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No. 91615-2

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,  
Respondent,

v.

ARLENE'S FLOWERS, INC., d/b/a ARLENE'S FLOWERS AND  
GIFTS, and BARRONELLE STUTZMAN,  
Appellants.

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**BRIEF OF *AMICUS CURIAE* CENTER FOR  
CONSTITUTIONAL JURISPRUDENCE**

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## **IDENTITY AND INTEREST OF *AMICUS CURIAE***

Amicus, the Center for Constitutional Jurisprudence was established in 1999 as the public interest law arm of the Claremont Institute, the mission of which is to restore the principles of the American Founding to their rightful and preeminent authority in our national life. This includes the principle that government officials may neither censor nor compel speech. The Center participated as amicus in a number of cases before the United States Supreme Court on these issues including *Janus v. American Fed. of State, County, and Municipal Employees*, 138 S. Ct. 2448, 201 L. Ed.2d 924 (2018); *Harris v. Quinn*, 573 U.S. 616, 134 S. Ct. 2618, 189 L. Ed.2d 620 (2014); and *Knox v. Serv. Employees Int’l Union*, 567 U.S. 298, 132 S. Ct. 2277, 183 L. Ed. 2d 281 (2012), to name a few.

## **STATEMENT OF THE CASE**

Amici incorporate by reference the Statement of the Case in Appellants’ brief.

## **INTRODUCTION**

“Say it with flowers” is a common phrase for the simple reason that people understand that a gift of flowers is intended to communicate a message. The arrangement of flowers as a work of art intended to convey a message has been a practice since at least the seventh century. *See* Deborah Needleman, *The Rise of Modern Ikebana*, *New York Times* (November 6,

2007).<sup>1</sup> There are plenty of florists to choose from. Thus, a couple seeking arrangements of flowers to celebrate their wedding will choose a florist on the bases of the florist’s artistic aesthetic.<sup>2</sup> As Justice Thomas concluded in the *Masterpiece* decision, “[t]he use of [Phillips’] artistic talents to create a well-recognized symbol [a custom designed wedding cake] that celebrates the beginning of a marriage clearly communicates a message— certainly more so than nude dancing, *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565-566 (1991), or flying a plain red flag, *Stromberg v. California*, 283 U.S. 359, 369 (1931).” *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Com’n*, 138 S. Ct. 1719, 1742, 201 L. Ed. 2d 35 (Thomas, J. concurring in part).

Ms. Stutzman creates floral art for weddings. She intends that art to honor her deeply held religious views of marriage—a “view [that] has been held—and continues to be held—in good faith by reasonable and sincere people.” *Obergefell v. Hodges*, 135 S. Ct. 2584, 2594, 192 L. Ed.2d 609

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<sup>1</sup> Available at: <https://www.nytimes.com/2017/11/06/t-magazine/ikebana-japanese-flower-art.html> (last visited February 28, 2019).

<sup>2</sup> Many wedding planning websites provide guides for how to choose a florist. 10 Questions to Ask Before Booking Your Florist, Bridal Guide (2017), <https://www.bridalguide.com/blogs/the-budget-guru/questions-to-ask-a-florist> (last visited Dec 19, 2018); See also Lauren Kay, “Find your floral match. Hire someone whose creative process matches your needs.”, 10 Questions to Ask Before Hiring Your Florist, The Knot (2017), <https://www.theknot.com/content/wedding-florist-questions-before-hiring> (last visited Dec 18, 2018).

(2015). The State of Washington, however, disagrees with that view and now seeks to force those “reasonable and sincere people” out of business if they refuse to create speech in line with the State’s preferred position on same-sex marriage.

This compelled speech requirement is contrary to more than seven decades of Supreme Court precedent and the original understanding of the First Amendment. The First Amendment was meant to protect a pre-existing natural right to freedom of conscience. The Washington law, as interpreted by the courts below and the Attorney General, by contrast, purports to decree what viewpoints are permissible. Under that interpretation, the application of the Washington law to appellants cannot withstand First Amendment scrutiny.

