No. 21-476

In The
Supreme Court of the United States

303 CREATIVE LLC, et al.,

Petitioners,

v.

AUBREY ELENIS, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF *AMICI CURIAE* MULTIMEDIA PRODUCTION PROFESSIONALS IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici are a group of individuals and organizations dedicated to the creation, curation, and promotion of speech that encourages traditional, conservative values—and these groups depend on editorial discretion in offering consistent messages about those topics. In the marketplace of ideas, such a voice is invaluable. This speech—made across a wide range of media, from television to radio to Internet to print—relies on the First Amendment and its robust protections for differing viewpoints.

Under the First Amendment, *amici* currently have the editorial freedom to engage in speech that helps ensure that debate on public issues retains a diversity of opinions. But Colorado's interpretation of the Colorado Anti-Discrimination Act (CADA), C.R.S. § 24-34-601(2)(a), has created a censorship tool that goes far beyond even just the local baker, artist, or service provider. Indeed, the Tenth Circuit's logic in upholding Colorado's speech restrictions cuts across mediums and thus threatens the variety of viewpoints offered by *amici*. At the heart of the freedom of speech, safeguarded jealously under this Court's precedent, is the commitment to protect different and diverse ideas. *Amici*'s interest lies in the continued ability to offer a different perspective on a wide range of issues that the

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief, in whole or in part, and no person or entity other than *amici* contributed monetarily to its preparation or submission. The parties' consents to the filing of this brief have been filed with the Clerk.

Tenth Circuit's undermining of the First Amendment threatens.

Amicus National Religious Broadcasters (NRB) is a non-profit, membership association that represents the interests of Christian broadcasters throughout the nation. Most of its approximately 1100 member organizations are made up of radio stations, radio networks, television stations, television networks, and the executives, principals, and production and creative staff of those broadcast entities. NRB member broadcasters are both commercial and non-commercial entities. Since 1944, the mission of NRB has been to help protect and defend the rights of Christian media and to ensure that the channels of electronic communication stay open and accessible for Christian broadcasters to proclaim the Gospel of Jesus Christ. Additionally, NRB seeks to effectively minister to the spiritual welfare of the United States of America through the speech it advances to the public.

Amicus American Family Association, Inc. (AFA) is a non-profit, faith-based religious organization devoted to developing and fostering a biblical worldview through radio programming. Its mission since 1977 has been to inform, equip, and activate people to transform American culture and to give aid to the church in its call to execute the Great Commission. Through its broadcast division, AFA airs its programming to roughly 180 radio stations in over 30 states across the country each week.

Amicus The Briner Institute, Inc. (TBI) is a network of like-minded individuals dedicated to improving culture through media and entertainment. TBI is named in honor of author Bob Briner, whose vision was for people to 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 and donations, spotlighting people, projects, initiatives, and ventures of "salt-and-light-inspired" people. 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.

Amicus Christian Professional Photographers (CPP) is an organization devoted to encouraging and training like-minded professional photographers who are committed to the Christian faith. CPP connects photographers across the country through conferences and assists those professionals in obtaining excellence in their field.

Amicus Eternal Word Television Network, Inc. (EWTN) is the largest Catholic media outlet in the world. Its television and radio broadcasting has played an important role in educating others about the Catholic faith since its founding in 1981. The network attempts to strengthen the faith of Catholics and explain its views to non-Catholics as well. Since its inception, EWTN has expanded its television presence, with 11 networks broadcasting in multiple languages, 24 hours a day, seven days a week, to over 300 million

households in more than 145 countries and territories. EWTN's broadcasts may be found almost anywhere on the globe, reaching viewers on a wide range of traditional and emerging technologies.

Amicus Pinnacle Peak Pictures (PPP) is a production and theatrical distribution company dealing in family, inspirational, and faith-based content. The company's mission is to serve as a full-service production outlet focusing on theatrical film and international television and video in the family and inspirational marketplace. PPP seeks to tell stories that are not only entertaining and compelling, but to do so in a way that the whole family can enjoy together. PPP is renowned for its inspirational movies—such as *God's Not Dead* (2014)—and television series.

