**Case No. 19-1413**

**UNITED STATES COURT OF APPEALS**
**FOR THE TENTH CIRCUIT**

303 CREATIVE LLC and
LORIE SMITH, *Plaintiffs-Appellants*

v.

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

On appeal from the United States District Court for the District of Colorado
The Honorable Chief Judge Marcia S. Krieger
Case No. 1:16-cv-02372-MSK

# BRIEF OF *AMICI CURIAE*, TYNDALE HOUSE PUBLISHERS; CROSSROADS PRODUCTIONS, INC. d/b/a CATHOLIC CREATIVES; WHITAKER PORTRAIT DESIGN, INC. d/b/a CHRISTIAN PROFESSIONAL PHOTOGRAPHERS; AND THE BRINER INSTITUTE, INC.

**SUPPORTING APPELLANTS AND REVERSAL**

***FILED WITH CONSENT OF THE PARTIES***

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## CORPORATE DISCLOSURE STATEMENT

The *amici curiae* provide the following disclosure pursuant to Federal Rule of Appellate Procedure 26.1:

Tyndale House Publishers is an operating division of Tyndale House Ministries, which is organized as a not-for-profit organization under the laws of Illinois. Tyndale House Ministries neither issues stock nor has a parent corporation.

Crossroads Productions, Inc. is a Texas nonprofit corporation. It has no parent. It does not issue stock.

Whitaker Portrait Design, Inc. is an Oklahoma corporation. It has no parent corporation. There is no publicly held corporation that owns 10% or more of its stock.

The Briner Institute, Inc is a Tennessee nonprofit corporation. It has no parent. It does not issue stock.

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## STATEMENT OF IDENTITY, INTEREST IN CASE, AND SOURCE OF AUTHORITY

Tyndale House Publishers ("Tyndale House") was founded in 1962 by Dr. Kenneth N. Taylor as a means of publishing *The Living Bible*. Tyndale publishes Christian fiction, nonfiction, children's books, and other resources, including Bibles in the New Living Translation (NLT). Tyndale products include many *New York Times* best sellers, including novels such as the popular *Left Behind* fiction series by Tim LaHaye and Jerry B. Jenkins, and numerous nonfiction works. Tyndale House Publishers and Tyndale House Foundation are operating divisions of Tyndale House Ministries. As a result, the company's profits help underwrite the foundation's mission, which is to spread the Good News of Christ around the world, primarily through literature consistent with biblical principles.

Tyndale House is located in Carol Stream, Illinois. Its publications are sold in every state of the union, including approximately 2,000 commercial bookstores across the country, and also directly to individual consumers and through mass retailers such as chistianbook.com. In the past year Tyndale House sold more than 10 million copies of its Christian books and Bibles through independent bookstores, chain bookstores (e.g., Barnes & Noble and Lifeway Christian Stores), and mass retailers (e.g., Amazon, Wal-Mart, and Target).

Catholic Creatives ("CC") is an arm of Crossroads Productions Inc. CC believes that beauty is the greatest force of evangelization and social change in our world and

that Catholicism is the most beautiful framework for understanding and expressing the human experience. CC is a movement of Catholic designers, filmmakers, photographers, creative thinkers, artists, entrepreneurs, and others working to bring the gospel to the world in fresh, beautiful ways. CC's mission is to restore the Church at the forefront of beauty, art and design in the world. Its vision includes providing "creative challenge" meetups throughout the country, a resource-packed website and online community, and an annual summit where members can connect in person.

Christian Professional Photographers ("CPP") is an arm of Whitaker Portrait Design, Inc. CPP's mission is to help Christian photographers become stronger in their Christian walk, be an example and witness to others, encourage excellence in the photography profession as an act of obedience to God, reach out to all who have an interest in photography, encourage fellowship with other Christian photographers, freely share successful photography techniques, and meet together in conference retreats and small groups in order to teach and learn scriptural truths and encourage the practical application of the Word of God.

The Briner Institute, Inc. ("TBI") is a network of like-minded individuals dedicated to improving culture. TBI is named in honor of author Bob Briner, whose vision was that people should live their lives attempting to do good and provide a positive influence on society. TBI provides financial support for gatherings and talent development efforts through grants, donations and crowd sourcing, spotlighting "salt-and-light-inspired" people, projects, initiatives, and ventures. TBI hosts events that are

focused on bringing together the best and the brightest minds in entertainment, media, and technology to develop new strategies for achieving its mission of cultural engagement and influence.