That scrutiny requires a narrowly tailored compelling governmental interest. No such interest is present in this case. The State cannot argue that it has a compelling interest in protecting the “dignity” of same-sex couples. Even if that were an appropriate governmental interest, upholding that interest in this case requires the destruction of the dignity of individuals who are trying to abide by their religious beliefs. The State’s position argues that sincerely held religious beliefs are anathema to the interests of the State of Washington. But the First Amendment protects the right to exercise religion as surely as it protects the freedom from compelled speech. The State

cannot choose to advance the “dignity” of one preferred group by decreeing what shall be orthodox in speech and religion in the State.

## ARGUMENT

### **I. The Washington Law Compels Artists to Create Speech in Violation of the Freedoms Recognized and Protected by the First Amendment.**

The Supreme Court has consistently held that an individual cannot be compelled to speak or publish a message with which he disagrees. *E.g.*, *Knox v. Serv. Employees Int’l Union*, 567 U.S. 298, 309, 132 S. Ct. 2277, 183 L. Ed. 2d 281 (2012); *Keller v. State Bar of Cal.*, 496 U.S. 1, 9-10, 110 S. Ct. 2228, 110 L. Ed. 2d 1 (1990); *Riley v. Nat’l Fed’n of the Blind*, 487 U.S. 781, 796-97, 108 S. Ct. 2667, 101 L. Ed. 2d 669 (1988); *Pacific Gas & Elect. Co. v. Pub. Util. Comm’n*, 475 U.S. 1, 8, 106 S. Ct. 903, 89 L. Ed. 2d 1 (1984) (plurality opinion); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234-35, 97 S. Ct. 1782, 52 L. Ed. 2d 261 (1977); and *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 254, 94 S. Ct. 2831, 41 L. Ed. 2d 730 (1974). The Court’s decision in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 63 S. Ct. 1178, 87 L. Ed. 2d 1628 (1943), established this principle more than 70 years ago: “If 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.”

*Id.* at 642; *see also* *Wooley v. Maynard*, 430 U.S. 705, 713, 97 S. Ct. 1428, 51 L. Ed. 2d 752 (1977) (State may not “require an individual to participate in the dissemination of an ideological message”). Nonetheless, Washington has decided to decree what view is “orthodox” for same-sex marriage. Any who oppose the State’s view must forfeit their right to free speech if they wish to do business in Washington.

**A. The Free Speech Clause protects Appellants’ artistic creations as pure speech.**

The Free Speech Clause “looks beyond written or spoken words as mediums of expression,” *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 569, 115 S. Ct. 2338, 132 L. Ed. 2d487 (1995), to protect “pictures, films, paintings, drawings, and engravings” as pure speech, *Kaplan v. California*, 413 U.S. 115, 119, 93 S. Ct. 2680, 37 L. Ed. 2d 492 (1973). The state may not compel Appellants to produce art just as it may “never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schönberg, or Jabberwocky verse of Lewis Carroll.” *See Hurley*, 515 U.S. at 569. Appellants artwork is pure speech insofar as it involves artistic judgments on layout, coloring, design, choice of flowers, and composition, *cf.* Timothy O’Sullivan, *A Harvest of Death, Gettysburg, Pennsylvania*, J. Paul Getty Museum ([goo.gl/kcU1rW](http://goo.gl/kcU1rW), Jan. 18, 2018, 4:18 PM), focus and shading, *cf.* Dorothea Lange, *Migrant Mother, The Story of*

the “*Migrant Mother*”, PBS ([goo.gl/R2GhrV](http://goo.gl/R2GhrV), Jan. 18, 2018, 4:23 PM), timing and motion, *cf.* Nick Ut, *Napalm Girl*, AP Images ([goo.gl/5UiQPo](http://goo.gl/5UiQPo), Jan. 18, 2018, 4:19 PM), and message and emotion, *cf.* Joseph Rosenthal, *Iwo Jima Flag Raising*, AP Images ([goo.gl/149f5N](http://goo.gl/149f5N), Jan. 18, 2018, 4:26 PM).

A number of the federal Circuit Courts of Appeals have recognized that creation of art in its many variety of forms is protected by the Free Speech Clause of the First Amendment. *See, e.g., Bery v. City of New York*, 97 F.3d 689, 695-96 (2d Cir. 1996) (paintings); *ETW Corp. v. Jireh Pub., Inc.*, 332 F.3d 915, 925 (6th Cir. 2003) (art prints); *Piarowski v. Illinois Cmty. Coll. Dist. 515*, 759 F.2d 625, 628, 632 (7th Cir. 1985) (stained glass artwork); *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1059 (9th Cir. 2010) (tattooing); *Buehrle v. City of Key W.*, 813 F.3d 973, 976 (11th Cir. 2015) (tattooing). The artistic works of Appellants are entitled to no less protection.