Amicus WallBuilders Presentations is a non-profit organization dedicated to presenting America's forgotten history and heroes, with an emphasis on the moral, religious, and constitutional foundation on which America was built. The heart of the organization's efforts is educational work. WallBuilders has collected thousands of first-edition works of America's Founding Fathers—including their own handwritten documents—and the organization's research focuses primarily on these original sources. Based on its extensive research, WallBuilders has produced over two dozen books and videos applying the lessons of America's history to contemporary issues. These books and videos not only present our nation's rich heritage, they also introduce the current generation of Americans to

an uncensored view of America's religious and political history.

Amicus Bruce Marchiano is an actor, producer/director, author, and ministry director best known for portraying Jesus in more films than any actor in history. A 38-year veteran of the film industry, Marchiano began his acting career in the 1980's with guest roles on classic television shows such as *Murder She Wrote*, *Colombo*, *L.A. Law*, *Hardball*, *General Hospital*, and *Days of Our Lives*. Currently, Marchiano is transitioning behind the camera, making his directorial debut in the award-winning *Alison's Choice* (2016). In 2021, Marchiano completed principal photography on the upcoming Biblical epic, *The Gospel According to John*, currently in post-production and due for release in 2024. Off the set, Marchiano is the founder of Marchiano Ministries, a non-profit outreach ministry largely involved in South Africa where Bruce has built churches, conducted innumerable missions, and currently provides daily meals to hundreds of destitute and HIV-affected children. As an author, Marchiano has penned several books on the person of Jesus, including the bestselling *In the Footsteps of Jesus*.

Amici Cary Solomon and Chuck Konzelman are film and television writers, producers, and directors who serve as co-CEO's of Believe Entertainment and Soli Deo Gloria Releasing. They have been in the entertainment industry for thirty years and have done feature projects for Warner Brothers, Paramount, Sony-Columbia and Marvel Entertainment. The two have also placed original-concept television pilots with

CBS, Fox, New Line Television, and Touchstone, as well as cable projects with TNT and HBO. Their films include the award-winning *God's Not Dead* (2014) and *Unplanned* (2019). Suppression of *Unplanned* by social media providers was so extensive that Mr. Solomon and Mr. Konzelman were invited to testify before the United States Senate in a hearing entitled "Stifling Free Speech: Technology Censorship and the Public Discourse."

SUMMARY OF ARGUMENT

The Constitution guards individual rights in furtherance of "a tolerant citizenry." *Lee* v. *Weisman*, 505 U.S. 577, 590 (1992). But such tolerance in "a pluralistic society * * * presupposes some mutuality of obligation." *Id.* at 590–91. That mutuality of obligation was recently emphasized in *Obergefell* v. *Hodges*, 576 U.S. 644 (2015). While *Obergefell* held that the Constitution does not allow government to prohibit same-sex marriage, it also explained that the First Amendment rights of individuals who disagree must be "given proper protection" by government. *Id.* at 679.

Lorie Smith and her company, 303 Creative LLC, must now choose between her art and her conscience because she has a view on marriage that Colorado will not abide being promoted. This is not the "proper protection" *Obergefell* promised. And whether one agrees with 303 Creative's position or not is irrelevant—the First Amendment protects diverse and conflicting

voices in the marketplace of ideas, especially on a public matter. Essential to American self-government is preventing the coercive power of the state from foreclosing debate; the solution to speech with which one disagrees is not to silence the speaker but to offer alternative views. It is only the organic result of competing ideas that may form the basis for legitimate government. Colorado's agreement with Petitioners' speech is thus irrelevant—it is protected by the First Amendment and must be allowed.

But Colorado doesn't just stop there. Under the panel opinion below, the Tenth Circuit allows for government censure of disfavored speech *and* the compulsion of other speech (if the speaker is going to participate in the marketplace at all). Consequently, the panel dissent noted that the scope of the majority's ruling is staggering and, "[t]aken to its logical end, the government could regulate the messages communicated by *all* artists, forcing them to promote messages approved by the government in the name of 'ensuring access to the commercial marketplace.'" Pet.App.80a (dissent at 30 (quoting majority opn. at 27)). And what is true of artists is also true of speech "editors" such as television studios, newspaper printers, or event organizers that work to ensure consistent messages from their organizations. Taken to its logical conclusion, the Tenth Circuit's opinion allows for government control in those areas as well.

