No. 17-1344

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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303 CREATIVE, LLC, *et al.*,
Plaintiffs-Appellants,

v.

AUBREY ELENIS, *et al.*,
Defendants-Appellees,

On Appeal from the United States District Court
for the District of Colorado
(16-cv-02372)

BRIEF OF AMICUS CURIAE CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF APPELLANTS

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IDENTITY AND INTEREST OF AMICUS[1]

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute for the Study of Statesmanship and Political Philosophy. The Center's mission is to restore the principles of the American founding to their rightful and preeminent authority in our national life through participation in cases of constitutional significance, including cases such as this involving the foundational principle that the preexisting right of freedom of conscience protected by the First Amendment forbids compelled speech, such as that compelled by the statute under review. The Center has participated in cases raising similar issues before the United States Supreme Court including, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, Supreme Court No. 16-111; *Harris v. Quinn*, 134 S. Ct. 2618 (2014); and *Knox v. Service Employees International Union, Local 1000*, 567 U.S. 298, 308 (2012)).

In this brief, amicus focuses on the codification of the natural right to freedom of conscience in the First Amendment, and the Supreme Court's long-standing rejection of compelled speech. Amici leave to the parties the argument describing

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[1] Pursuant to Rule 29(a), *Amicus Curiae* affirms that all parties have consented to the filing of this brief. Pursuant to Rule 29(c)(5). *Amicus Curiae* further affirms that no counsel for any party authored this brief in whole or in part and that no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus Curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

their standing to challenge this law under *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2342-43 (2014) and *Wooley v. Maynard*, 430 U.S. 705, 710 (1977), without the need to first violate the statute and be subjected to civil penalty.

SUMMARY OF ARGUMENT

The Colorado "Public Accommodation Statute" at issue in this case prohibits publishers and others from declining to publish websites or other works celebrating same-sex marriage. Under the Colorado law, such a refusal is deemed discrimination based on sexual orientation. The law further prohibits publishers and others from advertising the fact that they will decline to create and publish websites and other works that celebrate same-sex marriage. Plaintiffs, publishers of web sites, challenged the law as an infringement of their First Amendment rights. The District Court agreed that plaintiffs could challenge the ban on communicating their refusal to publish websites celebrating same-sex marriage – but refused to decide the case until the Supreme Court issues a ruling in *Masterpiece Cakeshops*. Plaintiffs' speech continues to be infringed by the Colorado law in the meantime. The District Court rejected plaintiffs' challenge to the accommodation requirement, finding that plaintiffs did not have standing to challenge the law until they were brought before the Colorado Civil Rights Commission for a violation.

The District Court's ruling, however, ignores the fact that the Colorado statute, applied to publishers such as plaintiffs, creates a serious conflict with the First

Amendment Right to freedom of conscience. The State now requires publishers to publish information promoting causes that the publisher opposes. This compelled speech requirement is contrary to more than seven decades of Supreme Court precedent. The First Amendment was meant to protect a pre-existing natural right to freedom of conscience. The Colorado law by contrast, purports to decree what viewpoints are permissible. The Colorado law cannot withstand First Amendment scrutiny.

ARGUMENT

I. The Colorado Statute Compels Publishers to Speak in Violation of the Freedoms Recognized and Protected by the First Amendment.

The Supreme Court has consistently held that an individual cannot be compelled to speak or publish a message with which he disagrees. *E.g.*, *Knox v. Serv. Employees Int'l Union*, 567 U.S. at 309; *Keller v. State Bar of Cal.*, 496 U.S. 1, 9-10 (1990); *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 796-97 (1988); *Pacific Gas & Elect. Co. v. Pub. Util. Comm'n*, 475 U.S. 1, 8 (1984) (plurality opinion); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234-35 (1977); and *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 254 (1974). The Court's decision in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), established this principle more than 70 years ago. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word

or act their faith therein." *Id*. at 642; *see also Wooley v. Maynard*, 430 U.S. at 713 (State may not "require an individual to participate in the dissemination of an ideological message"). Nonetheless, Colorado has decided to decree what view is "orthodox" for same-sex marriage. Any who oppose the State's view risk the wrath of the State's Civil Rights Commission.[2]

