NO. 21-476

IN THE

Supreme Court of the United States

303 CREATIVE LLC, A LIMITED LIABILITY COMPANY; and LORIE SMITH,

Petitioners,

v.

AUBREY ELENIS; CHARLES GARCIA; AJAY MENON; MIGUEL RENE ELIAS; RICHARD LEWIS; KENDRA ANDERSON; SERGIO CORDOVA; JESSICA POCOCK; and PHIL WEISER,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF 15 FAMILY POLICY ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

DAVID FRENCH
Counsel of Record
1020 19TH STREET NW
SUITE 875
WASHINGTON, D.C. 20036
931-446-7572
David@TheDispatch.com

Counsel for Amici Curiae

QUESTION PRESENTED

Whether applying a public-accommodation law to compel an artist to speak or stay silent violates the Free Speech Clause of the First Amendment.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

INTEREST OF *AMICI CURIAE*[1]

The 15 family policy councils and policy alliance listed below each work within their respective states to preserve religious liberty and rights of conscience from state overreach and government intrusion. They are nonprofits who advocate for the nation's first liberty – religious freedom – in courts, legislatures, governor's mansions, and in the court of public opinion. They are vitally concerned that the decision of the court below undermines a constitutional firewall against compelled speech and will drive from the marketplace creative professionals who dissent from state-mandated orthodoxy on matters of "politics, nationalism, religion, or other matters of opinion." The complete list follows:

Alaska Family Action, Arkansas Family Council, California Family Council, Hawaii Family Forum, the Center for Arizona Policy, The FAMiLY LEADER, Kansas Family Voice, Christian Civic League of Maine, Michigan Family Forum, Minnesota Family Council, Family Policy Alliance of NJ, North Dakota Family Alliance, Palmetto Family Council, Wisconsin Family Action, and Family Policy Alliance of Wyoming.

---

[1] No counsel for a party authored this brief in whole or in part, and no person other than amici and their counsel made any monetary contribution intended to fund the preparation or submission of this brief. Petitioners and Respondents have submitted blanket consents to the filing of amicus briefs in case. Both are reflected on the Court's docket.

SUMMARY OF THE ARGUMENT

This case comes to the court at a critical moment. There is an increasing collision between generations-long consistent protection of the First Amendment in this Court and a culture that increasingly yields to the impulse to dominate political opponents, censor their expression, and even compel them to host speech or engage in speech with which they disagree.

It is one thing if the pressure to conform remains cultural rather than legal. While online attacks are difficult to endure, one can persevere and still speak. While peer shame can sting, only a small amount of courage is required to preserve one's public voice.

State censorship and compulsions, however, are different matters altogether. It is the state that wields the power of the sword. It is the state that can bar entrance into the marketplace of ideas. It is the state that can dictate whether a citizen can open a business or earn a living. Thus, it is the state that is the eternal threat to liberty. Only the state can truly suppress the American idea.

The First Amendment thus erects a high wall around private speech and individual conscience. It does not ask if speech is wise, good, popular, or fashionable before it grants its protection. Popular speech does not need a constitutional shield. It is the dissenter who truly values the First Amendment, and it is for the dissenter that the First Amendment exists.

In this case, there is no real question that the petitioner, Lorie Smith, is engaged in speech. She's a graphic artist, and the court below clearly and unequivocally stated that her "creation of wedding websites was pure speech." Instead, the question is when and whether a state's nondiscrimination law can overpower Ms. Smith's rights of conscience and *force* her to say things she does not believe.

Consequently, at issue in this case is nothing less than perhaps this Court's most enduring and potent constitutional clarion call, issued in the depths of the worst war this world has ever seen, that "[i]f 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." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

It is this call that has for generations helped preserve the American conscience, limited the reach of the American government, and cultivated the robust diversity of American expression. It is this call that has clearly and plainly stated that the state bears the most difficult of all burdens to justify overcoming the human will, imposing itself on the human conscience, and forcing human beings to express things that they do not believe. If war could not justify such an action, can a peacetime change in sexual morality?

The facts in this case are simple and clear. A graphic artist has determined that she must not, consistent with the tenets of her faith, use her artistic

talents to design and create websites that advance or celebrate ideas she does not believe.

For this artist, a same-sex union does not represent God's plan for marriage, and it is thus wrong for her to lend her talents to celebrate a union that her religious beliefs reject. She does not refuse to serve gay customers. She only refuses to use her talents to celebrate or transmit messages that she finds morally objectionable.

