state's interest in ensuring that same-sex couples can conscript artists into endorsement of their viewpoint is far from "unrelated to the suppression of ideas."

Like this case, *Dale* was decided against the backdrop of a state public accommodations law banning discrimination on the basis of sexual orientation.

Justice Thomas's concurring opinion in *Masterpiece Cakeshop* also seemed to imply a *per se* rule, although, to be sure, his opinion

separately refers to compelled speech being subject to "the most exacting scrutiny." *Compare Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1741 (2018) (Thomas, J., concurring) ("While this Court acknowledged that the unit's exclusion [in *Hurley*] might have been misguided, or even hurtful, . . . it *rejected the notion that governments can mandate* thoughts and statements acceptable to some groups or, indeed, all people as the antithesis of free speech[.]") (internal quotation marks and citations omitted) (emphasis added), *and id.* at 1744 ("The First Amendment *prohibits* Colorado from requiring Phillips to bear witness to these facts, . . . or to affirm . . . a belief with which he disagrees.") (internal quotation marks, citations, and brackets omitted) (emphasis added) *with id.* at 1746 ("In cases like this one, our precedents demand the most exacting scrutiny.") (internal quotation marks and citations omitted).

Additionally, in the freedom of press context, the Supreme Court struck down compelled speech requirements imposed on newspapers, while also suggesting that there is no need to evaluate the government's interest or its means. *See Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 257–58 (1974).[4] In

[4] *Tornillo* is also cited in *Wooley*, where this Court seemed to adopt a *per se* rule against government compulsion of ideological messages. *Wooley*, 430 U.S. at 714 ("A system which secures the right to proselytize

holding for the newspaper, this Court flatly rejected the idea that the government could compel newspapers to print certain pieces. *Id.* at 258. There was no evaluation of the government's interests or its tailoring. *See id.* ("It has yet to be demonstrated how governmental regulation of this crucial process *can be* exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.") (emphasis added).

Where this Court has suggested that parties may in fact be compelled to speak against their will if strict scrutiny is satisfied, those cases have not involved ideological speech. *See Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 19 (1986) ("Notwithstanding that it burdens protected speech, the Commission's order could be valid if it were a narrowly tailored means of serving a compelling state interest."). However, *Pacific Gas* involved a speaker compelled to provide space for someone else's message—*not* compelled to endorse that message itself (in fact, the actual speaker in *Pacific Gas* was required to state that its messages were *not* the messages of the appellant being forced to provide space for its message). *Id.* at 6–7.

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religious, political, and ideological causes must also *guarantee* the concomitant right to decline to foster such concepts.") (emphasis added).

Here, there is no dispute that Petitioners are being compelled to express ideological messages about same-sex marriage by way of their web design services. *See 303 Creative*, 6 F.4th at 1176 ("Appellants' creation of wedding websites is pure speech."); *id.* at 1177 ("The Accommodation Clause also 'compels' Appellants to create speech that celebrates same-sex marriages.").

In short, the Tenth Circuit improperly concluded that compulsion of private ideological speech can (and here does) survive strict scrutiny. That conclusion is incorrect and should be reversed.

II. COURTS APPLY STRICT SCRUTINY TO FLUSH OUT IMPERMISSIBLE OBJECTIVES SUCH AS VIEWPOINT DISCRIMINATION.

The First Amendment enshrines "the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Turner Broad. Sys., Inc., v. FCC*, 512 U.S. 622, 641 (1994). Thus, this Court's jurisprudence applies strict scrutiny to any regulation or compulsion of speech based on the speech's content. *Reed*, 576 U.S. at 163 ("Content-based laws . . . are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.").

To "require[] the utterance of a particular message favored by the Government" is to "contravene[] this essential right." *Turner*, 512 U.S. at 641.

Strict scrutiny of content-based regulation of speech is justified by the vital purpose such scrutiny serves: exposing viewpoint discrimination, which the First Amendment exists to prevent, and which may be disguised by pretext. Content-based laws are thus rigorously scrutinized because they carry "the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion." *Id.* "The rationale of the general prohibition . . . [on content discrimination] is that [] [it] 'raises the specter that the [G]overnment may effectively drive certain ideas or viewpoints from the marketplace[.]'" *R.A.V. v. City of St. Paul*, 505 U.S. 377, 387 (1992) (quoting *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991)) (fourth bracket alteration in *R.A.V.*).

