

**SUPREME COURT
OF THE UNITED STATES**

IN THE SUPREME COURT OF THE UNITED STATES

303 CREATIVE LLC, ET AL.,)
 Petitioners,)
 v.) No. 21-476
 AUBREY ELENIS, ET AL.,)
 Respondents.)

Pages: 1 through 154
Place: Washington, D.C.
Date: December 5, 2022

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9
10 Washington, D.C.
11 Monday, December 5, 2022
12
13 The above-entitled matter came on for
14 oral argument before the Supreme Court of the
15 United States at 10:01 a.m.
16
17 APPEARANCES:
18 KRISTEN K. WAGGONER, ESQUIRE, Washington, D.C.; on
19 behalf of the Petitioners.
20 ERIC R. OLSON, Solicitor General, Denver, Colorado; on
21 behalf of the Respondents.
22 BRIAN H. FLETCHER, Deputy Solicitor General,
23 Department of Justice, Washington, D.C.; for
24 the United States, as amicus curiae, supporting
25 the Respondents.

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1 P R O C E E D I N G S

2 (10:01 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument first this morning in Case 21-476, 303
5 Creative LLC versus Elenis.

6 Ms. Waggoner.

7 ORAL ARGUMENT OF KRISTEN K. WAGGONER
8 ON BEHALF OF THE PETITIONERS

9 MS. WAGGONER: Mr. Chief Justice, and
10 may it please the Court:

11 Lorie Smith blends art with technology
12 to create custom messages using words and
13 graphics. She serves all people, deciding what
14 to create based on the message, not who requests
15 it. But Colorado declares her speech a public
16 accommodation and insists that she create and
17 speak messages that violate her conscience.

18 This Court rejects such
19 government-compelled speech. In Hurley, the
20 Court considered a very similar issue, asking
21 two questions: Is there speech, and is the
22 message affected? That test is easily met here.
23 Colorado agrees Ms. Smith creates speech, and
24 the law undeniably affects her message. She's
25 not asking this Court to create new law but to

1 apply its precedent.

2 Colorado first says this case is about
3 a sale. It's not just about a sale. The state
4 forces Ms. Smith to create speech, not simply
5 sell it.

6 Next, Colorado says it can compel
7 speech on the same topic. But Ms. Smith
8 believes opposite-sex marriage honors scripture
9 and same-sex marriage contradicts it. If the
10 government can label this speech equivalent, it
11 can do so for any speech, whether religious or
12 political. Under Colorado's theory,
13 jurisdictions could force a Democrat publicist
14 to write a Republican's press release.

15 Colorado's last resort is to argue
16 that it can at least compel the same expression.
17 But even the same expression can mean different
18 things, like a black sculptor who carves a
19 custom cross to celebrate a Catholic baptism but
20 not an Aryan church rally.

21 If the government may not force
22 motorists to display a motto, school children to
23 say a pledge, or parades to include banners,
24 Colorado may not force Ms. Smith to create and
25 speak messages on pain of investigation, fine,

1 and re-education.

2 I welcome this Court's questions.

3 JUSTICE THOMAS: Counsel, would you
4 spend just a few minutes on whether or not this
5 -- your case is ripe?

6 MS. WAGGONER: Sure. This Court has
7 considered pre-enforcement challenges before,
8 and, in those contexts, it has looked at the
9 facts. This is one of the strongest
10 pre-enforcement cases, I think, that this Court
11 has considered in that the parties have
12 stipulated every message that Ms. Smith would
13 create has a unique, customized message and that
14 it celebrates a wedding and celebrates a
15 marriage.

16 It's also difficult to imagine a
17 scenario where there is a more aggressive
18 enforcement history by Colorado. Ms. Smith's
19 speech has been chilled. For six years, she has
20 been unable to speak in the marketplace. She's
21 ready to do so today, and she's ready to post
22 her website statement today, which makes this
23 case ripe.

24 JUSTICE KAGAN: Ms. Waggoner, unless
25 you're not through with that -- sorry. Your --

1 MS. WAGGONER: I'm through.

2 JUSTICE KAGAN: Okay.

3 MS. WAGGONER: Thank you.

4 JUSTICE KAGAN: Can I give you a
5 hypothetical? It's not really a hypothetical,
6 because I happen to have two clerks in my
7 chambers this year who are engaged, so, in
8 looking at this case and preparing this case, I
9 looked at their websites.

10 And so the hypothetical is about,
11 like, I'm going to call it the standard website.
12 They both have their names on it, the date of
13 the wedding, a picture of the couple. Then
14 there are a bunch of places that you can click
15 to, and one is the schedule of events and the
16 other is travel and hotel arrangements, and
17 another is favorite things to do in town while
18 you're here, and another is registry.

19 So that's what most websites look
20 like, yeah? And they're not particularly
21 ideological and they're not particularly
22 religious. They're not particularly anything,
23 all right?

24 And -- and then there's a tag line
25 just like the tag line in this case about sort

1 of who created the website or whose graphics and
2 design and typefaces and so forth were used in
3 the website. And so one of them says -- I'm
4 going to substitute a woman's name just to not
5 advertise -- but one of them says, Made By Love
6 With Amber by -- Made With Love By Amber, right?
7 It's actually bigger than the 303 tag line.

8 So I guess what I want to know is
9 suppose Amber wakes up tomorrow morning and
10 says, you know what, I don't want to do those
11 websites anymore for same-sex couples.

12 Could she do that?

13 MS. WAGGONER: In terms of creating
14 new websites?

15 JUSTICE KAGAN: No, you know, like
16 she's providing these templates and she has all
17 these designs and -- and -- and typefaces and --
18 and that's what people use when they create
19 their own website because they give her the date
20 and they give her the -- the -- you know, the --
21 the list of hotels and so forth.

22 So can Amber wake up and just say no
23 more gay couples?

24 MS. WAGGONER: She can't say no more
25 gay couples, but a speaker does have the ability

1 to decide not to speak under the law, but I
2 think the hypothetical that you're mentioning is
3 assuming that it's a plug-and-play website
4 essentially, that the website is already made
5 and that the speech creator isn't making any
6 additions to it.

7 JUSTICE KAGAN: No, no, no.

8 MS. WAGGONER: But compelled --

9 JUSTICE KAGAN: I mean, you know, just
10 like -- I -- I mean, I have to think that your
11 client does something similar. You have lots of
12 graphics, you have, you know, typefaces, and,
13 you know, maybe, you know, some are a little bit
14 more you talk to the client and some are a
15 little bit less you talk to the client.

16 But, basically, you know, clients are
17 coming in and they're saying, we just want a
18 standard website, you know, that tells people
19 where to stay and what -- how to travel there
20 and -- and, you know, what our favorite things
21 to do are.

22 And -- and the question is, can a
23 website designer say, sorry, that's not my kind
24 of marriage?

25 MS. WAGGONER: The website designer --

1 JUSTICE KAGAN: There's no scripture,
2 there's no ideology, there's no nothing.

3 MS. WAGGONER: There is ideology. And
4 this Court has already recognized that there is
5 ideology and different views on marriage. And
6 the Court's promise in Obergefell is to protect
7 those who would believe marriage is between a
8 man and a woman from having to express a view
9 that violates their conscience. But I think --

10 JUSTICE KAGAN: Okay. So I think that
11 if I understand you, you're saying, yes, she can
12 refuse because there's ideology just in the fact
13 that it's Mike and Harry and there's a picture
14 of these two guys together.

15 MS. WAGGONER: That is speech. You
16 are announcing a wedding. And if you believe
17 the wedding to be false, then the -- the
18 government would be compelling you to say
19 something that you otherwise wouldn't say, which
20 makes it --

21 JUSTICE KAGAN: So --

22 MS. WAGGONER: -- content-based.

23 JUSTICE KAGAN: -- so it's really
24 nothing about the content of this speech. I
25 mean, it could be Mike and Pat and you don't

1 actually even know whether Pat is a woman or a
2 man. There's really nothing about the content
3 of this speech, am -- am I right?

4 In your case, you have, like,
5 scripture examples, and so that might, you know,
6 be different maybe, but you're being forthright
7 and saying it's really not about that. It's
8 nothing about the content of the speech. It's
9 just that the content is being -- what --
10 what -- whatever the graphics and typefaces and,
11 you know -- you know, which hotels are -- you
12 know, have been reserved for the wedding, it's
13 being used in a same-sex marriage.

14 MS. WAGGONER: No, it's not about the
15 use. It -- what it's about when a person is
16 creating speech, it is what is the message that
17 they are expressing. The Hurley framework asked
18 this Court to first look at is their speech, and
19 there clearly is words, graphics, text, videos,
20 pictures. That's speech, and it's generally
21 protected.

22 The second is to ask is the speaker's
23 message affected. And when you're requiring a
24 speaker to create a message to celebrate
25 something that they believe to be false, you're

1 compelling their speech and it's affecting their
2 message.

3 JUSTICE JACKSON: So their message is
4 not actually the content of the website. I
5 mean, this is Justice Kagan's point. We could
6 have a situation in which the identical website
7 is being offered, one to Harry and Ann and one
8 to Harry and Steve, but everything on the
9 website is exactly the same.

10 I think I hear you saying that the
11 message that the designer would be sending when
12 she offered the website to Harry and Steve would
13 be different and contrary to her beliefs, and
14 so -- so it's -- it's the implicit message that
15 she's endorsing that wedding --

16 MS. WAGGONER: No.

17 JUSTICE JACKSON: -- that's the
18 problem.

19 MS. WAGGONER: No, she's not -- it's
20 not about whether she's endorsing it. She's not
21 speaking through anything but creating a speech.
22 And when you switch out those names, you're
23 switching out the concept and the message that
24 is actually in the website. Think of an example
25 --

1 JUSTICE SOTOMAYOR: Where?

2 MS. WAGGONER: -- of "God bless this
3 marriage."

4 JUSTICE ALITO: Suppose that be a --

5 JUSTICE SOTOMAYOR: Well, that's --
6 that's a particular message. But I looked to
7 your proposed website, and turn to page 51. It
8 says Save The Date, Lilly and Luke, November 17,
9 2017.

10 So what's the message if it says, Save
11 The Date, Lilly and -- Lilly and Lillian or
12 Lilly and Mary? What's the message there?

13 MS. WAGGONER: That's an invitation to
14 celebrate a marriage, and --

15 JUSTICE SOTOMAYOR: But why is it your
16 invitation? I go to a wedding website. It's
17 something that I send, meaning you, your client,
18 I send it to my family and friends or Lilly and
19 Luke send it to their family and friends. You
20 don't send it. They go to this website. You're
21 not inviting them to the wedding. Lilly and
22 Mary are. So how does it become your message?

23 MS. WAGGONER: In the same way that it
24 is the message of a ghostwriter who writes an
25 anonymous press release or a book. It is still

1 that writer's speech. The whole point of the
2 Compelled Speech Doctrine is to ensure that in
3 --

4 JUSTICE SOTOMAYOR: So what's the
5 limiting line of yours -- of yours? Justice
6 Kagan asked you about another website designer.
7 But how about people who don't believe in
8 interracial marriage or about people who don't
9 believe that disabled people should get married?

10 What's -- where's the line? I choose
11 to serve whom I want. If I disagree with their
12 personal characteristics, like race or
13 disability, I can choose not to sell to those
14 people --

15 MS. WAGGONER: Not at --

16 JUSTICE SOTOMAYOR: -- this website --

17 MS. WAGGONER: -- not --

18 JUSTICE SOTOMAYOR: -- because it's my
19 speech?

20 MS. WAGGONER: -- not at all, Your
21 Honor. The Hurley framework provides that in a
22 public accommodation context, the first thing
23 the Court looks at is, is the speech creator
24 otherwise serving those in a protected class and
25 expressing other messages.

1 In the context of race, it's highly
2 unlikely that anyone would be serving black
3 Americans in other capacities but only refusing
4 to do so in an interracial marriage context --

5 JUSTICE KAGAN: Well, it's not
6 impossible.

7 MS. WAGGONER: -- but --

8 JUSTICE ALITO: Suppose -- suppose we
9 agreed that the website designer could not
10 refuse to provide that service to a same-sex
11 couple if the website is of the kind that
12 Justice Kagan described.

13 What does that say about the
14 particular case that is before us on stipulated
15 facts?

16 MS. WAGGONER: Well, it would say that
17 the Court isn't considering those facts because
18 that's not this case that's presented to them,
19 but, at the same time, even that website --

20 JUSTICE ALITO: Well, so what are the
21 differences between -- what differences do you
22 see between her hypothetical and the actual case
23 that is before us?

24 MS. WAGGONER: She provided a number
25 of hypotheticals, so in terms of assuming it's a

1 --

2 JUSTICE KAGAN: Just one, Ms.
3 Waggoner.

4 JUSTICE ALITO: The hypothetical --

5 MS. WAGGONER: -- website --

6 JUSTICE ALITO: -- where there is a
7 website and, basically, all the -- the website
8 operator does is to put in the names of the two
9 people who are getting married.

10 MS. WAGGONER: That's not a service
11 that -- or a speech creation that Ms. Smith
12 provides, but, if she did provide that, if it's
13 a plug-and-play website where the couple, for
14 example, is putting in their names and -- and
15 using their website, then you don't have
16 compelled speech because you don't have a speech
17 creator.

18 But even in the context of putting in
19 names --

20 JUSTICE SOTOMAYOR: I'm sorry. Show
21 me on your website -- show me in -- on the pages
22 of your petition for a writ of certiorari, show
23 me a page on that website that is an endorsement
24 of a marriage as opposed to the story of a
25 couple.

1 MS. WAGGONER: Well, either one
2 violates the Compelled Speech Doctrine.

3 JUSTICE SOTOMAYOR: No, no, no.

4 MS. WAGGONER: You can't --

5 JUSTICE SOTOMAYOR: Please show me a
6 page on your website that's attached to your
7 petition. I'll start you on page 51.

8 MS. WAGGONER: Pages 53, 52, 54 --

9 JUSTICE SOTOMAYOR: Okay. But leave
10 this --

11 MS. WAGGONER: -- 55, and 56 all
12 represent an invitation and a celebration --

13 JUSTICE SOTOMAYOR: Fifty-three says
14 "Our Photo Gallery." Fifty-four says "Funny
15 Dating Story." How is that your story, your
16 photo gallery?

17 MS. WAGGONER: Fifty --

18 JUSTICE SOTOMAYOR: It's the couple's
19 photo gallery. Page 54 is "Funny Dating Story."
20 It's their story, not your story.

21 I'm looking at every page, and,
22 basically, it's the story of the couple. It's a
23 date on page 51. Fifty-two is "Our Special
24 Day." Fifty-three is RSVP. "Our Photo
25 Gallery." Fifty-four is a funny dating story.

1 I keep looking at all of the mockups, and all of
2 them relate to what Lilly and Luke are saying or
3 doing, who they are, who are their grooms, who
4 aren't their -- who's their bridesmaids. I
5 don't understand. How is this your story? It's
6 their story.

7 MS. WAGGONER: If you're asking
8 whether -- first of all, book authors, newspaper
9 editors, those who write all kinds of
10 publications may be writing about someone else's
11 story, but it's still their speech, and it's
12 still protected --

13 JUSTICE JACKSON: But they're not
14 public accommodations in the same way.

15 JUSTICE BARRETT: Ms. Waggoner, can I
16 ask you --

17 MS. WAGGONER: But they --

18 JUSTICE BARRETT: -- a question about
19 a heterosexual couple? So, in response to
20 Justice Sotomayor's questions, I took it that
21 your website where you say why a wedding
22 website, you go through and it seems like
23 careful, Ms. Smith was careful to say things
24 like I fully customize the look, feel, theme,
25 message, color palettes, et cetera. And then

1 there's the engagement story page and inspired
2 by -- "a page inspired by you and written by
3 Lorie that captures and conveys the cherished
4 storybook of your love."

5 So I want to ask you a hypothetical
6 about a heterosexual couple that comes to your
7 client, and their wedding story, you know, that
8 they want to write under the engagement story
9 page goes like this: We are both cisgender and
10 heterosexual, but that is irrelevant to our
11 relationship which transcends such categories.
12 We knew we were soulmates from the moment that
13 we met and on and on.

14 Would your client publish that site?

15 MS. WAGGONER: Yes, she would publish
16 the site because her objection -- assuming that
17 the marriage is between a man and a woman, she
18 would publish it and that there's no
19 message that she objected --

20 JUSTICE BARRETT: Even though that
21 narrative, I assume, is inconsistent with her
22 biblical views about marriage? I'll give you
23 another related one. A heterosexual couple
24 comes to her and in the engagement story part
25 writes a story that goes like this: We met at

1 work, we were both married to other people, but
2 what began as late nights at the office quickly
3 turned into love. After six months, we realized
4 we could be happy only with each other, so we
5 decided to begin our story today, got divorced,
6 and are marrying each other.

7 Does she publish it?

8 MS. WAGGONER: I don't believe that
9 she would. I also don't believe that she would
10 embrace or express a message that would
11 essentially say it doesn't matter whether there
12 is a marriage between a man and a woman. She
13 wouldn't create that speech either.

14 JUSTICE BARRETT: So it's about the
15 message and not about the sexuality of the
16 couple that asked her to express it that
17 matters?

18 MS. WAGGONER: Yes, which is exactly
19 how the Court decided the case in Hurley, but
20 it's also in other cases as well, the Pacific
21 Gas and Miami Herald cases. This Court has
22 routinely looked at compelled speech cases to
23 determine if the message --

24 JUSTICE BARRETT: And, Ms. Waggoner,
25 can I just ask you to clarify before we move on?

1 When I first asked you the question about the
2 cisgender heterosexual couple, you said you
3 thought she would publish it, but then it seemed
4 like you wavered and said something different a
5 minute ago.

6 MS. WAGGONER: If I could just clarify
7 the hypothetical. The second part of the
8 statement was that it didn't matter? Is -- is
9 that --

10 JUSTICE BARRETT: That concepts of
11 gender or, you know, sexual orientation were
12 irrelevant to their relationship because they
13 believe that those categories don't matter.
14 What matters is their union of souls.

15 MS. WAGGONER: No, she would not
16 create a website that would say that because
17 that would violate her beliefs about what
18 scripture holds on marriage, in the same way,
19 though, this law and the Compelled Speech
20 Doctrine protects the LGBT website designer, who
21 won't be forced to have to create a website
22 essentially advocating for a view of marriage
23 that they don't hold.

24 JUSTICE KAGAN: Can I ask not just --

25 JUSTICE GORSUCH: Well, what do we --

1 what do we do --

2 JUSTICE KAGAN: -- and this is --

3 JUSTICE GORSUCH: -- what do we -- I'm

4 sorry. No.