She applies the same standards to customers gay and straight, white and black. No person, of any identity, should compel her to speak. The transaction between artist and customer should be what tradition and the Constitution dictate, a match between a patron and a willing creator.

As this brief will demonstrate, artists instinctively understand that they are not and should not be automatons, with their creative energies at the employ of the highest or first bidder, regardless of the message. Liberties forged in the worst days of the deadliest war should easily survive the easy days of a long peace.

This brief will relate stories of artists who refused to use their talents to promote people or messages they reject. But it will also go beyond, illustrating how corporations now view the decision to do business itself as a political act, granting or withholding economic opportunity on the basis of the rights of conscience of their leaders, employees, and shareholders. In each case, the artist, the CEO, and shareholder are exercising the right guaranteed by

Barnette, to be free of any obligation to express support for a cause they despise.

This Court decided *Barnette* in a moment of ultimate national crisis, before the tide had fully turned in a war not just for national survival but for the survival of liberty itself. It allowed boys and girls to opt out of a pledge of national loyalty, a pledge that simply declared that we were in this great struggle together, united as one nation. It allowed people of faith to shock the conscience and wound the dignity of their friends and neighbors by standing apart from the prevailing national will.

Surely, if this Court can decide *Barnette* when a nation's very survival is at stake, it can reaffirm its central principle when rights of conscience collide with hurt feelings and personal convenience. The choice isn't between art or conscience. Same-sex couples can choose from an abundance of graphic designers. Instead, reaffirming *Barnette* means our citizens can enjoy art and conscience. Let the patron find a willing creator, and let the unwilling artist keep her conscience clean.

ARGUMENT

I. If Freedom of Conscience Can Survive the War for Western Civilization, It Can Survive the Culture War.

Follow modern American political rhetoric, and one will find that hyperbole, exaggeration, and outrage are the order of the day. Seemingly every

week our nation confronts a new "constitutional crisis" or "existential threat." But we should be clear, not every cry of "wolf" is false. There are true emergencies. There really are times when a nation stares into the abyss.

Even amateur students of history can think of our nation's most perilous moments. There's August 29, 1776, when General George Washington narrowly escaped the destruction of the young Continental Army when it slipped out of William Howe's grasp after defeat at the Battle of Long Island.

Who can forget July 3, 1863, Pickett's Charge, and the highwater mark of the Confederacy. The Battle of Gettysburg hung in the balance, and with it –arguably – the fate of the Union itself.

But there are other, later dates – like December 7, 1941, and the days and weeks that followed. American arms faced historic defeat after historic defeat. The bulk of the surface striking power of the Pacific Fleet was immobilized in the smoking ruin of Pearl Harbor. Japanese air, naval, and ground forces struck American possessions abroad with impunity, inflicting staggering defeat after staggering defeat. Hitler's submarines roamed the Atlantic at will, inflicting terrible losses and slowly strangling our English allies. Hope was in short supply.

January 7, 1942, marked the beginning of the Bataan Campaign, arguably the lowest point for American arms in the history of our nation. American and Philippine forces, under the command of Douglas MacArthur made a fighting retreat to the Bataan

Peninsula on the island of Luzon. There, more than 100,000 allied forces stood against the invading Japanese. Over the next three months, they were ground into the dust, and when defeat finally came, it was capped off with the humiliating, deadly Bataan Death March – a moment that lives in its own unique infamy.

These were dark times. Casualty counts were staggering, and rumors of Japanese invasion caused immense fear on the west coast. In Europe, Hitler's empire was arguably at its apogee. Britain still stood, but Nazi Germany dominated Western Europe, Eastern Europe, and a vast swathe of the Soviet Union. The Soviets had yet to inflict their staggering defeat on the Wehrmacht at Stalingrad. The fate of the world hung in the balance.

Thus, is it any wonder that on January 9, 1942, the West Virginia Board of Education adopted a resolution declaring that a salute to the flag be "a regular part of the program of activities in the public schools?" *Barnette*, 319 U.S. at 626. The Board required a "stiff-arm" salute, with the student raising his or her right hand, palm up, and repeating the Pledge of Allegiance. Failure to do so was an act of "insubordination" that could lead to expulsion. *Id*. at 628-629.

