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 MARK JANUS, THE NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES, CARE NET, AND HEARTBEAT INTERNATIONAL, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Lorie Smith, a website designer who operates through 303 Creative, LLC, wants to expand into creating websites for weddings. Although Smith is generally willing to design websites for lesbian, gay, bisexual, and transgender customers, her religious convictions preclude her from creating 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 applying a public-accommodation law to compel Smith's custom design of websites violates the Free Speech Clause of the First Amendment.

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INTEREST OF THE AMICI CURIAE[1]

Collectively, the Amici Curiae were successful petitioners and amici curiae in this Court's two most recent cases protecting against government-compelled speech, *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018) and *National Institute of Family & Life Advocates (NIFLA) v. Becerra*, 138 S. Ct. 2361 (2018). They write this brief, as parties and beneficiaries of those cases, to urge the Court to continue its protection against compelled speech in this case.

Mark Janus is the former Illinois public employee whose First Amendment right to not pay for union speech against his will was vindicated by this Court in *Janus*, 138 S. Ct. 2448.

The National Institute of Family and Life Advocates ("NIFLA") is a 501(c)(3) nonprofit membership organization that exists to provide legal counsel, education, and training to life-affirming pregnancy centers and clinics. NIFLA represents more than 1,600 pro-life pregnancy centers across the country. Of that number, over 1,400 operate as medical facilities. This Court vindicated NIFLA's right to not be forced to inform patients about the availability of low-cost abortions in *NIFLA*, 138 S. Ct. 2361.

Care Net is a national nonprofit corporation and one of the largest affiliation organizations for pregnancy centers in North America. Care Net's mission is

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[1] Rule 37 statement: No counsel for any party authored any part of this brief, and no person or entity other than *amici* funded its preparation or submission. Counsel for both Petitioners and Respondents have given blanket consent to the filing of amicus briefs.

to offer compassion, hope, and help to anyone considering abortion by presenting them with realistic alternatives and Christ-centered support through its life-affirming network of pregnancy centers, churches, organizations, and individuals. To accomplish this mission, Care Net provides education, support, and training for its more than 1,200 affiliates and a growing network of churches. Care Net also runs a national call center providing real-time pregnancy decision coaching. Care Net filed a brief as amicus curiae supporting NIFLA in *NIFLA*, 138 S. Ct. 2361.

Heartbeat International, Inc. ("Heartbeat") is an 501(c)(3) nonprofit, interdenominational Christian organization whose mission is to support the pro-life cause through an effective network of affiliated pregnancy help centers. Heartbeat serves approximately 2,400 pro-life centers, maternity homes, and nonprofit adoption agencies in over 50 countries—making Heartbeat the world's largest such affiliate network. Heartbeat filed a brief as amicus curiae supporting NIFLA in *NIFLA*, 138 S. Ct. 2361.

SUMMARY OF ARGUMENT

The government may not require an individual to communicate by word one's acceptance of the government's political ideas. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). "[T]he First Amendment protects the right of individuals to hold a point of view different from the majority" and to refuse to articulate the view of the government or the majority. *Wooley v. Maynard*, 430 U.S. 705, 715 (1977). Further, the government's tolerance of expressions of dissent does not eliminate the First Amendment harm from compulsion to speak the government's preferred message.

This Court reaffirmed these principles in *Janus* and *NIFLA*. In *Janus*, this Court held that compelled speech extends to compelled subsidization of speech, holding that agency fees could not be taken from government employees who did not join a public sector union. 138 S. Ct. at 2460. In *NIFLA*, the Court held that a California law that compelled crisis pregnancy centers to inform women how they can obtain state-subsidized abortions "at the same time petitioners try to dissuade women from choosing that option" was content-based compelled speech and therefore subject to strict scrutiny. 138 S. Ct. at 2371.

The lower court correctly recognized that Petitioner's website design constituted speech and that compelling Petitioner to design websites for weddings of same-sex couples was content-based compelled speech subject to strict scrutiny. However, the lower court's finding that the Colorado Anti-Discrimination Act was narrowly tailored to Colorado's interest in ensuring equal access to publicly available goods and

services was erroneous. The specialization of Petitioner's products cannot serve both as a trigger to subject the law to strict scrutiny and as a justification for the law to satisfy strict scrutiny.