Speech in America does not work that way. Speakers and artists may not be pressganged into carrying water for the governmental party in power. And to

force *amici* to do so (or leave the public arena) would signal the end of differing artistic voices in the film, television, and radio industries—voices that are already a distinct minority in their field. Thankfully, such state-sponsored censorship and coercion has already been rejected on multiple occasions by this Court and should be rejected again here.

The judgment of the court of appeals should be reversed.

ARGUMENT

The First Amendment protects a diversity of viewpoints across all manner of media—everything from art to broadcast productions to website design. This diversity of speech is a necessary element of the marketplace of ideas that shapes society; and that speech, in turn, is "the essence of self-government." *Dun & Bradstreet, Inc.* v. *Greenmoss Builders, Inc.*, 472 U.S. 749, 759 (1985). At present, though, the overreach of Colorado's anti-discrimination statute (at least as interpreted by the Tenth Circuit) threatens "the free and robust debate of public issues." *Ibid.* By chilling both artists and groups that promote speech through various media outlets, the state law destabilizes the marketplace of ideas, cheapens the remaining speech, and undermines self-government. As applied, CADA thus ensures that "debate on public issues [will *not*] be uninhibited, robust, and wide-open," and as a result is

unconstitutional. *N.Y. Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964).

I. The First Amendment Protects Various Types Of Speech—Including Editorial Discretion—Across A Wide Range Of Media.

This Court has traditionally recognized free speech protections for the messages of speakers across a range of platforms and media. And the First Amendment's protections apply equally to expression that may not be literal speech. See *Ward* v. *Rock Against Racism*, 491 U.S. 781, 790–91 (1989) (recognizing that the First Amendment's protections apply to regulations of music). Art in its various forms is "unquestionably shielded"—whether it is nonsensical poetry (Lewis Carroll's Jabberwocky), uncomfortable instrumentals (Arnold Schönberg's atonal musical compositions), or incomprehensible paintings (Jackson Pollack's modern art). *Hurley* v. *Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 569 (1995).

The First Amendment applies equally to speech editors who serve as gatekeepers for groups or publications that want to ensure fidelity to certain messages. *Hurley*, 515 U.S. at 570–74 (noting that the First Amendment does not "require a speaker to generate, as an original matter, each item featured in the communication" and that editorial discretion is "enjoyed by business corporations generally and by ordinary people engaged in unsophisticated expressions as well as by professional publishers"). After all, editing

or producing is a "speech activity" entitled to First Amendment protections. *Ark. Educ. Television Comm'n* v. *Forbes*, 523 U.S. 666, 674 (1998). In fact, it is "no less communication than is creating the speech in the first place." *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 675 (1994) (O'Connor, J., concurring in part and dissenting in part). In exercising editorial discretion, the party engages in expressive conduct by determining which message is "worthy of presentation." *Hurley*, 515 U.S. at 575.

A group sponsoring a publication thus has a vested interest in the message set forth by their particular publication. That interest includes not having the general public confuse the publisher's message with any other messages an outsider may seek to disseminate through the publication. See *Manhattan Cmty. Access Corp.* v. *Halleck*, 139 S. Ct. 1921, 1930 (2019) ("[W]hen a private entity provides a forum for speech * * * [t]he private entity may * * * exercise editorial discretion over the speech and speakers in the forum."). That is why this Court has explained that newspapers are "more than a passive receptacle or conduit for news, comment, and advertising," but have First Amendment rights related to their editorial decisions. *Miami Herald Publ'g Co.* v. *Tornillo*, 418 U.S. 241, 258 (1974). That is also why parade organizers cannot be forced—under the guise of a public accommodation law—"to modify the content of their expression to whatever extent beneficiaries of the law choose to alter it with messages of their own." *Hurley*, 515 U.S. at 572. Free speech protection is not forfeited

through profit motives, either, as editors do not lose their First Amendment rights even when they are paid to convey information for third parties. *Sullivan*, 376 U.S. at 266.

