

No. 21-476

IN THE
Supreme Court of the United States

303 CREATIVE LLC, ET AL.,

Petitioners,

v.

AUBREY ELENIS, ET AL.,

Respondents.

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

**BRIEF OF *AMICI CURIAE* CATO INSTITUTE
AND HAMILTON LINCOLN LAW INSTITUTE
SUPPORTING PETITIONERS**

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QUESTION PRESENTED

Lorie Smith, through her graphic and website design firm, 303 Creative, wants to expand into producing websites for weddings. Although Smith is generally willing to design graphics and websites for lesbian, gay, bisexual, and transgender customers, her religious convictions preclude her from creating graphics and websites announcing and celebrating marriages of same-sex couples. But the Colorado Anti-Discrimination Act requires her to create custom websites celebrating the marriages of same-sex couples if she does so for opposite-sex couples.

The question presented is whether, in applying a public-accommodation law, the state may compel speech through the creation of an expressive product on the grounds that the product is “custom and unique.”

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INTEREST OF *AMICI CURIAE*¹

The **Cato Institute**, founded in 1977, is a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual *Cato Supreme Court Review*, and files *amicus* briefs.

Cato has published a vast range of commentary supporting both the First Amendment and gay rights, and indeed finds that position to maximize individual liberty. *See, e.g.*, Eugene Volokh & Ilya Shapiro, "Choosing What to Photograph Is a Form of Speech," *Wall St. J.*, Mar. 17, 2014, <https://bit.ly/3pxeb3c>; Robert A. Levy, "The Moral and Constitutional Case for a Right to Gay Marriage," *N.Y. Daily News*, Aug. 15, 2011, <https://bit.ly/3jvXq4e>; Dale Carpenter, *Unanimously Wrong*, 2005-2006 *Cato Sup. Ct. Rev.* 217 (2006), <https://bit.ly/3B8Mdgd>.

The **Hamilton Lincoln Law Institute** is a non-profit law firm that litigates for free speech, limited government, and separation of powers. HLLI seeks to protect individuals, consumers, professionals, and shareholders from regulatory abuse and overreach at the state and federal levels.

¹ Rule 37 statement: All parties were timely notified and consented to the filing of this brief. No part of this brief was authored by any party's counsel, and no person or entity other than *amici* funded its preparation or submission.

This case interests *amici* because its correct resolution can show how freedom of speech can be maintained and protected without intruding on gay rights.

SUMMARY OF ARGUMENT

This Court has generally recognized that the First Amendment protects the right of individuals to speak, or to refrain from speaking, even when the government cites a compelling interest in forbidding discrimination. In *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995), for example, the Court held that organizers of a St. Patrick’s Day Parade could not be required to allow an Irish gay, lesbian, and bisexual contingent to march behind a banner merely proclaiming their presence, despite a state public accommodations law protecting people from sexual-orientation discrimination.

The Tenth Circuit declined to follow the Court’s example. *303 Creative LLC v. Elenis*, 6 F.4th 1160, 1176–1183 (10th Cir. 2021), app. 19a–34a [*hereinafter* “*app.*,” *with line cites*]. The lower court recognized that Smith’s “creation of wedding websites”—through her sole proprietorship, 303 Creative—“is pure speech.” App. 20a. It acknowledged that the Accommodations Clause of the Colorado Anti-Discrimination Act (“CADA”) “‘compels’ [Smith] to create speech” celebrating marriages that her conscience tells her she cannot celebrate and understood that such compulsion necessarily “works as a content-based restriction.” App. 22a-23a. The court even affirmed that Smith is likely willing to work with, and design websites for, LGBT customers in nearly all other circumstances. App. 6a.

But apparently none of that matters in the Tenth Circuit. If Smith sells graphic designs celebrating the marriages of some couples, Colorado can demand that she create and sell similar graphic designs to celebrate the marriages of all couples. App. 27a–28a. In essence, even though comparable website-design services are widely available, the lower court believes that the harm of being denied a single person’s creative designs outweighs the harm of compelling a person to support a cause that violates her conscience. *See* App. 26a–32a. That cannot be correct.