5 JUSTICE KAGAN: No, go ahead.

6 JUSTICE GORSUCH: No, no, please.

7 JUSTICE KAGAN: No, no, no.

8 CHIEF JUSTICE ROBERTS: Justice --

9 Justice Gorsuch?

10 (Laughter.)

11 JUSTICE GORSUCH: I -- I -- I -- I'm

12 sorry.

13 JUSTICE KAGAN: No, no, no.

14 JUSTICE GORSUCH: One can view these

15 websites, or last time around we had cakes, as

16 either expressing the maker's point of view or

17 the couple's point of view, and -- and that's

18 really at -- at the heart of a lot of this. And

19 I guess I'm -- I'm a little confused because

20 sometimes, as I -- as I understand it, you're

21 saying inherently here it is my client's point

22 of view and not just the couple's point of view.

23 I'm being compelled to speak. I get it.

24 And sometimes Colorado agrees with

25 you, for example, when it comes to the example

1 you just gave, which is why it popped up. I
2 believe it was William Jack in -- in the
3 Masterpiece Cake example where Colorado said he
4 didn't have to create cakes that -- that spoke
5 against same-sex marriage, that that would be
6 his compelled speech, not just the couple's
7 speech.

8 So what do we do about this level of
9 generality problem, if you will, where people
10 slide back and forth based upon their priors?
11 How do we avoid that as a Court? What rule
12 would you have us draw?

13 MS. WAGGONER: The Court should follow
14 a rule that says, if speech is being created and
15 there's an objection and that objection is
16 contained in the message, it is protected
17 speech, and the government can't --

18 JUSTICE SOTOMAYOR: So please --

19 MS. WAGGONER: -- slide up and down --

20 JUSTICE SOTOMAYOR: -- tell me why
21 it's not protected speech, the identical message
22 that -- that Justice Barrett put forth but by a
23 disabled couple. And you say, I don't want
24 disabled people to get married. I think
25 propagating a disability is against my personal

1 belief. It doesn't have to be religious because
2 we're not dealing with the religious part of
3 this. I don't want to speak that message. I
4 too believe that two disabled people getting
5 married and telling their story of how they got
6 in love, I'm not going to serve those people
7 because I don't believe --

8 MS. WAGGONER: It's not --

9 JUSTICE SOTOMAYOR: -- that they
10 should be married. What's the difference
11 between that and I don't believe black people
12 and white people should get married?

13 MS. WAGGONER: What matters is what
14 the objection is that the speaker is being asked
15 to create and whether the objection --

16 JUSTICE SOTOMAYOR: But -- but, if I
17 just -- that's my objection. I don't believe
18 they should be telling their story.

19 MS. WAGGONER: If you don't believe
20 they should be telling their story and what
21 they're asking you to do is tell their story,
22 then you don't have to do that, in the same way
23 --

24 JUSTICE SOTOMAYOR: So it doesn't
25 really -- there is no line on race, there is no

1 line on disability, ethnicity, none of the
2 protected categories --
3 MS. WAGGONER: That's --
4 JUSTICE SOTOMAYOR: -- in a public
5 accommodation law?
6 MS. WAGGONER: There is a line.
7 There's a very clear line, and it's worked --
8 JUSTICE SOTOMAYOR: Well, tell me --
9 MS. WAGGONER: -- very well.
10 JUSTICE SOTOMAYOR: -- what the clear
11 line is. It's compelled --
12 MS. WAGGONER: The clear --
13 JUSTICE SOTOMAYOR: You're saying it's
14 compelled speech, correct, not compelled
15 service?
16 MS. WAGGONER: I'm saying that in the
17 public accommodation cases, this Court has
18 routinely looked at whether there's speech and
19 whether the message is affected and whether the
20 objection lines up with the final speech.
21 JUSTICE SOTOMAYOR: But the one -- one
22 line --
23 MS. WAGGONER: That --
24 JUSTICE SOTOMAYOR: -- that you're
25 missing is Justice Gorsuch's line. Whose speech

1 --

2 MS. WAGGONER: The Pulitzer --

3 JUSTICE SOTOMAYOR: -- is the person
4 viewing it going to think is talking? You --

5 MS. WAGGONER: The Pulitzer Prize
6 doesn't go to the customer or to the subject; it
7 goes to the photographer, and there's a reason
8 for that. That reason is because you are
9 requiring that artist to speak a message. It is
10 their work. It might also be the customer's and
11 the customer can use that.

12 But the First Amendment is broad
13 enough to cover the lesbian website designer and
14 the Catholic calligrapher. The line is that no
15 one on any side of any debate has to be
16 compelled to express a message that violates
17 their core convictions because, as this Court
18 found, it's demeaning to them.

19 JUSTICE SOTOMAYOR: But the line you
20 want us --

21 JUSTICE JACKSON: So can I --

22 JUSTICE SOTOMAYOR: I'm sorry.

23 JUSTICE JACKSON: -- can I ask you a
24 hypothetical that just sort of helps me to flesh
25 that out? Because I also heard you suggest

1 earlier that there's something different about
2 race, maybe the person wouldn't sell to someone
3 of a different race.

4 So -- so suppose -- you say that
5 photography is expressive. Can you give me your
6 thoughts on a photography business in a shopping
7 mall during the holiday season that offers a
8 product called Scenes with Santa, and this
9 business wants to express its own view of
10 nostalgia about Christmases past by reproducing
11 classic 1940s and 1950s Santa scenes. They do
12 it in sepia tone and they are customizing each
13 one. This is not off a rack. They're really
14 bringing the people in and having them interact
15 with Santa, children, because they're trying to
16 capture the feelings of a certain era.

17 But precisely because they're trying
18 to capture -- capture the feelings of a certain
19 era, their policy is that only white children
20 can be photographed with Santa in this way
21 because that's how they view the scenes with
22 Santa that they're trying to depict.

23 Now the business will gladly refer
24 families of color to the Santa at the other end
25 of the mall who will take anybody, but -- and --

1 and they will photograph families of color in
2 other scenes -- other scenes, so they're not
3 discriminating against the families. What
4 they're saying is Scenes with Santa is preserved
5 for white families and they want to have a sign
6 next to the Santa that says "only white
7 children."

8 Why isn't your argument that they
9 should be able to do that? And maybe it is.

10 MS. WAGGONER: Because, in the
11 photograph itself, the objection is not
12 contained in that photograph.

13 But, in addition, I think it's
14 important to remind the Court that --

15 JUSTICE JACKSON: No, no, no, don't
16 leave. Sorry. What do you mean? I mean, the
17 objection, just like your client's objection, is
18 to expressions that violate their own views of
19 what is being depicted, and so their view of
20 what is being depicted is that a scene with
21 Santa and a child on the lap and all of that in
22 sepia tone, trying to harken back to the good
23 old days, should only have white children in it.
24 That's their firm belief. They are not willing
25 to take photographs of black, Hispanic, Asian

1 children on Santa's lap.

2 Why is that any different than a
3 situation like this?

4 MS. WAGGONER: Because the specific
5 objection that you're including is not
6 necessarily in that photograph, but even if it
7 were, this Court has protected vile, awful,
8 reprehensible, violent speech in the past, and
9 it has never --

10 JUSTICE JACKSON: No, I'm just asking
11 you why is the objection of the web designer, as
12 Justice both Kagan and Sotomayor's pointed out,
13 when we look at your examples, they just say
14 things like "Please come to the wedding on this
15 day."

16 MS. WAGGONER: Precisely. It's an
17 invitation to a wedding --

18 JUSTICE JACKSON: Okay. So I --

19 MS. WAGGONER: -- which --

20 JUSTICE JACKSON: -- so -- so, if my
21 hypothetical is an invitation to join me in the
22 1950s through looking at this photo, you say one
23 is different?

24 MS. WAGGONER: I say that that same
25 clarity of the message isn't in that photo, but

1 there are difficult lines to draw and that may
2 be an edge case, but this is not. We have a
3 creative -- a creator of speech and a very
4 clear message --

5 JUSTICE KAGAN: It may be an edge case
6 meaning it could fall on either side, you're not
7 sure?

8 MS. WAGGONER: I am -- I am sure in
9 that the message isn't in the product. It's not
10 in the photograph. But even if this Court were
11 to find that it was, the Court would still have
12 to protect the speech, and the Court could draw
13 a line in a different place, as it has
14 juxtaposed Loving and Obergefell in terms of the
15 beliefs between same-sex marriage. But it --

16 JUSTICE KAGAN: So just --

17 JUSTICE ALITO: In --

18 JUSTICE KAGAN: Sorry.

19 JUSTICE ALITO: -- in Obergefell, did
20 the Court say that religious objections to
21 same-sex marriage are the same thing as
22 religious or other objections to people of
23 color?

24 MS. WAGGONER: No. In fact, it said
25 that decent and honorable people hold beliefs

1 about marriage, believing that there's a
2 gender-differentiated marriage and that that's
3 based on reasonable religious and philosophical
4 premises.

5 When we review Loving, there's a very
6 different --

7 JUSTICE SOTOMAYOR: But tell me how to
8 write this decision for you that draws the line
9 just on gay marriage, because that's what you
10 seem to be saying right now, but draws a line
11 that doesn't affect my example of a disabled
12 person or an interracial couple.

13 You're saying it's just because it's
14 compelled speech.

15 MS. WAGGONER: I'm saying that the
16 interracial couple, the disabled person, the
17 lesbian graphic designer, the Democrat, the
18 Republican, no one should be compelled to speak
19 a message. And this Court has never found a
20 compelling interest that was narrowly
21 tailored --

22 JUSTICE SOTOMAYOR: So you -- you're
23 -- you're saying a print shop, a web designer,
24 a -- a cake maker, a --

25 JUSTICE JACKSON: A photographer.

1 JUSTICE SOTOMAYOR: -- a jewelry -- a
2 photographer, a jewelry maker, they can refuse
3 to serve anyone they want to refuse because they
4 have a deeply felt belief that serving -- taking
5 pictures of black couples, black and white
6 couples, taking pictures of disabled people,
7 people are going to believe that they're
8 speaking that message?

9 MS. WAGGONER: I'm not saying that at
10 all. What I'm saying is that in every free
11 speech case the Court looks first is there
12 speech. In many of the situations you've
13 raised, there would not be speech.

14 JUSTICE SOTOMAYOR: But why not? I'm
15 saying your identical website, and I don't see a
16 page in here where it says I am speaking, 303.
17 That's on your personal website. It's not on
18 the wedding website. I've asked you to show me
19 where, in which pages, it's your message as
20 opposed to the couple's message.

21 MS. WAGGONER: Every page is my
22 client's message --

23 JUSTICE SOTOMAYOR: But that --

24 MS. WAGGONER: -- just as in a
25 newspaper that posts an op-ed written by someone

1 else --

2 JUSTICE SOTOMAYOR: So why doesn't the

3 --

4 MS. WAGGONER: -- or Hurley, the
5 parade.

6 JUSTICE SOTOMAYOR: But then why does
7 an off-the-shelf website -- the creator of an
8 off-the-shelf website is then speaking? That's
9 what you're saying.

10 MS. WAGGONER: No, because the
11 Compelled Speech Doctrine doesn't apply once
12 you've entered that speech into the stream of
13 commerce. When the speech is completed, the
14 Compelled Speech Doctrine no longer applies.

15 But, in addition, there are 20 states
16 that have filed an amicus brief in this case and
17 said they are right now using their public
18 accommodation laws to allow message-based
19 protections, as Hurley would require, and
20 they're not experiencing these issues. And in
21 --

22 JUSTICE SOTOMAYOR: But you're not
23 asking for that. You're saying, I don't want to
24 serve a particular person, a disabled person, a
25 black and white couple, a disabled couple, a --

1 a gay couple. You're basing it not on the
2 nature of the message, you're basing it on who
3 you're serving.

4 MS. WAGGONER: That's -- I don't think
5 that's a fair characterization. The stipulated
6 facts in this case are that Ms. Smith has LGBT
7 clients. She serves them regularly. She has
8 all kinds of clients.

9 JUSTICE SOTOMAYOR: Tell me how that's
10 different, by the way. What you're basically
11 saying is, in our Ollie's Barbecue case, the
12 company there said, I'll serve blacks but only
13 on a takeout window, not inside my restaurant
14 because that sends a message that I endorse
15 integration.

16 MS. WAGGONER: Ms. Smith isn't looking
17 to send a message through her conduct. She's
18 look --

19 JUSTICE SOTOMAYOR: No, she -- what
20 you're saying is, I want to give gay couples a
21 limited menu, not a full menu, just the way that
22 luncheonette said.

23 MS. WAGGONER: No. Just as this Court
24 found in Hurley, she's being asked to shape her
25 speech by a third party, and it's -- again, it's

1 about what messages she is creating. In Ollie's
2 Barbecue, they weren't engaging --

3 JUSTICE SOTOMAYOR: Well, when I sit
4 down to eat a meal by a full chef who creates
5 this beautiful picture on a plate, why can't he
6 say, I make specialized meals for my clients. I
7 will not serve a black person. I won't serve a
8 disabled person because they can't appreciate
9 fully what I'm creating. That's basically what
10 you're saying.

11 MS. WAGGONER: No, I don't think it is
12 what I'm saying. We're conflating service and
13 speech in that instance. A chef isn't --

14 JUSTICE SOTOMAYOR: But why is yours
15 not a service?

16 MS. WAGGONER: May I answer the
17 question?

18 CHIEF JUSTICE ROBERTS: Yes.

19 MS. WAGGONER: Because it is creating
20 speech. And the public accommodation law is
21 broad enough to ensure that we're not crushing
22 consciences not just of Ms. Smith but of her
23 LGBT friends.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel. If your client's website --

1 MS. WAGGONER: Stay?

2 CHIEF JUSTICE ROBERTS: Yeah, don't
3 go. Not so fast.

4 (Laughter.)

5 MS. WAGGONER: A new way of doing it.

6 CHIEF JUSTICE ROBERTS: If your -- if
7 your client's website was the same as it is, but
8 the only indication of any limitation was a tag
9 line at the end saying these services are for
10 heterosexual couples only, could that
11 constitutionally be applied under the Colorado
12 statute?

13 MS. WAGGONER: The speech could be
14 compelled if you're suggesting that she
15 essentially has a "no customers only" sign. And
16 that's exactly --

17 CHIEF JUSTICE ROBERTS: No, no. Well,
18 no -- as in your case, no websites. No websites
19 are available for -- except for heterosexual
20 couples.

21 MS. WAGGONER: For marriage?

22 CHIEF JUSTICE ROBERTS: Yeah, the same
23 thing.

24 MS. WAGGONER: Generally speaking, no.
25 In Ms. Smith's particular case, all of her

1 websites are created, they're original,
2 customized to the story, and so, in that
3 instance, she believes same-sex marriage to be
4 false and couldn't create the speech.

5 CHIEF JUSTICE ROBERTS: Okay. What if
6 it said, I won't provide websites for anything
7 other than heterosexual marriages because of
8 religious reasons? Could that be covered, or is
9 it simply the invocation of religious basis for
10 the objection that protects it from coverage
11 under the statute?

12 MS. WAGGONER: The religious basis is
13 not determinative here. This Court has provided
14 broad protection for religious speech, but it --
15 it wouldn't matter. This -- this Compelled
16 Speech Doctrine applies in a host of situations
17 and cases that are not religious.

18 CHIEF JUSTICE ROBERTS: I guess I
19 don't understand that answer. In other words,
20 is it simply adding for religious reasons to the
21 label that would change whether it could be
22 regulated or not?

23 MS. WAGGONER: I think what's
24 important is that the objection is to the
25 message she's being asked to create. And so, if

1 she believes she's being asked to create a
2 message that violates her convictions, whether
3 those convictions are based on a moral reason or
4 a religious reason, it would be protected.

5 CHIEF JUSTICE ROBERTS: Okay. Thank
6 you.

7 Justice Thomas?

8 Justice Alito?

9 Justice Sotomayor?

10 Justice Kagan?

11 JUSTICE KAGAN: Yeah. I -- I wanted
12 to take you back to my opening questions and
13 then Justice Alito's question about how your
14 case is different from my hypothetical, and
15 maybe the way to sort of cut through some of
16 this is to not make it a hypothetical and just
17 ask about your client.

18 So Mike and Mary go into your client,
19 we love your graphics, we saw them someplace
20 else, we love how this looks. Here's what we
21 want. We want a standard site, our names, our
22 -- the picture, the hotels, the registry, you
23 know, just -- just that.

24 And you say okay, don't you?

25 MS. WAGGONER: Yes, assuming all the

1 details line up with the message that she's
2 willing to create.

3 JUSTICE KAGAN: Yeah. I mean, and
4 they say we don't want your scripture. That's
5 all right with you? They don't have to have
6 scripture?

7 MS. WAGGONER: No, they do not have
8 to.

9 JUSTICE KAGAN: Yeah. They can just
10 have a standard site, right? Okay.

11 So now it's not Mike and Mary. Now
12 it's Mike and Mark, and they want the identical
13 site. We saw Mike and Mary's site. We loved
14 it. We're getting married. You know -- you
15 know, all they want to change is the date maybe
16 or, you know, their names, whatever. We loved
17 it. And -- and they don't get it.

18 And the question -- and -- and you say
19 no, right? You -- you -- you wouldn't be up
20 there if you weren't going to say no, right?
21 They can't get that site?

22 MS. WAGGONER: Yes, because the same
23 words can even convey different meanings.

24 JUSTICE KAGAN: Yeah. So then -- I
25 mean, the difference is one couple is opposite

1 sex, one couple is same sex. How is this -- you
2 know, what -- what are the different meanings?
3 What is the speech that your client is
4 expected -- is -- is required to provide in the
5 way I expressed it to you?

6 MS. WAGGONER: The purpose of the
7 websites is to celebrate an upcoming wedding.
8 It's to announce a wedding. And so --

9 JUSTICE KAGAN: It is to announce a
10 wedding. I mean, let's -- this is a standard
11 site. You know, there's not a whole lot of,
12 gosh, isn't this great? It's just like here's
13 the registry, you know. It's announcing the
14 wedding. It's announcing where to get the hotel
15 reservations and so forth, right?

16 So what speech is being -- I mean,
17 that's -- that's what -- that's what websites
18 do, just like it's what invitations do, right?
19 So, you know, next, we'll have the stationer up
20 there saying, you know, we print the station --
21 the stationery, right? I mean, it would be the
22 same. It is announcing the wedding.

23 What's the speech that's been required
24 of your client that we -- I mean, I'm going to
25 have lots of questions for these guys too, but,

1 in -- in that context, what is the speech that
2 is required of your client that would violate
3 the First Amendment?