Therefore, if the government seeks to compel a newspaper to publish material to which the newspaper objects, this interferes with the newspaper's editorial function and is a free speech violation. *Tornillo*, 418 U.S. at 258. Because editing involves "interpretation and * * * selection," there is a risk of "editorial suppression" by the government; the state cannot "force abstention from discrimination in the news without dictating selection." *Id.* at 258 n.24 (quoting 2 Z. Chafee, Government and Mass Communications 633 (1947)). And so the state cannot compel a newspaper "to publish that which reason tells them should not be published." *Id.* at 256.[2]

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[2] Newspapers retain editorial discretion even when accused of violating anti-discrimination laws. See *Groswirt* v. *Columbus Dispatch*, 238 F.3d 421, 2000 WL 1871696, at *2 (6th Cir. 2000) (invoking "free press right" in context of discrimination claim); *Johari* v. *Ohio State Lantern*, 76 F.3d 379, 1996 WL 33230, at *1 (6th Cir. 1996) (invoking First Amendment in context of equal protection claims); *Melvin* v. *U.S.A. Today*, No. 3:14-cv-00439, 2015 WL 251590, at *9 (E.D. Va. Jan. 20, 2015) (explaining that selective news coverage, which was allegedly discriminatory, "lies at the heart of editorial discretion protected by the First Amendment"); *Rose* v. *Morning Call, Inc.*, No. 96-2973, 1997 WL 158397, at *13 (E.D. Pa. Mar. 28, 1997) (invoking *Tornillo* in context of discrimination claims and declining to issue injunction forcing newspaper to run advertisement); *Treanor* v. *Wash. Post Co.*, 826 F. Supp. 568, 569 (D.D.C. 1993) (explaining that applying public accommodations requirements to newspapers "would likely be inconsistent with the First Amendment"); *cf. Sinn* v. *Daily*

These same editorial freedoms are available in other forms of media as well—television stations, radio show producers, photography editing companies, and Internet designers all engage in protected speech in determining what their company produces. After all, "whatever the challenges of applying the Constitution to ever-advancing technology, 'the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary' when a new and different medium for communication appears." *Brown* v. *Ent. Merchs. Ass'n*, 564 U.S. 786, 790 (2011). To be sure, there are some restrictions on editorial content—for instance, there is no First Amendment protection "when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity." *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Hum Rels.*, 413 U.S. 376, 389 (1973). Publishers may also be subject to liability for distributing unprotected speech such as libel. *Sullivan*, 376 U.S. at 279–80. Neither case is applicable here. When dealing with protected speech regarding a topic of public debate, media producers "exercise substantial editorial discretion in the selection and presentation of their programming." *Forbes*, 523 U.S. at 673. This allows broadcasters to be afforded the "widest journalistic freedom consistent with its public

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Nebraskan, 638 F. Supp. 143, 146, 152 (D. Neb. 1986) (finding no constitutional right to have housing ad printed that included plaintiffs' sexual orientation because it would usurp newspaper's editorial discretion).

obligations." *Columbia Broad. Sys., Inc.* v. *Democratic Nat'l Comm.*, 412 U.S. 94, 119 (1973).

Editorial discretion thus serves as both a form of speech and a protection against the message of the speaker—the group or publication—being misconstrued by outsiders. This is why the state cannot force citizens to "host or accommodate another speaker's message." *Rumsfeld* v. *Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 63 (2006). Otherwise, "[p]rivate property owners and private lessees would face the unappetizing choice of allowing all comers or closing the platform altogether." *Halleck*, 139 S. Ct. at 1931. And so a Catholic television station—such as *amicus* EWTN, for example—cannot be forced to host a commercial promoting abortion. Like the organizer of a parade or a newspaper publisher, the owner of that station is ultimately responsible for (and inevitably tied to) the speech produced in her studio. Consequently, the company must be allowed to have a say in the content of what appears on the station because the freedom of speech "necessarily compris[es] the decision of both what to say and what not to say." *Riley* v. *Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796–97 (1988).[3]

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[3] This should not be confused with the potential First Amendment violation some states are attempting to curb through legislation that prevents online forums from censoring viewpoints with which they disagree. See, e.g., HB 20, Tex. Civ. Prac. & Rem. Code § 143A.002 ("Censorship Prohibited"), Dec. 2, 2021. While a private company or individual—such as *amici* here—may exercise editorial discretion over speech that may be construed as *the company's* speech, the states argue that online platforms do not

II. The Failure To Protect Diverse Speech Short-Circuits The Exchange Of Ideas Essential To A Free Society.

The First Amendment reflects a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *Sullivan*, 376 U.S. at 279. Government that is representative of a free people demands no less. *Janus* v. *AFSCME, Council 31*, 138 S. Ct. 2448, 2464 (2018) ("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 those ends."). Thus an individual's right to speak on public matters "is more than self-expression; it is the essence of self-government." *Dun & Bradstreet*, 472 U.S. at 759.