Because—as even the Tenth Circuit found—it is easy to appreciate how this case implicates speech rights, it affords this Court a prime opportunity to affirm the basic of teaching of *Hurley*, *Wooley v. Maynard*, 430 U.S. 705 (1977), and *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974): the First Amendment’s protections for the “individual freedom of mind” means that the government may not require people to distribute speech with which they disagree and cannot force them to change their message because they have decided to speak. *Wooley*, 430 U.S. at 714. This case allows the Court to again clarify that, despite their importance, state laws prohibiting discrimination in places of public accommodation are subject to the First Amendment’s limits on governmental power. And it provides this Court the opportunity to reject the corrosive version of strict scrutiny applied by the Tenth Circuit, which defers to the state’s choice of means in any case involving expressive custom products in the commercial marketplace.

ARGUMENT

I. THE FIRST AMENDMENT PROHIBITION AGAINST SPEECH COMPULSIONS IS A CRITICAL AND EXPANSIVE PROTECTION

The government may not violate Smith’s “freedom of mind” by requiring her to display speech with which she disagrees. *Wooley*, 430 U.S. at 714. For such “content-based restriction[s],” app. 23a (citing *Nat’l Inst. of Family and Life Advocates v. Becerra (NIFLA)*, 138 S. Ct. 2361, 2371 (2018)), it does not matter whether the government wants to force Smith to display the message on her vehicle, *Wooley*, 430 U.S. at 715, or to publish it in a film or on a website. *See Reno v. ACLU*, 521 U.S. 844, 870 (1997) (finding “no basis for qualifying the level of First Amendment scrutiny that should be applied to” the internet). Films and graphic designs published on web sites are a “significant medium for the communication of ideas” ranging from “direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression.” *See Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501–02 (1952).

Nor does it matter that Smith is producing the message for profit and through her business. *See, e.g., Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 789 (2011) (commercial video games); *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991) (books); *Joseph Burstyn*, 343 U.S. at 502 (films). Speech in commercially distributed works, no less than in politics, may “contribute to the discussion, debate, and the dissemination of information and ideas that the First Amendment seeks

to foster.” See *Pacific Gas & Electric Co. v. Public Utilities Comm’n*, 475 U.S. 1, 8 (1986) (cleaned up). And it does not matter whether Smith has already decided to speak on a given topic. *Tornillo*, 418 U.S. at 257. The state may not use Smith’s services or her “private property as a ‘mobile billboard’ for the State’s ideological message.” *Wooley*, 430 U.S. at 715, 717.

Laws that require Smith to speak are coercing her into “betraying [her] convictions,” which “is always demeaning.” *Janus v. American Fed’n of State, Cty., and Mun. Emps., Council 31*, 138 S. Ct. 2448, 2464 (2018). Such laws deny citizens the ability to preserve their integrity as speakers and thinkers; to preserve their sense that their expression, and the expression that they “foster” and for which they act as “courier[s],” *Wooley*, 430 U.S. at 715, dovetails with what they believe. Indeed, because any design created by 303 Creative stems directly from the mind of Smith herself, the concern for the individual’s freedom of conscience is exceptionally striking here.

The violation of Smith’s freedom of conscience is greater still because her designs are far “more than a passive receptacle or conduit” for any given message on a website that she creates. *Cf. Tornillo*, 418 U.S. at 258. Smith “actively create[s] each website, rather than merely hosting customer-generated content on [her] online platform.” App. 21a. In other words, Colorado’s law would insist that Smith not only promote a specific message, if customers sought out her services, but that she also design many details of the message. As the Eighth Circuit correctly wrote, requiring individuals or companies “to use their own creative skills to speak in a way they find morally objectionable” “may well be more troubling from a First

Amendment perspective” than laws that only require the more passive act of, for example, mandating a media company to “reproduce verbatim an opinion piece written by someone else.” *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 754 n.4 (8th Cir. 2019). Even requiring that more passive act, however, is impermissible. *Tornillo*, 418 U.S. at 241.