4 MS. WAGGONER: She believes that
5 same-sex weddings contradict scripture and she's
6 announcing a concept of marriage that she
7 believes to be false.

8 And, in addition to that, even --

9 JUSTICE KAGAN: I mean, but that just
10 sounds to me like I would be participating in a
11 wedding, I would be, you know, lending my
12 services to a wedding. You know, as Justice
13 Sotomayor suggested, the florist, the baker, and
14 the guy who provides the chairs are also
15 providing the services in a wedding that they
16 don't like. So why are they any different?

17 MS. WAGGONER: The person providing
18 the chairs isn't providing speech, but when
19 you're engaging in symbolic speech, whether that
20 be through the creation of a custom wedding cake
21 or a custom wedding website, you are creating
22 speech. I can't --

23 JUSTICE KAGAN: Even though the site
24 doesn't say anything about that? It doesn't
25 say, wow, gay marriage is a wonderful thing. It

1 doesn't say -- it doesn't even say, you know,
2 we're here to celebrate this wonderful marriage
3 in my hypothetical. It doesn't even say that.

4 MS. WAGGONER: Again, the announcement
5 of the wedding itself is a concept that she
6 believes to be false. And the entire purpose
7 behind the Compelled Speech Doctrine is to avoid
8 these ends by avoiding these beginnings. It's
9 to ensure that individuals don't speak messages
10 that betray their conscience. And that applies
11 just as much to the Democrat as to the LGBT or
12 the black cross sculptor.

13 JUSTICE KAGAN: Thank you.

14 CHIEF JUSTICE ROBERTS: Justice
15 Gorsuch?

16 JUSTICE GORSUCH: So, counsel, we've
17 spoken a little bit about how Colorado has
18 handled this compelled speech question
19 differently with respect to different messages,
20 some that it prefers, others that it dislikes.

21 I'm curious how other states have
22 dealt with this conundrum besides Colorado and
23 how you -- which ones of those you think we
24 should take account of.

25 MS. WAGGONER: Twenty states filed an

1 amicus brief in support of Ms. Smith
2 and expressed to this Court that they're
3 applying their public accommodation law to
4 provide message-based object -- protections,
5 just like the Court did in Hurley, following the
6 same test that's being articulated today, and
7 they've been doing it successfully.

8 Yes, there are difficult line-drawing
9 questions, but those are in every speech case,
10 whether it's sleeping in the park or putting on
11 an arm band. The Court doesn't have to resolve
12 every single one of them, but we do have the
13 rules, and we need the Court to provide
14 guidance, again, reaffirming public
15 accommodation laws cannot compel speech
16 creators, whether that's artistic expression
17 with symbols or pure speech.

18 JUSTICE GORSUCH: And just so I make
19 sure I understood your colloquy with Justice
20 Barrett, the objections to compelled speech on
21 religious grounds could include, in fact, do
22 include, some objections with respect to certain
23 heterosexual marriages, that there are certain
24 heterosexual unions that your client would not
25 speak toward either, is that correct?

1 MS. WAGGONER: Certainly, and that's
2 in the stipulated facts in terms of she declines
3 messages based on the message, and she has
4 declined other projects based on the message
5 that have nothing to do with same-sex marriage.

6 JUSTICE GORSUCH: So the question
7 isn't who, it's what?

8 MS. WAGGONER: Always.

9 JUSTICE GORSUCH: Thank you.

10 CHIEF JUSTICE ROBERTS: Justice
11 Kavanaugh?

12 JUSTICE KAVANAUGH: From the briefs, I
13 saw a lot of agreement actually between the
14 parties in this case on basic legal principles.
15 In your reply brief at page 15, you say that
16 hairstylists, landscapers, plumbers, caterers,
17 tailors, jewelers, and restaurants ordinarily
18 wouldn't have a First Amendment free speech
19 right to decline to serve a same-sex wedding.
20 At least that's how I read that reference in
21 your brief. But you say artists are different,
22 like publishing houses. And I think the other
23 side -- I'll hear from them -- but agree that
24 artists are different because of the First
25 Amendment rights that artists possess.

1 But then, at least as I read the
2 briefs, the case comes down to a fairly narrower
3 -- narrow question of, how do you characterize
4 website designers? Are they more like the
5 restaurants and the jewelers and the tailors, or
6 are they more like, you know, the publishing
7 houses and the other free speech analogues that
8 are raised on the other side?

9 That's what I took away from the
10 briefs. A lot of agreement on broad legal
11 principles and some disagreement about how to
12 characterize the website designers. So why are
13 you right about how you characterize website
14 designers or, put another way, why are they
15 different -- and you've gotten this question --
16 but why are they different from, say,
17 restaurants or caterers, for example?

18 MS. WAGGONER: Because they're
19 creating speech. In those other examples,
20 speech is not at issue, that is creating speech,
21 announcing a wedding, or announcing anything.
22 And art is different. And so, while there may
23 be agreement on that, there also is a problem
24 with Colorado's advancing theories that keep
25 narrowing and providing alternatives.

1 But, in the end, one thing is certain:
2 Those who object to same-sex marriage and
3 creating messages about them, those are the ones
4 that can't speak, but everyone else seems to be
5 able to do so under Colorado's theory.

6 In addition, this Court has already
7 articulated how we determine whether speech is
8 involved for an artist, and I think the Court
9 could follow those tests here, with words,
10 graphics, videos, and, again, symbolic speech.

11 JUSTICE KAVANAUGH: So, for you, as --
12 as there's an effort to protect both the equal
13 rights of gay and lesbian people and same-sex
14 couples and at the same time protect free speech
15 rights, your line is look at whether the action
16 of the business involves speech?

17 MS. WAGGONER: And the second line
18 would be to look at what is the objection that
19 the creator is asserting and would that actually
20 be in the final product, because that's how this
21 Court has ferreted out pretextual objections.
22 So, if a -- if a speech creator articulates an
23 objection and it's not in that final photograph,
24 the objection or the -- the message isn't in
25 there, that's one way we can know. Another is

1 if they're refusing to serve an entire class of
2 people and design other messages, none of which
3 are true here. But I do --

4 JUSTICE KAVANAUGH: So, if you win
5 this case, if you prevail here, you know, and
6 the next case involves a caterer, at least your
7 position here is that's different.

8 MS. WAGGONER: I won't be coming back
9 with the caterer, but I will be coming back with
10 perhaps a custom wedding cake or a cake --

11 JUSTICE KAVANAUGH: I understand that,
12 but the --

13 MS. WAGGONER: -- that has a symbolic
14 meaning to it.

15 JUSTICE KAVANAUGH: Okay. But the --
16 the caterer, the -- the list of things that you
17 had on page 15 of the reply brief, at least
18 ordinarily -- you had a caveat in there -- but
19 ordinarily wouldn't -- wouldn't have the same
20 right that your client here does, who's a
21 website designer?

22 MS. WAGGONER: They wouldn't have a
23 free speech right. And as -- in terms of your
24 initial statement about the parties agreeing, I
25 do think it's important, on pages 17 and 32 of

1 the United States' brief, they're even conceding
2 that it's a burden on a speaker to have to
3 express a message that violates their
4 convictions. They're just simply relabeling
5 this or repackaging speech as a sale or conduct.

6 JUSTICE KAVANAUGH: Thank you.

7 CHIEF JUSTICE ROBERTS: Justice
8 Barrett?

9 JUSTICE BARRETT: So I think the
10 questions that Justice Kagan asked you are hard
11 because they seem like they're not creating. I
12 mean, you're on your strongest ground when
13 you're talking about her sitting down and
14 designing and coming up with the graphics to
15 customize them for the couple. So let me just
16 clarify exactly what your position is on things
17 that are already created in the past.

18 What if it is plug-and-play? I don't
19 know that much about website design, so I don't
20 know how it could be plug-and-play. I'm sure it
21 can be. She -- she does the programming, the
22 coding. She has stock pictures. And she sells
23 that as a product, and the customers, you know,
24 Mike and Henry or, you know, Lilly and Luke,
25 fill it in themselves. Is that protected?

1 MS. WAGGONER: It is not protected in
2 the same way that if you sold a Bible
3 commentary, you wouldn't be able to decide
4 whether the Bible commentary will be burned or
5 it will be used in a church service. The stream
6 of commerce, it's been put in the stream of
7 commerce.

8 JUSTICE BARRETT: Okay. So why is it
9 different? Justice Kagan said, so maybe you do
10 create customized websites and you've created
11 one for, you know, Lilly and Luke, and then, you
12 know, Mike and Henry see it and say, you've
13 created that already, we love it, we want to buy
14 it. Don't create anything new for us. Just
15 give us exactly what you did for them.

16 Why is that different than
17 plug-and-play, or is it?

18 MS. WAGGONER: It is different. I
19 mean, first of all, if I take your hypothetical
20 on its face, we would be selling essentially a
21 web -- she would be creating a website that's
22 exactly the same with the same pictures and text
23 and graphics and videos of an opposite-sex
24 couple and selling it to a same-sex couple,
25 which seems highly unlikely they would use that

1 to celebrate their wedding.

2 So, in terms of, if you're asking her
3 to change the text, to change the logistics, to
4 change the names, you're changing bride and
5 groom. You're changing the couple's name.
6 You're changing -- we know context changes
7 meaning.

8 Justice Ginsburg said that in Yates
9 versus United States. Even the same words have
10 different meaning. "God bless this marriage"
11 means something different. "My body, my choice"
12 means something different to an anti-vaxxer or a
13 pro-abortion opponent -- or proponent.

14 So, in -- in that sense, that's why
15 she would object if she were changing the words
16 in the text, but, of course, she would sell the
17 same website celebrating an opposite-sex wedding
18 to a same-sex couple.

19 JUSTICE BARRETT: Okay. So context
20 changes meaning. What if, instead of a graphic
21 designer, she's a songwriter and she writes a
22 song, you know, let's say "At Last" or "Wind
23 Beneath My Wings" or something that people want
24 to dance to at their wedding, and the lyrics are
25 out there. You know, it could be played at a

1 heterosexual wedding or it could be played at a
2 gay wedding. Once the artist has created that
3 song, can the artist say, but I'm not licensing
4 it to be played at certain kinds of weddings?

5 MS. WAGGONER: No, I don't think the
6 artist could. I'm not familiar with the
7 licensing rules and how all that would apply in
8 terms of the contractual relationship, but in
9 terms of just having a song used at a wedding,
10 assuming that would otherwise be okay, there's
11 no other legal rights, she couldn't. That was
12 in the stream of commerce.

13 But I think it's important to point
14 out that if that artist were being asked to
15 perform that song in a live way, for example,
16 sang at a Democratic inauguration and they were
17 asked to perform at the Republican one, under
18 Colorado's theory, they could be compelled to do
19 so in a number of jurisdictions. Nineteen
20 jurisdictions have political ideology. And when
21 we think about that, there's no limit to what
22 the government could compel.

23 JUSTICE BARRETT: Thank you.

24 CHIEF JUSTICE ROBERTS: Justice
25 Jackson?

1 JUSTICE JACKSON: But isn't an artist
2 typically sort of a -- a freelancer and they are
3 selling their own messages? They're not
4 purporting to be a business for hire in -- in --
5 in any meaningful sense. And so I -- I want to
6 kind of go back to Justice Kavanaugh's thought
7 of, like, where do we place your client as
8 between, you know, restaurants and artists.

9 I thought that there really isn't that
10 clear a distinction in a situation like this
11 because your client is an artist for hire
12 essentially. Yes, she does customize things,
13 they're not off the shelf, but she purports to
14 be a public accommodation providing customized
15 things to anyone who pays her, except for people
16 whose messages are those that she disagrees
17 with.

18 And I just don't know that I've ever
19 seen that kind of scenario, even in the cases
20 that you're talking about, because sort of what
21 Justice Gorsuch was saying, it's -- it's relying
22 on the implicit message that she does not want
23 to convey by supporting this person.

24 There's an explicit message in the
25 actual work, but to the extent that actual work

1 is identical to the -- to the work that she
2 would otherwise sell to the gay couple except
3 for their names, then she is implicitly saying,
4 you know, by selling this, I'm going to be
5 violating my own beliefs.

6 So let me just ask you another quick
7 hypo. So I -- I'm trying to understand the
8 extent to which this matters that she's a
9 speaker as opposed to a restaurant. So I sell
10 food, and one line of products that I make is
11 from scratch for particular customers that are
12 based on my grandmother's cherished family
13 recipes.

14 My dearly departed grandmother was
15 clear that she only wanted to provide this kind
16 of nourishment for people who share our same
17 religious heritage. So I call these products
18 Grandma Helen's Protestant Provisions. And I
19 sit with each customer who comes in and I hear
20 about their faith and their family, and I
21 customize the recipe for them after having this
22 discussion.

23 So the food is not expressive, right?
24 I'm not speaking in my food, but I am trying to
25 convey that only certain people get to partake

1 in this product. Can I do that consistent with
2 the First Amendment or not?

3 MS. WAGGONER: No, and in -- and in a
4 situation as you said, in terms of a caterer,
5 the caterer is not engaging in speech. In terms
6 of your initial statements or questions, speech
7 is speech whether it's paid or pro bono.

8 JUSTICE JACKSON: But -- but aren't --
9 don't we have cases that suggest that people's
10 conduct can be expressive? I thought there was
11 a whole line of cases that said you didn't have
12 to actually have an express message, you could
13 be acting in such a way as to express a message.

14 And in my restaurant hypo, I'm saying,
15 if I sell to non-Protestants, I'd be expressing
16 a message contrary to Grandma Helen's core
17 beliefs.

18 MS. WAGGONER: You're speaking through
19 conduct at that point, and that is a different
20 analysis. In terms of the expressive conduct
21 test, the Court has already articulated what
22 those tests are and what a reasonable person
23 would observe.

24 But, in that case, you're talking
25 essentially about status discrimination.

1 There's no message that she is creating that
2 would be compelled in that way. That would
3 simply be service.

4 In addition, though, I think it's
5 important to recognize the breadth of the public
6 accommodation law. You started with a statement
7 about freelance writers. At oral argument at
8 the Tenth Circuit, my friend in Colorado
9 admitted that freelance writers are considered
10 to be public accommodations under this law as --

11 JUSTICE JACKSON: All right. Well,
12 I'll ask them about that. But what about my
13 photographer? My photographer is speaking
14 through photography, yes?

15 MS. WAGGONER: In -- in your
16 photography, yes, photography is speech --

17 JUSTICE JACKSON: Is speech.

18 MS. WAGGONER: -- just as websites are
19 under the Court's decision in Reno.

20 JUSTICE JACKSON: All right. So my
21 photographer could -- is speaking by -- by being
22 forced to create a Santa photo with minority
23 children in it that they don't want to, they
24 don't think that should be there?

25 MS. WAGGONER: The issue in that

1 hypothetical isn't whether there is speech. The
2 issue is, in that context, are they otherwise
3 serving those and expressing other messages and
4 does the objection that they're asserting line
5 up with the message.

6 The Court in Hurley did the exact same
7 analysis to say is the parade organizers
8 otherwise in -- otherwise --

9 JUSTICE JACKSON: But Hurley was a
10 private association. It wasn't a public
11 business. What I'm asking you is I have a
12 public business. I'm a photographer. My belief
13 is that -- you know, I'm doing "It's a Wonderful
14 Life" scenes. That's what I'm offering, okay?
15 I want to do video depictions of "It's a
16 Wonderful Life."

17 And I -- knowing that movie very well,
18 I want to be authentic, and so only white
19 children and families can be customers for that
20 particular product. Everybody else can -- I'll
21 give to everybody else, I'll sell them anything
22 they want, just not the "It's a Wonderful Life"
23 depictions.

24 I'm expressing something, right? For
25 your purposes, that's speech. What about --

1 what's the other step? It's speech, and I can
2 say anti-discrimination laws can't make me sell
3 the "It's a Wonderful Life" package to nonwhite
4 individuals.

5 MS. WAGGONER: In the same way -- I --
6 I would say, first of all, in the same way that
7 this Court, when there is a message and a status
8 and it's overlapping, the Court would say that
9 message wins in that instance.

10 JUSTICE JACKSON: So -- so -- so --

11 MS. WAGGONER: I don't think that the
12 message --

13 JUSTICE JACKSON: -- I don't have to
14 sell it to --

15 MS. WAGGONER: -- I don't think that
16 that message is in that hypothetical. But take
17 the example of the musical of "Hamilton."
18 There's a direct overlap in the musical of
19 "Hamilton." And, in that case, we know that
20 they're expressing a preference for who they're
21 hiring in terms of race. Yet we would say that
22 --

23 JUSTICE JACKSON: No, I'm not talking
24 about -- you're -- you're sort of slipping into,
25 like, a thousand different analogies. I just

1 want -- I just want you to focus on whether or
2 not I am -- I have speech when I am a
3 photography business and I hang out my shingle.
4 Everybody can come. But I have certain products
5 that I'll only sell to non -- to -- to white
6 individuals because the speech that I'm trying
7 to depict is the authentic depiction of that
8 scene as I understand it and that I want to put
9 out there in the world and it has my signature
10 on the bottom of it, so people are seeing my
11 photos, and I want my photos of "It's a
12 Wonderful Life" to be as authentic as possible,
13 meaning no people of color.

14 MS. WAGGONER: It seems, in each
15 iteration of the hypothetical, the objection is
16 changing. What I can articulate is the test.
17 And I can also say that when there's an overlap
18 between message and status, message does win.
19 And "Hamilton" provides an example of that.

20 JUSTICE JACKSON: All right. Thank
21 you.

22 MS. WAGGONER: But I -- I would --

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 Mr. Olson.

1 ORAL ARGUMENT OF ERIC R. OLSON
2 ON BEHALF OF THE RESPONDENTS

3 MR. OLSON: Mr. Chief Justice, and may
4 it please the Court:

5 The central dispute here is what
6 public accommodations law target when they
7 require a business to provide equal access to
8 its services. The company claims that because
9 it wants to sell websites, the law somehow
10 targets expression and therefore violates the
11 First Amendment.

12 But, because Colorado law targets the
13 commercial conduct of discriminatory sales and
14 its effect on expression is at most incidental,
15 it easily satisfies the framework set out in
16 O'Brien.

17 The company can choose to sell
18 websites that only feature biblical quotes
19 describing a marriage as between a man and a
20 woman, just like a Christmas store can choose to
21 sell only Christmas-related items. The company
22 just cannot refuse to serve gay couples, as it
23 seeks to do here, just as a Christmas store
24 cannot announce no Jews allowed.