This rule applies regardless of who creates or sponsors the message. For instance, in *Pacific Gas & Electric*, the Court ruled that a utility company could not be compelled to include a newsletter from a private advocacy group in the company's billing envelope. 475 U.S. at 8 (plurality opinion). The plurality found in that case that compelled publication of the advocacy groups news letter "both penalizes the expression of particular points of view and forces speakers to alter their speech to conform with an agenda they do not set." *Id*. Both aspects of the regulation at issue in *Pacific Gas & Electric* violated the First Amendment. Justice Marshall, who provided the fifth vote, would have gone further. He opined that the regulation failed First Amendment scrutiny because it burdened one party's speech in order to enhance another's. *Id*. at 25 (Marshall, J., concurring in the judgment). Under either analysis, the Colorado statute at issue here fails.

[2] At oral argument in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, Supreme Court No. 16-111, Justice Kennedy noted that at least one member of the State Commission believes that religious views in opposition to the State's orthodoxy on same-sex marriage are "despicable" rhetoric. Official Transcript of Oral Argument, 52:15-16 (Dec. 5, 2017).

Similarly, the government cannot compel a newspaper to publish an article or editorial it does not wish to publish. In *Miami Herald Pub. Co. v. Tornillo*, the Court described the issue under consideration as whether the State could compel "editors or publishers to publish that which 'reason' tells them should not be published.'" 418 U.S. at 257. That is precisely the same issue presented by the Colorado statute at issue in this case. The statute compels publishers of websites, like 303 Creative, to publish what reason and faith tells them should not be published. Just as in *Miami Herald*, however, such a compelled publishing requirement cannot stand. The freedom of speech necessarily includes freedoms to choose "both what to say and what not to say." *Riley*, 487 U.S. at 797. The statute at issue here seeks to deprive plaintiff-appellants of their freedom to choose what not to say.

Nor can the State claim it has a compelling interest that justifies this wholesale infringement on First Amendment rights. Such an argument has already been rejected by the United States Supreme Court. In *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995), the Court considered a State law almost identical to the Colorado statute at issue here. The Massachusetts law in *Hurley* forbade discrimination on the basis of sexual orientation in places of public accommodation. The Massachusetts courts ruled that the annual St. Patrick's Day parade, organized by a private association, was a place of public accommodation and thus was governed by the anti-discrimination law. Thus, under the State law,

the private association organizing the parade was required to allow a gay rights group that had applied to participate to march in the parade. The United States Supreme Court unanimously rejected application of the State law to the parade.

Parades, the Court ruled, are a form of expression. *Id*. at 568. That expression includes not only what is said, but also what is excluded. *See id.* at 570, 573. Thus, the parade organizer has a First Amendment right to choose which messages will or will not be in the parade. The State cannot compel inclusion of a group expressing a viewpoint contrary to the parade organizer. The State's compulsion fails even if it is in pursuit of ending discrimination:

> It might, of course, have been argued that a broader objective is apparent: that the ultimate point of forbidding acts of discrimination toward certain classes is to produce a society free of the corresponding biases. Requiring access to a speaker's message would thus be not an end in itself, but a means to produce speakers free of the biases, whose expressive conduct would be at least neutral toward the particular classes, obviating any future need for correction. *But if this indeed is the point of applying the state law to expressive conduct, it is a decidedly fatal objective.*

Id. at 578-79. The State simply has no power compel expression of the State's "orthodox" viewpoint on same-sex marriage, or any other topic for that matter. Regardless of whether the State views contrary views as "despicable," as at least one member of the State's Civil Rights Commission opined, it still must tolerate other points of view. Those viewpoints are expressed by publishers both in what they publish and in what they decline to publish.