The issues in this case have serious implications for the First Amendment rights of those engaged in the communications and creative arts industries to choose the content and messages they publish. These *amici* have a common interest in protecting the First Amendment rights of publishers and artists to be free from compelled speech and to freely exercise their religion without undue government interference. Persons affiliated with these *amici* are diverse in their views, but the *amici* are united in their commitment that each publisher and artist should have the right to pursue his or her profession and exercise their artistic and editorial judgment in a manner consistent with their core convictions.

Pursuant to Rule 29(a)(2) of the Federal Rules of Appellate Procedure, counsel for all parties have consented on the parties' behalf to the filing of this brief.

## STATEMENT OF AUTHORSHIP AND FINANCIAL CONTRIBUTIONS

Pursuant to Rule 29(a)(4)(E) of the Federal Rules of Appellate Procedure, the *amici curiae* state that no counsel for any party authored this brief in whole or in part. The *amici curiae* further state that no party or party's counsel or any other person, aside from the *amici curiae* and their respective counsel, made any monetary contribution toward the preparation or submission of this brief.

## ARGUMENT

The issues raised by Appellants Lorie Smith and 303 Creative LLC concern an issue of crucial importance to any citizen – that of their individual freedom from government coercion to do or say things that violate their conscience. More specifically, the practical consequences of how the opinion below interprets Colorado's Anti-Discrimination Act (CADA), C.R.S. § 24-34-601(2)(a), potentially could force businesses or non-profits engaged in creating and disseminating various forms of speech and expression to promote messages in violation of their conscience. The consequences of the opinion below also could have the effect of preventing such businesses or non-profits from issuing public statements explaining their reasons for making certain creative or editorial choices regarding, even when those reasons are based on their sincerely held religious beliefs.[1] Such actions threaten the most basic First Amendment rights of a publisher or other business involved in creating and disseminating various forms of speech – that of editorial discretion. For these reasons, and as explained further below, these *amici* file this brief in support of Appellants.

[1] As the Court is well aware, CADA contains an "Accommodations Clause" that makes it unlawful for a person or business who offers services or accommodations to the public to "refuse, withhold from, or deny to an individual or a group, because of … sexual orientation … the full and equal enjoyment of [such services]." C.R.S. § 24-34-601(2)(a). The same statute also includes a "Communications Clause" making it unlawful "to publish, circulate, issue, display, post, or mail any written, electronic, or printed communication, notice, or advertisement" indicating that such services will be refused or withheld from an individual "because of … sexual orientation." *Id.*

"The First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster … an idea they find morally objectionable." *Wooley v. Maynard*, 430 U.S. 705, 715 (1977). Inherent to that right, and as this Court recently has affirmed, the First Amendment protects two aspects of speech – "the First Amendment protects an individual's 'right to speak freely and the right to refrain from speaking at all.'" *Semple v. Griswold*, 934 F.3d 1134, 1143 (10th Cir. 2019) (quoting *Wooley*, 430 U.S. at 714); *see also Golan v. Holder*, 609 F.3d 1076, 1084 (10th Cir. 2010) ("[F]reedom of thought and expression 'includes both the right to speak freely and the right to refrain from speaking at all.'") (quoting *Harper & Row, Publrs. v. Nation Enters.*, 471 U.S. 539, 559 (1985)); *Wooley*, 430 U.S. at 714 ("The right to speak and the right to refrain from speaking are complementary components of the broader concept of individual freedom of mind.") (internal citation and quotation marks omitted). Accordingly, under the protections of the First Amendment, the government may neither force particular speech nor prohibit it.

Yet the reasoning of the opinion below endangers both these rights, ignoring the fundamental liberties that are at stake. In denying Appellants' standing to bring a pre-enforcement challenge to CADA's "Accommodations Clause," the court below effectively ruled that Appellants and other similarly situated businesses are compelled to create, publish, and disseminate messages with which they not only disagree but that would also violate their conscience. Moreover, and despite the bulk of caselaw to the contrary, the lower court's ruling also found Appellant Lorie Smith could not challenge

the content and viewpoint-based restrictions in CADA's related "Communications Clause" that prohibit her from publicly stating how her business goals and creative judgment are informed by her sincerely held religious beliefs. Accordingly, Appellants face punishment by the state if they refuse to create certain content, and also if they issue a statement explaining how their religious beliefs inform their editorial discretion in choosing the content they create.