25 Here, the company seeks a

1 pre-enforcement order allowing it to turn away
2 all gay couples, even if, as we've discussed,
3 the wedding website they request is identical to
4 one the company would sell to a heterosexual
5 couple. Granting such a license to discriminate
6 would empower all businesses that offer what
7 they believe to be expressive services, from
8 architects to photographers to consultants, to
9 refuse service to customers because of their
10 disability, sexual orientation, religion, or
11 race.

12 The Free Speech Clause exemption the
13 company seeks here is sweeping because it would
14 apply not just to sincerely held religious
15 beliefs, like those of the company and its
16 owner, but also to all sorts of racist, sexist,
17 and bigoted views. This rule would allow
18 another web design company to say no interracial
19 couples served, an ad agency could refuse
20 women-led businesses, and a tech consulting
21 company could refuse to serve 303 Creative
22 itself because it disagreed with the owner's
23 religion.

24 This Court should not upend
25 long-settled law that protects the full and

1 equal access of all Americans to our public
2 marketplace.

3 I welcome the Court's questions.

4 JUSTICE THOMAS: Counsel, you have
5 spent quite a bit of your brief talking about
6 the history -- the tradition of public
7 accommodations laws. Would you just spend a few
8 minutes or whatever amount of time you can
9 explaining whether there is a similarly long
10 tradition of public accommodations laws applying
11 to speech --

12 MR. OLSON: Well --

13 JUSTICE THOMAS: -- or expressive
14 conduct?

15 MR. OLSON: -- certainly, Justice
16 Thomas. The history of public accommodation law
17 shows that when those held themselves open to
18 the public, they were required to serve
19 everybody.

20 JUSTICE THOMAS: I understand that. I
21 understand -- the complicating factor here --
22 fact here is this is not a hotel, this is not a
23 restaurant, this is not a riverboat or a train.
24 I'm interested in the intersection of public
25 accommodations law and speech.

1 MR. OLSON: I think we see some public
2 accommodation law being applied to examples that
3 are speech today, tailors, barbers, et cetera.
4 But what we don't see over the long history of
5 public accommodation laws in this country is
6 people raising First Amendment speech objections
7 to those laws applying to it.

8 JUSTICE THOMAS: Well, I think that in
9 part depends upon whether or not you're engaging
10 in speech. If you're running a train business
11 or a riverboat business, that's not exactly --
12 doesn't implicate speech. So those are
13 straightforward. I understand that.

14 What I'm interested in is, when you
15 are talking about public accommodations laws
16 directly or indirectly regulating speech, is
17 there a tradition of that? Can you point to
18 cases? Can you point to common law treatises,
19 et cetera?

20 MR. OLSON: So I think that the
21 historical record is sparse on both sides, but
22 the two things I would say, Justice Thomas, is
23 what we don't see is a history of public
24 accommodation laws carving out speech. They all
25 are laws of general applicability that apply to

1 all those operating a trade to the public. They
2 don't say except those engaged in expressive
3 conduct.

4 And, with that framework, we do not
5 see a history of cases where people raise their
6 hand and say it shouldn't apply to me because
7 I'm speaking. And so I think the public
8 accommodations brief on our side in this case
9 sets that out quite nicely. But -- but there is
10 no case from 150 years ago that comes out either
11 way with this exact issue.

12 JUSTICE GORSUCH: Mr. Olson, I --

13 CHIEF JUSTICE ROBERTS: Well, just --

14 JUSTICE GORSUCH: I'm sorry, Chief.

15 CHIEF JUSTICE ROBERTS: Not -- not 150
16 years ago, but I think it's 10 or -- or -- or 12
17 years ago, in City of Fulton, which you cite in
18 your brief, it sort of follows up on Justice
19 Thomas's question, although you don't even get
20 to speech. I think the Court in that case said,
21 when you're looking at some of the concerns that
22 you're talking about, that a individualized,
23 subjective, multifactor, whatever,
24 determination, in that case foster care and
25 adoption, is not the same as a seat on the bus

1 or a room in the hotel.

2 How -- how does your argument fit with
3 that position that was articulated in the Court
4 with respect to the nature of individual
5 speakers' message?

6 MR. OLSON: Well, I think those
7 questions are not presented in this case because
8 most artists are not public accommodations. But
9 my friend stipulated that the company was a
10 public accommodation. And often a lot of the
11 hypotheticals that we've been talking about,
12 about artists, and -- and, certainly, Lin-Manuel
13 Miranda, who is writing the play "Hamilton," is
14 not a --

15 CHIEF JUSTICE ROBERTS: But, in terms
16 of -- in terms of the concern expressed in a lot
17 of our cases about compelled speech and the
18 distinction of others where you can have a
19 requirement of serving people without regard to
20 certain characteristics, the case did make the
21 point that to the extent there's subjective,
22 individualized determinations that go into the
23 decision about placing children, that it did
24 not -- that those cases were not, at least not
25 directly, applicable?

1 MR. OLSON: That's correct, Chief
2 Justice Roberts. And I think, here, again, the
3 record is entirely devoid of those factors
4 because the company chose to litigate this case
5 as a public accommodation. I think a lot of the
6 description that we heard today would be
7 powerful arguments that they may not be a public
8 accommodation in what they do. But we simply
9 don't have those facts here. But, certainly,
10 the level of selectivity, the -- the way in
11 which the -- the potential customer engages with
12 the -- the client -- I'm sorry, with the service
13 provider, and how the service provider makes
14 their product available or -- or known to the
15 public all factor in in that analysis.

16 CHIEF JUSTICE ROBERTS: Yeah, and I'd
17 like to ask you a question about one other case.
18 It's the one you rely on most heavily in your
19 brief, Rumsfeld against FAIR. And it seems to
20 me that a distinction you have to deal with in
21 that case is that the speech there was not
22 compelled, or what was compelled was not
23 considered speech. It involved the schools
24 providing rooms for the military recruiter, and
25 when it came to the question of compelled

1 speech, what the Court said is empty rooms don't
2 speak.

3 But, here, of course, the whole
4 argument is that the speech is being compelled.
5 So -- so how does the either holding or analysis
6 in FAIR help you?

7 MR. OLSON: Two responses, Chief
8 Justice. First is, in FAIR, it recognized that
9 there was some speech by the schools. There
10 were e-mails, posters on bulletin boards, et
11 cetera. So there was some speech, but it said
12 it was incidental, like in O'Brien, to the
13 purpose of the regulation, which was ensuring
14 equal access, similar to Colorado's law here.

15 And -- and the second point I would
16 make, and it comes from the example of the
17 identical website being turned away for the
18 same-sex couple but provided to the opposite-sex
19 couple, here, sometimes the speech itself does
20 not change. And what this company seeks, if you
21 look at the -- the specific prayer for relief in
22 the complaint, is a total permission to turn
23 away every same-sex couple, even if they seek
24 exactly the same website that an opposite-sex
25 couple that they will provide.

1 CHIEF JUSTICE ROBERTS: Well, just to
2 -- just to stop you, their point is they do not
3 turn away same-sex couples who want the service
4 that they're providing. They just won't provide
5 that service with respect to a particular type
6 of wedding.

7 MR. OLSON: I respectfully disagree,
8 Your Honor. What the company said is under no
9 circumstances will they provide a wedding
10 website for a same-sex wedding, period.

11 CHIEF JUSTICE ROBERTS: Correct.

12 MR. OLSON: Right. And --

13 CHIEF JUSTICE ROBERTS: But that --
14 I'm sorry.

15 MR. OLSON: -- and that is
16 status-based discrimination when -- and it
17 doesn't matter whose credit card is used for
18 that transaction. What -- what -- the sole
19 basis that the company seeks relief from this
20 Court is they would like an injunction that says
21 so long as -- if this is going to be used for a
22 same-sex wedding, then we need not provide it.
23 And so it's a status-based discrimination that
24 they seek from this Court.

25 JUSTICE ALITO: Let me see if I

1 understand your argument. I understand you to
2 be arguing that a website designer can put
3 anything it wants on a standardized website,
4 even if that includes a denunciation of same-sex
5 marriage. Is that correct?

6 MR. OLSON: Yes.

7 JUSTICE ALITO: So, if the -- to pick
8 up on Justice Kagan's hypothetical from earlier
9 this morning, if the standard announcement is
10 Made With Love by Amber, who believes that a
11 valid marriage is a union between one man and
12 one woman," that's okay?

13 MR. OLSON: If that's on every
14 website, yes.

15 JUSTICE ALITO: Then this is -- your
16 argument is -- you're making kind of a sliver of
17 an argument, right? What is the difference
18 between that and what you think is a violation
19 of your law?

20 MR. OLSON: Two things, Justice Alito.
21 The first --

22 JUSTICE ALITO: I mean, you're not --
23 that website designer is not going to be serving
24 a same-sex couple if the website designer puts
25 that on the website. They're turning away

1 same-sex couples by doing that, are they not?

2 MR. OLSON: No, they're -- they're not
3 turning away same-sex couples. They are
4 defining their -- they are able to choose what
5 services they offer, and that is the service
6 they are choosing to offer.

7 The state does not regulate that at
8 all. All that the state says is whatever you
9 choose to sell --

10 JUSTICE ALITO: No, I understand that.
11 Does it any difference in the real world as a
12 practical matter?

13 MR. OLSON: Well, it -- it does in the
14 real world because a -- a -- my second point is
15 that a website designer like that will lose a
16 lot of opposite-sex couples as potential clients
17 as well because they don't want to be seen with
18 that message.

19 And what the company wants to do here
20 is take advantage of the public marketplace, go
21 out and sell their wares to everyone and have
22 control over -- and change what they sell to
23 different people based on the status of -- of
24 what they have.

25 JUSTICE ALITO: Okay. To --

1 MR. OLSON: And -- and --

2 JUSTICE ALITO: Yeah, I understand
3 that. So to sell to everyone. So this goes to
4 your -- to the interpretation of your statute,
5 and I'm not quite clear what your position is on
6 it. If a business provides a service that is
7 "open to the public," it's a public
8 accommodation, right?

9 MR. OLSON: Yeah. You have to engage
10 in sales or offering services to the public,
11 yes.

12 JUSTICE ALITO: Okay. So what does
13 "open to the public" mean? Does that mean no
14 selectivity whatsoever? Anybody who wants this
15 service can get it and it may be, if there's a
16 greater demand, then the demand exceeds the
17 supply, you've got to wait in line. But, if
18 there's any selectivity at all, they're out?

19 MR. OLSON: Well, again, it's not
20 presented in this case. The way that Colorado
21 has historically addressed that question is --
22 are, say, golf clubs who had limited their
23 membership to one gender, you know, did they
24 make money from the public coming to their
25 courses, did they -- did you have to be a member

1 to dine in the restaurant, et cetera.

2 So selectivity as the Court discussed
3 in Fulton certainly is a factor, but it -- but
4 it is a -- a fact-specific determination that --
5 that awaits more facts than we have here because
6 it can --

7 JUSTICE ALITO: Well, you should
8 understand what your statute means. So suppose
9 a website designer says, I'm -- I'm offering my
10 services, but I'm really in -- I -- I'm in a lot
11 of demand for my services and I reserve the
12 right to decide who I will provide a website for
13 and who I will not.

14 Is it a public accommodation then?

15 MR. OLSON: If that's the only factor,
16 then yes, but it can make decisions about who to
17 supply that -- that aren't based on protected
18 characteristics and choose its clientele just
19 fine.

20 What it can't do is say I reserve the
21 right to refuse service which means in practice
22 I will not serve black people.

23 JUSTICE JACKSON: And isn't part of
24 the problem here in terms of trying to answer
25 Justice Alito's various hypotheticals that we're

1 presented with a record of stipulated facts and
2 that the opposing -- your friend on the other
3 side actually stipulated to the application of
4 the statute?

5 So it's really hard for us to know and
6 figure out and determine in this context how the
7 statute would actually apply because we don't
8 really have a real record on that -- on that
9 score.

10 MR. OLSON: That's correct. And --
11 and I would say that we've heard some discussion
12 from my friend about sort of Colorado's history,
13 but what we haven't heard is any specific
14 example since this Court announced Masterpiece
15 of Colorado enforcing this law, the state
16 enforcing this law against anyone to --

17 JUSTICE ALITO: Well, my question
18 really was not whether this website is a public
19 accommodation. I understand that's been
20 stipulated. That wasn't my question.

21 What I'm trying to understand is the
22 breadth of your argument, and what I get is that
23 you're making a -- a tiny sliver of an argument.
24 So the website can put anything on its website,
25 even something that will blatantly or subtly

1 tell a same-sex couple, well, this is not a
2 service that I want. They can do that.

3 And a website can also potentially get
4 itself out from being a public accommodation
5 simply by reserving a degree of selectivity.
6 That's what you've told me so far.

7 MR. OLSON: No, I -- I don't think
8 it's just by reserving a degree -- degree of
9 selectivity, but I think it -- the more
10 selective and sort of curated the process is, it
11 makes it less likely to be a -- a public
12 accommodation, as the Court recognized in -- in
13 Fulton.

14 JUSTICE ALITO: All right.

15 JUSTICE KAGAN: General --

16 JUSTICE ALITO: Let me ask you a --
17 a -- and then I'll finish this line -- some
18 hypotheticals in a brief submitted by Josh
19 Blackman, okay?

20 A -- a Jewish man and a Jewish woman
21 who are engaged to be married ask a Jewish
22 website designer to build a website to celebrate
23 their upcoming -- their nuptials. No problem.
24 Okay.

25 Another Jewish man and a Christian

1 woman who are engaged to be married ask a Jewish
2 website designer to build a website to celebrate
3 their -- their nuptials. Big problem. "Many
4 Jews consider intermarriage an existential
5 threat to the future of Judaism."

6 Does that website have to accept the
7 second couple?

8 MR. OLSON: Again, as we talked about
9 before, if the Jewish website designer has, you
10 know, very explicitly Jewish themes on the --
11 the wedding, they don't need to -- on the
12 website, they don't need to take that down for
13 the -- the -- the interreligious couple that
14 comes. But they -- if they offer a general
15 service to the public, they need to offer that
16 regardless of the customer's religion.

17 JUSTICE ALITO: So the fact that they
18 offer this to -- that this is a Jewish -- that
19 it's offered mostly to Jews, that's enough to
20 make it -- or exclusively to Jews, that's enough
21 to make it sufficiently selective to get them
22 out from your --

23 MR. OLSON: No. I'm -- I'm drawing a
24 distinction between what the website designer
25 chooses to put on the website and who the

1 website designer sells the website to.

2 The website designer can choose to put
3 on their websites whatever they want, but they
4 just can't refuse to sell -- if they're a public
5 accommodation, they can't refuse to sell that
6 website to someone solely because of their --
7 the customer's or the couple's religion.

8 JUSTICE ALITO: Okay. An unmarried
9 Jewish person asks a Jewish photographer to take
10 a photograph for his Jdate dating profile. It's
11 a dating service, I gather, for Jewish people.

12 JUSTICE KAGAN: It is.

13 (Laughter.)

14 JUSTICE ALITO: All right. Maybe
15 Justice Kagan will also be familiar with the
16 next website I'm going to mention.

17 So, next, a Jewish person asks a
18 Jewish photographer to take a photograph for his
19 ashleymadison.com dating profile.

20 (Laughter.)

21 JUSTICE ALITO: I'm not suggesting
22 that. I mean, she knows a lot of things. I'm
23 not suggesting -- okay. Does he have to do it?

24 MR. OLSON: Well, again, it would --
25 it would -- what Colorado look -- it depends.

1 What Colorado looks to is what services the
2 photographer makes available to the public. And
3 if -- if the photographer makes that service
4 available to -- to others, taking pictures, you
5 know, for use on websites, then probably yes,
6 but it depends on --

7 JUSTICE ALITO: Okay, Justice -- then
8 I really will stop.

9 Justice Jackson's example of the --
10 the Santa in the mall who doesn't want his
11 picture taken with black children. So, if
12 there's a -- a black Santa at the other end of
13 the mall and he doesn't want to have his picture
14 taken with a child who's dressed up in a Ku Klux
15 Klan outfit, that -- that black Santa has to do
16 that?

17 MR. OLSON: No, because Ku Klux Klan
18 outfits are not protected characteristics under
19 public accommodation laws.

20 JUSTICE KAGAN: And, presumably, that
21 would be the same Ku Klux Klan outfit regardless
22 whether the child was black or white or any
23 other characteristic.

24 JUSTICE ALITO: You do see -- you do
25 see a lot of black children in Ku Klux Klan

1 outfits, right? All the -- all the time.
2 Suppose that -- I mean --
3 JUSTICE KAGAN: Can I -- can I -- can
4 I --
5 JUSTICE ALITO: Yeah.
6 JUSTICE KAGAN: Yeah? Is that all
7 right?
8 JUSTICE ALITO: Sure.
9 JUSTICE KAGAN: I have one, I -- I
10 hope, easy question for you and then a more
11 difficult question.
12 So, as I understand your argument, the
13 kind of you can say anything you want as long as
14 you say it to everybody or not say anything you
15 want as long as you don't say it to anybody.
16 So a gay couple walks in to Ms.
17 Smith's office and says, we want a quote from
18 Obergefell, and she says, I don't do that.
19 That's okay with you, yes?
20 MR. OLSON: Yes.
21 JUSTICE KAGAN: Because she doesn't do
22 it for anybody, yeah?
23 MR. OLSON: Correct.
24 JUSTICE KAGAN: Okay. Gay couple
25 walks in and says -- this is the harder one, all

1 right? A gay couple walks in and says, I'd like
2 the standard website, you know, everything
3 standard, the kind of website we were talking
4 about before, but I want something in addition
5 to that. I want -- I want in the -- on the home
6 page the website to say "God blesses this
7 union." All right?

8 And Ms. Smith says -- well, that's a
9 problem, Ms. Smith says. And the gay couple
10 says, well, you would say that if -- if we were
11 an opposite-sex couple, right? And -- and she
12 says, we -- I would say that if you were an
13 opposite-sex couple.

14 And the gay couple says, well, what's
15 the big deal then? I don't know, I think that
16 that kind of is different, so I'm wondering
17 whether you think it's different.

18 MR. OLSON: Well, I -- I think it's
19 different in part because it implicates the very
20 compelling free exercise concerns of the vendor,
21 which aren't present in this case, right? This
22 is just a procedure --

23 JUSTICE KAGAN: Yeah, possible. I get
24 the -- I get the idea that there's a kind of
25 religious element to it. I wish I could think

1 of one that didn't have that component because I
2 feel like there's something else going on there
3 as well, that it is a statement of opinion about
4 the nature of this marriage, which, you know, in
5 my earlier hypotheticals I took care to remove.

