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United States Court of Appeals for the Second Circuit

EMILEE CARPENTER, LLC, D/B/A/ EMILEE CARPENTER PHOTOGRAPHY, AND EMILEE CARPENTER,
PLAINTIFFS-APPELLANTS,

v.

LETITIA JAMES, IN HER OFFICIAL CAPACITY AS ATTORNEY GENERAL OF NEW YORK; MARIA L. IMPERIAL, IN HER OFFICIAL CAPACITY AS ACTING COMMISSIONER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS; AND WEEDEN WETMORE, IN HIS OFFICIAL CAPACITY AS DISTRICT ATTORNEY OF CHEMUNG COUNTY,
DEFENDANTS-APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK, NO. 21-CV-6303, HON. FRANK P. GERACI, PRESIDING

BRIEF OF HARVEST HOUSE PUBLISHERS AND NAZARENE PUBLISHING HOUSE D/B/A THE FOUNDRY PUBLISHING AS *AMICI CURIAE* SUPPORTING PLAINTIFFS-APPELLANTS AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Harvest House Publishers has no parent corporation and no publicly held corporation owns 10% or more of its stock.

The Nazarene Publishing House, d/b/a The Foundry Publishing has no parent corporation and no publicly held corporation owns 10% or more of its stock.

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INTEREST OF *AMICI CURIAE*

Harvest House Publishers was founded in 1974 and exists to fulfill its mission to provide high quality books and products that affirm biblical values, help people grow spiritually strong, and proclaim Jesus Christ as the answer to every human need. Harvest House publishes evangelical Christian books about social issues, current events, apologetics, Bible prophecy, Christian living, and children's educational books. Each year, Harvest House publishes about 100 new books and maintains an active backlist of more than 1,600 titles.

The Foundry Publishing, also known as The Nazarene Publishing House, was founded in 1912. Its mission is to publish Wesleyan Holiness Literature, primarily for the Church of the Nazarene, but it also assists many other denominations and independent churches. The publishing house produces several lines of quarterly curriculum for all age levels as well as hundreds of book titles and music products.[1]

[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and, no person—other than the *amici curiae*, their members, or their counsel—contributed money that was intended to fund preparing or submitting the brief. All parties consented to the filing of this brief.

INTRODUCTION

Amici are religious publishers that create resources for millions of people to grow in their faith. *Amici* are diverse in many views but united in their commitment to the principle that every speaker should have the right to exercise their expressive judgment in a manner consistent with their core convictions. *Amici*'s publishing is an exercise in free speech, for they both convey the speech of others and convey their own speech by their editorial decisions about content, layout, and design.

In that respect, they are much like Emilee Carpenter, the wedding photographer and blogger who sought here to exercise her First Amendment rights by creating expressive content in accord with her faith. New York law, however, would require her to create expression with which she disagrees. The district court agreed that is precisely the law's effect: Ms. Carpenter is "compel[led]" "to create speech" that she "would otherwise refuse" because that speech violates her conscience. Special Appendix (SA) 22–23.

Yet the court found that this blatant restriction on free speech did *not* violate the First Amendment. To arrive at that counterintuitive result, the district court announced that New York has a compelling interest in ensuring equal access to public accommodations—and it presumed that wedding services were a type of essential public accommodation. The court then held that forcing Ms. Carpenter to speak against her own views was the only way for New York to further that interest,

because Ms. Carpenter's "unique artistic style and vision" is "nonfungible." SA 34. A different photographer would not, after all, "deliver the *same* photographs she does." *Id.* So according to the district court, the State can put Ms. Carpenter to the choice to speak the message it demands or not to speak at all.

The district court's decision butchers the First Amendment. Ms. Carpenter uses artistic judgment to convey others' pictures through wedding photographs and others' speech through blog posts. Likewise, *amici* exercise discretion to convey both others' and their own speech. The type of expressive discretion exercised by both Ms. Carpenter and *amici* is a protected right rooted in this Nation's history and tradition. The First Amendment's protection of speech and press stemmed in large part from various English and colonial efforts to punish publication of disfavored books and newspapers. When a creator conveys the speech of others and exercises independent judgment, the creator's own speech is protected just as any other speech.