Thus, consistent with the Tenth Circuit, this Court should find that the Colorado Act's application to Petitioner is content-based compelled speech subject to strict scrutiny. This Court should, however, reverse the Tenth Circuit's erroneous application of strict scrutiny and hold that the Act is not narrowly tailored to serve the government's interest.

ARGUMENT

I. This Court has long held that government-compelled speech is constitutionally suspect.

This Court has long held that compelled speech "transcends constitutional limitations on [government] power and 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." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633 (1943).

In *West Virginia State Board of Education v. Barnette*, the Court held unconstitutional West Virginia's enforcement of a regulation requiring children in public schools to salute the American flag. *Id.* The Court found that a flag salute constituted a form of utterance and that West Virginia employed a flag as "a symbol of adherence to government as presently organized." *Id.* at 631–32. The flag salute regulation "requires the individual to communicate by word and sign his acceptance of the political ideas it thus bespeaks." *Id.* at 633. The Court found no compelling

justification for requiring students to salute the flag, and therefore held the compelled expression of allegiance to the state unconstitutional. *Id.* at 633–34.

In *Wooley v. Maynard*, 430 U.S. 705 (1977), this Court applied its reasoning in *Barnette* to invalidate a New Hampshire statute that forbade covering up lettering on a license plate, including the state's license plate slogan, "Live Free or Die." *Id.* at 706–07. The Court noted that "the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." *Id.* at 714. The Court held that the application of the statute to covering up the slogan was unconstitutional because "the First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster, in the way New Hampshire commands, an idea they find morally objectionable." *Id.* at 715.

In neither *Barnette* nor *Wooley* did the state prohibit private individuals from expressing views counter to state-held orthodoxy—this Court nonetheless found the compelled speech sufficiently disruptive of First Amendment interests as to make them unconstitutional. Martin H. Redish, *Compelled Commercial Speech and the First Amendment*, 94 Notre Dame L. Rev. 1749, 1755–56 (2019).

One other potential effect of compelled speech is that it could deter a speaker from communicating his or her own views. In *Pacific Gas & Electrical Co. v. Public Utilities Commission*, 475 U.S. 1 (1986), this Court found unconstitutional a California requirement that a gas and electric utilities company apportion space in its billing envelopes four times a year for inserts from an opposing consumer group. This Court

found that "because access is awarded only to those who disagree with [Pacific Gas and Electric's] views and who are hostile to [its] interests, [Pacific Gas and Electric] must contend with the fact that whenever it speaks out on a given issue, it may be forced . . . to help disseminate hostile views." *Id.* at 14. This might well lead Pacific Gas to conclude that the safe course is to avoid controversy. *Id.* In other words, by compelling Pacific Gas to include speech with which it disagrees, the government made disseminating Pacific Gas's own speech more expensive.

II. This Court has recently affirmed its strong disfavor of government-compelled speech in *Janus* and *NIFLA*.

This Court's disfavor of government-compelled speech remains strong today. Several terms ago, this Court powerfully reaffirmed it in two cases: *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018), and *National Institute of Family & Life Advocates (NIFLA) v. Becerra*, 138 S. Ct. 2361 (2018).

Janus held that the First Amendment generally bars compelling people to pay money to a private organization that will use it for speech. Specifically, the case involved a challenge to agency fees—fees that state governments forced public employees represented by unions to pay to those unions even if the employee was not a union member. *Janus*, 138 S. Ct. at 2460. This Court held that any requirement for nonmembers to subsidize public-sector unions violated the Free Speech Clause of the First Amendment because almost everything that public-sector unions do, including engaging in collective bargaining, constitutes speech on matters of public concern. *Id.* at 2459–60.

