No. 19-1413

IN THE 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
No. 1:16-cv-02372-MSK
The Honorable Chief Judge Marcia S. Krieger

BRIEF *AMICUS CURIAE* OF THE CATO INSTITUTE IN SUPPORT OF PLAINTIFFS-APPELLANTS

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Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for *amicus* certifies that (1) *amicus* does not have any parent corporations, and (2) no publicly held companies hold 10% or more of the stock or ownership interest in *amicus*.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

INTEREST OF *AMICUS CURIAE*[1]

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Cato has published a vast range of commentary strongly supporting both the First Amendment and gay rights, and indeed finds that position to maximize individual liberty. *See, e.g.,* Eugene Volokh & Ilya Shapiro, *Choosing What to Photograph Is a Form of Speech*, WALL ST. J., Mar. 17, 2014, available at http://www.cato.org/publications/commentary/choosing-what-photograph-form-speech; Robert A. Levy (Cato's chairman), *The Moral and Constitutional Case for a Right to Gay Marriage*, N.Y. DAILY NEWS, Aug. 15, 2011, available at https://www.cato.org/publications/commentary/moral-constitutional-case-right-gay-marriage.

[1] Pursuant to Fed. R. App. P. 29, counsel for *amicus* states that all parties have consented to the filing of this brief. Further, no party's counsel authored any part of this brief and no person other than *amicus* made a monetary contribution to fund its preparation or submission.

SUMMARY OF ARGUMENT

1. The government may not require Americans to help distribute speech of which they disapprove. The Supreme Court affirmed this principle in *Wooley v. Maynard*, 430 U.S. 705 (1977), where it held that drivers have a First Amendment right not to display messages that they disagree with on their license plates. *Wooley*'s logic applies equally to a web designer's right not to be forced to create or promote messages he or she doesn't want to endorse.

2. The government's interest in preventing discrimination cannot justify restricting 303 Creative's First Amendment rights. 303 Creative is not discriminating based on the sexual orientation of any *customer*. Instead, its owner, Ms. Lorie Smith, is choosing which *messages* she crafts and promotes through web and graphic design. In this respect, Lorie's actions are analogous to the actions of the parade organizers in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995), who also chose not to spread a particular message through their parade.

In *Hurley*, the Supreme Court noted that the state, in trying to force the organizers to include a gay pride group in a parade, was applying its antidiscrimination law "in a peculiar way," mandating the inclusion of a message, not equal treatment for individuals. *Id.* at 572. The Court held that this application of antidiscrimination law violated the First Amendment. Colorado's attempt to use

the Colorado Anti-Discrimination Act ("CADA") to force 303 Creative to design websites and graphic designs promoting the weddings of same-sex couples if it does so for those of opposite-sex couples likewise violates the First Amendment.

3. The Supreme Court has held that large organizations that host competing messages, such as cable operators or universities, might be required to host messages from additional speakers with whom they disagree, especially when the speakers would otherwise find it hard to reach their intended audience. 303 Creative, however, is a small owner-operated company in which the owner is necessarily closely connected to the speech that the company produces. 303 Creative's declining to create a wedding website would also not interfere with the couple's ability to get others to create a website instead. In this respect, Lorie, as the owner of 303 Creative, is much closer to the Maynards in *Wooley v. Maynard*, whose "individual freedom of mind," secured the right to refuse to help distribute speech that they disapproved of. 430 U.S. at 714.

ARGUMENT

I. *Wooley* Shows That 303 Creative May Not Be Forced to Make Websites and Graphic Designs Expressing Messages with Which It Disagrees

Because the First Amendment protects the "individual freedom of mind," the government may not require people to display speech that they disagree with. *Wooley*, 430 U.S. at 714. Just as the state may not force a driver to display a message he finds objectionable on his license plate, it may not force a web designer to create websites or graphic designs that convey a message that *she* finds objectionable. Like artists, writers, or book publishers, web designers have the constitutional right to choose which messages they convey through the websites and graphics they design. Speech and images on the internet fall under the free speech and free press protections of the First Amendment. *Reno v. ACLU*, 521 U.S. 844, 870 (1997) (finding "no basis for qualifying the level of First Amendment scrutiny that should be applied to" the internet). Just likes films, web sites and the graphic designs they feature are a "significant medium for the communication of ideas" ranging from "direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression." *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-02 (1952) (finding that the First Amendment's free speech and free press protections extend to films).