Free speech—necessary to a free people—protects society through diverse speech creating competition amongst ideas and preventing blind spots that develop when operating in an echo chamber. In fact, the Constitution provides freedom of expression "in the hope that use of such freedom will ultimately produce a more capable citizenry and * * * in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political

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have that same right. That is because the online platforms enjoy legal immunity (under § 230 of the Communications Decency Act) granted only because the platforms are, ostensibly, merely maintaining *a public forum for others* to speak. See 47 U.S.C. § 230.

system rests." *Cohen* v. *California*, 403 U.S. 15, 24 (1971). That is why the very purpose of the First Amendment's Free Speech Clause—and among its highest uses—is allowing opposing sides of a debate to express themselves without censorship. See *Roth* v. *United States*, 354 U.S. 476, 484 (1957).

As this Court has held, "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas* v. *Johnson*, 491 U.S. 397, 414 (1989). That is especially critical in the debate in this case—a topic over which this Court has recognized that people of "good faith" are divided. *Obergefell*, 576 U.S. at 657. Indeed, *Obergefell* explicitly mentioned that the First Amendment rights of individuals who disagree with same-sex marriage must be "given proper protection" by government. *Id.* at 679. Government involvement only short-circuits that process and undermines the legitimacy of the viewpoint that gains predominance.

Recent protests in Hong Kong highlight what happens when government silences unpopular viewpoints. America is different, though. We err on the side of allowing more speech, not less, in order to ensure the exchange of ideas crucial to our society. This includes protesting against war by wearing black armbands to school, *Tinker* v. *Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503 (1969), or against the draft by wearing clothing with vulgar words, *Cohen* v. *California*, 403 U.S. 15 (1971). We even allow the burning of our

nation's flag as a form of symbolic speech against some aspect of the government with which one does not agree. *Johnson*, 491 U.S. at 414. A diversity of viewpoints is encouraged as we believe that "each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Agency for Int'l Dev.* v. *All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 213 (2013) (quoting *Turner Broadcasting*, 512 U.S. at 641). Our commitment to the free exchange of ideas must continue to be upheld here.

III. Censorship Of The Protected Speech At Issue In This Case Undermines Editorial Freedom For *Amici* And Other Speech Outlets That Contribute To Public Debate.

The Tenth Circuit's damage to First Amendment principles not only strips 303 Creative of its rights, it also attacks *amici*'s speech and opens the door for wide-ranging censorship in other areas. Indeed, because all speakers are unique, the Tenth Circuit's logic requiring access to any unique speech ensures that any speaker may be banned in Colorado for failing to promote the state-sponsored view. Pet.App.80a (dissenting opn. at 30 (quoting majority opn. at 27)). The editorial freedom of speakers (such as *amici*) that currently adds to the public debate will be peeled away as state-imposed orthodoxy is enforced. As a result, the national debate on controversial topics will be impoverished as dissent on matters of public life becomes forbidden.

Amici require editorial freedom and discretion in the projects they undertake in order to remain true to their values and commitments. For instance, *amici* Cary Solomon and Chuck Konzelman were asked early in their careers to script a film called *St. Lucifer*. The producer was an avowed atheist who wanted to make a movie claiming that the devil was basically the unwilling and unwitting victim of a cosmic "frameup" executed by a jealous and malevolent entity—God. Given their ability to craft feature-worthy content, as well as their specific knowledge of biblical concepts and a familiarity with theology, Mr. Solomon and Mr. Konzelman were uniquely suited to make the film. But they were able to decline handling the project; and given the nature of the industry, appreciated not having to explain why they were passing. Yet under Colorado's misguided notion of free speech, they could have been forced to either make the film or find new jobs since to turn down the atheist's project would be viewed by the Tenth Circuit as religious discrimination. See, e.g., Pet.App.69a (recognizing that, under the majority's reasoning, "the State could wield CADA as a sword, forcing an unwilling Muslim movie director to make a film with a Zionist message or requiring an atheist muralist to accept a commission celebrating Evangelical zeal").