The principle that protects Smith’s freedom of speech applies beyond the specific context of 303 Creative’s views on same-sex marriages. This freedom is protected regardless of whether the messages involve matters of religion, sexual orientation, sex, race, national origin, or other classifications. Web designers should be free to choose not to speak for any political movement, no matter how laudable or condemnable it is. They should be free not to create web sites or graphic designs proclaiming “White Lives Matter,” “The Nation of Islam Is Great,” “KKK,” “There is No God but Allah,” “Jesus is the Answer,” or any other message that they cannot in good conscience abide.

II. THIS CASE PROVIDES A CHANCE TO AFFIRM THAT THE FIRST AMENDMENT APPLIES TO “UNIQUE” GOODS AND SERVICES

Although they serve important interests, app. 24a, antidiscrimination laws violate the First Amendment when they are applied to require individuals (or organizations) to “alter the expressive content of their [message],” *Hurley*, 515 U.S. at 572–73, “interfere” with the choice of individuals “not to propound a point of view contrary to [their] beliefs[.]” *Boy Scouts of America v. Dale*, 530 U.S. 640, 654 (2000), or other-

wise “target speech.” *Hurley*, 515 U.S. at 572. Antidiscrimination laws are constitutional, “as a general matter,” given that they do not regulate speech on the basis of content. *See id.* at 572; *Roberts v. United States Jaycees*, 468 U.S. 609, 626–27 (1984).

Together, *Roberts* and *Hurley* highlight this First Amendment line. Both cases involved state laws designed to combat “invidious discrimination”—discrimination based on sex or sexual orientation in places of public accommodation. *Id.* at 615, 628; *Hurley*, 515 U.S. at 572–73. Both cases concerned plaintiffs who believed that an organization was treating them differently based on a protected characteristic. In *Roberts*, the Jaycees would not permit women to be full voting members of the organization. 468 U.S. at 612. In *Hurley*, the South Boston Allied War Veterans Council denied “GLIB”—a group formed to “express pride in their Irish heritage as openly gay, lesbian, and bisexual individuals”—a spot in its St. Patrick’s Day-Evacuation Day Parade. 515 U.S. at 560–61. And both cases addressed the organizations’ beliefs that the First Amendment protected their actions. The Jaycees argued that they had a right to engage in “expressive association.” *Roberts*, 468 U.S. at 622. The Council noted their right to control the content of their message. *Hurley*, 515 U.S. at 574.

A few variations in the facts, however, demanded opposite conclusions. The Jaycees excluded women altogether from full membership regardless of what they did or said, while gay men, lesbians, and bisexuals were allowed to participate as individuals in the parade; what the Boston Council barred them from was marching behind a banner identifying their group as such. *Compare Roberts*, 468 U.S. at 614–616,

with Hurley, 515 U.S. at 572–74. The Court thus found no basis to believe that admitting women as full members would impede the Jaycees’ own message or coerce them to display someone else’s message, but determined that forcing the Council to permit GLIB to march and carry a banner would affect its ability to control its own expression of “traditional religious and social values.” *Compare Roberts*, 468 U.S. at 627–28, *with Hurley*, 515 U.S. at 562, 568–70. The Council’s parade was expressive and GLIB’s participation in the parade would have been expressive; giving women “full membership” in a group in which they were already participating was simply not expressive.

Those distinctions made all the difference: the application of antidiscrimination laws in *Roberts* was consistent with the First Amendment; their application in *Hurley* was not. *Compare Roberts*, 468 U.S. at 628–29, *with Hurley*, 515 U.S. at 581.