No less protected are websites created and designed for money. *Ashcroft v. ACLU*, 542 U.S. 656 (2004) (striking down as unconstitutional a law criminalizing

certain types of commercial internet posts because the law infringed on speech protected by the First Amendment and was not the least restrictive option available). Just as with other media such as books, newspapers, and films, the fact that the web and graphic designs are produced for a profit does not remove their First Amendment protections. *See, e.g., Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2733 (2011) (finding that video games produced for profit are protected under the First Amendment); *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.,* 502 U.S. 105, 116 (1991) (books); *Joseph Burstyn*, 343 U.S. at 502 (films). *See also Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1151 (2017) (even regulation of communications about price should be analyzed as a restriction on speech for First Amendment purposes).

The internet is a marketplace of ideas and 303 Creative's web design activities, like those of most web designers, involve the writing of text and creation of graphic designs that explicitly or implicitly convey ideas. Just as a freelance writer who earns money writing articles in support of same-sex marriage for a gay rights website may not be compelled to write articles arguing that same-sex marriage is a sin for a conservative Christian website, a web designer such as 303 Creative may not be compelled to design websites advocating for the celebration of same-sex marriage merely because it designs websites advocating for opposite-sex marriage. The line between freelance writer and website designer would be a judicially

unmanageable one to draw. Thankfully, the Supreme Court's broad protections of the internet and artistic expression as First Amendment speech make such an exercise unnecessary. Web designers are no more or less protected in the content they create than are freelance writers, and the First Amendment prohibits states from compelling either to express views with which they.

Wooley should dispose of this case. In *Wooley*, the Supreme Court held that drivers have a right not to display the New Hampshire state motto, "Live Free or Die," on their license plates. This motto was created and printed by the government and observers doubtless realized that it did not represent the drivers' own views. Yet the Court nonetheless held that the law requiring drivers to display this motto "in effect require[d] that [drivers] use their private property as a 'mobile billboard' for the State's ideological message." 430 U.S. at 715. Such a requirement, the Court concluded, unconstitutionally "'invade[d] the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.'" *Id.* (citation omitted). Freedom of speech, after all, includes the freedom *not* to speak. "A system which secures the right to proselytize religious, political, and ideological causes," the Court held, "must also guarantee the concomitant right to decline to foster such concepts. The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of the mind.'" *Id.* at 714 (citation omitted).

The Court's reasoning in *Wooley* applies here with equal force. Just as the Maynards had a "First Amendment right to avoid becoming the courier for [a] message" displayed on their license plate, *id.* at 717, Lorie, as the owner of 303 Creative, has a First Amendment right to avoid creating websites and graphic designs that convey a message that she disagrees with. Indeed, if the government could not compel even "the passive act of carrying the state motto on a license plate," *id.* at 715, it certainly may not compel the more active act of conveying the message through web and graphic design. And just as the Maynards prevailed even though passersby would not have thought that the license plate motto represented the Maynards' own views, 303 Creative should prevail even though people would be unlikely to attribute a particular website's message to 303 Creative or Lorie.

In the recent Eighth Circuit case *Telescope Media Grp. v. Lucero*, which was a challenge by a wedding filmmaking company to a Minnesota antidiscrimination law similar to CADA, the court held that the filmmakers had a First Amendment right not to be compelled to create films of same-sex weddings. 936 F.3d 740 (8th Cir. 2019). The *Telescope Media* court wrote that antidiscrimination laws (like CADA) that require individuals or companies "to use their own creative skills to speak in a way they find morally objectionable" "may well be more troubling from a First Amendment perspective" than laws that only require the more passive act of "reproduc[ing] verbatim an opinion piece written by someone else." *Id.* at 754 n.4.

And yet, in cases such as *Wooley* and *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 258 (1974), the Supreme Court has made clear that even those more passive requirements are constitutionally impermissible.[2] As the Eighth Circuit correctly concluded, laws compelling individuals and companies to actively create speech they disagree with cannot satisfy the strict test imposed by the First Amendment where the comparatively lower burdens imposed by the government in *Wooley* and *Tornillo* failed to do so. *Telescope Media*, 936 F.3d 740.

The respect shown in *Wooley* for "individual freedom of mind," as a right not to take part in creating and distributing material one disagrees with, resonates strongly with core democratic principles. Democracy and liberty rely in large part on the ability of citizens to preserve their integrity as speakers and thinkers; to preserve their sense that their expression, and the expression that they "foster" and for which they act as "courier[s]," is consistent with what they actually believe.