6 But now there's a kind of statement of
7 opinion about the nature of this marriage, and
8 unlike the kind of "our story" things, which is
9 like -- obviously, it's their story, it's not
10 the designer's story. You know, unlike that, it
11 feels a little bit to me as though it could be a
12 kind of third person saying God blesses this
13 union. And who would the third person be other
14 than the person who's put the whole website
15 together? So I have difficulty with that
16 hypothetical, and I'm wondering what you think
17 about it.

18 MR. OLSON: So I agree, Justice Kagan,
19 and I think -- imagine a statement that says
20 something along the lines of -- you know,
21 there's a dating website that meets people and
22 then the people that they connect through it
23 says, you know, this is a wonderful marriage
24 that we support. No religion, right?

25 And then where you have that direct

1 speech, it does get a little trickier, but --
2 but I -- but what I would say is this is -- you
3 know, the default rule would still apply even
4 though that is an edge case, I agree, because
5 the question is what services does the company
6 choose to provide and, if it chooses to provide
7 that service to some -- now, here, it's -- you
8 know, it may be that -- that looking at the
9 service is, well, I evaluate your marriage and I
10 give it a thumbs-up or a thumbs-down, and, you
11 know, I assume you don't want the thumbs-down on
12 the website, so if you get a thumbs-up, you get
13 on the website. So that's a fact question I
14 think that would be hard.

15 But, if it was a statement that was
16 made solely based on the status of the person
17 seeking the website, in other words, thumbs-up
18 for all opposite-sex couples, thumbs-down for --
19 for same-sex couples, then it's an easier --
20 easier question.

21 JUSTICE JACKSON: Isn't Justice --

22 JUSTICE KAGAN: Yeah, I --

23 CHIEF JUSTICE ROBERTS: Thank -- thank
24 you, counsel.

25 Justice Thomas, anything further?

1 Justice Alito?

2 JUSTICE ALITO: Well, back to my black
3 Santa example, suppose it's a state that defines
4 a public accomodation -- prohibits a public
5 accommodation to discriminate on the basis of
6 political ideology. So then -- then the picture
7 has to be taken?

8 MR. OLSON: I -- I think that is
9 likely -- those political ideology distinctions
10 face much more difficult constitutional scrutiny
11 and I think are separate in kind from the kind
12 of characteristics that we're talking about
13 here, which are categories of invidious
14 discrimination. I can only think, in most
15 circumstances, political ideology did not
16 satisfy the constitutional requirements.

17 JUSTICE ALITO: So it has to satisfy a
18 constitutional requirement? Your argument is
19 dependent on that?

20 MR. OLSON: Yes, because even under
21 O'Brien, there's -- there's -- we have to show a
22 basis for what we're doing.

23 JUSTICE ALITO: In light of what
24 Justice Kennedy wrote in Obergefell about
25 honorable people who object to same-sex

1 marriage, do you think it's fair to equate
2 opposition to same-sex marriage with opposition
3 to interracial marriage?

4 MR. OLSON: Yes, because -- in how the
5 law applies, not in -- in the -- the discussion
6 with folks because, of course, honorable people
7 have different views on this issue. But I
8 think, when you look at what Justice Kennedy
9 said there, the way to honor that requirement
10 is, as this Court has set forth in *Fulton*, in
11 *Masterpiece*, of having a rigorous interrogation
12 to make sure that there are neutral and
13 generally applicable laws applied in fact that
14 way that don't single out religion.

15 And then the very next sentence of
16 what Justice Kennedy said in *Obergefell* talked
17 about, when -- when it transformed, that honest
18 and decent disagreement transformed into enacted
19 law and policy, the necessary consequence is to
20 put the imprimatur of the state on that
21 exclusion. And I think, if this Court were to
22 say that the imprimatur of this Court would
23 allow a web designer to say no same-sex people
24 allowed or allow a school photographer to say,
25 you know, no pictures of --

1 JUSTICE ALITO: Well, do you think
2 Justice Kennedy would have said that there are
3 -- that it's honorable to oppose -- to
4 discriminate on the basis of race?

5 MR. OLSON: No, I don't think so.

6 JUSTICE ALITO: Let me just give you
7 one -- one more hypothetical. Suppose someone
8 offers the service of writing customized wedding
9 vows or customized speeches to be given at a
10 wedding by people who have an idea what they
11 would like to say about a family member or a
12 good friend, but they just don't feel they're
13 very good with words. They can't put it into
14 words.

15 And let's say that this outfit is just
16 starting up. They don't have a lot of clients.
17 They're sitting at -- you know, they're sitting
18 by the phone and their computer waiting for
19 somebody to show up, so they will take anybody.
20 All right? Can -- can they be forced to write
21 vows or speeches that espouse things they
22 loathe?

23 MR. OLSON: No, they cannot be forced
24 to -- to write vows or speeches that espouse
25 things they loathe because that's not a

1 protected characteristic. But they cannot -- I
2 assume in your example --

3 JUSTICE ALITO: Well, is -- is -- is
4 the prohibition or the limitation against
5 compelled speech limited to things that are
6 unconstitutional?

7 MR. OLSON: No. I think -- I think
8 there are --

9 JUSTICE ALITO: So why does it matter?

10 MR. OLSON: Well, because, here,
11 things they loathe is not a protected
12 characteristic anywhere I know -- anywhere that
13 I know of, but on the constitutional limit, it
14 doesn't have --

15 JUSTICE ALITO: Okay. It doesn't fall
16 within -- you say -- you say it doesn't fall
17 within your statute. But maybe it's going to
18 fall within the statute -- it may fall within
19 another statute.

20 MR. OLSON: Under -- under any level
21 of scrutiny here, you look at the state's
22 compelling interest in -- in -- in determining
23 the -- the burden -- the incidental burden on
24 the -- in our example, the vow writer's rights,
25 and I don't know of any state that has sort of a

1 compelled -- it has the same compelling interest
2 as they do -- as they do for, you know,
3 protecting things that other people loathe as
4 they do for sex, gender, religion
5 discrimination. So I think it would be a
6 different analysis.

7 CHIEF JUSTICE ROBERTS: Justice
8 Sotomayor?

9 JUSTICE SOTOMAYOR: This would be the
10 first time in the Court's history, correct, that
11 it would say that a business open to the public,
12 as this Petitioner has said it is, that it's
13 open -- a commercial business open to the
14 public, serving the public, that it could refuse
15 to serve a customer based on race, sex,
16 religion, or sexual orientation, correct?

17 MR. OLSON: Yes.

18 CHIEF JUSTICE ROBERTS: Justice Kagan?
19 Justice Gorsuch?

20 JUSTICE GORSUCH: Good morning,
21 Mr. Olson.

22 MR. OLSON: Is it still morning?

23 JUSTICE GORSUCH: Just barely.

24 (Laughter.)

25 JUSTICE GORSUCH: It must not feel

1 like it standing where you are.

2 (Laughter.)

3 MR. OLSON: I'm here all day, Justice
4 Gorsuch.

5 (Laughter.)

6 JUSTICE GORSUCH: It's good to see
7 you. We -- we've had some discussion about
8 whether websites are speech or whether they are
9 some -- a service off the shelf. And I -- I --
10 I, like a lot of my colleagues, don't profess to
11 know much about this. But I do know that there
12 are some stipulations that you made in
13 paragraphs 81, 82, 83, which say that this is
14 customized, personalized, and expressive
15 activity in each and every circumstance.

16 What do we do about that from your
17 perspective? Don't we have to take that as
18 given?

19 MR. OLSON: Yes, but it doesn't change
20 the analysis, I think.

21 JUSTICE GORSUCH: Why not? Because I
22 do see a thing very different if I put a cake on
23 display, it's been made, it is what it is, or a
24 website that you can then go customize yourself,
25 and another thing to commission an expressive

1 activity and -- and -- and to require somebody
2 to create an expression. Those are two
3 different things analytically in our law. So
4 help me out.

5 MR. OLSON: Well, I think, along with
6 the stipulations, we need to look at the
7 specific relief that the company seeks.

8 JUSTICE GORSUCH: But those are the
9 stipulations.

10 MR. OLSON: They are the stipulations.
11 And the specific relief that the company seeks
12 is the ability to turn away every single
13 same-sex customer.

14 JUSTICE GORSUCH: Well, they can ask
15 for what they want. What they get might be
16 another thing, Mr. Olson. But how we analyze
17 the case depends upon those stipulations.

18 MR. OLSON: Of course, it does. And
19 -- and --

20 JUSTICE GORSUCH: Okay. Okay. And
21 then, separately, I -- I was intrigued by your
22 answer before my friends at the Tenth Circuit
23 about freelance writers and people like that and
24 the notion that Colorado could compel, for
25 example, an individual to write a speech or a

1 press release on behalf of, say, a religious
2 entity with whom he or she disagrees.

3 Does -- does every press release
4 writer, freelance writer have to write a press
5 release for the Church of Scientology, say, even
6 though the beliefs of that institution may be
7 inimical to that person?

8 MR. OLSON: Not at all. And -- and I
9 admit I don't have firmly in mind the exact
10 contours of my answer a couple years ago to the
11 Tenth Circuit, but I will tell you what Colorado
12 law says, which is you -- a freelance writer may
13 or may not be a public accommodation --

14 JUSTICE GORSUCH: Well, let's -- let's
15 assume they -- they are --

16 MR. OLSON: Okay.

17 JUSTICE GORSUCH: -- under your
18 definition, pretty broad, very different than
19 the historical understanding of public
20 accommodation, but we've gone over that.

21 MR. OLSON: So -- so assuming away
22 that hard part of the question, getting to -- to
23 what limitations, all that Colorado law requires
24 is that if you choose to offer a service to
25 someone, you need to offer that service to be

1 done --

2 JUSTICE GORSUCH: I offer to write
3 press releases for anyone. It's not a who, but
4 it is a what. And the what is, I won't write a
5 press release that expresses religious views or
6 that I disagree with.

7 MR. OLSON: Well -- well, I think,
8 certainly, a -- a freelance writer who is a
9 public accommodation could say, I don't write
10 press releases that express religious views,
11 full stop, I won't write that for anybody.
12 Right? You -- you can --

13 JUSTICE GORSUCH: No, no, no, I'm --
14 I'm happy to do it generally speaking but just
15 not ones I disagree with. There are many I
16 would agree with across a wide variety of
17 religious faiths, but I'm not going to do it for
18 some with whom I disagree.

19 MR. OLSON: Well, even in that
20 circumstance, what Colorado looks to is the
21 service you actually provide, and you choose the
22 service so long as -- you -- you could say I --
23 I --

24 JUSTICE GORSUCH: So the answer is
25 yes, Colorado would compel that person?

1 MR. OLSON: No, no, the answer is no.

2 JUSTICE GORSUCH: Okay, why?

3 MR. OLSON: Because Colorado could say
4 you as a -- as a speech writer could say, I
5 write -- you know, the religious speeches that I
6 write touch on a few traditions that I have
7 knowledge of and I don't write speeches that
8 touch on other knowledges. But you --

9 JUSTICE GORSUCH: Well, no, no, no.
10 It's not on -- you're changing my hypothetical,
11 Mr. Olson --

12 MR. OLSON: Well --

13 JUSTICE GORSUCH: -- that I disagree
14 with, that --

15 MR. OLSON: Okay.

16 JUSTICE GORSUCH: -- that I find
17 offensive to my religious beliefs. That's the
18 hypothetical.

19 MR. OLSON: So long as you would sell
20 that to everyone, not based on their religion,
21 but you -- you can define the contours of the
22 product, you can choose the contours of the
23 product that you sell, but you --

24 JUSTICE GORSUCH: I call it -- I call
25 it speech, but you can call it a product if you

1 want.

2 MR. OLSON: Well, we'll -- we'll call
3 it speech. You -- you can choose the content
4 of -- of what you sell. You just can't --

5 JUSTICE GORSUCH: What you say.

6 MR. OLSON: -- choose who you sell to.

7 JUSTICE GORSUCH: Okay.

8 MR. OLSON: Right? And so you could
9 say, I'm going to -- I'm going to focus on these
10 things and -- but I need to sell that to
11 everyone, even if the person who wants to buy it
12 is a member of a religious faith that I disagree
13 with. That gets by --

14 JUSTICE GORSUCH: So I will -- I will
15 write a press release for many faiths and many
16 belief systems that are -- but they have to be
17 consistent with mine and I won't do it if it --
18 if it offends my religious faith. Good to go?

19 MR. OLSON: So long as you sell that
20 to everybody.

21 JUSTICE GORSUCH: Yes. Okay. All
22 right. What's different about this case?
23 Because -- I'll just finish the question. I
24 know you're already ready to answer it. But we
25 have an individual who says she will sell and

1 does sell to everyone all manner of websites.

2 But she won't sell a website that
3 requires her to express a view about marriage
4 that she finds offensive to her religious
5 beliefs. What's the difference between the two
6 cases? I'm struggling to understand.

7 MR. OLSON: The difference is, and,
8 again, looking at the specific relief the
9 company seeks, is --

10 JUSTICE GORSUCH: Put aside the
11 specific relief the company seeks because it's
12 up to courts to fashion relief.

13 MR. OLSON: Yeah.

14 JUSTICE GORSUCH: So that's -- that's
15 not going to persuade me. Work on something
16 that might.

17 MR. OLSON: The difference is, is that
18 that distinction the -- well, the company has
19 chosen to say they want to provide wedding
20 websites generally and they will not provide --

21 JUSTICE GORSUCH: Well, all manner of
22 websites.

23 MR. OLSON: Well --

24 JUSTICE GORSUCH: This individual will
25 provide all manner of websites, just not one

1 that celebrates -- requires her to write
2 something, words on a page, customizable, all
3 the stuff you stipulated to, that celebrate a
4 particular thing that she finds offends her
5 religious beliefs.

6 I -- I still -- I'm -- I'm looking for
7 the distinction between the two cases. One you
8 say is okay and the other one not okay.

9 MR. OLSON: Because the company,
10 unlike our first example of the speech writer --

11 JUSTICE GORSUCH: Yeah.

12 MR. OLSON: -- the company here says
13 in no uncertain terms will they ever sell a
14 company -- a -- a -- a -- a product or a service
15 to a same-sex couple permitting that I --

16 JUSTICE GORSUCH: No, what they say is
17 we will not sell to anyone -- anyone a -- a
18 message that I disagree with as a matter of
19 religious faith, just as a speech writer says or
20 the press release writer, the freelance writer,
21 says I will not sell to anyone a speech that
22 offends my religious beliefs.

23 MR. OLSON: But, here, they are
24 defining their service by excluding someone
25 based on their --

1 JUSTICE GORSUCH: That's their
2 religious belief.

3 MR. OLSON: Well, in Colorado --

4 JUSTICE GORSUCH: You can't change
5 their religious belief, right?

6 MR. OLSON: No, but -- but -- well,
7 two --

8 JUSTICE GORSUCH: And you protect
9 religious beliefs under the statute, right?
10 That is one of the protected characteristics in
11 theory.

12 MR. OLSON: Yes, and in practice. If
13 it wasn't in practice, we'd have heard about it
14 over -- over the past several years, and -- and
15 my friend has pointed to no example where this
16 has been applied in a --

17 JUSTICE GORSUCH: Mr. Phillips did go
18 through a re-education training program pursuant
19 to Colorado law, did he not, Mr. Olson?

20 MR. OLSON: He -- he went through a --
21 a process that ensured he was familiar with --

22 JUSTICE GORSUCH: It was a
23 re-education program, right?

24 MR. OLSON: It was not a re-education
25 program.

1 JUSTICE GORSUCH: What do you call it?

2 MR. OLSON: It was a process to make
3 sure he was familiar with Colorado law.

4 JUSTICE GORSUCH: Someone might be
5 excused for calling that a re-education program.

6 MR. OLSON: I strongly disagree,
7 Justice Gorsuch.

8 JUSTICE GORSUCH: Thank you, Mr.
9 Olson.

10 CHIEF JUSTICE ROBERTS: Justice
11 Kavanaugh?

12 JUSTICE KAVANAUGH: I'm interested in
13 picking up on those questions and -- and what
14 Colorado's position on the First Amendment could
15 lead to, not what you would do based on your
16 representation, but what your theory of the
17 First Amendment could lead to in thinking about
18 the proper analogy to a website designer.

19 So I've been thinking about a
20 publishing house that says, we're not going to
21 publish -- we support pro choice positions.
22 We're not going to publish books that support a
23 pro life position or that we support same-sex
24 marriage and we're not going to publish books
25 that take a different position on same-sex

1 marriage.

2 Does the publishing house have a First
3 Amendment ability to select the kinds of books
4 that it will publish along the lines of my
5 hypotheticals there?

6 MR. OLSON: Of -- of course, it does,
7 and I think a publishing house is not a public
8 accommodation for precisely the level of
9 selectivity and choice that -- that it goes
10 into, just like the Court recognized in Fulton.

11 JUSTICE KAVANAUGH: Right. But, if it
12 were a public accommodation, it would still have
13 a First Amendment right, correct?

14 MR. OLSON: Yes.

15 JUSTICE KAVANAUGH: You sure about
16 that?

17 MR. OLSON: Yes, because what -- all
18 the public accommodation law says is you can't
19 turn someone away because of who they are.
20 And -- and it would be different if your
21 hypothetical was they will not publish gay
22 authors. If -- if they were -- if they were a
23 -- a publishing house who said they will -- will
24 not --

25 JUSTICE KAVANAUGH: Right. That's the

1 distinction right there.

2 MR. OLSON: Yes.

3 JUSTICE KAVANAUGH: You put your
4 finger on it, I think. So the website designer
5 is different from the publishing house how?

6 MR. OLSON: Because the website
7 designer is refusing to -- to publish gay
8 authors using the publishing house example.
9 They are saying, I will not provide this service
10 to someone because of who they are, period.

11 JUSTICE KAVANAUGH: They say it's
12 because of the message.

13 MR. OLSON: I -- I -- I understand,
14 but they define the service in a way that
15 excludes people based on who they are, and that
16 violates Colorado law.

17 And to the extent there's some
18 incidental impact on their message, it's the
19 kind of incidental impact that this Court held
20 in O'Brien as to be appropriate, where a law is
21 focused on conduct and not the -- the message
22 itself.

23 JUSTICE KAVANAUGH: I felt the amicus
24 brief of Professors Carpenter and Volokh was
25 fairly interesting. They supported the same-sex

1 position in Masterpiece but that they say
2 they're on the opposite side in this case and
3 they say that the reason is because this case
4 involves speech.

5 They say a website designer is unlike
6 a baker and that Hurley therefore is the key
7 precedent here, and they say there is no serious
8 question, their words, no serious question that
9 this case involves compelled speech.