By stripping First Amendment protection from Ms. Carpenter's exercise of expressive speech, the district court departed from the Supreme Court's precedents. Those precedents protect speakers' rights to speak what they wish to speak and to refrain from speaking what they desire not to. Though the Supreme Court has allowed narrow speech restrictions where they are the least restrictive means of furthering a compelling government interest, it has rejected any suggestion that a

restriction is narrowly tailored simply because the speaker offers some sort of "unique" or "nonfungible" speech. The Court has protected the speech of *actual* monopolies, like energy and cable companies. And it has often protected the rights of those who offer unique forms of expression, from parade organizers to Boy Scout troops. In any case, ensuring access to a particular wedding photographer is not a government interest of the highest order sufficient to compel speech.

Absent correction, the reasoning of the decision below would lead to widespread suppression of speech. Like Ms. Carpenter, *amici* could be forced to publish material at odds with their religious beliefs, depriving readers of resources about their own faith. All that the government would need to bring down its heavy hand of censorship on a speaker would be to identify some "unique" public service and an arguable connection with a protected classification—religious beliefs, sexual preferences, even political views—or other government interests. A wide swath of speech could be suppressed, especially ideas that the government dislikes. Reversal is required to vindicate the First Amendment rights of creative speakers and publishers.

ARGUMENT

I. Expressive discretion is a protected right rooted in this country's history and legal traditions.

The expressive judgment of those who print, publish, or transmit others' speech (including pictures) is an essential part of the freedom of speech and the press

protected by the First Amendment. This protection was borne of experience. "All nations have tried censorship and only a few have rejected it." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 73 (1963) (Douglas, J., concurring). And colonial Americans were all too familiar with the dangers and temptations of governmental power over speech.

A few examples prove the point. After the printing press came to England in 1476, Henry VIII quickly realized the potential (and dangers) of such mass distribution of the written word. *See* Michael W. McConnell et al., *Religion and the Constitution* 559 (4th ed. 2016). He gave favors to certain printers and prosecuted printers who opposed the Crown. *Id.* He also prosecuted those who printed Protestant religious works. *See id.* "[O]ne of the burning issues of the day was whether the Bible should be translated and published in the vernacular." *Id.* The famed publisher William Tyndale "fled to the Continent to publish his English translation and smuggled copies into England from there." *Id.* Many other individual publishers, religious and otherwise, did similarly. *Id.* For Tyndale, his new translation of the New Testament into English would lead to exile from England and ultimately being burned at the stake.[2] The Puritans opposed the Crown's "scheme of royal censorship," launching a campaign led by John Milton against press licensing in the 1640s. *Id.* at 559–60.

[2] For this reason, Margaret Atwood has called him a "martyr[] for 'free speech.'" Jemimah Steinfeld, *Novel Lines*, Index on Censorship, July 2017, at 73, 73.

Yet still, even in colonial America, freedom of speech for publishers was not always secure. For instance, in 1733, John Peter Zenger created the *New York Weekly Journal*, the first opposition newspaper in the colonies. Livingston Rutherford, *John Peter Zenger: His Press, His Trial and A Bibliography of Zenger Imprints* 28 (1904). His publication included essays by leading English libertarian philosophers, as well as the popular Cato's Letters that played a key role in the American Revolution. "Zenger Trial," *The Oxford Companion to United States History* 858–59 (Paul S. Boyer ed., Oxford University Press 2001). Zenger also used sarcasm, innuendo, and allegory to ridicule New York's British Governor. *Id.* at 858.

Because of these criticisms, Zenger was charged with seditious libel. At trial, Zenger argued for acquittal, not by denying that he had published the materials at issue, but by arguing that the content of what he published was true. He was acquitted by a jury and would be the last colonial publisher to be prosecuted by royal authorities. *Id.* Zenger's trial established that publishers would be free to criticize the government, an important marker on the path to adopting the First Amendment. *Id.* at 858–59.

The "exigencies of the colonial period" and "the efforts to secure freedom from oppressive administration" were part of the motivation for the First Amendment. *Near v. State of Minnesota ex rel. Olson*, 283 U.S. 697, 716–17 (1931). Against this history, the rights to speak and to be free from compelled speech have

long been recognized as encompassing the right to exercise expressive discretion in fields that create and produce messages and art, including publishing, broadcasting, and cable programming. "[T]he free publication and dissemination of books and other forms of the printed word furnish very familiar applications of these constitutionally protected freedoms." *Smith v. California*, 361 U.S. 147, 150 (1959). This protection holds even if "the dissemination takes place under commercial auspices." *Id.* Indeed, the publisher's "economic stake" in the speech can give it a particularly strong interest in preventing "infringements of freedom of the press" and speech. *Bantam Books*, 372 U.S. at 64 n.6; *accord Bigelow v. Virginia*, 421 U.S. 809, 818 (1975); *Time, Inc. v. Hill,* 385 U.S. 374, 397 (1967) ("That books . . . are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment." (cleaned up)).