Viewpoint discrimination, as *Turner* implies, is an illegitimate regulatory goal, and strict scrutiny exists to prevent it being pursued covertly. *Turner*, 512 U.S. at 641 ("Laws of this sort pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate

the public debate through coercion rather than persuasion."); *see also* Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 451 (1996) ("The . . . distinction among viewpoint-based, other content-based, and content-neutral action [] facilitates the effort to flush out improper purposes. The distinction in fact serves just this function: it separates out, roughly but readily, actions with varying probabilities of arising from illicit motives.").

Strict scrutiny accordingly requires the government to articulate a compelling interest and demonstrate that its actions are narrowly tailored as a way of proving that the government is in fact not discriminating on the basis of viewpoint. When the government can't carry that burden, it is more likely to be guilty of impermissible viewpoint discrimination.[5]

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[5] Similarly, in the race discrimination context, this Court has declared some purported government interests flatly off limits, even though (presently) race discrimination may be constitutional if it satisfies the elements of strict scrutiny. *Compare*, *e.g.*, *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978) (Opinion of Powell, J.) ("Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids.") with *id.* at 314–15 ("As the interest of diversity is compelling in the context of a university's admissions program, the question remains whether the program's racial classification is necessary to promote this interest.").

For example, the under-inclusiveness of the statute at issue in *Brown v. Entertainment Merchants Association* served to "raise[] serious doubts about whether the government [was] in fact pursuing the interest it invoke[d], *rather than disfavoring a particular speaker or viewpoint*." 564 U.S. 786, 802 (2011) (emphasis added).

Here, Lorie Smith "sincerely believes . . . that same-sex marriage conflicts with God's will[,]" and therefore "will not create a website celebrating same-sex marriage[.]" *303 Creative*, 6 F.4th at 1170.[6] And the Tenth Circuit conceded that Petitioners are being compelled to express ideological messages about same-sex marriage by way of their web design services. *See id. at* 1176 ("Appellants' creation of wedding websites is pure speech."); *id.* at 1177 ("The Accommodation Clause also 'compels' Appellants to create speech that celebrates same-sex marriages."). Most crucially, the court below conceded not only that "there is more than a substantial risk of excising certain ideas or viewpoints from the public dialogue" in this case, but that "*[e]liminating such ideas is CADA's very purpose.*" *Id.* at 1178 (emphasis added).

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[6] As this Court has noted, such a belief is neither indecent nor dishonorable. *See Obergefell v. Hodges*, 576 U.S. 644, 672 (2015) ("Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here.").

The Tenth Circuit's inquiry should have ended with that conclusion. By concluding that CADA could survive strict scrutiny while having elimination of dissent from public debate as its aim, the court below demonstrated that it failed to apprehend the very purpose of the strict scrutiny it purported to apply, which, as Justice Kagan observed, is to serve as a prophylactic against disguised viewpoint discrimination. *See supra* Part II p. 13. Here, there is no such disguise; CADA comes as a wolf.

III. VIEWPOINT-DISCRIMINATORY COMPULSION OF IDEOLOGICAL SPEECH IS *PER SE* UNCONSTITUTIONAL BECAUSE IT CANNOT CONCEIVABLY SATISFY STRICT SCRUTINY.

Countless statements from this Court suggest that viewpoint discrimination against protected private speech, when found, is *per se* unconstitutional. *See Sorrell v. IMS Health Inc.*, 564 U.S. 552, 571 (2011) ("In the ordinary case it is all but dispositive to conclude that a law is content based and, in practice, viewpoint-discriminatory."). In fact, *Sorrell*'s rhetorical hedge ("all but") notwithstanding, the Supreme Court has *never* concluded that the First Amendment permits a viewpoint-discriminatory restriction or compulsion of non-governmental speech.

This Court has made categorical statements regarding the impermissibility of viewpoint discrimination. *See*, *e.g.*, *Iancu v. Brunetti*, 139 S. Ct. 2294, 2299 (2019) ("The government may not discriminate against speech based on the ideas or opinions it conveys."); *Matal v. Tam*, 137 S. Ct. 1744, 1751 (2017) (trademark provision "offend[ed] a bedrock First Amendment principle: Speech may not be banned on the ground that it expresses ideas that offend."); *Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."); *Masterpiece Cakeshop*, 138 S. Ct. at 1733 (Kagan, J., concurring) ("As the Court states, a principled rationale for the difference in treatment *cannot* be based on the government's own assessment of offensiveness.") (emphasis added) (internal quotation marks and citation omitted).