10 Do you agree it involves compelled
11 speech?

12 MR. OLSON: No.

13 JUSTICE KAVANAUGH: Even though they
14 say there's no serious question that it does,
15 you disagree with that?

16 MR. OLSON: We disagree with that.

17 JUSTICE KAVANAUGH: Okay. Thank you.

18 CHIEF JUSTICE ROBERTS: Justice
19 Barrett?

20 JUSTICE BARRETT: How can you disagree
21 with that in light of the stipulations that
22 Justice Gorsuch reviewed with you? Because, if
23 it's speech, you know, as the stipulations
24 Justice Gorsuch read did, and she has to say it,
25 why isn't it compelled speech?

1 MR. OLSON: Because, on the
2 stipulations and -- and where we are here, the
3 company would refuse to provide the same
4 identical speech to a customer solely because of
5 who they are.

6 And if a company is going to -- is
7 going to provide speech, already said they're
8 going to do it, the website I think was the
9 colloquy with Your Honor, Justice Barrett, where
10 someone comes in and says, I want the exact same
11 website as you gave to my friends, and the
12 company says, no, I will not provide that to you
13 and the only reason is because of who -- who you
14 are, that's not compelled speech.

15 Certainly, there are some
16 circumstances where there may be more of this,
17 you know, tell the story, et cetera, but the
18 company can choose to determine the services
19 that it wants. Here, it has chosen to say that
20 I will not provide the exact same website for
21 one couple than I would for another solely based
22 on the identity of the couple.

23 JUSTICE BARRETT: Okay. I want to
24 give you a hypothetical that doesn't rely on
25 disagreement, philosophical or otherwise, with

1 speech but just a desire to promote a different
2 kind of speech.

3 So let's say a newspaper is running --
4 as many newspapers do, runs marriage
5 announcements. And so, you know, The New York
6 Times says that such announcements which it
7 picks have to satisfy its normal editorial
8 standards.

9 Let's just say that the newspaper for
10 gay pride month decides that it's going to run
11 to promote and recognize same-sex marriage only
12 same-sex marriage announcements, turns away
13 heterosexual announcements, not because it
14 disparages or disagrees with opposite-sex unions
15 but because it's trying to promote something
16 else.

17 Can it do that? That's a protected
18 characteristic under the law?

19 MR. OLSON: Well, that's a hard
20 hypothetical because, normally, the marriage
21 announcements are considered to be a public
22 accommodation, but your intro -- hypothetical
23 introduces a layer of editorial discretion in --

24 JUSTICE BARRETT: Well, you can't run
25 every marriage announcement that comes. There

1 would be too many. So you're necessarily going
2 to pick and choose, just like every business is
3 going to have to pick and choose based on
4 resources.

5 MR. OLSON: Well, and I think -- but,
6 in that circumstance, if the sole basis for
7 picking and choosing is a protected
8 characteristic, The New York Times couldn't say
9 that we're -- we're going to have -- this month
10 we're just going to run opposite-sex weddings,
11 next month we're just going to run white people
12 weddings, next month we're just going to run --

13 JUSTICE BARRETT: So, for gay pride
14 month, a newspaper can't choose to try to
15 celebrate that and communicate a message by
16 running only gay marriage announcements?

17 MR. OLSON: Well, again, I think the
18 answer is no, but that's an unusual case because
19 a newspaper obviously typically has great
20 discretion.

21 JUSTICE BARRETT: Well, it might be an
22 unusual case, but the problem and what a lot of
23 the hypotheticals are getting at is however we
24 decide this case obviously applies to others.
25 And what if we say it's not The New York Times,

1 but what if we say that it's a gay rights group
2 that wants to publish gay rights announcements
3 online all year round, not just for gay pride
4 month, because it wants to celebrate love in
5 that community, and so it publishes only
6 same-sex marriage announcements and turns away
7 opposite sex.

8 MR. OLSON: Well --

9 JUSTICE BARRETT: Can the gay rights
10 organization do that?

11 MR. OLSON: Right. I think there
12 that's very unlikely to be a public
13 accommodation, so the answer is likely yes, but
14 --

15 JUSTICE BARRETT: Well, they're paid.
16 Why? I mean, they're paid. I mean, they --
17 they craft these for -- it's a business, it's a
18 commercial enterprise, but they craft these
19 announcements for the gay community.

20 MR. OLSON: I guess -- who crafts the
21 announcements? I thought it was --

22 JUSTICE BARRETT: So it's a -- it's a
23 -- it's a -- it's a gay rights enterprise. It's
24 a -- it's a group run by, you know, people who
25 are interested in promoting gay rights, and it's

1 a forum to celebrate gay marriage. They charge.
 2 You make money, and you run marriage
 3 announcements that have our story, et cetera,
 4 but it's done specifically to celebrate love in
 5 that community. Can they turn away opposite-sex
 6 marriage announcements?

7 MR. OLSON: So, in this unusual
 8 hypothetical, assuming they're a public
 9 accommodation, they cannot turn away
 10 announcements based on a protected
 11 characteristic. So they couldn't turn around --
 12 turn away opposite-sex announcements or
 13 interracial marriages, I think, if they're a
 14 public accommodation. But I think the --

15 JUSTICE BARRETT: So they can be
 16 compelled to -- it's not -- it's not that they
 17 have anything against opposite-sex unions, but
 18 they can be compelled to give their, you know,
 19 web space to those -- to those announcements
 20 even though it's not consistent with the message
 21 of their organization?

22 MR. OLSON: Again, assuming they're a
 23 public accommodation and opening themselves to
 24 the public --

25 JUSTICE BARRETT: Yes, assuming

1 they're --

2 MR. OLSON: Yes, they -- they can be

3 --

4 JUSTICE BARRETT: -- a public

5 accommodation.

6 MR. OLSON: -- they can do that, but I

7 think what makes the hypothetical difficult is

8 that that assumption likely does -- does not

9 apply to most organizations like that that we

10 talked --

11 JUSTICE BARRETT: But it seems like

12 you can't get out of everything by defining

13 public accommodation narrowly or broadly

14 depending on it. I mean, you agree that in

15 Hurley the parade was a public accommodation, as

16 we held? Because Hurley is your hardest case,

17 right?

18 MR. OLSON: It's a difficult case, but

19 it -- but we are different than Hurley, and I'm

20 happy to talk about why. But the public

21 accommodation law was applied to the parade in

22 Hurley, and the Court said that was -- because

23 of the peculiar circumstances there, it was

24 inappropriate.

25 But, importantly, in Hurley, everyone

1 could march in the parade. The only issue was
2 who could carry the banner in the parade. And,
3 in this case, people can't march in the parade.
4 The company is turning away people for their
5 products based solely on who they are, and
6 that's the big difference from here and Hurley.

7 JUSTICE BARRETT: Thank you.

8 CHIEF JUSTICE ROBERTS: Justice
9 Jackson?

10 JUSTICE JACKSON: Yes. So I just
11 wanted to say how perplexed I was about the
12 questions that seemed to distinguish this kind
13 of sexual orientation refusal to provide
14 services from the race discrimination. And
15 there were some questions raised about, you
16 know, religion being the basis, but I guess --
17 and -- and you might be able to help me with
18 this and you might not, but I -- I was fairly
19 certain that, historically, opposition to
20 interracial marriages and to integration in many
21 instances was on religious grounds.

22 So I don't know that we can say that
23 just because we have a religious objection to
24 same-sex marriage in this situation, that
25 wouldn't necessarily implicate religious

1 objections to other kinds of situations.

2 Am I right about that?

3 MR. OLSON: Absolutely correct about
4 that. I mean, Bob Jones University is a good
5 example of that case --

6 JUSTICE JACKSON: All right. So --

7 MR. OLSON: -- where there was a
8 religious basis --

9 JUSTICE JACKSON: -- so whatever we
10 decide here, as Justice Barrett suggested, could
11 have implications for other kinds of
12 categorizations and First Amendment -- strongly
13 religious held First Amendment invocations of
14 rights?

15 MR. OLSON: Absolutely, and I think
16 the -- the reason my friend was having such
17 difficulty giving clear answers to some of these
18 hard questions was because there is no way to
19 cabin this to -- under the Free Speech Clause
20 exemption they seek, just to weddings or --
21 sexual orientation is involved.

22 JUSTICE JACKSON: All right. So can I
23 just direct your attention back to Justice
24 Kagan's question? Because I think she -- she
25 made good points about, you know, the "God bless

1 this union" hypothetical. And I guess I was
2 thinking, isn't part of the problem trying to
3 figure out whose statement of opinion it is when
4 you have a public accommodation?

5 When you have an artist for hire,
6 right, ordinarily, you would have an artist who,
7 even though they're making custom, you know,
8 things, they're making custom things based on
9 their own views and opinions and this is my art.
10 But, when you have an artist for hire and people
11 come to them and say here's what I'd like you to
12 make, there's a question about whether what they
13 make is their statement or the customer's
14 statement.

15 So, if it was clear that it was not
16 their statement, let's say the gay couple comes
17 and they say we want "God bless this union" on
18 our website, and the web designer says that's
19 fine, but you understand under our name at the
20 bottom we say on every website we believe that
21 marriage is only between one man and one woman
22 and we're going to put that on your website?
23 Justice Alito says maybe that person will walk
24 away, and maybe they will.

25 But the point is, if they do that in

1 every situation and it's clear that it's not
2 their statement, then do we solve the -- the --
3 the difficult Justice Kagan problem of, like,
4 who's -- who's making an expression here?

5 MR. OLSON: I think we -- we make
6 progress towards solving it. And I think, back
7 to the stipulations, I think it's notable that
8 the stipulations here do not address that
9 question that you raise, Justice Jackson.

10 What the company says is, well, every
11 website has "Designed by 303 Creative" at the
12 bottom. That's paragraph 83 of the
13 stipulations. And then they say: And, if a
14 viewer of a wedding website goes to 303
15 Creative, then they will understand our
16 philosophy -- our own website, then they will
17 understand our philosophy and understand that
18 there's some implicit, you know, recognition or
19 endorsement, whatever, of the wedding.

20 But, on the stipulated facts here, the
21 question you pose is totally wide open. There's
22 no evidence in the record whatsoever and no
23 websites in the record to look at to see whether
24 anyone would attribute the speech about the
25 couple on the wedding website to the designer as

1 opposed to the couple.

2 JUSTICE JACKSON: Should -- should we
3 have that as part of our standard in the
4 holding? Like let's say we don't want to go as
5 far as you're suggesting perhaps with the
6 holding in this case. Could -- could it be that
7 we would say, you know, the First Amendment
8 protects the web designer's abilities to, you
9 know, not have this kind of a same-sex wedding
10 website only if it would be clear from, you
11 know, a neutral observer or from the audience
12 that having that website is their own
13 expression?

14 MR. OLSON: So two things to say on
15 that, Your Honor. First is I think both Spence
16 and Hurley itself talked about the importance of
17 how an onlooker would look at the message and --
18 and who the onlooker would attribute the message
19 to. So I think you certainly could -- could --
20 could build on that. And, again, here, there's
21 no evidence whatsoever that -- that anyone would
22 look at a wedding website designed by 303
23 Creative and say, oh, that is, you know, the
24 speech and beliefs of the designer as opposed to
25 the couple getting married.

1 JUSTICE JACKSON: Thank you.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 MR. OLSON: Thank you.

5 CHIEF JUSTICE ROBERTS: Mr. Fletcher.

6 ORAL ARGUMENT OF BRIAN H. FLETCHER
7 FOR THE UNITED STATES, AS AMICUS CURIAE,
8 SUPPORTING THE RESPONDENTS

9 MR. FLETCHER: Thank you, Mr. Chief
10 Justice, and may it please the Court:

11 My friend, Ms. Waggoner, offered a
12 two-part test this morning for when a commercial
13 business is entitled to an exemption from a
14 generally applicable public accommodations law.
15 She said, number one, is their product speech,
16 and, number two, does serving a particular
17 customer change the message in the view of the
18 business.

19 Now, as the questions today have
20 already explored, that leads to extremely
21 sweeping results. It means that any provider of
22 expressive services is entitled to put up a sign
23 saying we do not serve people with particular
24 characteristics whenever they believe that
25 serving those people would change their message.

1 What I want to begin with today is to
2 explain why that way of approaching the problem
3 is also inconsistent with this Court's cases,
4 most notably Rumsfeld versus FAIR, which you
5 mentioned, Mr. Chief Justice. That case was not
6 just about access to the law schools' rooms.
7 The law schools had a separate claim that said
8 we provide other services to recruiters in the
9 form of e-mails, newsletters, other things of
10 that nature. And this Court did not disagree.

11 It said those things are clearly
12 speech. And the law schools also said, when we
13 are required to provide those services to the
14 military, it changes our message because it
15 forces us to support a cause we deeply oppose.
16 And this Court did not disagree.

17 Instead, it said that compulsion of
18 speech is permissible because it's incidental to
19 a content-neutral regulation of conduct and that
20 law schools are required to speak only if and to
21 the extent they would provide the same speech
22 for others.

23 I welcome the Court's questions.

24 CHIEF JUSTICE ROBERTS: I do think the
25 Court in -- in Rumsfeld was dealing with the

1 sort of compulsion that is significantly
2 different from the compulsion here. In what
3 other case have we upheld compelling speech, in
4 other words, not simply just restricting speech
5 but actually compelling an individual to engage
6 in speech contrary to her beliefs?

7 MR. FLETCHER: So I think, Mr. Chief
8 Justice, Rumsfeld really is one of those cases.
9 And I want to emphasize that the law schools
10 there really did have a very credible claim, I
11 think, that they deeply opposed the military's
12 policies and that --

13 CHIEF JUSTICE ROBERTS: Well, they
14 opposed the military's policies, but all they
15 really had to do was give them an empty room.

16 MR. FLETCHER: Mr. Chief Justice,
17 that's not correct. At pages 60 to 62, the
18 Court acknowledges that there were things that
19 the law schools were required to do, like
20 sending e-mails, coordinating meetings,
21 including announcements in their newsletters
22 that were clearly speech. The court below had
23 held that that --

24 CHIEF JUSTICE ROBERTS: Advising --
25 advising people that the military recruiters

1 were available in a particular room, right?

2 MR. FLETCHER: And including their
3 announcements, distributing the announcements on
4 behalf of the military, including the military's
5 announcements in the law school's own
6 newsletter. The court below held and the law
7 schools --

8 CHIEF JUSTICE ROBERTS: Of the -- of
9 the fact that they would be recruiting on campus
10 pursuant to the Solomon amendment. Do you think
11 that's the same as the speech that's compelled
12 here, which is directly opposite to the beliefs
13 that the -- Ms. Smith is -- is seeking to
14 convey?

15 MR. FLETCHER: So I think it depends
16 very much about what type of speech we're
17 talking about here. I don't know that it is
18 different in a constitutional sense from the
19 sort of speech that was described in what
20 Justice Kagan, I think, called the basic
21 website, where we're talking about a website
22 that presents in an attractive way the details
23 of the couple's wedding.

24 I think it might be a very different
25 case if she were compelled, if Colorado ever

1 applied its law to compel her to create messages
2 or express religious views about marriage or to
3 do some of the opinion-based statements that
4 Justice Kagan described, but I think that case
5 might well come out differently.

6 JUSTICE KAGAN: In other words, you
7 would say that here is where the military
8 recruiters are going to be, with those
9 recruiters, of course, using a discriminatory
10 policy that the law schools deeply objected to.
11 Here is where the military recruiters are going
12 to be is very similar to here is where the
13 wedding is going to take place, which is what
14 standard websites do.

15 MR. FLETCHER: Exactly. And in saying
16 that, I don't want to at all minimize Ms.
17 Smith's sincere religious objection to saying
18 that for a wedding that she opposes. I'm just
19 making the point that the law schools also had
20 sincere moral objections to making those
21 statements to facilitate recruiting that they
22 found deeply objectionable.

23 JUSTICE BARRETT: What if the law
24 schools also had to make available their CDO to
25 sit down with the military and help them craft,

1 you know, in a statement that would be
2 attributable to the military, you know, this is
3 why a career with the military -- this is what
4 it would be, this is why it's attractive, and
5 then post it? Would that change Rumsfeld?

6 MR. FLETCHER: So there was actually
7 evidence that those sorts of services were
8 offered, that the law schools were pressing that
9 are referenced in the Third Circuit's opinion
10 but not specifically referenced in this Court's
11 cases.

12 I think what that starts to get into
13 is how do you draw the line between are you
14 providing -- is it really the same speech that
15 you would provide for someone else and are you
16 being required to do something that goes beyond
17 that to express the sort of opinion-related
18 statements that Justice Kagan espoused.

19 JUSTICE BARRETT: What if they do it
20 for everyone? The Career Development Office
21 will do that for, you know, law firms, this is
22 the job of an associate, and here is why it
23 would be appealing, what you'd be getting out of
24 it? If they do that, then they would have had
25 to do that for the military, or would that make

1 that case more like Hurley?

2 MR. FLETCHER: So I guess here is the
3 way I'd answer the question, is the way that
4 Hurley did. We read Hurley to ask is the
5 compulsion, is the burden on speech, is it truly
6 incidental to the content-neutral regulation of
7 conduct.

8 And what Hurley started with on pages
9 572 to 573 is being emphatic in saying this
10 parade is not excluding people because they are
11 gay and lesbian. It is excluding them solely
12 because of the message that they want to send.
13 And so the Court said applying the public
14 accommodations law to them is not incidental,
15 it's not serving the content-neutral regulation
16 of conduct because they're not discriminating on
17 the basis of status.

18 Instead, the law in Hurley, the Court
19 said, was equivalent to a law saying that the
20 parade had to include any message that any
21 protected group wanted to offer. That is not an
22 incidental burden on speech. That is a direct
23 burden on speech.

24 And the reason why we view this case
25 as being like FAIR and not like Hurley is

1 because Colorado is not asking Ms. Smith to say
2 messages or to speak messages that she would not
3 speak for anybody. The only thing that it is
4 saying is you can't discriminate based on status
5 and you can't define your services based on
6 protected status, so that you can't say the
7 thing, the message that I object to that I won't
8 speak for anybody is a message that is tied to
9 the customer's status.

10 JUSTICE KAGAN: But what --

11 JUSTICE SOTOMAYOR: Well, I -- I don't
12 know how many of my colleagues have looked at
13 the actual website. I don't even see
14 celebration of marriage in any of the examples.

15 Exhibit A, page 51, says Save The
16 Date, Lilly and Luke, November 20, you're
17 invited. And it says Lilly and Luke and the
18 date and place, the town. The Exhibit 52 is
19 counting down the days. It doesn't even say
20 what it's counting down for, except "our special
21 day," which everybody has to assume is the
22 couple's.