Janus quoted favorably from Justice Jackson's majority opinion in *Barnette*: "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." *Id.* at 2463 (quoting *W. Va. Bd. of Ed.*, 319 U. S. at 642). The Court stated that "[c]ompelling individuals to mouth support for views they find objectionable violates [this] cardinal constitutional command, and in most contexts, any such effort would be universally condemned." *Id.*

Janus hypothesized that no one would seriously argue that the First Amendment would permit the State of Illinois to require all residents to sign a document expressing support for a particular set of positions on controversial public issues. *Id.* at 2464. Although most of this Court's free speech cases have involved restrictions on what may be said, rather than laws compelling speech, *Janus* said that perhaps that is because such compulsion so plainly violates the Constitution. *Id.* "[M]easures compelling speech are at least as threatening." *Id.*

In addition to undermining the ends of serving our democratic form of government and furthering the search for truth, compelled speech does additional damage: "[f]orcing free and independent individuals to endorse ideas they find objectionable is always demeaning." *Id.* In other words, compelled speech is antithetical to the First Amendment because it undermines one's individual autonomy to hold and communicate one's opinions and beliefs.

A day before *Janus*, this Court decided *NIFLA v. Becerra*, in which it held that the government cannot

require crisis pregnancy centers to inform patients about the availability of low-cost abortions. 138 S. Ct. 2361, 2371–76 (2018).

The Court in *NIFLA* found that California's notice requirement was a content-based regulation of speech. By compelling individuals to speak a particular message, such notices altered the content of their speech. *Id.* at 2371. Under the California notice requirement, "licensed clinics [had to] provide a government-drafted script about the availability of state-sponsored services," including abortion—the very practice that the crisis pregnancy centers were devoted to opposing. *Id.* The California law compelled petitioners to inform women how they can obtain state-subsidized abortions "at the same time petitioners try to dissuade women from choosing that option." *Id.* Thus, the Court found that the notice requirement plainly altered the content of petitioners' speech and was therefore a content-based restriction on speech. *Id.*

Normally, content-based restrictions on speech are subject to strict scrutiny, but the Ninth Circuit in *NIFLA* did not apply strict scrutiny because it held that the notice requirement regulated "professional speech." *NIFLA*, however, rejected professional speech as a separate category of speech subject to a different test than other restrictions on speech. *Id.*

NIFLA recognized that in some cases the Court has recognized an exception to applying strict scrutiny to laws that compel speech. In *Zauderer v. Office of Disciplinary Counsel of Supreme Court*, 471 U.S. 626, 650–53 (1985), for example, this Court upheld a rule requiring lawyers who advertised their services on a contingency-fee basis to disclose that clients might be

required to pay some fees and costs. *Zauderer* stands for the proposition that when a disclosure requirement governs only "commercial advertising" and requires the disclosure of "purely factual and uncontroversial information about the terms under which . . . services will be available," that such requirements should be upheld unless they are "unjustified or unduly burdensome." *NIFLA*, 138 S. Ct. at 2372 (quoting *Zauderer*, 471 U.S. at 651).

But *NIFLA* held that the *Zauderer* exception did not apply in that case because the California notice requirement did not involve purely factual and uncontroversial information about the terms under which services will be available. *NIFLA*, 138 S. Ct. at 2372.

NIFLA also recognized that this Court's previous cases have allowed regulations directed at commerce or conduct, including professional conduct, from imposing incidental burdens on speech. *Id*. at 2373. But the Court held that the California notice requirement for crisis pregnancy centers were not regulations of professional conduct; the requirement regulated speech as speech. *Id*. at 2373–74.

III. Government speech compulsion is always content-based and therefore almost always subject to strict scrutiny.

NIFLA stands for the proposition that compelled speech always involves content-based speech regulation and therefore, is almost always subject to strict scrutiny. Although this Court did not specifically undertake the analysis, the Illinois agency-fee system at issue in *Janus* was also a compelled speech requirement that was content-based because nonmember

agency-paying public employees were forced to pay funds to the union to be used for a specific message—a pro-union message.