The Supreme Court did not invent this constitutional protection. Freedom of expression is a right that the founders believed existed prior to the Constitution. The First Amendment merely forbids government interference with those rights.

II. The First Amendment Protects Liberty of Conscience.

The First Amendment[3] preserves the natural right to liberty of conscience – that right to one's own opinions. James Madison, *On Property*, Mar. 29, 1792 (Papers 14:266-68) ("A man has a property in his opinions and the free communication of them"). Without this right, the people lose their status as sovereign and officials in power "can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." *West Virginia State Board of Education v. Barnette*, 319 U.S. at 642. The founding generation rejected the idea that government officials should have such power. They clearly recognized that freedom to communicate opinions is a fundamental pillar of a free government that, when "taken away, the constitution of a free society is dissolved." Benjamin Franklin, *On Freedom of Speech and the Press*, Pennsylvania Gazette, November 17, 1737 reprinted in 2 The Life and Writings of Benjamin Franklin (McCarty & Davis 1840) at 431.

Thomas Paine argued that "thinking, speaking, forming and giving opinions"

[3] The First Amendment originally applied only to the federal government, of course, but it was incorporated and made applicable to the States by the Fourteenth Amendment. *Cantwell v. State of Connecticut*, 310 U.S. 296, 303 (1940).

are among the natural rights held by people. Edmond Cahn, *The Firstness of the First Amendment*, 65 Yale L.J. 464, 472 (1956). Congress and the states agreed. The First Amendment does not "grant" freedom of speech. The text speaks about a right that already exists and prohibits Congress from enacting laws that might abridge that freedom. U.S. Const. Amend. I. As Thomas Cooley noted, the First Amendment's guaranty of free speech "undertakes to give no rights, but it recognizes the rights mentioned as something known, understood, and existing." Thomas Cooley, The General Principles of Constitutional Law, (Little, Brown, & Co. 1880) at 272.

A sample of the speech activity at the time of the founding helps define the breadth of the freedom of speech recognized in the First Amendment. Thomas Paine, of course, is the most famous example of the pamphleteers during the time leading up to the revolution. His pamphlet, *Common Sense*, urged his fellow citizens to take direct action against the Crown. John P. Kaminski, Citizen Paine (Madison House 2002) at 7.

Such speech was not protected under British rule. Understandably, Paine chose to publish *Common Sense* anonymously in its first printing. *See id*. Paine's work was influential. Another of Paine's pamphlets, *Crisis* ("These are the times that try men's souls"), from *The American Crisis* series, was read aloud to the troops

to inspire them as they prepared to attack Trenton. *Id.* at 11. That influence, however, is what made Paine's work dangerous to the British and was why they were anxious to stop his pamphleteering.

With these and other restrictions on speech fresh in their memories, the framers set out to draft their first state constitutions even in the midst of the war. These constitution writers were careful to set out express protections for speech.

The impulse to protect the right of the people to hold their own opinion rather than be forced to adopt state-sanctioned orthodoxy was widespread at the founding. This was especially true for publishers. In 1776, North Carolina and Virginia both adopted Declarations of Rights protecting freedom of the press. Francis N. Thorpe, 5 The Federal and State Constitutions (William S. Hein 1993) at 2788 (North Carolina) (hereafter *Thorpe*); 7 *Thorpe* at 3814 (Virginia). Both documents identified this freedom as one of the "great bulwarks of liberty." Maryland's Constitution of 1776, Georgia's constitution of 1777, and South Carolina's constitution of 1778 all protected liberty of the press. 3 *Thorpe* at 1690 (Maryland); 2 *Thorpe* at 785 (Georgia); 6 *Thorpe* at 3257 (South Carolina). Vermont's constitution of 1777 protected the people's right to freedom of speech, writing, and publishing. 6 *Thorpe* at 3741. As other states wrote their constitutions they too included protections for what Madison called "property in [our] opinions and the free communication of them." James Madison, *On Property*, *supra*.