23 Fifty-three is an RSVP with pictures.
24 Fifty-four is "Our Blog, Bring Your Dancing
25 Shoes." Fifty-five is their date, "It all began

1 seven years ago," Lilly's version and Luke's
2 version. It's clearly not 303's version. "We
3 love each other and coffee" -- I don't even know
4 what CO -- "Colorado, Jesus, dogs, and diving.
5 We love each other" is the couple who loves
6 Jesus. I assume your adversary won't say Jesus
7 doesn't love them back, but it doesn't say that.

8 The 57 is the ceremony. Fifty-eight
9 is the reception, location, spirits, dinner menu
10 and dancing. Fifty-nine is location. I don't
11 see anywhere I'm celebrating the marriage or God
12 loves anyone or anything to do with anything
13 like that. So have you reviewed this website?

14 MR. FLETCHER: I have, Justice
15 Sotomayor.

16 JUSTICE SOTOMAYOR: Do you believe
17 that there's any page that says celebrate the
18 marriage?

19 MR. FLETCHER: I -- honestly, to -- as
20 I stand here today, I can't remember whether
21 there is or not. I don't think it would make a
22 difference if there were. And I think what the
23 examples that you just read highlight is that
24 there is a lot of websites or content on
25 websites that is properly within this case

1 because it is consistent with the stipulations
2 Justice Gorsuch and with the scope of relief
3 that they're asking for and with the type of
4 services that Ms. Waggoner has described this
5 morning.

6 JUSTICE SOTOMAYOR: What they're
7 asking for is a status-based exemption to
8 accommodate.

9 MR. FLETCHER: That's exactly right.

10 JUSTICE GORSUCH: Well, on that --

11 CHIEF JUSTICE ROBERTS: I thought --

12 JUSTICE SOTOMAYOR: Not a speech-based
13 exemption.

14 CHIEF JUSTICE ROBERTS: Just I thought
15 at pages 188A and 189A, the stipulation below
16 said that the additions to the web page stated,
17 and then it lists the firm belief in God that
18 they, Ms. Smith, subscribed to. Is that -- do
19 you understand that to be part of the
20 stipulations or not?

21 MR. FLETCHER: I do, Mr. Chief
22 Justice, but that's referring to her website,
23 her business's own website, not the websites
24 that she would create for clients and not the
25 websites that would be subject to the public

1 accommodations law.

2 JUSTICE GORSUCH: We also --

3 CHIEF JUSTICE ROBERTS: And -- I'm
4 sorry, go ahead.

5 JUSTICE GORSUCH: No, no. Please,
6 Chief.

7 CHIEF JUSTICE ROBERTS: I was just
8 going to say also on page 188A is the determined
9 -- the stipulation that her religious beliefs
10 will be unmistakable to the public after viewing
11 the addition to the web page.

12 MR. FLETCHER: Yes. Once again,
13 that's describing her website, not the websites
14 that she would create for clients or the
15 Colorado law might her -- might require her to
16 provide on a nondiscriminatory basis.

17 JUSTICE GORSUCH: And, counsel, we
18 also have stipulations from Colorado that the
19 plaintiff is willing to work with all people,
20 regardless of classifications such as race,
21 creed, sexual orientation, and gender, right?

22 MR. FLETCHER: In some respects, yes,
23 but not --

24 JUSTICE GORSUCH: No, that is the stip
25 -- I -- I -- I just read it. Do you disagree

1 with that? It's a stipulated fact in this case.

2 MR. FLETCHER: That is stipulated, but
3 it's also clear that she will not provide any
4 wedding website for a same-sex couple.

5 JUSTICE GORSUCH: Well, for a same-sex
6 wedding --

7 MR. FLETCHER: For a same-sex wedding,
8 yes.

9 JUSTICE GORSUCH: -- and she wouldn't
10 provide it to a heterosexual couple either,
11 right?

12 MR. FLETCHER: But that's still
13 discrimination within the meaning of --

14 JUSTICE GORSUCH: Just as she wouldn't
15 sell a website that celebrates a heterosexual
16 union that she disagreed with to anyone
17 regardless of their sexual orientation, right?

18 MR. FLETCHER: That may be right,
19 Justice Gorsuch, but I think Masterpiece
20 couldn't have been clearer in saying that
21 declining to sell goods or services, even
22 expressive goods and services, for a same-sex
23 wedding is a form of status-based discrimination
24 properly within the scope of public
25 accommodations laws.

1 JUSTICE GORSUCH: And, on -- on that,
2 I just want to make sure I understand. Do we
3 agree as well that this is -- this work that the
4 plaintiff performs is expressive in nature?

5 MR. FLETCHER: We do.

6 JUSTICE GORSUCH: Okay. Thank you.

7 JUSTICE JACKSON: And if it's
8 expressive, what -- what about my photograph
9 hypothetical?

10 MR. FLETCHER: So I didn't belabor
11 this at the beginning, Justice Jackson, but your
12 photograph hypothetical is exactly the sort of
13 implication of the arguments that Petitioners
14 are advancing that are of concern to the United
15 States.

16 We really do think it's very difficult
17 if you accept her principle, is it speech and
18 does the speaker believe the message has
19 changed, to say that someone who is doing that
20 would not be entitled under her theory to an
21 exemption from the public accommodations laws.

22 And we think that's a very sweeping
23 accommodation that's inconsistent with the
24 Court's admonition in Masterpiece Cakeshop that
25 any sorts of carveouts in these areas have to be

1 carefully cabined to avoid undermining the
2 government's compelling interest in ensuring
3 that all Americans have equal access to the
4 public marketplace.

5 JUSTICE JACKSON: And so just to be
6 clear, right, it -- it's the same photograph for
7 both customers, that this expression in my
8 example is classic Scenes with Santa, "It's a
9 Wonderful Life," 1940s, and we want -- the --
10 the artist, the photographer, wants Santa with
11 the kinds of depictions that are in that movie,
12 and he wants to sell that to everybody, but what
13 that means is only some people can be depicted
14 in that picture.

15 Is that -- that's -- I'm just trying
16 to make it -- because we've heard a lot of
17 questions about, well, isn't she customizing it?
18 I mean, he's customizing each photo, but what
19 he's saying is, I won't do the customization for
20 these folks who want depictions with Santa
21 because that is inconsistent with my beliefs
22 about how that scene should be depicted, and I'm
23 an artist, and you'd be forcing me to put out
24 into the world pictures of Santa with children
25 that I think are inconsistent with my view of

1 how Santa should be depicted.

2 MR. FLETCHER: We agree, Justice
3 Jackson. We think, if you accept Petitioners'
4 theory, the upshot is that that photographer or
5 a photographer who says, I won't take corporate
6 head shots for women because I don't want to
7 send the message that women should be leaders in
8 the workplace, can deny service to a class of
9 people.

10 JUSTICE BARRETT: Mr. Fletcher, what
11 if you have a gay couple who runs a web design
12 business in a college town, and, you know, a big
13 part of their business is developing websites
14 for student organizations, the environmental
15 organization, like, different rec club leagues,
16 whatever. And then you have a Christian
17 organization or a Catholic organization that
18 basically stands for and advocates traditional
19 views of marriage. This is the raison d'etre
20 for the club. They host debates, invite
21 speakers, and they want the standard website
22 that this couple provides in their business,
23 which is, you know, graphics that make it look
24 appealing, kind of an About Us page that
25 describes what they do and what their beliefs

1 are. And let's say that this couple, like 303
2 Creative, has on the bottom of every page like,
3 you know, "Designed" -- "Designed by," you know,
4 "Jack and Michael." Everything this club wants
5 to say is an anathema to this couple.

6 Do they have to -- can you compel that
7 speech? Do they have to publish it?

8 MR. FLETCHER: I don't think they do,
9 Justice --

10 JUSTICE BARRETT: Why?

11 MR. FLETCHER: Because I don't think
12 that's a refusal based on status.

13 JUSTICE BARRETT: Okay. This is my
14 question, that's why I asked it, because I
15 think, here, there's a difference of opinion
16 about whether turning down the same-sex couple
17 simply for purposes of a marriage announcement
18 is a turn-down based on status or message. And
19 it seems to me in my hypothetical that the
20 status of the club is inextricably intertwined
21 with the message they want to speak.

22 So why is it different?

23 MR. FLETCHER: For a couple of
24 reasons. I think, first of all, just to start
25 with same -- the same-sex marriage context, this

1 Court has recognized that that's a circumstance
2 where status and conduct are inextricably
3 intertwined. In Lawrence and Masterpiece, the
4 Court has said refusing to serve for same-sex
5 marriages is discrimination against same -- gays
6 and lesbians because status and conduct is
7 inextricably intertwined.

8 The public accommodations laws and the
9 anti-discrimination laws generally don't work
10 that way in general. We don't think that the
11 expression of particular views is inextricably
12 intertwined with having a particular religion or
13 being a Democrat or a Republican.

14 In general, in public accommodations
15 laws, we say, when you discriminate against
16 someone because they want you to print a website
17 or serve an event or cater an event for
18 something that you disagree with, we wouldn't
19 say that that's a status-based refusal. And I
20 think that's correct. I -- I don't think --

21 JUSTICE BARRETT: So this is a
22 carveout that's applicable just to the same-sex
23 context?

24 MR. FLETCHER: I think it's a context
25 -- it's like the Court's recognition in Bray

1 that a tax on yarmulkes is a tax on Jews. There
2 are certain rare contexts where status and
3 conduct are inextricably intertwined, and I
4 think the Court has rightly recognized that
5 same-sex marriage is one of them.

6 JUSTICE BARRETT: Thank you.

7 CHIEF JUSTICE ROBERTS: Justice
8 Thomas?

9 Justice Alito?

10 JUSTICE ALITO: I want to make sure I
11 understand some of the contours of your
12 argument. So my first question is whether you
13 believe that speech can be compelled so long as
14 the person who is compelled to speech -- to
15 speak is -- is not associated with the compelled
16 speech.

17 MR. FLETCHER: That's not the line
18 that we draw, Justice Alito. I think we focused
19 on is it being compelled pursuant -- incidental
20 to a content-neutral regulation of conduct as in
21 FAIR or is it not.

22 JUSTICE ALITO: Well, outside of that
23 context, in general, does the prohibition or
24 restriction of compelled speech apply only where
25 there is no danger of attribution?

1 MR. FLETCHER: I don't think so, no.
2 I would imagine it applying in other contexts
3 too.

4 JUSTICE ALITO: Okay. Do you agree
5 with Mr. Olson that a -- a website for marriages
6 can tailor the website in a way that makes the
7 website unacceptable to same-sex couples?

8 MR. FLETCHER: By saying, for
9 instance, we -- on every website, we believe
10 that marriage is only between one man and one
11 woman or something like that, yes, we do.

12 JUSTICE ALITO: You believe that
13 that's permissible?

14 MR. FLETCHER: We understand that to
15 be permissible as a matter of Colorado law, and,
16 also, we think that's consistent with the way
17 the public accommodations laws usually work.

18 JUSTICE ALITO: Mr. Olson's answer to
19 that was if a website -- or part of the answer
20 at least was that if a website included
21 something like that, that would cause the
22 website to lose a significant amount of business
23 because some opposite-sex couples wouldn't want
24 that. But that's dependent on the views of the
25 community about opposite-sex -- about

1 same-sex -- I'm sorry, about same-sex marriages.

2 What if it's in a community where 99
3 percent of the public agree with that view, that
4 same-sex marriages are -- are bad, and they're
5 happy to have that associated with it?

6 MR. FLETCHER: So I don't think my
7 answer changes, Justice Alito, because I think
8 that imposing a requirement or prohibiting that
9 inclusion on a website is directly targeting the
10 expressive content of the website.

11 JUSTICE ALITO: Isn't that kind of a
12 silly distinction?

13 MR. FLETCHER: Justice Alito,
14 respectfully, no, I -- I don't think it is. I
15 think it's one that's familiar both to public
16 accommodations laws and to the First Amendment.
17 So, in the public accommodations context, as Mr.
18 Olson said, you could have a store that can say
19 we sell products that are solely for -- related
20 to Judaism, and it's not likely to be appealing
21 to Christians or Hindus, but no one thinks the
22 store is violating the public accommodations
23 laws unless it says no Christians or Hindus may
24 enter, and then it is violating the public
25 accommodations laws.

1 JUSTICE ALITO: Is there any limit to
2 how broadly a state can define a public
3 accommodation? So suppose a state defines it as
4 any business provide -- a business that provides
5 services to a significant portion of the public.

6 MR. FLETCHER: I --

7 JUSTICE ALITO: Would that make --
8 mean it's no -- it can't be regarded as public
9 accommodations anymore?

10 MR. FLETCHER: I don't know about that
11 line specifically, Justice Alito. I -- I will
12 accept the premise of the question. I do think
13 there are limits as to how far the state can go
14 at least when we're talking about what's a
15 sufficiently substantial interest to justify or
16 to pass scrutiny under the O'Brien test.

17 JUSTICE ALITO: Well, I ask this
18 because a lot of the arguments on your side
19 seemed to view public accommodations -- that if
20 it's a public accommodations law, it's generally
21 okay, there's no problem with it. And that's
22 why I want to know how far that can be expanded.

23 So some selectivity would not
24 necessarily take a business outside of the --
25 the definition of public accommodations? The

1 same arguments would apply?

2 MR. FLETCHER: Some selectivity
3 wouldn't take them out, but I think the farther
4 the state wanders from the sort of traditional
5 core of commercial establishments that hold
6 themselves out as serving the public, the weaker
7 the state interest is.

8 JUSTICE ALITO: What about the
9 characteristics that form the basis for an
10 impermissible denial of service? Any limit to
11 those?

12 MR. FLETCHER: I think there, the same
13 answer. So not in the sense that a state can
14 define its public accommodations laws however it
15 wants. But, yes, when it starts to bump up
16 against the First Amendment and you're
17 applying the O'Brien standard, protection for
18 some characteristics, you know, things that go
19 beyond the traditional things, like race, sex,
20 sexual orientation, religion, those at issue
21 here, and get out into political affiliation or,
22 you know --

23 JUSTICE ALITO: It can't define it as
24 political affiliation?

25 MR. FLETCHER: I --

1 JUSTICE ALITO: It can't define it to
2 include political affiliations --

3 MR. FLETCHER: I'm not saying it can't
4 --

5 JUSTICE ALITO: -- or ideology?

6 MR. FLETCHER: -- I'm not saying it
7 can't define it that way. I'm just saying that
8 the interests supported by such a prohibition
9 would be weaker than the really core ones like
10 those that we see at issue here.

11 JUSTICE ALITO: Along -- okay. So how
12 much selectivity do you think is required?

13 MR. FLETCHER: So that's going to be,
14 I think, in the first instance, as a state law
15 matter or as a constitutional sort of backstop
16 matter, I think it's hard to give a precise
17 answer. I think the Court's opinion in Fulton
18 gives some guidance and says more selectivity,
19 more individualized review is less likely to be
20 a public accommodation, and in contrast, an
21 entity that generally holds itself out as open
22 to the public can't escape the public
23 accommodations laws just by imposing a
24 discriminatory limitation or some pretense of
25 selectivity. And I -- I know I can't give you a

1 bright line, but I think this is a familiar
2 problem in public accommodations law.

3 JUSTICE ALITO: Okay. Suppose -- last
4 -- I -- I think my last question. Suppose 303
5 Creative says that there's so much demand for
6 our services that we have to be selective in who
7 we choose. Would this be -- would that make
8 this case -- would this case come out
9 differently then?

10 MR. FLETCHER: I don't think so,
11 Justice Alito. I think that a business that is
12 open to the public and serves the public but has
13 more business than it can handle and so has to
14 be selective is still a public accommodation.

15 JUSTICE ALITO: Thank you.

16 CHIEF JUSTICE ROBERTS: Justice
17 Sotomayor?

18 Justice Kagan?

19 JUSTICE KAGAN: Mr. Fletcher, when I
20 read your brief, I had the sense that you and
21 General Olson, Colorado, parted ways on -- on --
22 on some matters, and I'll just -- on my
23 hypothetical, God blesses this union, I thought
24 that you might find -- find that more difficult
25 than General Olson, and I'm wondering if I'm

1 right about that and -- and if I am right why
2 and what that says about your argument
3 generally.

4 MR. FLETCHER: So let me give you the
5 answer I'd give today. I'd start with just the
6 same observation that General Olson gave you,
7 which is that I think there are free exercise
8 clause issues might come into play. I'll put
9 those to the side because this is a speech case,
10 right?

11 And I think what that pushes on is can
12 the person who's providing services credibly say
13 I'm not denying service just because of status,
14 I'm denying service because there's some message
15 that's not just tied to status that I'm not
16 willing to speak for anybody.

17 And, to me, some --

18 JUSTICE KAGAN: Gay marriages are
19 wonderful to take the religion out of it.

20 MR. FLETCHER: Right. Right. So,
21 obviously, Ms. Smith can say, I will not make
22 any wedding website for anyone that says gay
23 marriages are wonderful. She can refuse on that
24 ground. Colorado agrees. We agree. Right?

25 JUSTICE KAGAN: Right. I get the "God

1 bless this union" was -- was supposed to be so
2 that it would be, she would be, like, perfectly
3 fine with saying it for some couples and not
4 fine with saying it for other couples.

5 MR. FLETCHER: Correct, yes. And I
6 guess I -- it's -- it's a harder case. You
7 know, I think it's one of the reasons why this
8 case is frustrating, is because we don't have
9 any concrete facts.

10 I think my inclination on that case is
11 that I think she has a strong argument to say,
12 really, that is making me send a different
13 message because of the context. It's not a
14 literal test. It's not just are the words
15 exactly the same, right?

16 We acknowledge that context matters.
17 And so, in a case like that, I think she has a
18 much stronger claim to say, if Colorado law
19 applied its law to make me say that, and I think
20 it's far from clear that Colorado would, then it
21 wouldn't be imposing the sort of incidental
22 burden the Court saw in FAIR. Then it's
23 imposing the sort of direct burden you saw in
24 Hurley, and the analysis looks very different.

25 JUSTICE KAGAN: Yeah. So what you

1 said is part of what frustrates me about this
2 case, because, you know, I guess my view when
3 I'm trying to think up hypotheticals for myself
4 is a little bit it depends.

5 On the first set of hypotheticals I
6 gave, I would come out one way, and on the
7 second set of hypotheticals I gave -- I hope I'm
8 not giving too much away -- I think it's much
9 tougher and I might come out the other way.

10 And -- and it really depends on the
11 facts and on what exactly Ms. Smith is being
12 asked or compelled to do and that matters. And
13 we have a case without any of that in it. And
14 what should I do with that?

