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.

Appeal from the United States District Court for the District of Colorado, No. 1:16-cv-02372-MSK-CBS (before the Hon. Marcia S. Krieger)

BRIEF OF THE STATES OF ARIZONA, ALABAMA, ALASKA, ARKANSAS, KENTUCKY, LOUISIANA, MISSOURI, MONTANA, NEBRASKA, OKLAHOMA, SOUTH CAROLINA, TENNESSEE, TEXAS, AND WEST VIRGINIA AS AMICI CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS

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IDENTITY AND INTEREST OF AMICI CURIAE

Amici curiae, the States of Arizona, Alabama, Alaska, Arkansas, Kentucky, Louisiana, Missouri, Montana, Nebraska, Oklahoma, South Carolina, Tennessee, Texas, and West Virginia, file this brief in support of Plaintiffs pursuant to Fed. R. App. P. 29(a)(2). Amici curiae, as States, have compelling interests in protecting their citizens' freedoms of speech and religion as secured by the United States Constitution. Amici curiae do not, however, have legitimate interests in coercing individuals to use their talents to create government sponsored messages or in muzzling individual expression by presuming that the exercise of religion is unlawful. Such practices, if permitted, are not only constitutionally forbidden, they also would undermine the "mutuality of obligation" upon which our "pluralistic" and "tolerant" society is founded. *Lee v. Weisman*, 505 U.S. 577, 590–91 (1992).

SUMMARY OF ARGUMENTS

The district court's decision is based on a simple but unsupported syllogism. It reasons: (1) governments may prohibit speech that proposes an unlawful act; (2) Colorado makes it unlawful for places of public accommodation to refuse to perform services because of sexual

orientation; (3) therefore, Colorado can constitutionally prohibit 303 Creative LLC—a place of public accommodation—from publishing an intent to refuse to design same-sex wedding websites. But, as the district court itself recognized, this reasoning "assumes" that Colorado's prohibition can be constitutionally applied in all circumstances, including when the law forces individuals to engage in expressive activity contrary to their sincerely held religious beliefs.

The district court's assumption is contrary to the law. Governments cannot force individuals to modify the content of their expression to "promot[e] an approved message or discourage[] a disfavored one, however enlightened either purpose may strike the government." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 579 (1995). To hold otherwise would violate the "fixed star in our constitutional constellation" 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. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). Indeed, under similar facts, the Eighth Circuit and the Arizona Supreme Court both recently held—contrary to

the assumption of the district court—that public accommodation laws could not constitutionally be applied to compel individuals to create expressive content for same-sex weddings. *Telescope Media Grp. v. Lucero*, 936 F.3d 740 (8th Cir. 2019) (videographers); *Brush & Nib Studio, LC v. City of Phoenix*, 448 P.3d 890 (Ariz. 2019) (calligraphers).

A content-based speech prohibition cannot be justified by a statute that makes constitutionally-protected expression unlawful. The Court should remand this case back to the district court so that it can analyze the questionable assumption underlying its decision and tackle the core question at the heart of this case: the lawfulness of the content-based speech prohibition that Colorado seeks to impose in all circumstances, even on those for whom that prohibition contravenes sincerely held religious beliefs.

BACKGROUND

Lorie Smith is the owner and sole employee of 303 Creative LLC. Aplt. App. 2-320 (¶¶ 44, 48, 49). This business provides custom graphic and website design services. Aplt. App. 2-320 (¶¶ 45, 48, 50). When deciding whether to create a custom graphic or website, Ms. Smith evaluates the message the design will promote. Aplt. App. 2-323 (¶ 68).

Consistent with her traditional Judeo-Christian beliefs, Ms. Smith will not accept a commission to create content that contradicts biblical truth, demeans or disparages others, promotes sexual immorality, supports the destruction of unborn children, incites violence, or promotes marriage other than between one man and one woman. Aplt. App. 2-323 (¶ 66). Ms. Smith desires to post a statement on her business website notifying potential customers that she will not design content that conveys a message contrary to these beliefs. Specifically, with respect to custom wedding websites, Ms. Smith plans to announce that she "will not be able to create websites for same-sex marriages or any other marriage that is not between one man and one woman." Aplt. App. 3-513, 526, 565.

Colorado law prohibits discrimination on the basis of sexual orientation. In a single provision, Colorado law prohibits places of public accommodation from both (1) refusing to offer services because of sexual orientation (the "Accommodation Clause") and (2) publishing a notice that indicates an intent to refuse services because of sexual orientation (the "Communication Clause"). Colo. Rev. Stat. § 24-34-601(2)(a). The pertinent Colorado provision provides as follows:

> It is a discriminatory practice and unlawful for a person, directly or indirectly, ***to refuse, withhold from, or deny to*** an individual or a group, because of disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry, the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation or, directly or indirectly, ***to publish, circulate, issue, display, post, or mail any written, electronic, or printed communication, notice, or advertisement that indicates*** that the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation will be refused, withheld from, or denied an individual or that an individual's patronage or presence at a place of public accommodation is unwelcome, objectionable, unacceptable, or undesirable because of disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry.

Id. (emphasis added).