This conclusion by the lower court directly contradicts "[t]he essential thrust of the First Amendment [which] is to prohibit improper restraints on the voluntary public expression of ideas; it shields the man who wants to speak or publish when others wish him to be quiet." *Harper & Row, Publrs.*, 471 U.S. at 559 (quoting *Estate of Hemingway v. Random House, Inc.*, 244 N.E. 2d 250, 255 (1968)). On the other hand, as this Court also has recognized, "a State [also] runs afoul of the First Amendment if it 'compel[s] a party to express a view with which the private party disagrees.'" *Cressman v. Thompson*, 798 F.3d 938, 949 (10th Cir. 2015) (quoting *Walker v. Tex. Div. Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2243 (2015)); *see also Agency for Int'l Dev. v. All. For Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2327 (2013) ("It is … a basic First Amendment principle that 'freedom of speech prohibits the government from telling people what they must say.'") (quoting *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 61 (2006)).

Fighting for and preserving these rights has a long history in Western, and especially American, legal tradition. Interpreting a state anti-discrimination statute in a manner that contradicts these basic principles that are woven into the fabric of our legal

history is repugnant to the very concept of free speech and would have far-reaching, devastating effects on all businesses involved in creating, promoting, or disseminating any message. "Free speech … is essential to our democratic form of government…. Whenever the Federal Government or a State prevents individuals from saying what they think on important matters or compels them to voice ideas with which they disagree, it undermines these ends." *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2464 (2018) (internal citations omitted).

## I. The right to exercise editorial discretion in determining the content of one's speech has a long and important history in the Anglo-American legal tradition.

American jurisprudence has long protected citizens from government coercion concerning the content of their speech. The First Amendment's protection of speech reflects the fundamental American principle that "each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Agency for Int'l Developm,* 133 S. Ct. at 2327 (quoting *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 641 (1994)). Accordingly, the lower court's findings regarding CADA's Communications Clause contradicts this Court's own explanation that

> persons may not be punished merely for peacefully expressing unpopular views…. [A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging.

*PeTA v. Rasmussen*, 298 F.3d 1198, 1206 (10th Cir. 2002) (internal citations and quotation marks omitted).

And, contrary to the assumptions in the opinion below, there is no distinction as to whether the speech infringement involves a restriction or a compulsion. *Agency for Int'l Development*, 133 S. Ct. at 2327. In short, "[t]he government may not . . . compel the endorsement of ideas that it approves." *Knox* v. *Service Employees*, 567 U.S. 298, 309 (2012). As also previously noted by this Court, "[t]he Supreme Court has long recognized that, for purposes of the First Amendment, forced speech is no different than censored speech." *Corder v. Lewis Palmer Sch. Dist. No. 38*, 566 F.3d 1219, 1231 (10th Cir. 2009) (citing cases).

Both the right to speak and to be free from compelled speech have long been recognized as including the right to exercise editorial discretion in fields that create and produce messages such as publishing, broadcasting, and cable programming. *See Ark. Educ. TV Comm'n v. Forbes*, 523 U.S. 666, 673-74 (1998) (explaining why entities that exercise editorial discretion in selecting and communicating certain messages engage in speech activity protected by the First Amendment); *see also Turner Broad. Sys., Inc.*, 512 U.S. at 636 ("There can be no disagreement" that when cable programmers and cable operators "exercise[e] editorial discretion" over what content to include they "engage in and transmit speech" and "are entitled to the protection of the speech and press provisions of the First Amendment."); *Phelps v. Wichita Eagle-Beacon*, 886 F.2d 1262, 1271

(10th Cir. 1989) ("the act of publication and the exercise of editorial discretion concerning what to publish are protected by the First Amendment.").

As with Appellants who use their own creative judgment in crafting messages for others, publishers also routinely make decisions about what to publish, both in style and content, that convey important messages to the public about their values and beliefs, and such decisions are protected by the "First Amendment guarantees of a free press." *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 257 (1974) (emphasizing that government interference with the freedom of the press to choose which topics to discuss, however controversial, "inescapably dampens the vigor and limits the variety of public debate") (internal citations omitted). The long history of First Amendment jurisprudence makes clear that government compulsion "to publish that which 'reason' tells [editors and publishers] should not be published is unconstitutional." *Id.* at 256 (internal citations and quotation marks omitted); *see also Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376, 391 (1973) ("reaffirm[ing] unequivocally the protection afforded to editorial judgment and to the free expression of views … however controversial.").

The freedom of publishers and others engaged in similar activities to determine what speech to convey has not always been protected by governments in the past, but rather are freedoms that have been fought for, won, and preserved over time and at great cost. The history of that struggle can be traced through English history and colonial America, as well as throughout Supreme Court caselaw. American

jurisprudence traditionally has had great respect for that history and has protected these rights as fundamental to a free society. *See, e.g., Janus*, 138 S. Ct. at 2463-64 (collecting cases); *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Committee*, 412 U.S. 94, 145 (1973) (J. Stewart, concurring) ("Those who wrote our First Amendment put their faith in the proposition that a free press is indispensable to a free society.").