And why not? The nation was rallying for war: "All recruiting records of the nation's armed forces were shattered … as thousands of men attempted to enlist for combat duty in the Army, Navy, Marine Corps or Coast Guard," reported the New York Times on Dec. 10, 1941. At the height of the Second World

War, fully 37.5 percent of total national gross domestic product was dedicated to the war effort, an amount more than triple that dedicated to the Civil War and more than double that dedicated to World War I. On July 1, 1939, the Army's strength was limited to 174,000 men.[2] By the end of 1945, approximately 16 million Americans had served under arms.[3]

With fathers marching off to war and the nation preparing for a level of loss and sacrifice not seen since the Civil War, Americans craved tangible evidence that we were all in this together. What would sons and daughters of soldiers think if their classmates didn't stand beside them? When students sat down, didn't that mean they'd refuse the call if and when it came time to take their own turn in the line of battle? If there was ever a compelling need for national unity, wasn't it in January 1942? Surely, the overwhelming weight of popular opinion was decidedly against any who might object.

It is in this most intense atmosphere that this Court issued one of its most stirring calls not for ideological uniformity, but – critically – for constitutional fidelity. Just before the famous "fixed star" statement quoted in the introduction above,

---

[2] Stephen Daggett, Costs of Major U.S. Wars, Congressional Research Service (June 29, 2010), https://fas.org/sgp/crs/natsec/RS22926.pdf.

[3] Allyn Vannoy, Expanding the Size of the U.S. Military in World War II, Warfare History Network (June 26, 2017), http://warfarehistorynetwork.com/daily/wwii/expanding-thesize-of-the-u-s-military-in-world-war-ii/.

Justice Jackson – writing for a six-Justice majority – wrote words every bit as meaningful and just as applicable to the present dispute:

> Nevertheless, we apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization. To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous, instead of a compulsory routine, is to make an unflattering estimate of the appeal of our institutions to free minds. We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the State as those we deal with here, the price is not too great. But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.

319 U.S. at 641-642.

Note the key words: "[The] freedom to differ is not limited to things that do not matter much." *Id.* National unity matters in war. Marriage matters to the vast majority of men and women. The test of the substance of the First Amendment is "the right to differ as to things that touch the heart of the existing order." *Id.* In other words, are we free to disagree even

when matters are important? Are we free to disagree even when lives are at stake?

Emerging from the *Barnette* precedent wasn't a narrow ruling that no man can be required to pledge allegiance to the flag, but rather a far more sweeping precedent – one that has resonated so strongly that it has laid down a nearly iron-clad principle: The government may not compel speech in support of even the most virtuous and well-meaning of causes.

In *Barnette*, those who argued for the compulsory pledge quoted Abraham Lincoln, "Must a government of necessity be too strong for the liberties of its people, or too weak to maintain its own existence?" *Id.* at 636. Yet even in time of war, the Court held that to be a false choice. Justice Jackson wisely wrote, "Government of limited power need not be anemic government. Assurance that rights are secure tends to diminish fear and jealousy of strong government, and, by making us feel safe to live under it, makes for its better support." *Id*.

The threats to our national existence pale in comparison to the age of *Barnette*. Now the "danger" isn't disunity in the face of a vicious enemy but rather disappointment in the face of a reluctant artist. The "danger" is merely a slightly longer Google search as a patron finds a willing graphic designer. For the sake of preventing inconvenience and disappointment is the Court willing to gut one of its greatest precedents?

And make no mistake, a ruling against petitioners would gut *Barnette*. As a direct contrast to *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights*

Commission, 138 S. Ct. 1719 (2018), there is no viable dispute that the petitioners are engaged in anything other than "pure speech." Designing a website is an unquestioned act of artistry, one that includes not just the creation of visual arts, but also the creation and placement of prose on a virtual page.

Nor does the fact that petitioners sell their artistic services for profit vitiate their First Amendment interests. Must painters paint any picture their customers demand? Must writers write anything their clients require?

Moreover, who can doubt the significance of the speech at issue in this case? Sacramental in Catholicism, sacred in Protestantism, holy in religions the world over, and precious beyond words for the nation's secular citizens, the marriage ceremony isn't just the dry and formalistic signing of a civil contract but rather a signal moment in a human life.

Critically, while it is vitally important for all participants, it does not mean the same things for each of them. For Mormons, for example, a marriage is an eternal bond, sealing man and woman together in this life and the next. For most orthodox Christians, it's a once-in-a-lifetime relationship, so special that any subsequent marriages are inherently morally suspect unless there are specific, defined grounds for divorce or annulment.