Alternatively, suppose that the United Church of Christ sought to convert faithful Catholics to its position that abortion is permissible. *Amicus* EWTN (and its affiliates around the world) would be the ideal medium for such a campaign given the network's scope

and reach. The UCC might want to run advertisements in EWTN's print arm—the *National Catholic Register*—or on its Internet news websites—operating under the *Catholic News Agency* and *ACI* (*Agencia Católica de Informaciones*) brands. And following the panel opinion here, the UCC would be allowed to scandalize the Catholic network in that manner or cause EWTN to face charges of religious discrimination. Such a result is obviously wrong, and violates the "central lesson of *Hurley*" by "compel[ling] affirmance of a belief with which the speaker disagrees." Pet.App.69a (quoting *Hurley*, 515 U.S. at 573). In effect, removing editorial discretion for media outlets in what they produce or air unconstitutionally allows the state to "alter the expressive content" of the message the speaker wishes to convey. *Hurley*, 515 U.S. at 572–73; see also *Halleck*, 139 S. Ct. at 1931 (rejecting the claim that government may force business owners to face the "unappetizing choice of allowing all comers or closing the [business] altogether").[4]

303 Creative is entitled to full First Amendment protections even when offering its view on traditional marriage: even—or especially—if that view is unpopular in Colorado. After all, "[i]t is firmly settled that * * * the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." *Street* v. *New York*, 394 U.S.

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[4] Not only is there no need to force creative individuals into using their platforms for speech to which they are opposed, allowing commissioned speakers to choose the content of their messages ensures more powerful and persuasive results.

576, 592 (1969). And "[t]he very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials, and to establish them as legal principles to be applied by the courts." *W. Va. State Board of Educ.* v. *Barnette*, 319 U.S. 624, 638 (1943).

But under Colorado law, the company must affirm same-sex marriage if it is to say anything in support of traditional marriage. CADA thus puts artists and editors to an unconstitutional choice: publish content that goes against the speaker's beliefs or remove content in that area all together. See *Halleck*, 139 S. Ct. at 1931. The effect, of course, is a ban on the company's speech since it does not wish to give equal time to both of those viewpoints. Yet Colorado need not "burn[] the house to roast a pig." *Reno* v. *ACLU*, 521 U.S. 844, 882 (1997). And the First Amendment will not allow it anyway. As a private entity, 303 Creative has the right to choose between messages, and this Court has held that a government actor may not censor that choice through speech compulsion. *Tornillo*, 418 U.S. at 258. Therefore, it is unconstitutional for Colorado to violate the company's conscience by making it promote same-sex marriage or leave the field altogether.

This is confirmed by the fact that 303 Creative's Internet-based platform ensures that it enjoys the same freedoms that a newspaper, magazine, or book publisher would have. *Reno*, 521 U.S. at 870; see also *U.S. Telecom Ass'n* v. *Fed. Commc'ns Comm'n*, 855 F.3d

381, 427 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc) ("[F]oundational First Amendment principles apply to editors and speakers in the modern communications marketplace in much the same way that the principles apply to the newspapers, magazines, pamphleteers, publishers, bookstores, and newsstands traditionally protected by the First Amendment."). Because it is undisputed that a newspaper could not be forced to surrender its editorial discretion to the state's prerogative, *Tornillo*, 418 U.S. at 258, Petitioners may not be made to do so either.

When speech that is so obviously protected is allowed to be censored, it threatens other speakers (such as *amici*) that participate in the public debate on controversial issues; it also chills any speech that challenges common viewpoints in the public square. These concerns are particularly relevant to publishers and speakers who purposefully encourage "counter-cultural" speech in an effort to restore traditional, conservative principles to public life. This means *amici*'s speech will necessarily be a dissenting voice in some segments of the populace—a dissenting voice Colorado continues to threaten across a wide range of mediums. There is no warrant for such undermining of the public debate and the Tenth Circuit's contrary position is simply wrong.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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