15 MR. FLETCHER: So I think you should
16 take the case as it comes to you. And as it
17 comes to you, it's Ms. Smith saying, I want to
18 post a sign saying, I will not provide any
19 websites for any same-sex marriages. That's
20 Pet. App. 7A.

21 JUSTICE KAGAN: Categorical rule.

22 MR. FLETCHER: Categorical rule based
23 on status. And at page 303 to 304 in the -- of
24 the Joint Appendix, which General Olson referred
25 to, that's the relief that she's seeking, how

1 she's framed her claim. What she wants is an
2 injunction that says you can't make --

3 JUSTICE KAGAN: Justice Gorsuch says
4 we don't want to do things based on relief
5 because courts are in control of relief, so take
6 out that part of your -- I mean, whether he
7 might be right, he might not be right, but would
8 it matter if we took that out?

9 MR. FLETCHER: I don't -- I don't
10 think it would because what I heard Ms. Waggoner
11 to say this morning when she was asked about
12 what her client wants to do is that the services
13 she provide are not limited to the ones that are
14 described in the stipulations. She would
15 provide something that wasn't so customized as
16 long as it was to an opposite-sex couple, but
17 she wouldn't provide it to a same-sex couple.
18 That is what she is asking the courts to
19 validate.

20 And I think the Court can take that
21 claim as she presents it and say on that level
22 of generality she is not entitled to
23 pre-enforcement relief.

24 But I think it can also do to --
25 because I recognize there are harder questions

1 out there. It could and should do what it did
2 in Holder versus Humanitarian Law Project and
3 Doe versus Reed and say, in rejecting this
4 facial challenge in part -- or, I'm sorry,
5 pre-enforcement challenge, in part because we
6 need more facts and we don't have them, we are
7 not foreclosing the possibility that there is
8 narrow relief in future cases with concrete
9 facts.

10 JUSTICE KAGAN: Last question. You
11 said to Justice Jackson that you didn't want to
12 belabor the point, but her hypothetical is
13 exactly the kind of hypothetical that you're
14 concerned about.

15 You must have done many moots of this
16 case and thought of many hypotheticals. What
17 are your two ones that you're like killers?

18 (Laughter).

19 JUSTICE KAGAN: If we rule for Ms.
20 Waggoner and her client, what happens? Give me
21 two hypotheticals.

22 MR. FLETCHER: That's a lot of
23 pressure on my mooters. My favorite one is this
24 Court's decision in Runyon versus McCrary, which
25 was about a school that wanted to exclude

1 children of particular races, and it said the
2 reason we want to do this is because segregation
3 is important to our beliefs and that's what we
4 want to teach. And this Court said, you are
5 free to teach segregation in your school, but
6 you can't act on that belief by excluding
7 children of particular races.

8 And I think -- this is a private
9 school obviously. And I think, if Petitioners
10 are right, that case comes out differently as
11 long as the school can come in and say, when we
12 teach, we are expressing messages and those
13 messages change when we express them to students
14 of different races.

15 I think that's very troubling. And I
16 guess I take Justice Alito's point that I do not
17 mean to equate those who have different views
18 about marriage to racists, but the reason why I
19 rely on those hypotheticals is because this
20 Court's First Amendment jurisprudence does not
21 distinguish between views we find odious and
22 those we respect. The same principles apply in
23 both cases, and if the principles lead to
24 unacceptable places when we consider them in
25 light of odious views, then I think we have to

1 reject those principles even in a case where we
2 sympathize with and respect the views.

3 JUSTICE KAGAN: Thank you.

4 CHIEF JUSTICE ROBERTS: Justice
5 Gorsuch?

6 JUSTICE GORSUCH: I think, at the end
7 of two hours -- we are now in the afternoon, by
8 the way.

9 MR. FLETCHER: Good afternoon.

10 JUSTICE GORSUCH: That there --
11 there's actually radical agreement on -- on how
12 we should analyze this case legally. Tell me if
13 I'm wrong.

14 MR. FLETCHER: I disagree, but go
15 ahead.

16 JUSTICE GORSUCH: You haven't even
17 given me a chance.

18 (Laughter.)

19 JUSTICE GORSUCH: That -- that -- that
20 what -- what would be impermissible is
21 discrimination on the basis of status, but what
22 would be permissible is -- is refusing service
23 because of a disagreement about views.

24 MR. FLETCHER: So I guess I -- what
25 I -- the reason I disagreed at first is to say I

1 think there is general agreement that that's
2 about the right outcome.

3 JUSTICE GORSUCH: That that's about
4 the right way to think about this case.

5 MR. FLETCHER: But great difference of
6 opinion about how legally you get there, and
7 that leads to difference of opinion about how
8 you answer it.

9 JUSTICE GORSUCH: But -- but -- but --
10 but -- but I -- I was about -- you just steal my
11 thunder, counsel.

12 (Laughter.)

13 JUSTICE GORSUCH: You think this is a
14 status case. The other side thinks it's a -- a
15 viewpoint case. Is that fair too?

16 MR. FLETCHER: I -- I wouldn't say
17 that. I acknowledge that this is a status and a
18 message case.

19 JUSTICE GORSUCH: Okay. It's both --

20 MR. FLETCHER: Yes.

21 JUSTICE GORSUCH: -- in your view, I'm
22 sorry, whereas they would say it's a message
23 case.

24 MR. FLETCHER: Correct.

25 JUSTICE GORSUCH: But to think about

1 it, the status versus message, is -- I just want
2 to make sure we all agree that that's the right
3 way to think about this case.

4 MR. FLETCHER: Correct. And can I
5 explain why we think --

6 JUSTICE GORSUCH: Sure. Sure.

7 MR. FLETCHER: -- that's the right to
8 think about the case? Because we think the
9 first question is, is the burden that's being
10 imposed on Ms. Smith incidental to a
11 content-neutral regulation of conduct that says
12 you can't turn people away because of status.

13 JUSTICE GORSUCH: Right.

14 MR. FLETCHER: So, to us, the first
15 question is, is what she's doing status-based
16 discrimination?

17 JUSTICE GORSUCH: Right.

18 MR. FLETCHER: And if the answer is
19 yes, then the burden is incidental even if she
20 thinks it affects her --

21 JUSTICE GORSUCH: No, I -- I -- I -- I
22 -- I got that about an hour ago, but thank you.

23 MR. FLETCHER: I -- I -- I -- I
24 apologize.

25 JUSTICE GORSUCH: Now the -- the --

1 the other question I had is, in your view, this
2 is status-based, but Justice Barrett's
3 hypothetical of the inverse situation is
4 message-based.

5 MR. FLETCHER: I wouldn't describe it
6 as the inverse situation because I didn't
7 understand the hypothetical to say that the
8 campus print -- website design company was
9 turning people away because of their status. I
10 understood it to be turning them away because
11 they wanted to say things that the company would
12 not say.

13 JUSTICE GORSUCH: That's one way of
14 describing it, or one might describe it as
15 turning away those with traditionalist views of
16 marriage based on their religious beliefs,
17 conservative Christians, for example.

18 MR. FLETCHER: So I guess I just
19 disagree with that, Justice Gorsuch. I think
20 the way we answer any status-based
21 discrimination question is we change the
22 protected status, we hold everything else
23 constant, and we ask does the outcome change.

24 And in Ms. Smith's case, you change
25 the protected status, it's, you know, Jack and

1 Taylor, and you ask will she make the website --

2 JUSTICE GORSUCH: Except for that runs
3 into all those stipulated facts in which the
4 plaintiff has said repeatedly that she will
5 serve everyone and she would deny everyone this
6 kind of website.

7 MR. FLETCHER: But denying everyone,
8 whether it -- it -- it's --

9 JUSTICE GORSUCH: Everyone, regardless
10 of status.

11 MR. FLETCHER: Right, but it -- it's
12 --

13 JUSTICE GORSUCH: Right?

14 MR. FLETCHER: -- race discrimination
15 to say I won't serve interracial -- I won't
16 create inter -- websites for interracial
17 marriage and I won't sell them even to a white
18 wedding planner. That's still race
19 discrimination.

20 JUSTICE GORSUCH: It can be -- it can
21 be status or it can be message, and we have to
22 figure that out in this case, right?

23 MR. FLETCHER: What I -- but the way
24 you would figure it out is, does -- has Colorado
25 validly defined it as status-based

1 discrimination, and I think the answer that the
2 Court gave at pages 1727 to 1729 in Masterpiece
3 is yes.

4 JUSTICE GORSUCH: Okay. Got it.
5 Thank you.

6 CHIEF JUSTICE ROBERTS: Justice
7 Kavanaugh?

8 JUSTICE KAVANAUGH: I just want to
9 follow up there and ask about one thing in your
10 brief. On page 32 of your brief, you deal with
11 a few hypotheticals. The hypotheticals you
12 dealt with were requiring Muslim filmmakers to
13 promote Scientology, compelling lesbian artists
14 to design church websites criticizing same-sex
15 marriage, or -- and the third one I really want
16 to focus on -- or forcing writers to write
17 speeches that violate their most deeply held
18 convictions.

19 So those are the three hypotheticals
20 you posit responding to the other side. And
21 then you say those hypotheticals, unlike this
22 case, involve direct burdens on speech because
23 they contemplate speakers being forced to create
24 and convey ideological messages they would not
25 create for anyone.

1 And I think the other side would say
2 that's exactly this case too to take that third
3 category. These are writers, in essence, being
4 asked to write speeches that violate their most
5 deeply held convictions.

6 So I'm trying to figure out given what
7 you say there how you would say this case does
8 not involve the same thing as a writer being
9 forced to write speeches that violate their most
10 deeply held convictions.

11 MR. FLETCHER: Because, in each of
12 those hypotheticals, you can't posit a
13 content-neutral law like a public accommodations
14 law that would validly require the writer or the
15 speaker or the filmmaker to do what the
16 hypothetical has posited.

17 It's because, in those cases, as we
18 say, it's a direct burden on speech. The
19 regulation is compelling you to write something
20 you deeply disagree with because of the message.
21 It's not incidental to a content-neutral
22 regulation of conduct like the Court confronted
23 in FAIR and like we believe it's confronted with
24 here.

25 JUSTICE KAVANAUGH: You don't think

1 applying a public accommodations law to a
2 speech-writing business that offers to do
3 speeches or PR releases for anyone, but they
4 say, oh, we're not going to do this message --

5 MR. FLETCHER: That's --

6 JUSTICE KAVANAUGH: -- you don't think
7 that's this --

8 MR. FLETCHER: I -- I --

9 JUSTICE KAVANAUGH: They would say
10 that's this case, and you say it's not because?

11 MR. FLETCHER: I think they'd be
12 wrong. I -- so, first of all, at a couple of
13 levels.

14 JUSTICE KAVANAUGH: Yeah.

15 MR. FLETCHER: Speech writers aren't
16 likely to be public accommodations. Set that
17 aside.

18 JUSTICE KAVANAUGH: Yeah, but --

19 MR. FLETCHER: Suppose you have one
20 that was one, right?

21 JUSTICE KAVANAUGH: -- until they are,
22 after this case if you prevail, I mean, that's
23 -- that's -- that's what states could do.

24 MR. FLETCHER: But -- but I've tried
25 to give you -- in response to Justice Alito,

1 there is, I think, a constitutional backstop
2 about, you know, core public accommodations laws
3 we think satisfy O'Brien scrutiny. If a state
4 wanders from that, not so -- not so much.

5 But, again, just to get to the nub of
6 your hypothetical, we think, if the speech
7 writer says here's a speech that expresses views
8 that I abhor and I won't write the speech, they
9 wouldn't do that for anybody, regardless of
10 status. Now it may be that the status of the
11 person who's asking them to write the speech is
12 somehow correlated with the message in some way,
13 but that's still not status-based discrimination
14 in the way that the law regards discrimination
15 against people who are entering into a same-sex
16 marriage as status-based discrimination.

17 JUSTICE KAVANAUGH: Okay. Thank you.

18 CHIEF JUSTICE ROBERTS: Justice
19 Barrett?

20 Justice Jackson?

21 JUSTICE JACKSON: Can I just say that
22 I'm sort of trying to think about what you just
23 said in your exchange with Justice Kavanaugh --
24 it's late -- by wondering whether or not it has
25 something to do with the message being

1 implicitly provided in a situation in which the
2 -- what's actually being stated is the same.

3 So, you know, it -- what would you
4 think of a holding that says that the First
5 Amendment protects this designer's right to
6 provide products that explicitly express her
7 beliefs about marriage, so she absolutely has
8 the right to say one man, one woman, in every
9 website, and she has the right to refuse to say
10 gay marriage is great in any website, but what
11 she's really asking for in this case, I think,
12 is the right to say the same thing, here's the
13 wedding, it's at this place, et cetera, et
14 cetera, but she's afraid that if she says it for
15 gay people that that will be sort of like an
16 implicit endorsement of their wedding, and so
17 she wants to be able to protect against
18 implicitly endorsing, right, in a way that we've
19 never really recognized before in the same way,
20 when it isn't really clear that that's her
21 message, when we don't -- when an objective
22 observer would know that she was really trying
23 to do that? Am I right in trying to think about
24 explicit versus implicit in this way?

25 MR. FLETCHER: I think that basically

1 maps onto the test that we're trying to give
2 you, which is to say, if she's discriminating
3 based on status, and that includes if she's
4 defining the message or the product based on the
5 status, defining the what by the who, that's not
6 okay. But, other than that, she has the freedom
7 to define her own product.

8 And I think I'd agree with you
9 entirely that the Court has never recognized
10 that sort of implicit problem as being
11 sufficient. And, in fact, I would say, in FAIR,
12 the Court squarely rejected it, where the law
13 schools had a claim that was very, very similar
14 in structure, to say we don't want to implicitly
15 support these policies we deeply, deeply oppose.
16 No one doubted there was implicit support, and
17 no one doubt it was speech, but because it was
18 incidental, the Court upheld it.

19 JUSTICE JACKSON: Thank you.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel.

22 Rebuttal, Ms. Waggoner?

23 REBUTTAL ARGUMENT OF KRISTEN K. WAGGONER
24 ON BEHALF OF THE PETITIONERS

25 MS. WAGGONER: Mr. Chief Justice, the

1 United States says that you can refuse to
2 express messages unless those messages are about
3 marriage and unless those views on marriage have
4 to do with believing that marriage is between a
5 man and a woman. That's a significant
6 concession that the government has made.

7 In terms of this issue of categorical
8 denial, the only categorical denial that Ms.
9 Smith seeks or a categorical request she seeks
10 is to have message-based protection that the
11 First Amendment already provides. It's based on
12 the message. And, in that way, this Court
13 decides every speech case based on the message.
14 We can look at FAIR. We can look at Miami
15 Herald, Tornillo. All of the Court's cases on
16 speech where compelled speech is applied, you
17 will see the "affect or alter the message" test,
18 including in Hurley. And in order to rule
19 against Ms. Smith in this particular case, it
20 does seem that the Court would essentially have
21 to overrule that Hurley framework.

22 Second, Chief Justice Roberts raised
23 the issue of FAIR and how FAIR applies, and the
24 United States has suggested that somehow this
25 case is closer to that. But, in FAIR itself,

1 FAIR was about a duty to give access to empty
2 rooms. The logistical e-mails that were to send
3 directions to how go to those rooms was a duty
4 that was required to facilitate legal conduct.

5 This case is speech that's only
6 incidental to speech. When you have a speech
7 corrector -- creator, you're in a very different
8 space, as the Court articulated in FAIR itself.
9 Looking at Wooley and Barnette, where you are
10 intruding on the mind and the spirit to force
11 someone to create a message that violates their
12 convictions. FAIR would be a very different
13 case if the law schools were to have advocated
14 for the "don't ask, don't tell" policy.

15 In terms of whose speech it is, that's
16 come up a few times, at worst, it's both.
17 Third-party perceptions cannot possibly matter
18 to this case, or we wouldn't have any of the
19 other compelled speech doctrine cases.
20 Barnette, Wooley, the newspaper cases, all of
21 those, you wouldn't have any. And the
22 government would have unfettered authority to
23 compel speech because we would all know it was
24 the government that was doing it.

25 In addition to that, the definition of

1 public accommodation, my friends on the other
2 side are playing a little fast and loose with
3 what the statute says and how they've
4 interpreted it in the past. The statute says a
5 place of public accommodation. On page 41 of
6 Colorado's brief, they say that applies to
7 virtual sales as well, meaning the soccer mom
8 earning some extra income trying to sell her
9 handmade sign. She's a public accommodation
10 under this law. It is broad, and it would take
11 away First Amendment rights just for opening a
12 business. Certainly, Michelangelo's speech was
13 sold and commissioned, but we would all say it
14 had protection.

15 In addition, the idea that we can't
16 give a bright line, the bright line we give is
17 the line that this Court has consistently
18 followed, and I find it ironic in the United
19 States also having to concede they can't give a
20 bright line. For some reason, political speech
21 is protected, but religious speech is not
22 protected under this law. The bright line is,
23 is the message affected? And, as Justice
24 Gorsuch brought up, that line is massive when it
25 comes to the distinction between pre-made

1 speech, plug-and-play, and speech that you are
2 creating in a custom way.

3 In conclusion, Ms. Smith's speech has
4 been chilled for over six years, and the record
5 demonstrates every website she would create
6 would create a custom message that is
7 celebratory. Colorado asked this Court for the
8 power to drive views like Ms. Smith's from the
9 public square, views about marriage that this
10 Court has held are honorable and decent,
11 promises that it has provided that the
12 government would not mandate orthodoxy.

13 Cultural whims may shift, but the
14 Compelled Speech Doctrine should not. Compelled
15 speech crushes the speaker's conscience, and it
16 is the tool of authoritarianism, which is why
17 this Court has never allowed it.

18 In the end, it is not Ms. Smith who is
19 asking you to change the law but Colorado. This
20 Court should affirm, again, that public
21 accommodation laws cannot be used to compel
22 speech, and this includes artistic expression,
23 photography, painting, calligraphy, and films,
24 forms of media that the lower courts have
25 shockingly refused -- refused to recognize as

1 speech when it comes to marriage. And, yes,
2 this Court should give guidance to limit the
3 cruelty that has been imposed by endless
4 litigation on artists like Jack Phillips.

5 One need not agree with a particular
6 belief to affirm that law-abiding people have a
7 right to speak their conscience, including on a
8 controversial subject like marriage, and that
9 noble principle is rooted in love of neighbor,
10 extending the same rights to others that we want
11 for ourselves. This right to be free from
12 government coercion of speech is also
13 foundational to our self-government and to the
14 free and fearless pursuit of truth.

15 Thank you. This Court should reverse.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel. The case is submitted.

18 (Whereupon, at 12:26 p.m., the case
19 was submitted.)
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25

Official - Subject to Final Review

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