It is for this reason, among others, that the state cannot, must not, compel any individual to speak in or in support of a wedding ceremony. To do so is an

imposition on the human conscience every bit as grotesque and intrusive as a requirement that an individual blaspheme their own faith or pledge loyalty to a nation above their god.

Seven years ago in *Obergefell v. Hodges*, Justice Kennedy wrote at great length about the meaning and importance of marriage, memorably declaring:

> From their beginning to their most recent page, the annals of human history reveal the transcendent importance of marriage. The lifelong union of a man and a woman always has promised nobility and dignity to all persons, without regard to their station in life. Marriage is sacred to those who live by their religions and offers unique fulfillment to those who find meaning in the secular realm. Its dynamic allows two people to find a life that could not be found alone, for a marriage becomes greater than just the two persons. Rising from the most basic human needs, marriage is essential to our most profound hopes and aspirations.

135 S. Ct. 2584, 2593-94 (2015).

When an artist creates a website to celebrate a marriage, then, she is creating a work of art dedicated in its own way to the "transcendent importance" of the union of her patrons. Must she be required, however, to dedicate herself to honoring all marriages the state deems lawful? Must she delegate the determinations of her faith and her conscience to state officials who

now purport to re-define what is to her a holy and sacred covenant?

To override Ms. Smith's rights of conscience and force her to create would send an earthquake through American free speech doctrine. It would immediately cast into doubt the ability of artists, citizens, and corporations to choose the messages they want to send, a choice that they've long exercised to express their core values. It is to those choices we now turn.

II. Corporations and Creative Professionals Consistently Exercise Their Rights under *Barnette* to Promote and Disassociate from Specific Values and Messages.

In the immediate aftermath of the Capitol riot on January 6, 2021, two of the largest and most powerful multinational communications companies in the world exercised their rights of conscience. On January 7, 2021, Facebook indefinitely suspended the president of the United States, Donald Trump, from its platform.[4] The next day, Twitter announced the permanent suspension of President Trump's personal account, @realDonaldTrump.[5]

---

[4] Tony Romm and Elizabeth Dwoskin, "Trump banned from Facebook indefinitely, CEO Mark Zuckerberg Says," The Washington Post (January 7, 2021), https://www.washingtonpost.com/technology/2021/01/07/trump-twitter-ban/.

[5] Twitter, "Permanent suspension of @realDonaldTrump," (January 8, 2021), https://blog.twitter.com/en_us/topics/company/2020/suspension.

These companies suspended the president not because of his identity, but because of his message. Even though they were in the business of transmitting and reproducing the thoughts and ideas of others, they still drew lines. There was expression they could not transmit. There were ideas they would not communicate.

Such corporate acts of conscience are hardly unusual in the present age. They've in fact become so routine that one hardly knows where to start in detailing and describing all the ways in which American citizens use the companies they own or control to express and defend their most fundamental values.

The National Football League's corporate threat to move the Super Bowl was instrumental in persuading then-Arizona governor Jan Brewer to veto a state Religious Freedom Restoration Act.[6] When Georgia considered its own Religious Freedom Restoration Act, Walt Disney placed immense pressure on the state, threatening to pull filming from its Pinewood Studios outside Atlanta.[7]

---

[6] Tommy Tomlinson, "How the NFL Helped Kill Arizona's Anti-Gay Rights Bill," *Forbes*, (Feb. 27, 2014), https://www.forbes.com/sites/tommytomlinson/2014/02/27/arizona-gay-rights-and-the-super-bowl/#1dd14455214c.

[7] Ted Johnson, "Disney, Marvel to Boycott Georgia if Religious Liberty Bill is Passed," *Variety*, (Mar. 23, 2016), http://variety.com/2016/biz/news/disney-marvel-boycott-georgiaanti-gay-bill-1201737405/.

Such expression can be deeply contentious–even hurtful–to Americans with differing views. For example, Major League Baseball's decision to move its all-star game from Georgia to Colorado[8] to protest Georgia's voting reforms inflicted real economic harm on individuals who had nothing to do with state politics, or who even potentially shared Major League Baseball's opposition to Georgia's reforms.