Within that long history, and of particular significance to *amici*, is the legacy of William Tyndale. Tyndale House Publishers is named in honor of William Tyndale, a name perhaps forgotten by many but nevertheless a figure important in any case implicating the freedom of speech for any publisher or printer. In the centuries following the invention of the movable-type printing press, governments had to grapple with the unprecedented ability of private citizens to disseminate literature, opinions, and political views in vastly greater volume and at a far greater speed than ever before in history – an ability which those in power often perceived as a threat to their authority and control. William Tyndale was one of several early publishers whose publications the government viewed as threatening to the status quo, and he paid the ultimate price for his choice of publication.

Tyndale lived in England from about 1494 to 1536 under the reign of Henry VIII and was a contemporary of Martin Luther and Sir Thomas More. Although highly controversial at the time because of his religious views, Tyndale was the first to translate the New Testament (as well as portions of the Old Testament) into English, and he

used the relatively new printing press to publish it, along with many other works.[2] His publication of the Bible into English, as well as his published criticisms of the King's actions, infuriated Henry VIII along with other political and church leaders, and resulted in his exile from England. Because of the content of his publications, Tyndale was declared a heretic, was eventually captured in Antwerp, and on October 5, 1536, he was strangled and burned at the stake. Yet, Tyndale's legacy cannot be understated. Tyndale's writings, translations, and publications had a profound effect on the development and standardization of the English language.[3] While Tyndale may be less known than Shakespeare, in our modern English language we arguably use more of Tyndale's original words than Shakespeare's.[4]

Nearly two centuries later, even in Colonial America, freedom of speech for printers and publishers still was not entirely secure. One of the more notable early cases in American legal history concerning censorship of printers was the famous libel trial of a publisher named John Peter Zenger. In 1733, Zenger created the *New York Weekly*

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[2] Although John Wycliffe (ca. 1320-1384) is credited with completing the first English translation of the Bible, his translation was in "Middle English," which was significantly different from the "modern" English that Tyndale used, and was long before the invention of the movable-type printing press.

[3] The *Oxford English Dictionary* credits Tyndale with the first usage in English (as we know it) of multiple words including: network, atonement, Godspeed, Jehovah, Passover, intend, complainer, sorcerer, viper, castaway, fisherman, inexcusable, childishness, ourselves, scapegoat, uproar, wave, and many more. David Teems, *Tyndale: The Man Who Gave God An English Voice* 268-69 (2012); *see also Oxford English Dictionary* 2018. http://www.oed.com/.

[4] Teems, at xix.

*Journal*, the first opposition newspaper in the Colonies. His publication attacked New York's British Governor, William Cosby. Zenger's publication used sarcasm, innuendo, and allegory to ridicule the royal governor, and it also was the first American publication to include essays by leading English libertarian philosophers, as well as the popular *Cato's Letters* which played a key role in the American Revolution.[5]

Because of his criticisms of the governor, Zenger was charged criminally with seditious libel. At trial, Zenger argued for acquittal, not by denying that he had published the materials at issue, but rather by arguing that the content of what he published was true. Upon his subsequent acquittal by the jury, Zenger was the last colonial printer to be prosecuted by royal authorities.[6] Zenger's trial established in the Colonies, and early America, that printers would be free to criticize the government; and it became one of many factors helping shape the political culture that led to the Revolutionary War and the adoption of the First Amendment.[7]

## II. First Amendment protections for a speaker's editorial discretion remain intact even when the speaker conveys speech on behalf of a third party.

Of primary importance for a publisher or printer is that speakers do not lose First Amendment protection because they convey speech on behalf of someone else.

[5] "Zenger Trial," *The Oxford Companion to United States History* (Paul S. Boyer ed., Oxford University Press 2001).
[6] *Id.* at 858.
[7] *Id.* at 858-59.