The same rule that protects publishers also protects analogous entities that engage in various forms of artistic expression. For instance, the government cannot regulate a newspaper's "choice of material" or "the size and content of the paper," "whether fair or unfair." *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974); *see also Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376, 391 (1973). The same rule applies to broadcasters and many others whose creative product constitutes speech. *E.g.*, *Arkansas Education Television Commission v. Forbes*, 523 U.S. 666, 674 (1998) ("When a public broadcaster

exercises editorial discretion in the selection and presentation of its programming, it engages in speech activity."); *Turner Broad. System, Inc. v. FCC*, 512 U.S. 622, 636 (1994) ("Through original programming or by exercising editorial discretion over which stations or programs to include in its repertoire, cable programmers and operators see[k] to communicate messages on a wide variety of topics and in a wide variety of formats." (cleaned up)); *Buehrle v. City of Key West*, 813 F.3d 973, 977 (11th Cir. 2015) ("The First Amendment protects the artist who paints a piece just as surely as it protects the gallery owner who displays it, the buyer who purchases it, and the people who view it."); *Telescope Media Group v. Lucero*, 936 F.3d 740, 750 (8th Cir. 2019) (wedding videos "are a form of speech").

This protection for the exercise of expressive discretion serves important public purposes. "Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truth." *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940). Thus, "[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail." *FCC v. League of Women Voters of California*, 468 U.S. 364, 377 (1984). And in that way, freedom of speech and the press "will ultimately produce a more capable citizenry and more perfect polity." *Cohen v. California*, 403 U.S. 15, 24 (1971). For that reason, protecting artistic expression "contribute[s] greatly to the development and well-being of our free society and its

continued growth." *Smith*, 361 U.S. at 155. But because the temptation for any government to suppress disliked speech is so strong, "[c]easeless vigilance is the watchword to prevent" the erosion of speech protections "by Congress or by the States." *Id.*

II. By sanctioning a violation of artistic expression, the decision below contradicts the Supreme Court's First Amendment precedents.

The First Amendment prohibits "[c]ompelling individuals to mouth support for views they find objectionable." *Janus v. Am. Federation of State, County & Municipal Employees, Council 31*, 138 S. Ct. 2448, 2463 (2018). "[T]he government, even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers and listeners." *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 791 (1988). The district court agreed that Ms. Carpenter's professional judgment in providing wedding photography and blogging constitutes pure speech protected by the First Amendment. SA 22–23 & n.10. And it correctly acknowledged that "compel[ling] her to create speech"—by forcing her to provide those wedding services—would amount to the government compelling her to speak an inherently "expressive" message that she "would otherwise refuse." SA 22–23.

Yet the district court concluded that the First Amendment allows the government to excise Ms. Carpenter's speech because it dislikes the content of that speech. That is incredible. No Supreme Court decision supports that implausible reading of

the First Amendment, and many decisions refute it. The district court invoked strict scrutiny, under which the government must prove that its restriction is narrowly tailored to a compelling government interest. But its application of both parts of that test departs from Supreme Court precedent.

With some understatement, the district court agreed that "other photographers may operate in the same market," but they would not "deliver the *same* photographs [Ms. Carpenter] does." SA 34. Her "expressive services" are, in the district court's view, "unique" and "nonfungible." *Id.* In other words, Ms. Carpenter is a monopolist who has cornered the market for her own photographs and blog posts. Thus, according to the district court, New York's restriction on Ms. Carpenter's speech is narrowly tailored to an interest in equal access to public accommodations.

The First Amendment does not give way nearly so easily, and that is why the Supreme Court has protected the speech even of actual monopolists like energy and cable companies. And it has repeatedly protected the speech of speakers offering unique services against public accommodations attacks. To excuse a First Amendment violation on monopoly grounds for a wedding photography service twists the Court's narrow tailoring test beyond recognition. What's more, allowing the government to state a compelling interest at a high level of generality—*e.g.*, "equal access"—misunderstands the demanding nature of the government's burden to justify violations of a speaker's constitutional rights. And it is doubtful that the

government's interest, properly defined as access to specific wedding photographers, is a pressing public necessity of the highest order.