Ms. Smith's business, 303 Creative LLC, is a place of public accommodation subject to Colo. Rev. Stat. § 24-34-601(2)(a). There is no dispute that, if Ms. Smith designs custom wedding websites, Colo. Rev. Stat. § 24-34-601(2)(a) makes it unlawful for her (1) to refuse to design such websites for same-sex weddings, and (2) to post notice of an intent to do so. Ms. Smith brought this as-applied action to enjoin Defendants

from enforcing Colo. Rev. Stat. § 24-34-601(2)(a) to compel Ms. Smith to design custom wedding websites in violation of her sincerely held religious beliefs and to prohibit her from publishing an intent to act in conformity with these beliefs. Applied this way, Ms. Smith contends that Colo. Rev. Stat. § 24-34-601(2)(a) would violate (among other things) the First Amendment.

The district court rejected Ms. Smith's claims. The district court concluded that Plaintiffs only had standing to challenge the Communication Clause. Aplt. App. 3-509–21. The court then reasoned that its refusal to consider the Accommodation Clause allowed it to presume that the Accommodation Clause was lawful and, on that basis, to uphold the Communication Clause. Aplt. App. 3-576–579. But the court itself admitted that the Communication Clause survives scrutiny only "so long as the Accommodation Clause is constitutional." Aplt. App. 3-578.

ARGUMENT

A. The District Court Erred By Refusing To Consider Whether the Accommodation Clause Could Lawfully Be Applied

The district court should have considered whether the Accommodation Clause could lawfully be applied to Ms. Smith. "Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015). While governments may be able to prohibit speech that proposes an illegal act, this limited exception only applies when speech proposes conduct that is actually illegal.

For example, in *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 388–89 (1973), the Supreme Court upheld a content-based speech restriction that prohibited a newspaper from publishing an advertisement proposing *illegal* activity (sex discrimination in nonexempt employment). On the other hand, in *Bigelow v. Virginia*, 421 U.S. 809, 824–25 (1975), the Supreme Court struck down a content-based speech restriction that prohibited an

advertisement for *legal* activity (an abortion that could be legally performed in another state).

These cases make clear that the Communication Clause (a content-based prohibition on speech) is subject to strict scrutiny unless the conduct promoted by Plaintiffs' speech is illegal—and that conduct can be illegal only if the relevant prohibition is itself constitutional. If, on the other hand, Colorado cannot constitutionally coerce Plaintiff to speak under the circumstances of this case, it also cannot force Plaintiff to stay silent either. *See Telescope Media Group*, 936 F.3d at 757 n.5 ("Minnesota cannot compel the Larsens to speak, so it cannot force them to remain silent either."). Even the district court conceded that the Communication Clause could survive constitutional scrutiny only "so long as the Accommodation Clause is constitutional." Aplt. App. 3-578.

The district court nevertheless brushed past this difficulty by "assum[ing]" that the Accommodation Clause is constitutional. Aplt. App. 3-568. The district court attempted to justify this fiction because the Supreme Court did not evaluate the constitutionality of the

underlying laws in *Pittsburgh Press* and *Bigelow*.[1] But the underlying laws were not challenged in those cases. *See Pittsburgh Press*, 413 U.S. at 389 (stating that the underlying prohibition on sexual discrimination was "not challenged"). That is not the case here. Ms. Smith vigorously disputes that the Accommodation Clause can constitutionally coerce her to create custom websites and graphic designs contrary to her sincerely held religious beliefs.

The district court's refusal to consider the underlying assumption of its decision—in the face of a direct challenge—is as misguided as it is unfair. By assuming that the Accommodation Clause is constitutional, the court flips the rule for content-based restrictions on its head. *See Reed*, 135 S. Ct. at 2226 (content based laws "are presumptively unconstitutional"). Instead of presuming that such restrictions are *unconstitutional*, the district court creates an irrebuttable presumption

[1] The district court also defended its evasion of this issue by repeatedly asserting that the Accommodation Clause is "an entirely different statute" from the Communication Clause. Aplt. App. 3-755. This is both inaccurate and irrelevant. The two clauses are in fact not "entirely different statute[s]" but are part of the same sentence. Colo. Rev. Stat. § 24-34-601(2)(a). Even if it were true, this distinction is unpersuasive. If separation of statutory provisions was all that mattered, a legislature could bypass the First Amendment simply by separating two provisions that work in tandem to prohibit disfavored expression.

in this case that the content restriction in the Communication Clause is *constitutional*.

"Constitutional review by a court is not so easily circumvented." *Hous. Opportunities Made Equal, Inc. v. Cincinnati Enquirer, Inc.*, 943 F.2d 644, 652 n.9 (6th Cir. 1991). The validity of speech requirements and prohibitions in a public accommodation law must rise and fall together. *See Telescope Media Group*, 936 F.3d at 757 n.5 ("If creating videos were conduct that Minnesota could regulate, then the State could invoke the incidental-burden doctrine to forbid the Larsens from advertising their intent to engage in discriminatory conduct."); *Brush & Nib Studio*, 448 P.3d at 926 ("[B]ecause Plaintiffs' intended refusal to make custom wedding invitations celebrating a same-sex wedding is legal activity . . . Plaintiffs are entitled to post a statement, consistent with our holding today, indicating this choice.").