And it matters not whether they print or publish pamphlets, papers, photographs, or promotional materials. The protection guaranteed by the First Amendment "'does not end at the spoken or written word' … but extends to various forms of artistic expression." *Buehrle v. City of Key West*, 813 F.3d 973, 976 (11th Cir. 2015) (quoting *Texas v. Johnson*, 491 U.S. 397, 404 (1989)). Such protection is not a "mantle, worn by one party to the exclusion of another and passed between them depending on … each party's degree of creative or expressive input." *Id.* at 977. Because the government cannot force citizens to "host or accommodate another speaker's message," both creators and editors of speech retain just as much interest in their speech as those who request or receive it. *Rumsfeld*, 547 U.S. 47 at 63 (collecting cases); *see also Simon & Schuster, Inc. v. N.Y. Crime Victims Bd.*, 502 U.S. 105, 116 (1991) (acknowledging that both author and publisher have First Amendment rights).

### A. Both creators and editors of speech use editorial judgment and therefore deserve First Amendment protections.

Appellants' creation of wedding websites is similar to the work of other speech editors (e.g. newspapers, magazines, printers, search engines) who use their editorial judgment to publish speech created by others. Numerous cases illustrate the sweeping protections provided to all speakers along the chain of communication (a chain that clearly encompasses Appellants here). Perhaps newspapers are the most popular subject on this topic. The seminal United States Supreme Court case *Miami Herald Publishing Company v. Tornillo*, struck down a Florida statute requiring newspapers to print

counter-opinion pieces if the paper had previously published articles critical of an elected official. In doing so, the Court rejected any argument that the newspaper was not protected by the First Amendment simply because it printed the speech of others. 418 U.S. at 258 ("A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time."). Any compulsion "to publish that which 'reason' tells them should not be published" is unconstitutional. *Id.* at 256.

Historically, the Supreme Court consistently has applied this reasoning in similar cases involving editorial discretion of publishers even when they are printing the messages of third parties. *See, e.g., Bigelow v. Virginia*, 421 U.S. 809, 818 (1975) (finding newspapers do not lose First Amendment rights just because they are "paid for printing" an advertisement); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964) (overturning jury verdict for alleged slander because the newspaper did not forfeit its

editorial rights under the First Amendment by publishing statements in the form of a paid advertisement).[8]

Multiple rulings from the federal circuit courts, including this Circuit, also have recognized similar principles. *See, e.g., Talley v. Time, Inc.*, 923 F.3d 878, 904 (10th Cir. 2019) ("It is the 'function of editors' to decide '[t]he choice of material to go into a newspaper.'") (quoting *Tornillo*, 418 U.S. at 255); *Phelps*, 886 F.2d at 1271 (explaining that First Amendment protections extend to publisher's exercise of editorial discretion in choosing what to publish); *Ampersand Pub., LLC v. NLRB*, 702 F.3d 51, 56 (D.C. Cir. 2012) (finding that although newspapers are subject to laws such as the NLRA, "otherwise valid laws may become invalidated in their application when they invade constitutional guarantees, including the First Amendment's guarantee of a free press"); *Novotny v. Tripp County, S.D.*, 664 F.3d 1173, 1177 (8th Cir. 2011) ("[A]n individual does not possess a constitutional right to require that a privately owned newspaper publish his letter to the editor. Indeed, a contrary rule would infringe upon the right of the newspaper itself to decide what content it includes on its own editorial page."); *McDermott v. Ampersand Pub., LLC*, 593 F.3d 950, 959 (9th Cir. 2010) ("It is clear that the First Amendment erects a barrier against government interference with a

[8] Importantly, the Court further supported its reasoning based on "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open….", *id.* at 270, and emphasized that "[t]he constitutional protection [of the First Amendment] does not turn upon the truth, popularity, or social utility of the ideas and beliefs which are offered." *Id.* at 271 (internal citations and quotation marks omitted).

newspaper's exercise of editorial control over its content."); *Groswirt v Columbus Dispatch,* 238 F.3d 421, 2000 U.S. App. LEXIS 33466, *5 (6th Cir. 2000) (Table) ("A private publication has a First Amendment free press right to refuse to print material submitted to it for publication."); *McClellan v. Cablevision of Connecticut, Inc.*, 149 F.3d 161, 167 n. 12 (2d Cir. 1998) (noting that "a newspaper publisher has a First Amendment right to control the editorial content of the newspaper"); *Kania v. Fordham*, 702 F.2d 475, 477 n.5 (4th Cir. 1983) ("The University could not compel *The Daily Tar Heel* to provide equal access to those disagreeing with its editorial positions without running afoul of the constitutional guarantee of freedom of the press.") (citations omitted); *Homefinders of America, Inc. v. Providence Journal Co.*, 621 F.2d 441, 444 (1st Cir. 1980) (finding the First Amendment prohibits the government from ordering a newspaper "to publish advertising against its will"); *Chicago Joint Bd., etc. v. Chicago Tribune Co.*, 435 F.2d 470, 478 (7th Cir. 1970) (finding that newspaper may not be required to open its "printing presses and distribution systems without [its] consent" to accommodate someone else's speech that it opposes).