Indeed, compelled speech always involves "content-based" regulation because the government, when it compels speech, compels a specific message, not just an obligation to say whatever the speaker wants. Ashutosh Bhagwat, *Constitutional Rights: Intersections, Synergies, and Conflicts*, 28 Wm. & Mary Bill of Rts. J. 287, 289 (2019); *see also, e.g., Riley v. Nat'l Fed'n of Blind*, 487 U.S. 781, 795 (1988) ("Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech. We therefore consider the Act as a content-based regulation of speech."); *Miami Herald Pub. Co., Div. of Knight Newspapers, Inc. v. Tornillo*, 418 U.S. 241 (1974) (compelled printing of candidate's reply to criticism interfered with editorial judgment about newspaper content); *Pacific Gas & Electrical Co.,* 475 U.S. 1 (compelling utilities to apportion space in its billing envelopes for inserts of an opposing public consumer group unconstitutional); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.,* 515 U.S. 557, 559 (1995) (finding that Massachusetts may not compel private citizens who organize a parade to include among the marchers a group imparting a message the organizers do not wish to convey).

"Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). "Government regula-

tion of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Id*. Thus, compelled speech laws should almost always be subject to strict scrutiny. *See Reed*, 576 U.S. at 163.

Here the Tenth Circuit correctly recognized that Petitioner Lorie Smith's website design constitutes speech, that the Colorado Anti-Discrimination Act (the "Act") was being enforced to compel Smith's speech—forcing her to design websites for weddings of same-sex couples if she designed websites for opposite-sex couples—and that the Act is a content-based restriction subject to strict scrutiny. Pet. App. 23a. ("Because the Accommodation Clause compels speech in this case, it also works as a content-based restriction"). Nonetheless, the Tenth Circuit erroneously held that the Act survived strict scrutiny because it was "narrowly tailored to Colorado's interest in ensuring 'equal access to publicly available goods and services.'" Pet. App. 24a–25a. In doing so, the Tenth Circuit found that, Petitioner's products are unique and customizable, and thus irreplaceable, and held that the government therefore has an interest in forcing Petitioner to provide her specialized products to everyone equally in the market. Pet. App. 28a.

But the Tenth Circuit's application of strict scrutiny makes no sense. Petitioner's products' unique, specialized nature cannot be a basis to subject the Act to strict scrutiny because they are speech, but also serve as a basis to uphold the Act as narrowly tailored.

First, the Tenth Circuit provides no basis for limiting the purported compelling interest of ensuring equal access to the marketplace generally to only Pe-

titioner's unique and specialized products (i.e., Petitioner's speech), rather than the marketplace for website design generally. *See Hurley,* 515 U.S. at 573 (holding that the state has no legitimate interest in making speech itself the public accommodation).

Second, in limiting the marketplace to Petitioner's unique and specialized website design specifically, rather than the marketplace for website design generally, the Tenth Circuit eliminates the state's evidentiary burden under strict scrutiny to show whether there are actual barriers to the website design marketplace. *See NIFLA*, 138 S. Ct. at 2377 (holding that the state's burden to justify the restriction on speech under strict scrutiny requires more than the "purely hypothetical").

The result of the Tenth Circuit's erroneous application of strict scrutiny is to allow the specialization of Petitioner's products to serve both as a trigger to subject a law to strict scrutiny while also serving as a justification for the law to satisfy strict scrutiny. Such an application is contrary to this Court's precedents, would be self-defeating, and would doom free speech protection for any provider of expressive products.

Thus, while the Tenth Circuit's analysis finding that Petitioner's website design constitutes free speech, and application of strict scrutiny to the Act because the Act compels speech in a content-based manner is consistent with this Court's compelled speech cases, particularly in *Janus* and *NIFLA*, and should be upheld, this Court should reverse the Tenth Circuit's illogical application of strict scrutiny, as inconsistent with this Court's precedent.

CONCLUSION

This case involves government-compelled speech—and this Court has long held that compelled speech presumptively violates the First Amendment. Most recently in *Janus* and *NIFLA*, the Court struck down laws that compelled individuals or groups to speak in violation of their own beliefs or to subsidize speech with which they disagree. Similarly, in this case, the government is forcing Petitioners to engage in speech contrary to their deeply held beliefs. Because the compelled speech is content-based, this Court must apply strict scrutiny, as the court below did. However, this Court should reverse the conclusion of the Tenth Circuit that the Act is narrowly tailored to serve as government interest because the lower court's reasoning does not fit this Court's strict scrutiny analysis.

Respectfully submitted,

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