This is why, in the dark days of Soviet repression, Alexander Solzhenitsyn admonished his fellow Russians to "live not by lies": to refuse to endorse speech that they believed to be false. Alexander Solzhenitsyn, *Live Not by Lies*, WASH. POST, Feb. 18, 1974, at A26, *reprinted at* http://www/washingtonpost.com/wp-

[2] In *Tornillo*, the Supreme Court struck down a Florida statute requiring newspapers to print politicians' replies to the newspaper's criticisms of those politicians on the ground that "the Florida statute fail[ed] to clear the barriers of the First Amendment because of its intrusion into the function of editors," emphasizing the right of the newspaper to maintain its "editorial control and judgment." 418 U.S. 241.

dyn/content/article/2008/08/04/AR2008080401822.html. Each person, he argued, must resolve to never "write, sign or print in any way a single phrase which in his opinion distorts the truth," to never "take into hand nor raise into the air a poster or slogan which he does not completely accept," to never "depict, foster or broadcast a single idea which he can see is false or a distortion of the truth." *Id.*

Such an uncompromising path is not for everyone. But those whose consciences—religious or secular—require them to refuse to produce expression "which [they do] not completely accept" are constitutionally protected in that refusal. *Id.*

II. Antidiscrimination Law Cannot Trump 303 Creative's Right Not to Convey Through Websites and Graphic Designs Messages with Which It Disagrees

The government's interest in preventing discrimination does not justify restricting 303 Creative's First Amendment rights. Although the Supreme Court has held that antidiscrimination laws "do not, as a general matter, violate the First . . . Amendment[]," this is because, in their usual application, such laws do not "target speech" but rather target "the act of discriminating against individuals." *Hurley*, 515 U.S. at 572. But the Court noted in *Hurley* that applying antidiscrimination laws to private organizations' exclusion of speech based on its content is quite different from applying them to private organizations' exclusion of people based on their identity.

In *Hurley*, a parade organizer excluded a group that wanted to carry an "Irish American Gay, Lesbian & Bisexual Group of Boston" banner in a parade. Massachusetts courts held that this exclusion violated antidiscrimination law, but the Supreme Court concluded that in this situation "the Massachusetts [antidiscrimination] law ha[d] been applied in a peculiar way." *Id.* "Petitioners disclaim any intent to exclude homosexuals as such, and no individual member of GLI claims to have been excluded from parading as a member of any group that the Council has approved to march." *Id.* "Instead, the disagreement goes to the admission of GLIB as its own parade unit carrying its own banner." *Id.* The parade organizers, the Court held, had a First Amendment right to exclude that banner.

Likewise, 303 Creative does not seek to exclude gay, lesbian, or bisexual customers as such; it simply does not want to produce websites promoting any client's messages that are contrary to Lorie's faith. 303 Creative would accept a same-sex couple as customers if they are parents or friends who wish to pay for a website celebrating another's opposite-sex wedding, or if the web design services were not for a wedding and instead fell into the wide field of categories that are consistent with Lorie's religious beliefs. Just as the parade organizers had a right not to participate in the dissemination of GLIB's message in *Hurley*, so here 303

Creative has a right not to participate in the creation of websites and graphic designs that promote ceremonies of same sex couples.[3]

This principle, of course, applies far beyond 303 Creative's decisions. A web designer must be free to refuse to produce websites and graphic designs promoting Satanism, or Scientology, or, if it chooses, Christianity; the ban on discrimination against religious *customers* cannot justify requiring a designer to create a website carrying religious *messages*. *See Joseph Burstyn*, 343 U.S. at 504 (state could not prohibit films that subjected religion to "contempt, mockery, scorn [or] ridicule").

This freedom is protected regardless of whether the messages are intertwined with the religion, sexual orientation, sex, race, national origin, or other protected status of the group seeking to place the order. An Israeli-American web designer must be free to choose not to produce a website in support of the Palestine Liberation Organization, and a Palestinian-American web designer must be free to choose not to produce a website supporting Zionism. Again, a ban on discrimination based on customers' national origin cannot justify requiring a web designer to produce messages with which he disagrees, including when the disagreement stems from

[3] The Eighth Circuit similarly concluded that "[e]ven antidiscrimination laws, as critically important as they are, must yield to the Constitution," *Telescope Media*, 936 F.3d at 755, noting that applying such laws in the manner that Colorado seeks to apply CADA here "is at odds with the 'cardinal constitutional command' against compelled speech." *Id.* at 752-53 (quoting *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2463 (2018)).

views related to the nationalities involved in a political dispute. Similarly, web designers must be free not to convey messages through websites or graphic designs that express views they disagree with related to marriage or sexual orientation.