**B. Works for hire are protected by the First Amendment.**

That Appellants’ artistic floral arrangements are “sold for profit does not prevent [them] from being a form of expression whose liberty is safeguarded by the First Amendment.” *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-02, 72 S. Ct. 777, 96 L. Ed. 1098 (1952); *see also New York Times Co. v. Sullivan*, 376 U.S. 254, 266, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964); *Buckley v. Valeo*, 424 U.S. 1, 96, 96 S. Ct. 612, 46 L. Ed. 2d 659

(1976); *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 756 n. 5, 108 S. Ct. 2138, 100 L. Ed. 2d 771 (1988); *Time, Inc. v. Hill*, 385 U.S. 374, 397, 87 S. Ct. 534, 17 L. Ed. 2d 456 (1967). Appellants maintain “an independent First Amendment interest in the speech, even though payment is received.” *Riley*, 487 U.S. at 794 n.8; *see also United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 468, 115 S. Ct. 1003, 130 L. Ed. 2d 934 (1995). Just as the Supreme Court has protected for-profit authorship and publication, *see Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 112 S. Ct. 501, 116 L. Ed. 2d 476 (1991); *New York Times*, 376 U.S. at 266; *Miami Herald*, 418 U.S. at 258, the for-profit status of Appellants’ artistic creations does not deprive their art of constitutional protection.<sup>3</sup>

Nor does Appellants’ artwork lose the Constitution’s protection merely because it is commissioned. The Supreme Court has not lessened protection for speakers merely because they are commissioned to carry another person’s intended speech. *See, e.g., Riley*, 487 U.S. at f.8 (U.S. 1988) (professional fundraiser); *New York Times*, 376 U.S. at 266 (paid ad). The art still remains Appellants’ creative expression.

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<sup>3</sup> Appellants’ artwork maintains constitutional protection even though it is created through a business. *See, e.g., Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 342, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010).

Traditional treatment of art confirms that the artist maintains an expressive interest even when commissioned. The *Sistine Chapel* ceiling expresses not merely the theology of the See but also the aesthetics of Michelangelo, and the *Last Supper* represents not merely the piety of Ludovico Sforza but also the design of da Vinci. The expression attributed to the artist is not reduced even when the commissioner himself is portrayed as the subject. The *Portrait of Henry VIII* is still the painting of Hans Holbein the Younger, and *Las Meninas* represents the mind of Diego Velazquez as much as the Spanish crown that commissioned him. Even the portrayal of real-life events presents opportunity for artistic vision. See, e.g., O’Sullivan, *supra* (Gettysburg photograph).

It is no reply that the floral artist becomes a mere conduit for the same-sex couple’s speech. The couple seeks to hire Appellants’ artistic talent. They do not dictate the content of the art, or the feel or mood communicated by the colors, designs, flower selection, and arrangement. All of these are Appellants’ individual and unique expressions and unmistakably carry Appellants’ message. Unlike the must-carry provisions in *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 662, 114 S. Ct. 2445, 129 L. Ed. 2d 497 (1994), which were: (1) “justified by special characteristics of the cable medium”; (2) were “broad based” and did not pose “dangers of sup-

pression and manipulation”; and (3) therefore “[did] not call for strict scrutiny,” the Washington law is not furthered by federal policies regarding mass communications but poses dangers to freedom of speech by requiring Appellants to express a message with which they disagree, *see Barnette*, 319 U.S. at 642. Further, unlike the must carry provision, the Washington law does not simply require Appellants to carry the state’s message. Instead, it requires Appellants to actually speak the state’s message. But the government may not compel Appellants to utter such a message. *See id.*; *Wooley*, 430 U.S. at 715-17. Therefore, the Washington law does call for strict scrutiny.