Like *Hurley*, the present case diverges from *Roberts* in two critical ways. Smith would serve a “gay man” in nearly all circumstances to the same extent she would serve a “straight man.” App. 6a, 12a. Because of Smith’s faith, however, she simply will not design a website announcing the marriage of a same-sex couple. App. 6a. The Tenth Circuit spent several pages saying so. *See generally* app. 19a–24a; *see also* app. 55a–63a (Tymkovich, C.J., dissenting) (detailing how “compelled speech” doctrine is implicated here). The result should be the same as it was in *Hurley*: The First Amendment forbids applying Colorado’s antidiscrimination law to Smith’s specific case.

Unfortunately, both federal and state courts have provided uncertain and conflicting guidance on how

to apply this Court's decisions in cases like Smith's. The Eighth Circuit faithfully applied *Hurley*, recognizing that the First Amendment limits antidiscrimination laws. *See, e.g., Telescope Media*, 936 F.3d at 758–60. Other courts have determined the asserted expressive components of a business's product do not warrant First Amendment protection. *See, e.g., Elane Photography, LLC v. Willock*, 309 P.3d 53, 63–64 (N.M. 2013). And now the Tenth Circuit has ruled that, even if a law forces an individual to promote a message to which he or she objects, it can be enforced so long as courts can characterize the product or service denied as unique. *See app.* 19a–34a.

This Court has the chance to clarify how the First Amendment applies to public accommodation laws for expressive goods and services. This Court can reaffirm *Hurley*, remind the lower courts that the First Amendment's protections are subject to state anti-discrimination law, and clarify the circumstances in which heightened judicial scrutiny may be met.

III. THIS CASE IS AN OPPORTUNITY TO REPUDIATE THE TENTH CIRCUIT'S DANGEROUS STRICT SCRUTINY

As the Tenth Circuit acknowledged, Smith's creation of wedding sites is pure speech. Forcing her to create websites to which she objects is a speech compulsion. The law cannot force her to speak in this way unless the state can satisfy strict judicial scrutiny.

Declaring that a unique and customized product is irreplaceable and that therefore a requirement to provide it in the commercial marketplace is narrowly tailored, as the Tenth Circuit did, is to end free-speech

protection for providers of expressive products. It erodes the ability of courts to invalidate applications of speech regulations where part of the government's goal is to punish unpopular ideas rather than solely to protect consumers' access to products.

That cannot be right as a matter of constitutional law. While providers of commercial services are certainly subject to state anti-discrimination obligations, their freedom of speech must remain protected.

A. Through Excessive Deference to Colorado's Choice of Means, the Tenth Circuit Effectively Allows Smith's Speech to Be a Target of the CADA

The Tenth Circuit observes that Colorado has a compelling interest in generally preventing discrimination against LGBT persons in places of public accommodation and concludes that this interest will be substantially undermined unless speech like Smith's is compelled. App. 29a–30a. In reaching this conclusion, the court first emphasizes the uniqueness of Smith's services, app. 28a, and “imagine[s]” a world in which LGBT persons lack access to “a wide range of custom-made services” and are “relegated to a narrower selection of generic services.” App. 30a. The Tenth Circuit next contends that, because CADA applies to nearly all commercial goods and services, ensuring access to Smith's “unique, artistic product” is merely “the *consequence* of enforcing CADA.” App. 27a (emphasis original). And so, Smith's “unique goods and services,” says the court, “are where public accommodation laws are most necessary to ensuring

equal access.” App. 30a. This line of reasoning improperly defers to the state’s choice of means in the enforcement of an acknowledged speech compulsion.

First, to satisfy strict scrutiny Colorado must bear the burden of demonstrating, at least to some degree, the peculiar need to compel speech in the creation of expressive products. *See NIFLA*, 138 S. Ct. at 2377 (rejecting California’s justifications for its compelled disclosures in part because they were “purely hypothetical”). Instead, the Tenth Circuit simply presumes such facts—indeed, “imagine[s] them—and dismisses the reasonable prediction that “exempting custom [products] from a public accommodations law would not undermine the law’s purpose.” App. 30a (disagreeing with *Brush & Nib Studio, LC v. City of Phoenix*, 448 P.3d 890, 910, 916 (Ariz. 2019)).