Web designers should be free to choose not to create advocacy for any political movement, whether or not related to a protected class. They should be free not to create web sites or graphic designs proclaiming "White Lives Matter," The Nation of Islam Is Great," "KKK," "There is No God but Allah," "Jesus is the Answer," or any other message that they can't in good conscience abide.

This argument is consistent even with *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 288 (Colo. App. 2015) (overturned on other grounds in *Masterpiece Cakeshop v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018)), which held that a baker may not decline to bake a wedding cake with two men on top. The court expressly noted that "a wedding cake, in some circumstances, may convey a particularized message celebrating same-sex marriage and, in such cases, First Amendment speech protections may be implicated." *Id.* ¶ 71. But it concluded that it "need not reach this issue" because the bakery "denied Craig's . . . request without any discussion regarding . . . any possible written inscriptions." *Id.*

303 Creative's products are websites and graphic designs (including text), both of which communicate messages far more explicitly than wedding cakes. In deciding how to design web content, graphic designs, and the overall website layout,

Lorie makes an expressive creation designed to affect viewer attitudes and behavior about marriage and weddings in a variety of ways, including the "subtle shaping of thought which characterizes all artistic expression." *Joseph Burstyn*, 343 U.S. at 501. Like other creators of expressive work, Lorie has the right to decide how to convey her messages, and the right to refuse to convey messages to which she objects.

III. Forcing 303 Creative to Create Web Sites and Graphic Designs Interferes More with Individual Freedom of Conscience Than Did the Laws in *Turner* or *Rumsfeld*

303 Creative is a small business owned by a single woman. It is not a vast publicly held corporation like Turner Broadcasting System, *see Turner Broad. Sys. v. FCC*, 512 U.S. 622 (1994), or a large nonprofit university, like the ones in *Rumsfeld v. Forum for Acad. & Inst. Rights, Inc.*, 547 U.S. 47 (2006). Requiring 303 Creative to create websites and graphic designs with messages that its owner opposes interferes with the owner's "freedom of mind" much more than would imposing similar requirements on Turner Broadcasting or on a university.

In *Rumsfeld*, the Supreme Court held that the government could demand that universities let military recruiters access university property and send out e-mails and pose signs mentioning the recruiters' presence. "Compelling a law school that sends scheduling e-mails for other recruiters to send one for a military recruiter," the Court reasoned, "is simply not the same as . . . forcing a Jehovah's Witness to display the motto 'Live Free or Die,' and it trivializes the freedom protected in . . . *Wooley*

to suggest that it is." 547 U.S. at 62. But even if universities are far removed from the Maynards in *Wooley*, Lorie, the owner of 303 Creative, is quite similar to those drivers. Like both of the Maynards, Lorie is an individual who has to be closely and personally involved in the distribution of messages with which she disagrees—in *Wooley*, by displaying the message on their own car, and in this case, by having to produce the message in her own small business.

Turner is also different from this case because letting cable operators exclude certain channels interfered with those channels' ability to reach customers. As the U.S. Supreme Court noted in *Hurley*, "A cable is not only a conduit for speech produced by others and selected by cable operators for transmission, but a franchised channel giving monopolistic opportunity to shut out some speakers." 515 U.S. at 577. Because of this, the government had an interest in "limiting monopolistic autonomy in order to allow for the survival of broadcasters who might otherwise be silenced and consequently destroyed." *Id.* Likewise, in *Rumsfeld*, military recruiters would often find it much harder to reach students who study and often live on a secluded university campus, if the recruiters could not do so through the normal on-campus interview process. One more recruiter at the job fair, or one more channel on a cable network did not impact the message of the host institution.

But 303 Creative is no monopoly. As the company notes in its briefing, many other web designers all over Colorado and the nation are happy to accept money for

web sites promoting same-sex weddings. A rule protecting Lorie's choice about what websites to create does not diminish the ability of any couple in Colorado to obtain a professionally produced web site to promote and celebrate their wedding; the government's interests can be served without interfering with 303 Creative's First Amendment rights.

CONCLUSION

Web designers, like others engaged in commercial expression—and like the drivers in *Wooley*—have a First Amendment right to choose which speech they will disseminate. The district court below, which fail to recognize and protect this right, should be reversed.

Dated: January 29, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

(1) This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because this brief contains 3,505 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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I hereby certify that with respect to the foregoing:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system on January 29, 2020, which will automatically send notification to the counsel of record for the parties.

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