A. The district court's narrow tailoring analysis departs from the Supreme Court's precedents.

Though the district court held that New York's speech limitation was narrowly tailored because Ms. Carpenter is essentially a monopolist, the Supreme Court has repeatedly rejected both premises of that holding. First, a speaker is not a monopolist without First Amendment rights simply because it provides unique speech. Second, even actual monopolists do not give up their First Amendment rights.

Start with the Supreme Court's pathmarking decision in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, which recognized that statutes preventing discrimination "do not, as a general matter, violate" the First Amendment. 515 U.S. 557, 572 (1995). At issue was a St. Patrick's Day parade organized by the South Boston Allied War Veterans Council, which decided to exclude a gay, lesbian, and bisexual pride group from its annual parade. The group sued based on the state's public accommodations law, and the Council defended based on the First Amendment. *See id*. at 559–63.

Much like the statute here, the Massachusetts statute in *Hurley* did not "on its face, target speech," but prevented "discriminating against individuals in the provision of publicly available goods, privileges, and services." *Id.* at 572. But a First Amendment problem arose because the statute was applied to "essentially requir[e]

petitioners to alter the expressive content of their parade." *Id.* at 572–73. Though the state law characterized "the parade as a place of public accommodation," applying the statute to the parade's choice of participants "had the effect of declaring the sponsors' speech itself to be the public accommodation." *Id.* at 573. That was because of "the expressive character of both the parade and the marching GLIB contingent." *Id.*

Under the district court's view here, the parade organizers should have lost. After all, a certain parade is, by the definition below, "unique," and a group of people did not have equal access to participate in this "unique" parade. As the Court emphasized, the "success of [the Council's] parade makes it an enviable vehicle for the dissemination" of opposing views. *Id.* at 578.

But, unlike the decision below, the Supreme Court did not treat the uniqueness of speech as reason to eliminate the speaker's First Amendment rights. That the parade was unique did not show that it "enjoy[s] an abiding monopoly of access to spectators," as the parade does not have "the capacity to silence the voice of competing [messages]." *Id.* at 577–78 (cleaned up). Thus, the Court held that compelling the parade organizers to accept the group would "violate[] the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." *Id.* at 573. Though "the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere 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.* at 579.

If the speech restriction in *Hurley* was not narrowly tailored to any equal-access interest, neither is New York's here. Indeed, for Ms. Carpenter (like *amici* publishers), the protected nature of the speech is even clearer than in *Hurley* because she actively creates her own expression via photography and blogging.

Likewise, in *Boy Scouts of America v. Dale*, the Supreme Court rejected the argument that a State's interest in ensuring access to public accommodations superseded a private entity's First Amendment rights to expressive association. 530 U.S. 640 (2000). There, the Boy Scouts revoked Mr. Dale's assistant scoutmaster position when it learned that he was active in the LGBT community. *Id.* at 644. He sued the Scouts for violating New Jersey's statute that "prohibit[ed] discrimination on the basis of sexual orientation in places of public accommodation." *Id.* at 645.

Again, by the district court's measure, the Scouts offer a "unique" good or service. But that could not justify "such a severe intrusion" on the Scouts' First Amendment rights. *Id.* at 642. Under the First Amendment, the State could not "compel the organization to accept members where such acceptance would derogate from the organization's expressive message." *Id.* at 659–61. As the Court explained, "the First Amendment prohibits the State from imposing . . . requirement[s] through

the application of its public accommodations laws" that interfere with individuals' First Amendment rights. *Id.* at 659.

Even in the context of *actual* monopolies—*i.e.*, companies in industries that face high fixed costs or other barriers to entry—the Supreme Court has not stripped monopolists of their First Amendment rights. For instance, in *Pacific Gas and Electric Co. v. Public Utilities Commission of California*, the Court held "that the State cannot advance some points of view by burdening the expression" of a regulated energy company, for "monopoly [status] does not decrease" the constitutional "value of its opinions." 475 U.S. 1, 17 n.14, 20 (1986). And in *Tornillo*, the Court upheld the freedom of the press against governmental interference despite large media outlets' "monopoly of the means of communication." 418 U.S. at 250; *see id.* at 254–58. If speech restrictions are not narrowly tailored even where actual monopolies are involved, the restrictions here—in an industry with essentially no barriers to entry—certainly are not.