Second, the Tenth Circuit’s description of Colorado’s interest is equivalent to saying the state has an interest in making speech itself the public accommodation. “A statute is narrowly tailored if it targets and eliminates no more than the exact source of the ‘evil’ it seeks to remedy.” *Frisby v. Schultz*, 487 U.S. 474, 485 (1988). The Tenth Circuit believes that CADA is narrowly tailored to remedy the evil of discrimination against a protected class in the sale of “custom and unique” goods and services. App. 27a–28a. This must mean one of two things: (1) the state has a compelling interest in designating speech itself as the public accommodation subject to a non-discrimination requirement; or (2) it is impossible to distinguish between “custom and unique” goods and services that are speech and those that are not speech.

(1) *Hurley* forecloses the former option, holding that the state has no legitimate interest in making speech itself the public accommodation. 515 U.S. at 573. Recharacterizing the state’s purpose as eliminating discrimination in the sale of *all* “custom and unique” goods and services makes no difference. If the word “all” in that sentence encompasses speech as well, then the target of the regulation (not the “consequence” *but see* app. 27a) is at least partly speech. That Colorado cannot do. *Hurley*, 515 U.S. at 573.

(2) The latter possibility fails because *non-expressive* custom and unique goods and services differ from *expressive* custom and unique goods and services. There is not a “limitless variety” of conduct that may “be labeled as speech.” *United States v. O’Brien*, 391 U.S. 367, 376 (1968). Instead, conduct is speech when it is “inherently expressive.” *Rumsfeld v. Forum for Academic & Inst. Rights, Inc.*, 547 U.S. 47, 66 (2006). “[P]articular conduct possesses sufficient communicative elements” such that it may be described as “inherently expressive” when “an intent to convey a particularized message was present, and [] the likelihood was great that the message would be understood by those who viewed it.” *See Texas v. Johnson*, 491 U.S. 397, 404–05 (1989). It seems unlikely that all custom-made products would satisfy this standard.

As noted above, the Tenth Circuit spent several pages acknowledging that Smith’s “creation of wedding websites is pure speech.” *See generally* app. 19a–24a. Smith’s intended product is an uncontroversial example of speech: wedding websites “express approval and celebration of the couple’s marriage, which is itself often a particularly expressive event.” App. 19a. The creation of wedding cake is perhaps a harder

case. *See, e.g., Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 288 (Colo. App. 2015) (overturned on other grounds in *Masterpiece Cakeshop v. Colorado Civil Rights Comm’n*, 138 S. Ct. 1719 (2018)). But there would ordinarily be no discernible message conveyed, by either party, when a tailor fits bespoke suits for a same-sex couple.

Distinguishing expressive from non-expressive products in some contexts might be hard, but the Tenth Circuit agreed that Smith’s product does not present a hard case. Yet the Tenth Circuit (and Colorado) declined to recognize any exemption for products constituting speech when First Amendment doctrine provides a way of doing so. *See Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1916 (2021) (Barrett, J., concurring) (explaining how *Hurley* used the First Amendment to grant “exemptions” to “generally applicable laws”). Despite the Tenth Circuit’s protests to the contrary, app. 27a, by doing so, the Tenth Circuit is creating a state interest in subjecting speech itself to anti-discrimination laws, an interest that would then definitionally satisfy strict scrutiny. The endorsement of such an interest runs contrary to this Court’s precedent and warrants its review.