The importance of this right to exercise editorial discretion is of crucial importance to businesses that disseminate speech on behalf of third parties. For multiple reasons including economic considerations, business strategy, marketing purposes, and building and maintaining a particular reputation, among other things, publishers must make editorial decisions about what to publish and what not to publish. A variety of rationales and preferences inform such decisions as well, such as style,

length, content, viewpoint, and quality. Indeed, the reputation of those engaged in dissemination of creative material, and the corresponding ability to attract and retain customers, depend to a large degree precisely upon how they exercise their editorial discretion. For instance, certain publishers obviously cater more to certain segments of the reading public. Authors seeking publication, as well as the general public, rely on the reputation and values of various publishing companies, which have been established over time based on editorial choices of what messages to publish. As the cases cited above make clear, government interference with a publisher's constitutionally-protected freedom to make such choices, would do untold damage to the industry as well as contradict the long history of First Amendment jurisprudence.

But the First Amendment's protections apply well beyond newspapers. Television stations have similar security in declining to produce others' speech. *See, e.g., Columbia Broad. Sys.*, 412 U.S. 94 (upholding broadcaster's editorial judgment by striking down restrictions on broadcaster's rights to refuse political advertisements). In *Buehrle*, the Eleventh Circuit held that the First Amendment's free speech protection covered the tattoo technician who inks the citizen not just the person who displays the tattoo on the skin. *Buehrle*, 813 F.3d at 977 ("Protected artistic expression frequently encompasses a sequence of acts by different parties, often in relation to the same piece of work. The First Amendment protects the artist who paints a piece just as surely as it protects the gallery owner who displays it, the buyer who purchases it, and the people

who view it.") (citation omitted).[9] And in the recently decided case, *Telescope Media Group v. Lucero*, the Eighth Circuit found that wedding videos made by film producers "are a form of speech that is entitled to First Amendment protection." 936 F.3d 740, 750 (8th Cir. 2019). *See also Bullfrog Films, Inc. v. Wick*, 847 F.2d 502, 510 (9th Cir. 1988) ("the First Amendment does not allow the government to require independent filmmakers to present all views on a subject, or indeed any view contrary to the filmmakers' own.") (citation omitted).

Certainly, photographers – not just the subjects of the photos or those who hire them – find similar protection under the First Amendment,[10] as do internet search engine websites[11] and even Facebook.[12] Likewise, painters, and not merely their models

[9] *See also Anderson v. City of Hermosa Beach,* 621 F.3d 1051, 1061 (9th Cir. 2010) (holding tattooing was protected speech, reasoning that "[t]he principal difference between a tattoo and, for example, a pen-and-ink drawing, is that a tattoo is engrafted onto a person's skin rather than drawn on paper.... [A] form of speech does not lose First Amendment protection based on the kind of surface it is applied to.").

[10] *See, e.g.*, *Baker v. Peddlers Task Force*, 1996 U.S. Dist. LEXIS 19140, *3 (S.D.N.Y. Dec. 30, 1996) ("The City cites no authority for the proposition that commissioned works are excluded from the protection of the First Amendment, and common sense and even a casual acquaintance with the history of the visual arts strongly suggest that a commissioned work is expression.").

[11] *See, e.g.*, *Zhang v. Baidu.com Inc.*, 10 F. Supp. 3d 433 (S.D.N.Y. 2014) (affirming that search engines exercise protected editorial control over the information in their search list); *e-ventures Worldwide, LLC v. Google Inc.*, 2017 U.S. Dist. LEXIS 88650 (M.D. Florida Feb. 8, 2017) (same).

[12] *See, e.g.*, *La'Tiejira v. Facebook, Inc.*, 272 F. Supp. 3d 981 (S.D. Tex. 2017) (recognizing the First Amendment protects Facebook's editorial control over what it chooses to censor from users of its platform).

or those who commission their work, enjoy the full breadth and scope of First Amendment protection. *See, e.g., ETW Corp. v. Jireh Pub., Inc.*, 332 F.3d 915, 925 (6th Cir. 2003) (holding that distributing limited edition prints of original painting was protected speech because "[p]ublishers disseminating the work of others who create expressive materials also come wholly within the protective shield of the First Amendment."). How then can creators of wedding websites be treated differently? They certainly should not be. *See Denver Area Educational Telecommunications Consortium, Inc. v. F.C.C.*, 518 U.S. 727, 740 (1996) ("The history of this Court's First Amendment jurisprudence, however, is one of continual development, as the Constitution's general command that 'Congress shall make no law ... abridging the freedom of speech, or of the press,' has been applied to new circumstances requiring different adaptations of prior principles and precedents.").