An example of the importance of these rights to the founding generation is in the letter that the Continental Congress sent to the "Inhabitants of Quebec" in 1774. That letter listed freedom of the press as one of the five great freedoms because it facilitated "ready communication of thoughts between subjects." Journal of the Continental Congress, 1904 ed., vol. I, pp. 104, 108 *quoted in Thornhill v. Alabama*, 310 U.S. 88, 102 (1940). There would be no freedom of the press, however, if the government had the power to command publishers to print opinions they disbelieve.

The failure to include a free speech guaranty in the new Constitution was one of the omissions that led many to argue against ratification. *E.g.*, *George Mason's Objections*, Massachusetts Centinel, reprinted in 14 The Documentary History of the Ratification of the Constitution, Commentaries on the Constitution No. 2 at 149-50 (John P. Kaminski, et al. eds. 2009); *Letter of George Lee Turberville to Arthur Lee*, reprinted in 8 The Documentary History of the Ratification of the Constitution, Virginia No. 1 at 128 (John P. Kaminski, et al. eds. 2009); *Letter of Thomas Jefferson to James Madison*, reprinted in 8 The Documentary History of the Ratification of the Constitution, Virginia No. 1 at 250-51 (John P. Kaminski, et al. eds. 2009); *Candidus II*, Independent Chronicle, reprinted in 5 The Documentary History of the Ratification of the Constitution, Massachusetts No. 2 at 498 (John P. Kaminski, et al. eds. 2009); *Agrippa XII*, Massachusetts Gazette, reprinted in 5 The Documentary History of the Ratification of the Constitution, Massachusetts No. 2 at 722 (John P.

Kaminski, et al. eds. 2009).

Several state ratifying conventions proposed amendments to the new Constitution to cure this omission. Virginia proposed a declaration of rights that included a right of the people "to freedom of speech, and of writing and publishing their sentiments." *Virginia Ratification Debates* reprinted in 10 The Documentary History of the Ratification of the Constitution, Virginia No. 3 at 1553 (John P. Kaminski, et al. eds. 2009). North Carolina proposed a similar amendment. *Declaration of Rights and Other Amendments, North Carolina Ratifying Convention* (Aug. 1, 1788), reprinted in 5 The Founders' Constitution at 18 (Philip B. Kurland & Ralph Lerner eds., 1987). New York's convention proposed an amendment to secure the rights of assembly, petition, and freedom of the press. *New York Ratification of Constitution*, 26 July 1788, *Elliot 1:327--31*, reprinted in 5 The Founders' Constitution, *supra* at 12. The Pennsylvania convention produced a minority report putting forth proposed amendments, including a declaration that the people had "a right to freedom of speech." *The Dissent of the Minority of the Convention,* reprinted in 2 The Documentary History of the Ratification of the Constitution, Pennsylvania (John P. Kaminski, *et al*. eds. 2009).

Madison ultimately promised to propose a Bill of Rights in the first Congress. Creating the Bill of Rights (Helen Veit, *et al*. eds. 1991) at xii. Although Madison argued that a Bill of Rights provision protecting speech rights would not itself stop

Congress from violating those rights, Jefferson reminded him that such a guaranty in the Constitution provided the judiciary the power it needed to enforce the freedom. Madison repeated this rationale as he rose to present the proposed amendments to the House of Representatives. *The Firstness of the First Amendment*, *supra*, at 467-68. The First Amendment was designed to allow the judiciary to act in cases such as this where the government claims the power to dictate what must be published.

CONCLUSION

The District Court failed to apprehend the significant nature of the First Amendment violation created by application of the public accommodation law to publishers. There is no requirement that a speaker's only recourse is to either give his right for freedom of conscience or to exercise that right and wait to be brought before a hostile state administrative body before challenging the offending State law. This Court should reverse the judgment of the District Court.

DATED: December 26, 2017.

Respectfully submitted,

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s/ John C. Eastman

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system on December 26, 2017.

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