B. Smith Does Not Have a “Monopoly” on Her Expressive Product Such That Compelling Her to Provide It Might Satisfy Strict Scrutiny

To prevent speakers with monopolistic power from silencing “the voice of competing speakers with the mere flick of a switch,” the Court has suggested that the government may have greater flexibility under

the First Amendment in regulating companies possessing monopoly control over a market. *Turner Broadcasting Sys. v. FCC*, 512 U.S. 622, 656 (1994). Likely seizing onto that idea, the Tenth Circuit contended that Colorado’s choice of means was justified because Smith possesses a monopoly over her specific designs. App. 29a.² Smith’s wedding websites would be “custom and unique.” And because (for some unknown reason) the relevant market is Smith’s particular wedding website designs, rather than wedding website designers generally—let alone all website designers—the court says that Smith has monopolistic power in the market of *her* designs. *Id.* To the Tenth Circuit, that tautology constitutionally justifies Colorado’s compelling Smith to create messages with which she can’t agree. *See id.* But the court erred.

First, the lower court misapplied the function that monopolistic power has played in this Court’s First Amendment analysis. This Court has already made clear that merely characterizing a business as having a monopoly is not sufficient to affect that business’s protections under the First Amendment. *Turner Broadcasting*, 512 U.S. at 656 (concluding that a newspaper’s “enjoy[ing] monopoly status in a given locale” is constitutionally insignificant); *Consolidated Edison Co. v. Pub. Serv. Comm’n*, 447 U.S. 530, 534 n.1 (1980) (“Nor does Consolidated Edison’s status as a privately owned but government regulated monopoly preclude its assertion of First Amendment rights.”). Instead, this Court has recognized the

² The court does not cite *Turner Broadcasting*, or any court opinion to make this point, but instead an *amicus* brief by Law and Economics Professors.

state’s potential interest in preventing entities with monopolistic power from silencing other speakers. *Turner Broadcasting*, 512 U.S. at 656 (“A cable operator, unlike speakers in other media, can thus silence the voice of competing speakers with a mere flick of the switch.”); *see also Hurley*, 515 U.S. at 577 (“This power gives rise to the Government’s interest in limiting monopolistic autonomy in order to allow for the survival of broadcasters who might otherwise be silenced and consequently destroyed. The Government’s interest in *Turner Broadcasting* was not the alteration of speech, but the survival of speakers.”).

The Tenth Circuit does not attempt to describe a comparable danger if all customers are not given access to Smith’s designs. *See* app. 28a–29a. Indeed, because of the decentralized and competitive market for website design, the court had to concede that LGBT consumers would have the option to obtain products through other wedding-website services. App. 28a. To say that Smith can be compelled to speak simply to provide speech of her own particular “quality and nature” is antithetical to the First Amendment.

Second, this Court’s decision in *Hurley* is irreconcilable with the Tenth Circuit’s definition of a “monopoly.” The parade in *Hurley* was undoubtedly “unique”: The South Boston Allied War Veterans Council’s was the only organization for nearly 50 years to conduct it. *Hurley*, 515 U.S. at 560. The parade “has included as many as 20,000 marchers and drawn up to 1 million watchers.” *Id.* It was special and quite large, but the Court disavowed the view that *Turner Broadcasting*’s monopoly rationale applied. *Id.* at 577. The Tenth Circuit failed to explain how its definition of a “monopoly” would not apply to the parade in *Hurley*,

perhaps because that would be an impossible task. It is similarly unclear how the Tenth Circuit could distinguish *Dale*, 530 U.S. 640, under its “monopoly” rationale. Surely, the Boy Scouts are a “unique” organization.

Third, the Tenth Circuit’s definition of a “monopoly” would strip the term of all useful meaning. Under the court’s approach, any business that produces a good or service that is not *literally identical* to the good or service of another business could have a “monopoly.” Of course, that encompasses all businesses, large or small. Apple and Samsung may not have a monopoly over the smartphone industry, but Apple has a “monopoly” over the iPhone 12 Pro Max and Samsung has a “monopoly” over the Samsung Galaxy S21 Ultra 5G. A local surveyor may not have a monopoly over the surveying industry, but that surveyor has a “monopoly” over the specific skills and talents that make him or her competitive in the marketplace. The court’s methodology for defining a “monopoly” is little more than a word game.