An unconstitutional application of a public accommodation law cannot be invoked as a predicate to force individuals to remain silent. The district court should have considered whether the Accommodation Clause could constitutionally be applied to Ms. Smith before dismissing her First Amendment challenge to the Communication Clause.

B. The District Court Improperly Assumed That The Accommodation Clause Can Be Applied To Compel Individuals To Engage In Expressive Conduct

The district court improperly assumed that the Accommodation Clause can be constitutionally applied in all circumstances, including when it forces individuals to engage in expressive activity. This assumption is contrary to the Supreme Court's unanimous decision in *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557 (1995). This case held that a generally applicable (and generally constitutional) public accommodation law cannot be applied when it would have the effect of declaring "speech itself to be the public accommodation." *Id.* at 573.

At issue in *Hurley* was a general public accommodations law which (like here) prohibited discrimination on the basis of sexual orientation. 515 U.S. at 572. Massachusetts courts had held that this law required a private parade to include a gay, lesbian and bisexual group with its own banner promoting its own message—a message that the organizer of the parade desired not to promote. *Id.* at 562–65, 572. The Supreme Court reversed, recognizing that, even though the law did not "as a general matter" violate the First Amendment, the particular application of the law required the organizer "to alter the expressive

content of their parade." *Id.* at 572–73. Applied this way, the law violated "the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message," including the right to "decide what not to say." *Id.* at 573 (quotes omitted).

The Eighth Circuit and the Arizona Supreme Court also recognized, under facts similar to those here, that public accommodation laws could not constitutionally be applied to compel individuals to create expressive content for same-sex weddings. *Telescope Media Group*, 936 F.3d 740 (videographers); *Brush & Nib Studio,* 448 P.3d 890 (calligraphers). In *Telescope Media Group*, the Eighth Circuit held that the Minnesota Human Rights Act violated the First Amendment rights of videographers when applied to force them to create videos for same-sex weddings. 936 F.3d at 758. The court found that this application of the law interfered with the videographers' speech in "two overlapping ways": It compelled them to "speak favorably about same-sex marriage if they choose to speak favorably about opposite-sex marriage" and it "operate[d] as a content-based regulation of their speech." *Id.* at 752.

Similarly, in *Brush & Nib*, the Arizona Supreme Court examined an ordinance which required calligraphers to create custom invitations for same-sex weddings and prohibited them from posting an intent to decline such commissions. 448 P.3d at 926–27. After a searching analysis, the court determined that "the custom invitations are protected pure speech" and that—because the ordinance "'necessarily alters the content' of Plaintiffs' speech by forcing them to engage in speech they 'would not otherwise make'"—it was subject to (and did not survive) strict scrutiny.[2] *Id.* at 912–14 (quoting *Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 795 (1988)) ("When a facially content-neutral law is applied by the government to compel speech, it operates as a content-based law"). With the constitutionality of the accommodation requirement properly determined—and found to be lacking—the Arizona Court also held that the ordinance's communications provisions could not prevent the calligraphers from posting a statement about their refusal to engage in certain projects that would violate their beliefs. *Id.*

[2] Although the challenge in *Brush & Nib Studio* was brought under Arizona law, the court applied federal precedent in reaching its conclusion. 448 P.3d at 903. Thus, the federal case law analysis in *Brush & Nib Studio* is directly applicable to this case.

Together, *Hurley*, *Telescope Media Group*, and *Brush & Nib Studio* make clear that a public accommodation law's constitutionality cannot be presumed when applied to require individuals to modify the content of their expression. The district court's error in presuming the lawfulness of the Accommodation Clause is further amplified here because of the particular type of speech at issue. Colorado's interpretation of the Accommodation Clause may force Ms. Smith to participate in the recognition and celebration of a wedding—a ceremony long held "sacred to those who live by their religions" and with "transcendent importance" in the annals of human history. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2594–95 (2015). Because the application at issue may regulate "the communication of religious beliefs," it could raise serious "Free Exercise Clause concerns." *Employment Div., Dep't of Human Res. of Ore. v. Smith*, 494 U.S. 872, 882 (1990). Thus, this case is further distinguishable from other applications of general public accommodation laws both because it may have the effect of declaring "speech itself to be the public accommodation," *Hurley*, 515 U.S. at 573, and also because it may force a message about a ceremony long

associated with "the communication of religious beliefs," *Smith*, 494 U.S. at 882.

CONCLUSION

The Court should reverse and remand so that the district court can consider whether the Communication Clause can be constitutionally applied to Plaintiffs without assuming that it is unlawful for individuals to act upon sincerely held religious beliefs.

January 29, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(a)(4)(G) and Fed. R. App. P. 32(g)(1), the undersigned hereby certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B)(i) and Fed. R. App. P. 29(a)(5).

1. This brief is 2,725 words excluding the portions exempted by Fed. R. App. P. 32(f), if applicable.

2. This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Century type, which complies with Fed. R. App. P. 32(a)(5) and (6).

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CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify with respect to the foregoing:

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of January, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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