The district court's understanding of narrow tailoring would swallow the rule against compelled speech. Simply by defining the relevant market for a particular service as beginning and ending with a speaker's custom services, "the government could regulate the messages communicated by *all* artists, forcing them to promote messages approved by the government in the name of 'ensuring access to the commercial marketplace.'" *303 Creative LLC v. Elenis*, 6 F.4th 1160, 1205 (10th Cir.

2021) (Tymkovich, C.J., dissenting). That reasoning would "empty" the First Amendment's protection for a wide range of speakers, "for the government could require [them] to affirm in one breath that which they deny in the next." *Pacific Gas*, 475 U.S. at 16. The decision below conflicts with the Supreme Court's precedents.

B. The district court's understanding of compelling government interests contradicts Supreme Court precedents.

Beyond the district court's mangling of the narrow tailoring test, its compelling interest analysis is also dubious. A compelling government interest necessary for strict scrutiny must be of the highest order. As the Supreme Court has said, under strict scrutiny, "only the gravest abuses, endangering paramount interest, give occasion for permissible limitation." *Sherbert* v. *Verner*, 374 U.S. 398, 406 (1963) (cleaned up).

At least outside the national security context, it is doubtful whether *any* government interest is of a sufficiently high order to warrant a restriction (or compulsion) of speech protected by the First Amendment. *Cf. Telescope Media*, 936 F.3d at 755 ("[A]s compelling as the interest in preventing discriminatory conduct may be, speech is treated differently under the First Amendment."). The decision below found a compelling government interest in "ensuring" "equal access to publicly available goods and services." SA 24. But this characterization ignores that "public accommodations laws have expanded" dramatically from "traditional places of public accommodation." *Dale*, 530 U.S. at 656. *Compare* 42 U.S.C. § 2000a(b)

(defining as public accommodations lodgings, restaurants, and gas stations), *with* N.Y. Civ. Rights Law § 40 (covering essentially all businesses).

Though the district court cited *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984), for an "equal access" interest, SA 26, the Court in *Jaycees* "went on to conclude that the enforcement of the[] statute[] would not materially interfere with the ideas that the organization sought to express." *Dale*, 530 U.S. at 657. Thus, *Jaycees* does not answer the question of what compelling government interests suffice to limit protected speech, much less analyze the expansion of public accommodations laws.

When the government defines "public accommodations" so broadly as to encompass wedding photographers and bloggers, stating the relevant interest as "equal access to public accommodations" is much too general. The government may as well assert a compelling interest in "equality" or "freedom." "[B]ut the First Amendment demands a more precise analysis." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1881 (2021). Thus, the Court's precedents have "narrowly restricted the interests that qualify as compelling." *Parents Involved in Cmty. Schools v. Seattle Sch. District No. 1*, 551 U.S. 701, 766 n.15 (2007) (Thomas, J., concurring) (rejecting "[t]he notion that a 'democratic' interest qualifies as a compelling interest"); see, *e.g.*, *NAACP v. Button*, 371 U.S. 415, 438–39 (1963) (rejecting Virginia's "attempt to equate" the NAACP's litigation activities with prohibited legal activities and thereby define the relevant government interest at a high level).

Properly defined, New York's only interest here is in equal access to a speaker's expression—in this case, expression by a wedding photographer. And that is simply not a compelling government interest. If "combatting juvenile delinquency" is not a compelling government interest, *Bantam Books*, 372 U.S. at 76 (Harlan, J., dissenting), neither is ensuring access to a speaker's expression, including a particular wedding photographer. No one could call that a "pressing public necessity." *Grutter v. Bollinger*, 539 U.S. 306, 351 (2003) (Thomas, J., concurring in part and dissenting in part).

Moreover, the district court erred in finding a compelling interest based in part on its view that the forced speech here "lacks the 'demeaning' character usually associated with compelled speech." SA 31 (quoting *Janus*, 134 S. Ct. at 2464). First, courts cannot lower the bar for compelling government interests by downplaying the severity of compelling speech. The First Amendment broadly prohibits compelled speech, and the district court agreed that New York seeks to compel speech from Ms. Carpenter. Whether a particular interest is strong enough has nothing to do with some court's subjective speculation as to the case-specific harm of compelled speech.