C. The Effect of the Tenth Circuit’s Deference to Colorado’s Choice of Means Would Be to Allow the State to Punish Providers with Unpopular Views

The Tenth Circuit recognized that, as a “content-based restriction,” app. 23a, CADA is “justified only if [Colorado] proves that [CADA is] narrowly tailored to serve compelling state interests.” *NIFLA*, 138 S. Ct. at 2371 (internal quotation marks omitted). Here, speech itself is declared to be the “public accommodation” to which access must be granted without discrimination on forbidden grounds.

Among other things, strict scrutiny serves as an “evidentiary device” to filter out improper motives of silencing a particular view. Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. Chi. L. Rev. 413, 453-54 (1996). Underinclusive or overinclusive laws—those that are not “narrowly tailored”—raise “serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint.” *NI-FLA*, 138 S. Ct. at 2371, 75–76 (striking down a law for being underinclusive); *accord Simon & Schuster*, 502 U.S. at 108, 121, 122 n.2 (overinclusive).

The Tenth Circuit holds that, in general, the state has a compelling interest in protecting the interests of same-sex couples in accessing goods and services in the commercial marketplace. *Amici* do not challenge that holding, but the Tenth Circuit’s version of strict scrutiny is so deferential as to the state’s means that it is hard to discern whether a state might be acting with improper purposes to suppress unpopular views.

Here, for example, the state’s choice of means is overinclusive, placing an onerous burden on petitioners’ speech while accomplishing little to grant same-sex couples wider access to wedding website services, given that such services can readily be obtained from many other providers. That overinclusiveness cannot satisfy strict scrutiny.

Beyond that immediate erroneous conclusion, the Tenth Circuit’s strict scrutiny compounds the constitutional danger. The lower court freely concedes that the dignitary interests of same-sex couples cannot

justify compelling Smith’s pure speech. The requirement to create wedding websites for same-sex couples, the court correctly held, “is not narrowly tailored to preventing dignitary harm.” App. 25a–26a. The insult of being refused service is no doubt an affront, but does not justify “interfer[ing] with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government.” *Id.* (quoting *Hurley*, 515 U.S. at 579). That much of the Tenth Circuit’s decision is surely right.

But the lower court also concludes that compelling Smith’s pure speech *is* narrowly tailored to the material interest of same-sex couples in accessing publicly available goods and services. App. 26a–32a. As noted above, this conclusion is unwarranted based on the court’s “monopoly” theory, including the obvious fact that website services are widely and readily available. While harm to dignitary interests would indeed be hard to quantify, harm to material interests should not be. It is telling that neither the state, which has the burden of persuasion under strict scrutiny, nor the Tenth Circuit present any data on barriers to access in the website-design marketplace. That’s because the court defines the relevant market as the very expression Smith refuses!

Under this approach, no means chosen by the state could be regarded as underinclusive or overinclusive. Any speech regulation would be perfectly tailored to achieve what the state says it is designed to do. If that version of strict scrutiny were to migrate into other First Amendment doctrines, it would be the end of meaningful judicial review of free-speech regulation.

Because the Tenth Circuit has essentially surrendered to the state's choice of means, it has flipped the purpose of strict scrutiny on its head. The Court has the opportunity to reject such a dangerous development in First Amendment doctrine.

CONCLUSION

Just as drivers' "individual freedom of mind," *Wooley*, 430 U.S. at 714, permits them to refuse to display speech of which they disapprove, so creators' freedom of mind permits them to refuse to create speech they disapprove of. The Eighth Circuit has recognized this point; the New Mexico Supreme Court and the Tenth Circuit have not. This Court should grant certiorari to resolve the conflict, and to reaffirm all Americans' right to choose what speech they will create.

Respectfully submitted,

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