**C. The State cannot compel Appellants to create and publish the State’s message.**

The First Amendment protects against compelled speech in same manner as it protects against government censorship of speech. For instance, in *Pacific Gas & Electric*, the Court ruled that a utility company could not be compelled to include a newsletter from a private advocacy group in the company’s billing envelope. 475 U.S. at 8 (plurality opinion). The plurality found in that case that compelled publication of the advocacy groups newsletter “both penalizes the expression of particular points of view and forces speakers to alter their speech to conform with an agenda they do not set.” *Id.* Both aspects of the regulation at issue in *Pacific Gas*

*& Electric* violated the First Amendment. Justice Marshall, who provided the fifth vote, would have gone further. He opined that the regulation failed First Amendment scrutiny because it burdened one party's speech in order to enhance another's. *Id.* at 25 (Marshall, J., concurring in the judgment). Under either analysis, the Washington law at issue here fails. Under Justice Marshall's analysis, the State here seeks to burden Appellants' speech in order to advance the State's preferred message. This it may not do.

Similarly, the government cannot compel a newspaper to publish an article or editorial it does not wish to publish. In *Miami Herald Pub. Co. v. Tornillo*, the Court described the issue under consideration as whether the State could compel "editors or publishers to publish that which 'reason' tells them should not be published." 418 U.S. at 257. That is precisely the same issue presented by the Washington law at issue in this case. The law compels Appellants to create expressive works that reason and faith tells them they should not be create. Just as in *Miami Herald*, such a compelled publishing requirement cannot stand. The freedom of speech necessarily includes the freedom to choose "both what to say and what not to say." *Riley*, 487 U.S. at 797. The statute at issue here seeks to deprive plaintiff-appellants of their freedom to choose what not to say.

Nor can the State claim it has a compelling interest that justifies this wholesale infringement on First Amendment rights. Such an argument has

already been rejected by the United States Supreme Court. In *Hurley*, the Court considered a State law similar to the Washington law at issue here. The Massachusetts law in *Hurley* forbade discrimination on the basis of sexual orientation in places of public accommodation. The Massachusetts courts ruled that the annual St. Patrick's Day parade, organized by a private association, was a place of public accommodation and thus was governed by the anti-discrimination law. Thus, under the State law, the private association organizing the parade was required to allow a gay rights group that had applied to participate to march in the parade. The United States Supreme Court unanimously ruled that the law violated the Free Speech rights of the parade organizers.

Parades, the Court ruled, are a form of expression. *Hurley*, 515 U.S. at 568. That expression includes not only what is said, but also what is excluded. *See id.* at 570, 573. Thus, the parade organizer has a First Amendment right to choose who will or will not be in the parade. The State cannot compel inclusion of a group expressing a viewpoint contrary to the parade organizer. The State's compulsion fails even if it is in pursuit of ending discrimination:

It might, of course, have been argued that a broader objective is apparent: that the ultimate point of forbidding acts of discrimination toward certain classes is to produce a society free of the corresponding biases. Requiring access to a

speaker's message would thus be not an end in itself, but a means to produce speakers free of the biases, whose expressive conduct would be at least neutral toward the particular classes, obviating any future need for correction. *But if this indeed is the point of applying the state law to expressive conduct, it is a decidedly fatal objective.*

*Id.* at 578-79 (emphasis added). Washington simply has no power compel expression of the State's "orthodox" viewpoint on same-sex marriage, or any other topic for that matter. Regardless of whether Washington deems contrary views as unworthy of protection, it still must tolerate other points of view. Those viewpoints are expressed by artists both in what they create and in what they decline to create.

Nor does a claimed interest in protecting the "dignity" of one class of individuals suffice as an interest that overrides the express commands of the First Amendment. "A 'dignity' standard ... is so inherently subjective that it would be inconsistent with [the] 'longstanding refusal to [punish speech] because the speech in question may have an adverse emotional impact on the audience.'" *Boos v. Berry*, 485 U.S. 312, 322, 108 S. Ct. 1157, 99 L. Ed.2d 333 (1988). In any event, here the State seeks to advance one "dignity" interest at expense of another, constitutionally protected, "dignity" interest of religious believers. The State has no basis to challenge

the religious beliefs of Appellants – this is “forbidden domain.” *United States v. Ballard*, 322 U.S. 78, 86-88, 64 S. Ct. 882, 88 L. Ed. 1148 (1944). Appellants’ actions here are not the result of “personal preference” but are guided by “deep religious conviction.” *See Wisconsin v. Yoder*, 406 U.S. 205, 216, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972). That “deep religious conviction” is accorded as special dignity by the Free Exercise Clause of the United States Constitution. *Trinity Lutheran Church v. Comer*, 137 S. Ct. 2012, 2019-20, 198 L. Ed. 2d 551 (2017) (quoting *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 533, 113 S. Ct. 227, 127 L. E. 2d 472 (1993)). The State of Washington may not choose to trample that constitutionally protected dignity interest simply because it prefers to advance some other dignity interest.