Second, the court's subjective speculation here borders on the absurd. Ms. Carpenter's entire claim—as the district court elsewhere recognized—is that New York law "compels her to create artistic expression" that is "contrary to her desire

and beliefs." SA 18. What could be more demeaning than being forced by the government to choose whether to speak or to believe? The district court's invocation of *Janus* is particularly inapt, as the Supreme Court concluded there that "[f]orcing free and independent individuals to endorse ideas they find objectionable is *always* demeaning." 134 S. Ct. at 2464 (emphasis added).

Nor does it make any difference that Ms. Carpenter has "*chosen* to invite the public at large to make use" of her artistic expression. SA 31. "[A] speaker is no less a speaker because he or she is paid to speak." *Bery v. City of New York*, 97 F.3d 689, 696 (2d Cir. 1996). Just as "the government may not deny a benefit to a person on a basis that infringes his constitutionally protected freedom of speech even if he has no entitlement to that benefit," *Bd. of Cty. Comm'rs, Wabaunsee Cty., Kan. v. Umbehr*, 518 U.S. 668, 674 (1996) (cleaned up), speech "does not lose its First Amendment protection" "even though it is carried in a form that is 'sold' for profit." *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 420 (1993); *see also Time,* 385 U.S. at 397 (books); *Smith*, 361 U.S. at 150 (books); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952) (motion pictures); *Murdock v. Pennsylvania*, 319 U.S. 105, 111 (1943) (religious literature). Holding otherwise—particularly as governments recharacterize every aspect of modern life as a "public accommodation" or otherwise subject to regulation—would spell the end of meaningful First Amendment protections.

Last, "[t]he First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs." *Heller v. District of Columbia*, 670 F.3d 1244, 1283 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (quoting *United States* v. *Stevens*, 559 U.S. 460, 470 (2010)). The Supreme Court's longstanding "precedents and traditions" do not allow States to "censor speech whenever they believe there is a compelling justification for doing so." *Simon & Schuster, Inc. v. Members of New York State Crime Victims Board*, 502 U.S. 105, 125 (1991) (Kennedy, J., concurring in the judgment). As Justice Black put it:

> What are the 'more important' interests for the protection of which constitutional freedom of speech and press must be given second place? What is the standard by which one can determine when abridgment of speech and press goes 'too far' and when it is slight enough to be constitutionally allowable? Is this momentous decision to be left to a majority of this Court on a case-by-case basis? What express provision or provisions of the Constitution put freedom of speech and press in this precarious position of subordination and insecurity?

Smith, 361 U.S. at 157 (concurring opinion).

In sum, the decision below erred in defining the government interest too broadly, and in transmogrifying the narrow tailoring test to encompass every creative speaker. This Court should reverse.

III. The decision below would allow the government to suppress disfavored speech.

Publishers—who create expression by conveying certain speech—play an integral role in contributing to the marketplace of ideas. Just as Ms. Carpenter uses her

own creative judgment in making photographs and writing blog posts, *amici* and other publishers routinely decide whether and how to convey the speech of others. Their choices in curation, style, and content convey important messages to the public about their values and beliefs. As discussed, that is why the Supreme Court has repeatedly "reaffirm[ed] unequivocally the protection afforded to editorial judgment and to the free expression of views on these and other issues, however controversial." *Pittsburgh Press*, 413 U.S. at 391.

The decision below would nullify this protection. If a State can force Ms. Carpenter to create expressive content with which she disagrees, then it can do the same for publishers. So too can it prohibit publishers from even explaining their views publicly. Publishers would face content-based restrictions on speech that would force them to violate their principles or cease operation. The concomitant disruption to speech will reduce ideas available to a free society—especially ideas that may deviate from the governmental or societal orthodoxy. Official suppression of disfavored ideas would be the result. Absent reversal, these consequences would be stark.

First, the rule announced below would infringe on the "individual dignity and choice" promised by the First Amendment. *Cohen*, 403 U.S. at 24. The district court's approach would force a publisher to publish speech with which it fundamentally disagrees. The government could force a Christian publisher to print tracts that attack Christianity, a feminist publisher to publish literature opposed to women's

rights, and a liberal publisher to propound conservative views. *Cf.* D.C. Code § 2-1402.01 (including "political affiliation" as a protected class).[3] Or it could assert some interest in fairness or accuracy and prevent alleged "disinformation" or compel equal airtime. An essential element of the freedom to speak would be eviscerated. Being compelled to speak is even more "damag[ing]" than other speech regulations, for "[i]n that situation, individuals are coerced into betraying their convictions." *Janus*, 138 S. Ct. at 2464.