Creative professionals routinely express their politics in their art—through the art they choose *or refuse* to create. Famously, for example, shortly after the election of Donald Trump, a number of fashion designers (artists, to be sure) declared that they would, under no circumstances, "dress" Melania or Ivanka Trump –this despite the fact that dresses themselves rarely (if ever) contain a political or cultural message as explicit as the words or image a web designer creates. Merely doing business with the Trumps was an intolerable notion to creative professionals who abhorred the Trump family's political methods and messages.

In an open letter rejecting the idea of working with the Trumps, designer Sophie Theallet said, "We value our artistic freedom, and always humbly seek to contribute to a more humane, conscious, and ethical way to create in this world." She said, "As an independent fashion brand, we consider our voice an

---

[8] Bill Chappell, "MLB Moves All-Star Game To Colorado Amid Uproar Over Georgia Voting Law," NPR (April 6, 2021), https://www.npr.org/2021/04/06/984711881/mlb-moves-all-star-game-to-colorado-amid-uproar-over-georgia-voting-law.

expression of our artistic and philosophical ideas."[9] And another designer, Naeem Khan, asserted: "A designer is an artist, and should have the choice of who they want to dress or not."[10]

In reporting on the designer choices, the Washington Post's Robin Givhan explained well how artists view their work:

> Like other creative individuals, Theallet sees fashion as a way of expressing her views about beauty and the way women are perceived in society. Fashion is her tool for communicating her world vision. In the same way that a poet's words or a musician's lyrics are a deeply personal reflection of the person who wrote them, a fashion designer's work can be equally as intimate. In many ways, it's why we are drawn to them. We feel a one-to one connection.

Givhan, *supra* n. 9.

A web designer's work is similarly intimate. The creation of a website, from pictures to prose, is the

---

[9] Robin Givhan, "Should designers dress Melania and Ivanka? The question is more complex than it seems," *The Washington Post*, (Jan. 12, 2017), https://www.washingtonpost.com/news/artsand-entertainment/wp/2017/01/12/should-designers-dressmelania-and-ivanka-the-question-is-more-complex-than-it.

[10] Mehera Bonner, "Here's the Growing List of Designers Who Refuse to Dress Melania Trump," *Maria Claire* (Mar. 11, 2017), http://www.marieclaire.com/fashion/news/g4254/designers-whowont-dress-melania-trump/?slide=10.

product of a connection between designer and client. A web designer is the painter of the information age. They pour their creative energy into their work.

Men and women are drawn to creative professionals across artistic media because of that connection, but that connection does not make the creative professional the servant of the patron or of the state. The creative professional need not facilitate and celebrate the patron's message.

The fashion designers above rightly see their creative work as expressing support for political and moral beliefs. They also testify how dearly they hold the right to choose the patrons with whom they will enter into business relationships in accordance with the uncoerced dictates of their consciences. While any given American may find Theallet's protest overwrought, it is unthinkable that the state should have the power to override her declaration of conscience.

Indeed, the fashion designer comparison—which many of these same amici raised before in the *Masterpiece Cakeshop* case—is particularly appropriate here. In its decision below, the 10th circuit noted that the petitioners' artistry created something like a "monopoly," a market where only the petitioners exist.

By that standard, every fashion designer is a monopoly. Every painter. Every poet. Each one designs, paints and writes in a manner that is utterly unique to themselves. It would be perverse to hold that the First Amendment views artistic speech as

inherently *less* precious and *more* subject to government oversight than other forms of "pure speech." One can think of few doctrines better-calculated to suppress creativity and stifle the marketplace of ideas. The First Amendment permits no such thing.

The creative professionals profiled above, including the petitioners, are engaged in conduct remarkably similar to the conduct of the stalwart Jehovah's Witnesses in *Barnette*. When asked by others if they would participate in an act of expression they abhor, these creative professionals say no. They understand reality. They understand that no one would think that Melania Trump designs her own dresses or that couples create their own websites. They understand that the expression involved is joint expression with their patrons. They are lending their unique talents to acts secular and sacred. Doing so must be their choice.

III. To Undermine Barnette Is To Cruelly Impoverish the Marketplace of Ideas.

If creative acts are undertaken, not by choice, but by compulsion, do not imagine that the web designer will be merely passively complying with the law. The patron-artist relationship is not like a gumball machine that mechanically dispenses a product when payment is inserted. Quite the contrary, artistic work done at the behest of others involves the investment of the artist's mind and imagination in the expression of ideas suggested by a patron who has commissioned the artwork. This is, indeed, the major reason why artists are commissioned by patrons in the first place.

