reason
FREE MINDS AND FREE MARKETS

Government Can't Compel the Creation of Wedding Websites

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Today Eugene and I filed an amicus brief in the Supreme Court in support of the petitioners in *303 Creative LLC v. Elenis*, arguing that wedding-website designers cannot be required by a state public accommodations law to create website designs for same-sex couples. The Tenth Circuit erred in concluding otherwise, undermining a freedom critical to the LGBT-rights movement itself.

Here is the Summary of Argument:

> This case is about protecting the constitutional right to free expression while allowing government to generally ensure equal access to commercial goods and services.
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> "Our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth," this Court wrote in *Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n*, 138 S. Ct. 1719, 1727 (2018), another case involving Colorado's ongoing efforts to eliminate the discrimination it once fostered (see *Romer v. Evans*, 517 U.S. 620 (1996) (invalidating state constitutional amendment denying civil rights protections to homosexuals)). "For that reason," this Court continued, "the laws and the Constitution can, and in some instances must, protect them in the exercise of their civil rights. The exercise of their freedom on terms equal to others must be given great weight and respect by the courts." *Masterpiece Cakeshop*, 138 S. Ct. at 1727.
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> At the same time, the First Amendment freedom not to speak must include the freedom not to create speech, and the freedom to choose which speech to engage in or create based on the religious, political, or sexual-orientation-related content of the speech. A freelance writer cannot be punished for refusing to write press releases for the Church of Scientology, even if he is willing to work for other religious groups. A musician cannot be punished for refusing to play at Republican-themed events, even if he will play at other political events, and even if the jurisdiction bans discrimination based on political affiliation in public accommodations. *See* Eugene Volokh, *Bans on Political Discrimination in Places of Public Accommodation and Housing*, 15 NYU J. L. & Liberty 490 (2021). Likewise, a photographer or a wedding singer should not be punished

for refusing to take photographs celebrating a same-sex wedding, or for refusing to sing at such a wedding.

Indeed, 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, this Court held that a state public accommodations law could not constitutionally require that organizers of a St. Patrick's Day Parade let an Irish gay, lesbian, and bisexual contingent march behind a banner merely proclaiming their presence.

Of course, the First Amendment shields refusals to speak, but does not extend to refusals to do things that are not a form of speech. Limousine drivers, hotel operators, and caterers should not have a Free Speech Clause right to exempt themselves from antidiscrimination law in their professional activities, because in those cases the law is not compelling them to speak or to create First Amendment-protected expression. Likewise, though the First Amendment shields refusals to participate as a co-creator in others' speech— say, as an actor or a musical accompanist or a singer— again the limousine driver, hotel operator, or caterer would not qualify as co-creators of the speech involved in the wedding. This Court has rejected "the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *United States v. O'Brien*, 391 U.S. 367, 376 (1968). There must also be limits set on the variety of conduct compulsions that can be labeled "speech compulsions," and on the degree and quality of involvement that can be labeled compelled "participation" in a ceremony.

Fortunately, this case does not call on this Court to define such limits with precision, because there is no serious question that it involves compelled speech. The Tenth Circuit recognized that Smith's "creation of wedding websites"—through her sole proprietorship, 303 Creative—"is pure speech." Pet. 20a. It acknowledged specifically 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." Pet. 22a–23a. The lower court even recognized that Smith is willing to work with, and design websites for, LGBT customers in nearly all other circumstances. Pet. 6a.

Yet the Tenth Circuit failed to follow this Court's speech-protective lead in *Hurley* and other decisions. Pet. 19a–34a. If Smith sells graphic designs celebrating the marriages of some couples, according to the Tenth Circuit, Colorado can demand that she create and sell similar graphic designs to celebrate the marriages of all couples. Pet. 27a–28a. In essence, even though comparable website-design services are widely available, the lower court believed that the harm of being denied access to a single person's creative designs is sufficient to let the government compel that person to speak in ways that violate her conscience. See Pet. 26a–32a. That cannot be correct.

> Because it is easy to appreciate how this case implicates speech rights—as even the Tenth Circuit did—it affords this Court a prime opportunity to affirm the basic holding 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" mean that the government may not require people to create and 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.
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> In *Masterpiece Cakeshop*, this Court expressly recognized the "authority of a State and its governmental entities to protect the rights and dignity of gay persons who are, or wish to be, married but who face discrimination when they seek goods or services." 138 S. Ct. at 1723. This case allows this Court to add that, despite their importance, state laws prohibiting discrimination in such public accommodations 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 custom expressive products in the commercial marketplace

And we offer this thought from the Conclusion:

> The First Amendment has historically protected the rights of Americans to organize politically and to advocate unpopular causes. This protection has been especially critical for the LGBT-rights movement. *See* Dale Carpenter, *Born in Dissent: Free Speech and Gay Rights*, 72 SMU L. Rev. 375 (2019); Carpenter, *Expressive Association*, 85 Minn. L. Rev. at 1525-33. With such expressive freedom secure, "[m]illions of gay and lesbian Americans have worked hard for many decades to achieve equal treatment in fact and in law. They have exhibited extraordinary vision, tenacity, and grit—battling often steep odds in the legislative and judicial arenas, not to mention in their daily lives." *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1837 (2020) (Kavanaugh, J., dissenting).

Joining us as amici were Ilya Shapiro (formerly with the Cato Institute), the American Unity Fund (AUF), and the Hamilton Lincoln Law Institute (HLLI). Contributing as counsel were Devan Patel of AUF, and Theodore Frank, Anna St. John, and Adam Schulman of HLLI. I want to thank my research assistant Joshua Diaz (SMU Law '23) for his invaluable assistance on the brief.