The Tenth Circuit cited *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625 (1984), for the proposition that prohibiting discrimination in public accommodations is a compelling government interest. *303 Creative*, 6 F.4th at 1178; *Jaycees*, 468 at 625 ("By prohibiting gender discrimination in places of public accommodation, the Minnesota Act protects the State's citizenry from a number of serious social and personal harms."); *accord Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 733 (2014)

("The Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal.").

However, it is one thing to suggest that non-discrimination interests generally are compelling. It is quite another to suggest that compelling private actors to express certain viewpoints is a constitutionally permissible advancement of that interest. *303 Creative*, 6 F.4th at 1178 ("Eliminating such ideas is CADA's very purpose."). Indeed, the idea that the government may compel speech because it has a good reason to do so simply echoes the argument rejected in *Barnette* that saluting the flag was part of American citizenship. *See* 319 U.S. at 637 ("To enforce those [constitutional] rights today is not to choose weak government over strong government. It is only to adhere as a means of strength to individual freedom of mind in preference to officially disciplined uniformity for which history indicates a disappointing and disastrous end.").

The Tenth Circuit's holding is therefore wholly inconsistent with existing case law, which protects even that speech which is offensive, or which targets specific individuals and groups. Moreover, it is precisely because some opinions touch on important topics that we must safeguard the First Amendment right not to be compelled to speak a message. That is the true "test of its substance." *Id.* at 642

("[F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. *The test of its substance* is the right to differ as to things that touch the heart of the existing order.") (emphasis added).

Indeed, the Supreme Court has cautioned that *even otherwise unprotected* categories of speech may not be subjected to viewpoint discrimination by the government. *R.A.V.*, 505 U.S. at 384–90 (explaining that the First Amendment does not permit the government to engage in viewpoint discrimination under the guise of regulating unprotected speech). "Thus, the government may proscribe libel; but it may not make the further content discrimination of proscribing *only* libel critical of the government." *Id.* at 384. Even regarding generally unprotected "fighting words," "[t]he First Amendment does not permit . . . special prohibitions on those speakers who express views on disfavored subjects." *Id.* at 391.

Of course, a government interest in ensuring that individuals—even those operating commercial enterprises—must express a specific viewpoint can never be compelling; such an interest, being itself anathema to the First Amendment, is *definitionally* not compelling. *See*, *e.g.*, *id.* at 386 ("The government may not regulate use based on hostility—or favoritism—towards the underlying message expressed."); *cf. Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the L. v. Martinez*, 561 U.S.

661, 680 (2010) (noting that a "compelling [] interest[] . . . []related to the suppression of ideas" cannot satisfy strict scrutiny of restrictions on associational freedom) (internal quotation marks and citation omitted).

Here, the Tenth Circuit concluded that Petitioners speak as private citizens through their web design services. However, Lorie Smith's moral viewpoint, that marriage is "'between one man and one woman[,]'" does not align with Colorado's moral viewpoint that neither a man nor a woman is an essential element of a marriage, so Colorado passed a law to suppress Lorie's viewpoint and promote its own. *See 303 Creative*, 6 F.4th at 1178 ("Eliminating such ideas is CADA's very purpose.").

The courts below found that CADA survived strict scrutiny because a First Amendment exemption would "'relegate [same-sex couples] to an inferior market[,]" *id.* at 1180, "than that enjoyed by the public at large." *Emilee Carpenter, LLC v. James*, No. 21-cv-6303, 2021 WL 5879090, at *16 (W.D.N.Y. Dec. 13, 2021). But this premise (in addition to being risible on its own terms) could never suffice to override First Amendment protection against viewpoint discrimination. In other words, even if it were undeniably true that Petitioners offer the best website design in the world, it still cannot be the case that compelling their speech and servitude is a permissible remedy.

This Court's treatment of viewpoint discrimination against protected private speech is clear: such discrimination is categorically impermissible. It is conceptually impossible for viewpoint discrimination to satisfy strict scrutiny, because viewpoint discrimination is the very thing that strict scrutiny of content-based speech restriction or compulsion exists to prevent.

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The State of Colorado is forcing Petitioners to broadcast a message that Lorie Smith cannot reconcile with her religious convictions. The First Amendment protects Petitioners from the government's heavy-handed approach that makes Petitioners a billboard for the government's messages. Moreover, even if the correct standard to apply is strict scrutiny, it is impossible for strict scrutiny to be satisfied by compulsion of ideological speech without decimating the First Amendment. It is for these reasons this Court should reverse the Tenth Circuit's ruling and clarify that compulsion of and viewpoint discrimination against protected private speech is *per se* unconstitutional.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Tenth Circuit Court of Appeals.

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