Of great concern to *amici* here is that if Appellants can be compelled to create or disseminate messages with which they disagree, why not also a company that publishes books? Or a professional photographer or other professional artist who utilizes an art form to create messages for third parties? And if Appellants are not permitted to post a statement explaining how their religious beliefs inform their editorial discretion, can a Christian publisher also not publish a statement regarding how its Christian beliefs and mission prevents it from publishing books that promote certain messages antithetical to those same beliefs? Indeed,

> The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion…. To this end, the government, even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers and listeners; free and robust debate cannot thrive if directed by the government.

*Riley v. Nat. Red. of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 791 (1988) (internal quotation and citation marks omitted).

The way in which publishers and artists involved in disseminating third-party speech exercise their editorial discretion, and the values and goals that inform their decisions about messaging, go to the heart of defining how any one publisher is different from another.[13] *See Columbia Broad. Sys., Inc.*, 412 U.S. at 124 ("For better or worse, editing is what editors are for; and editing is selection and choice of material."). Each of these *amici* makes content-based editorial judgments about what messages to convey. Those choices are informed by their religious beliefs and identity. The opinion below threatens the basic freedoms of all similarly situated groups not only to make such choices, but also to explain how their faith informs them.

### B. First Amendment protections are no different in the face of an alleged violation of an anti-discrimination law.

The fact that this case involves a First Amendment defense to a non-discrimination law changes nothing. Time and again courts have recognized the

[13] For example, it is important for a publishing company to be able to explain to prospective authors and consumers how it makes certain decisions regarding the content of what it chooses to publish so that both authors and consumers can make informed decisions about whether to do business with a particular publisher.

supremacy of the First Amendment to different non-discrimination statutes including the 1866 Civil Rights Act,[14] the Americans with Disabilities Act,[15] Title VII/harassment,[16] and age discrimination complaints.[17] The same reasoning has been

[14] *See, e.g.*, *Groswirt*, 238 F.3d at 421 (affirming dismissal of suit against a newspaper for refusing to publish letters based on author's race because a private publication has a First Amendment free press right to refuse to print material submitted to it for publication); *Johari v. Ohio State Lantern*, 76 F. 3d 379 (6th Cir. 1996) (affirming dismissal of suit for racial discrimination and upholding newspapers' right to exercise editorial judgment over what it publishes, even when it solicits letters from its readers); *Claybrooks v Am. Broad. Co.*, 898 F. Supp. 2d 986, 1000 (M.D. Tenn. 2012) (dismissing suit for racial discrimination under 42 U.S.C. § 1981 brought by African-Americans who auditioned for, but were rejected by, ABC's television show *The Bachelor* because "the First Amendment protects the producers' right unilaterally to control their own creative content" and base their casting decisions "on whatever considerations the producers wish to take into account.").

[15] *See, e.g*, *Treanor v. Washington Post Co.*, 826 F. Supp. 568, 569 (D.D.C. 1993) (dismissing suit for alleged discrimination brought by a disabled individual against a newspaper for refusing to publish the person's book review because "requiring newspaper editors to publish certain articles or reviews would likely be inconsistent with the First Amendment").

[16] *See, e.g.*, *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 206 (3d Cir. 2001) (court enjoined school harassment policy as applied to regulate speech, recognizing that "[w]hen laws against harassment attempt to regulate oral or written expression on such topics, however detestable the view expressed may be, we cannot turn a blind eye to the First Amendment implications."); *DeAngelis v. El Paso Mun. Police Officers Ass'n,* 51 F.3d 591, 596-97 (5th Cir. 1995) (court overturned jury verdict against police association based on a sexist column by an anonymous columnist in its newsletter, recognizing that "[w]here pure expression is involved, Title VII steers into the territory of the First Amendment.").

