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ANTI-DISCRIMINATION LAWS

Colorado must let businesses speak for themselves on pronouns and names

Translate

By Kristen Waggoner
Guest Commentary

Eric and Sara Smith will sell a book to anyone who walks into Born Again Used Books, their family-owned Christian bookstore in Colorado Springs. They always have. But the state says they must use the government's vocabulary, even when it contradicts what they believe. On Nov. 16, the U.S. Court of Appeals for the 10th Circuit will hear their case.

Under a 2025 change to the state's antidiscrimination law, businesses can't refer to men who identify as women by their given names or with biologically accurate pronouns in their advertising, in their customer interactions or on their websites. If they do, they could face fines, cease-and-desist orders, investigations, and civil and criminal penalties.

Alongside Born Again Used Books, the 10th Circuit will also hear the case of XX-XY Athletics, a Denver business owned by former gymnast Jennifer Sey. Sey spent her childhood in gyms where every tenth of a point mattered, and she launched XX-XY Athletics to advocate for fairness and safety in women's sports.

Colorado wants to force Sey to trade biological reality for the state's preferred words, on her own website, about her own company. That is compelled speech.

Colorado voters agree with Sey that men shouldn't compete in girls' sports, as the Nov. 3 election showed. But the First Amendment would protect her even if they didn't. Free speech is not a privilege of the majority.

You don't have to share these two businesses' beliefs to see what's at stake. Imagine the government forcing an environmental nonprofit to call a pipeline "clean energy," a union to call a strike "lost productivity" or an immigrant-rights group to call its clients "illegal aliens." A government that can compel your words today can compel someone else's tomorrow.

The U.S. Supreme Court has rejected compelled speech many times. In 1943, in West Virginia Board of Education vs. Barnette, it held that a state could not force schoolchildren to salute the flag. The court never asked whether the children's beliefs were right. It made clear that the First Amendment protects everyone, not only those the government agrees with.

Colorado has been here before, and my colleagues and I have spent enough time in its courtrooms to recognize the pattern. In 303 Creative vs. Elenis, the Supreme Court ruled that the state could not force a graphic designer to create messages that violated her beliefs. Instead of learning from this, Colorado changed its law to compel more speech.

It did the same with its law restricting what counselors can say to children seeking help finding peace with their bodies. Even after the Supreme Court held 8-1 (with Justices Elena Kagan and Sonia Sotomayor joining the opinion)

that the law discriminated based on viewpoint, Colorado made cosmetic changes to the statute, but it didn't change course.

These cases take years. Business owners, counselors and artists wait, with their savings and licenses on the line, while the state uses antidiscrimination and licensing laws to force an impossible choice: your convictions or your livelihood.

The Smiths have given their lives to something they believe in. Sey has dedicated hers to standing up for girls who deserve a fair shot. Neither is asking Colorado to agree with them. The First Amendment doesn't require that. It requires only that the state leaves them free to run their businesses without being forced to say what they don't believe.

Free speech belongs to the Smiths, to Sey and to every Coloradan, not just to those who say what the state wants. The 10th Circuit should keep the door open for everyone's speech.

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