Not only would speakers be silenced or coerced, the rights of consumers who rely on and share the speakers' viewpoints would be diluted too. For instance, many depend on the works published by *amici* for devotion, worship, and deepening their faith. If *amici* are coerced into speech they do not believe or silenced, those who find sustenance in *amici*'s works suffer constitutional harm too. For the First Amendment's protection of the freedom of speech encompasses the "right to receive information and ideas." *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); *see also Virginia*

[3] The district court tried to wave away this problem with the disclaimer that "[t]he analysis may well be different with respect to other protected classes" based "on the historical inequities and economic discrimination faced by those groups." SA 35 n.14. But given that the district court unblinkingly accepted the State's own justification for "add[ing] sexual orientation as a protected category," SA 26, its disclaimer provides little solace. And regardless, the district court's own definition of the relevant government interest was not tied to particular protected classes: "A state's interest in eliminating discrimination so as to ensure that its citizens have equal access to publicly available goods and services is one of the highest order." *Id.* (cleaned up).

State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 756 (1976) ("[T]he protection afforded is to the communication, to its source and to its recipients both.").

Second, the rule announced below would "dampen[] the vigor and limit[] the variety of public debate," threatening an underlying premise of the First Amendment: that a vibrant marketplace of ideas will lead to the truth. *Tornillo*, 418 U.S. at 257. How publishers involved in disseminating third-party speech exercise their editorial discretion, and the values and goals that inform their decisions about messaging, go to the heart of defining how any one publisher is different from another. Stamping out speech based on its content would eliminate a slice of the spectrum of ideas that contributes to society's "search for truth." *Janus*, 138 S. Ct. at 2464. And if the decision below does not make a monopolist of everyone, it puts the speech of unique, skilled, or innovative publishers at special risk of censorship. *See* SA 34 (characterizing Ms. Carpenter's service as "unique" because "other photographers" could not "deliver the same photographs she does"). Publishers would be incentivized to select, to edit, to publish—to speak—in a generic way. Innovation and ingenuity would be punished. And consumers would suffer.

Third, the rule below would influence speech in a particularly dangerous way: censoring *disfavored* speech. How easy it would be for government commissions to characterize much speech as arguably implicating classifications in non-

discrimination laws, *cf.* SA 14 n.6, thereby ensnaring any publisher that dares print a controversial viewpoint. At minimum, the government can drag the offending speaker through years of litigation. At maximum, it can stamp out disfavored speech, terminate the speaker's business, and destroy the speaker's personal livelihood. *Cf. State v. Arlene's Flowers, Inc.*, 441 P.3d 1203, 1237 (Wash. 2019) (imposing personal liability on speaker of disfavored views). For that reason, the district court's view—that its decision would somehow promote "a free and open economy"—strains credulity. SA 32.

Fourth and relatedly, speech critical of the government is especially likely to be targeted for suppression. Because "informed public opinion is the most potent of all restraints upon misgovernment," "[t]he durability of our system of self-government hinges upon the preservation of these freedoms" of speech and the press. *Pittsburgh Press*, 413 U.S. at 382. Government efforts to censor critical speech are not new. *See, e.g.*, *Ex parte Vallandigham*, 68 U.S. 243, 244 (1863) (noting that a citizen of Ohio was charged for publicly criticizing the Civil War as "wicked, cruel, and unnecessary"); *New York Times Co. v. Sullivan*, 376 U.S. 254, 274 (1964) (discussing the 1798 Sedition Act, which criminalized "any false, scandalous and malicious writing or writings against the government of the United States"). But the decision below would give the government a potent new weapon to use against speech that criticizes it.

The district court's decision threatens the basic freedoms of *amici* and all similar organizations, and all Americans who rely on publishers for learning, devotion, and faith. By threatening the freedom of expressive discretion, the decision undermines one of this Nation's central constitutional promises: that citizens may think and speak for themselves.

CONCLUSION

The Court should reverse.

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CERTIFICATE OF COMPLIANCE

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Dated: March 11, 2022

/s Christopher Mills
Christopher Mills

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I, Christopher Mills, an attorney, certify that on this day the foregoing Brief was served electronically on all parties via CM/ECF.

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s/ Christopher Mills
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