[17] *See, e.g.*, *Ingels v. Westwood One Broad. Serv., Inc.*, 129 Cal. App. 4th 1050, 1974 (2005) (affirming dismissal of age discrimination suit, and upholding First Amendment rights of radio show to choose the content of its programming, stating "[h]ere, the broadcaster's choice of which callers to allow on the air is part of the content of speech") (citing *Riley*, 487 U.S. at 795).

true with regard to public accommodation laws. *See, e.g.*, *Dale v. Boy Scouts of Am.*, 530 U.S. 640 (2000) (upholding Boy Scouts' free association rights in face of challenge that they had violated public accommodation law by removing a gay scout leader); *Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp. of Bos.*, 515 U.S. 557, 569 (1995) (upholding parade organizers' First Amendment right to exclude LGBT advocacy group from marching under a banner in a St. Patrick's Day parade); *S. Bos. Allied War Veterans Council v. City of Boston*, 297 F. Supp. 2d 388, 392-93 (D. Mass 2003) (relying on *Hurley*, 515 U.S. at 579, for the proposition that private speakers have the right "not [to] have the message of an opposing group forced on them by the state," and thereby finding state officials violated the First Amendment rights of parade organizers by using public accommodations law to force them to allow an anti-war group to march at the end of their parade); *City of Cleveland v. Nation of Islam*, 922 F. Supp. 56, 59 (N.D. Ohio 1995) (holding that Cleveland's use of a state public accommodations law to prevent Nation of Islam ministers from delivering "separate speeches to men and women" and forcing them to speak to a mixed gender audience would necessarily change "the content and character of the speech," thereby violating the First Amendment).

Even more recently, the Eighth Circuit found in *Telescope Media Group*, that Minnesota's public accommodations law impermissibly operated as a content-based regulation of speech when used to force film producers to make wedding videos about same-sex marriage in violation of their religious beliefs. *See* 936 F.3d at 753 ("Even if [Appellants'] desire to selectively speak is provocative and stirs people to anger, …

Minnesota cannot coerce [them] into betraying their convictions and promoting ideas they find objectionable.") (internal citations and quotation marks omitted); *id.* ("The Supreme Court has recognized that the government still compels speech when it passes a law that has the effect of foisting a third party's message on a speaker.") (citing *Hurley*, 515 U.S. at 572-73).

The courts have long protected the editorial judgment of those who print, publish, or transmit others' speech. Accordingly, the primacy of the First Amendment must prevail in cases such as this one — where the government seeks to force a website designer to create and publish content that she objects to by application of a public accommodation law. *See NIFLA v. Becerra*, 138 S. Ct. 2361, 2371 (2018) (explaining that laws that "target speech based on its communicative content … are presumptively unconstitutional" due to the "fundamental principle that governments have no power to restrict expression because of its message, its ideas, its subject matter, or its content.") (internal citations and quotation marks omitted). Such a compulsion destroys editorial judgment and contradicts well-settled case law.

## CONCLUSION

The American legal tradition fiercely protects the autonomy of the speaker in exercising his or her editorial judgment. Interpreting public accommodation statutes in a manner that permits state or local governments to coerce particular expressions is not only unconstitutional, but also will have far-reaching effects on any publisher, printer,

artist, or other entity that historically has exercised editorial discretion in the message it produces or promotes.

Just as with the government action concerning William Tyndale, or John Peter Zenger, laws that have the effect of *either "stifl[ing] speech* on account of its message, *or that require[ ]the utterance* of a particular message favored by the Government … pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion." *Turner*, 512 U.S. at 641 (emphasis added); *see also NIFLA*, 138 S. Ct. at 2374 (quoting *Turner*, 512 U.S. at 641). As the case below illustrates, fear of the penalties imposed by Colorado's anti-discrimination law already is having a chilling effect on Appellants and others exercising their rights in how they conduct their businesses. That very risk "that the Government may effectively drive certain ideas or viewpoints from the marketplace" is one of the reasons that freedom of speech must be guarded and protected. *Turner*, 512 U.S. at 641 (quoting *Simon & Schuster, Inc.*, 502 U.S. at 116).

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## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 29(a)(4)(G) and Rule 32(g)(1) of the Federal Rules of Appellate Procedure, I hereby certify that this brief complies with the type-volume limitation of Rule 29(a)(5) and Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 6,393 words, excluding the parts of the brief exempted by Rule 32(f) of the Federal Rules of Appellate Procedure.

I further certify that this brief complies with the typeface and type-style requirements of Rule 32(a)(5) and Rule 32(a)(6) of the Federal Rules of Appellate Procedure because it was prepared in a 14-point proportionally spaced serif Garamond typeface using Microsoft Word 2016.

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## CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that all required privacy redactions have been made.

I hereby certify that the seven (7) hard copies of this *amicus* brief that are required to be submitted to the Clerk's Office pursuant to 10th Circuit Rule 31.5 will be exact copies of this version submitted electronically via the Court's ECF system.

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## CERTIFICATE OF SERVICE

I hereby certify that on January 29, 2020, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system. All participants in this case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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