Artistic work involves the whole person – mind, body, and soul. The use of the artist's creative talents must be undertaken willingly, or it is a violation of her integrity.

For this reason, there is something particularly cruel about coerced artistic expression, a cruelty recognized even in ancient times. Indeed, the Psalmist gives voice to the suffering of the artist under duress:

> By the rivers of Babylon, there we sat down, yea, we wept, when we remembered Zion. We hanged our harps upon the willows in the midst thereof. For there they that carried us away captive required of us a song; and they that wasted us required of us mirth, saying, Sing us one of the songs of Zion.

Psalm 137:1-3 (KJV).

The psalmist also viscerally describes the feeling of inner revulsion the artist feels at the idea of employing his artistic talents under coercion:

> If I forget thee, O Jerusalem, let my right hand forget her cunning. If I do not remember thee, let my tongue cleave to the roof of my mouth. . . .

Psalm 137:5-6 (KJV).

The psalmist would rather lose his ability to play the lyre, lose his ability to sing, than employ his skill for the schadenfreude of those who hate the city that he loves. A similar situation is at work in this case: The petitioners would rather go out of business than

be forced to use Ms. Smith's skill to celebrate an idea she does not believe. Shall the State of Colorado become the agent of this compulsion?

In April 2017, Apple CEO Tim Cook delivered an address to the Newseum that eloquently outlined the nature of his company's First Amendment rights. He recognized that Apple not only facilitates the speech of others, it possesses its own free speech rights in the context of its own work:

> It's no accident that these freedoms are enshrined and protected in the First Amendment. They're the foundation of so many of our rights, which means we all have a stake and a role in defending them. This is a responsibility that Apple takes very seriously. I see our work to fulfill this responsibility as twofold. First, we work to defend these freedoms by enabling people around the world to speak up. And second, we do it by speaking up ourselves, because companies can and should have values. We have a perspective on major public issues, and we are prepared to take a stand for things that we deeply believe in… a company is not some faceless, shapeless thing that exists apart from society. A company is a collection of human beings, and part of the fabric of our society. A company like ours has a culture, it has values, and it has a voice. Apple has spoken out, and will continue to speak out, for what we believe as a company. And the positions we take will continue to guide our actions. So we will continue to speak up for

> environmental protection. We will continue to stand up for inclusion and diversity in all facets of life. And we will continue to stand up for human rights, including the right to privacy.[11]

Apple understands it has a First Amendment right as a corporation to participate freely in the shaping of public opinion, and it does this by choosing which opinions it will express via the designs of its products and its publicly announced partnerships.

Many large corporations go even farther. Not only will they not create products that send unacceptable messages, they won't do business in places that promulgate (to them) unacceptable laws. Yet if rights of conscience attach to corporations worth trillions, shouldn't they also attach to a single artist whose alleged "monopoly" is merely in the sweat of her own brow? The state is demanding that an artist not only do business with a certain patron, it's demanding that she create and speak the patron's message. How could Colorado prevail and *Barnette* survive?

CONCLUSION

If the state of Colorado prevails in this case, fundamental First Amendment rights have become fragile indeed. Prohibitions against compelled speech survived world war and the pressure for national

---

[11] Timothy Cook, CEO, Apple, Address at the Newseum's 2017 Free Expression Awards Ceremony (April 18, 2017) (transcript and video available at https://www.cspan.org/video/?427127-1/newseum-presents-2017-freeexpression-awards).

unification in the face of an existential threat. Can they survive the culture war and the political animosity of the polarized present? That is what this Court will decide.

It is important to remember that this Court has clearly distinguished the constitutional right to marry from any legal obligation to adopt the state's view about the nature of marriage. Writing for the majority in *Obergefell*, Justice Kennedy was clear:

> Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered.

135 S. Ct. at 2607.

This is the language that preserves the First Amendment. This is the language that preserves *Barnette*. Ms. Smith is among the many millions of Americans who are not willing to violate "the principles that are so fulfilling and so central to their lives and faiths." Or, to put it another way, they are not willing to let any Colorado official, high or petty, "prescribe what shall be orthodox" regarding the institution of marriage "or force citizens to confess by word or act their faith therein."

May that star remain fixed in our constitutional constellation. The judgment of the court below must be reversed.

Respectfully submitted,

DAVID FRENCH
Counsel of Record
1020 19TH STREET NW
SUITE 875
WASHINGTON, D.C. 20036
931-446-7572
David@TheDispatch.com

June 2, 2022