The Supreme Court did not invent this constitutional protection against compelled speech. Freedom of expression is a right that the founders believed existed prior to the Constitution. The First Amendment merely forbids government interference with those rights.

## **II. The First Amendment Protects Liberty of Conscience.**

The First Amendment<sup>4</sup> preserves the natural right to liberty of conscience – that right to one’s own opinions. James Madison, *On Property*, Mar. 29, 1792 (Papers 14:266-68) (“A man has a property in his opinions and the free communication of them”). Without this right, the people lose their status as sovereign and officials in power “can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.” *Barnette*, 319 U.S. at 642. The founding generation rejected the idea that government officials should have such power. They clearly recognized that freedom to communicate opinions is a fundamental pillar of a free government that, when “taken away, the constitution of a free society is dissolved.” Benjamin Franklin, *On Freedom of Speech and the Press*, *Pennsylvania Gazette*, November 17, 1737 reprinted in 2 *The Life and Writings of Benjamin Franklin* (McCarty & Davis 1840) at 431.

Thomas Paine argued that “thinking, speaking, forming and giving opinions” are among the natural rights held by people. Edmond Cahn, *The Firstness of the First Amendment*, 65 *Yale L.J.* 464, 472 (1956). Congress and the states agreed. The First Amendment does not “grant” freedom of

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<sup>4</sup> The First Amendment originally applied only to the federal government, of course, but it was incorporated and made applicable to the States by the Fourteenth Amendment. *Cantwell v. State of Connecticut*, 310 U.S. 296, 303, 60 S. Ct. 900, 84 L. Ed. 1213 (1940).

speech. The text speaks about a right that already exists and prohibits Congress from enacting laws that might abridge that freedom. U.S. Const. Amend. I. As Thomas Cooley noted, the First Amendment's guaranty of free speech "undertakes to give no rights, but it recognizes the rights mentioned as something known, understood, and existing." Thomas Cooley, *The General Principles of Constitutional Law*, (Little, Brown, & Co. 1880) at 272.

A sample of the speech activity at the time of the founding helps define the breadth of the freedom of speech recognized in the First Amendment. Thomas Paine, of course, is the most famous example of the pamphleteers during the time leading up to the revolution. His pamphlet, *Common Sense*, urged his fellow citizens to take direct action against the Crown. John P. Kaminski, *Citizen Paine* (Madison House 2002) at 7.

Such speech was not protected under British rule. Understandably, Paine chose to publish *Common Sense* anonymously in its first printing. *See id.* Paine's work was influential. Another of Paine's pamphlets, *Crisis* ("These are the times that try men's souls"), from *The American Crisis* series, was read aloud to the troops to inspire them as they prepared to attack Trenton. *Id.* at 11. That influence, however, is what made Paine's work dangerous to the British and was why they were anxious to stop his pamphleteering.

With these and other restrictions on speech fresh in their memories, the framers set out to draft their first state constitutions even in the midst of the war. These constitution writers were careful to set out express protections for speech.

The impulse to protect the right of the people to hold their own opinion rather than be forced to adopt state-sanctioned orthodoxy was widespread at the founding. This was especially true for publishers. In 1776, North Carolina and Virginia both adopted Declarations of Rights protecting freedom of the press. Francis N. Thorpe, 5 *The Federal and State Constitutions* (William S. Hein 1993) at 2788 (North Carolina) (hereafter *Thorpe*); 7 *Thorpe* at 3814 (Virginia). Both documents identified this freedom as one of the “great bulwarks of liberty.” Maryland’s Constitution of 1776, Georgia’s constitution of 1777, and South Carolina’s constitution of 1778 all protected liberty of the press. 3 *Thorpe* at 1690 (Maryland); 2 *Thorpe* at 785 (Georgia); 6 *Thorpe* at 3257 (South Carolina). Vermont’s constitution of 1777 protected the people’s right to freedom of speech, writing, and publishing. 6 *Thorpe* at 3741. As other states wrote their constitutions, they too included protections for what Madison called “property in [our] opinions and the free communication of them.” James Madison, *On Property*, *supra*.

An example of the importance of these rights to the founding generation is in the letter that the Continental Congress sent to the “Inhabitants of Quebec” in 1774. That letter listed freedom of the press as one of the five great freedoms because it facilitated “ready communication of thoughts between subjects.” *Journal of the Continental Congress*, 1904 ed., vol. I, pp. 104, 108 *quoted in Thornhill v. Alabama*, 310 U.S. 88, 102, 60 S. Ct. 736, 84 L. Ed. 1093 (1940). There would be no such freedom, however, if the government had the power to command speakers or artists to express opinions with which they disagree.

The failure to include a free speech guaranty in the new Constitution was one of the omissions that led many to argue against ratification. *E.g.*, *George Mason’s Objections*, *Massachusetts Centinel*, reprinted in 14 *The Documentary History of the Ratification of the Constitution, Commentaries on the Constitution No. 2* at 149-50 (John P. Kaminski, et al. eds. 2009); *Letter of George Lee Turberville to Arthur Lee*, reprinted in 8 *The Documentary History of the Ratification of the Constitution, Virginia No. 1* at 128 (John P. Kaminski, et al. eds. 2009); *Letter of Thomas Jefferson to James Madison*, reprinted in 8 *The Documentary History of the Ratification of the Constitution, Virginia No. 1* at 250-51 (John P. Kaminski, et al. eds. 2009); *Candidus II*, *Independent Chronicle*, reprinted in 5 *The Documentary History of the Ratification of the Constitution, Massachusetts No. 2* at

498 (John P. Kaminski, et al. eds. 2009); *Agrippa XII*, Massachusetts Gazette, reprinted in 5 The Documentary History of the Ratification of the Constitution, Massachusetts No. 2 at 722 (John P. Kaminski, et al. eds. 2009).

Several state ratifying conventions proposed amendments to the new Constitution to cure this omission. Virginia proposed a declaration of rights that included a right of the people “to freedom of speech, and of writing and publishing their sentiments.” *Virginia Ratification Debates* reprinted in 10 The Documentary History of the Ratification of the Constitution, Virginia No. 3 at 1553 (John P. Kaminski, et al. eds. 2009). North Carolina proposed a similar amendment. *Declaration of Rights and Other Amendments, North Carolina Ratifying Convention* (Aug. 1, 1788), reprinted in 5 The Founders’ Constitution at 18 (Philip B. Kurland & Ralph Lerner eds., 1987). New York’s convention proposed an amendment to preserve the rights of assembly, petition, and freedom of the press. *New York Ratification of Constitution*, 26 July 1788, *Elliot 1:327--31*, reprinted in 5 The Founders’ Constitution, *supra* at 12. The Pennsylvania convention produced a minority report putting forth proposed amendments, including a declaration that the people had “a right to freedom of speech.” *The Dissent of the Minority of the Convention*, reprinted in 2 The Documentary History of the Ratification of the Constitution, Pennsylvania (John P. Kaminski, et al. eds. 2009).

Madison ultimately promised to propose a Bill of Rights in the first Congress. *Creating the Bill of Rights* (Helen Veit, *et al.* eds. 1991) at xii. Although Madison argued that a Bill of Rights provision protecting speech rights would not itself stop Congress from violating those rights, Jefferson reminded him that such a guaranty in the Constitution provided the judiciary with the power it needed to enforce the freedom. Madison repeated this rationale as he rose to present the proposed amendments to the House of Representatives. *The Firstness of the First Amendment, supra*, at 467-68. The First Amendment was designed to allow the judiciary to act in cases such as this where the government claims the power to dictate what must be published.

The State's attempt to limit creative expression to only those points of view with which the State agrees is at odds with the purposes underlying the First Amendment. "Disapproval of a private speaker's statement does not legitimize use of the [State's] power to compel the speaker to alter the message." *Hurley*, 515 U.S. at 580.

**CONCLUSION**

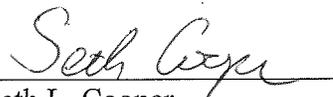
The Freedom of Speech protects dissenters from an overbearing government intent on decreeing what shall be orthodox. This Court should reverse the judgment of the Superior Court.

DATED: March 5, 2019.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

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