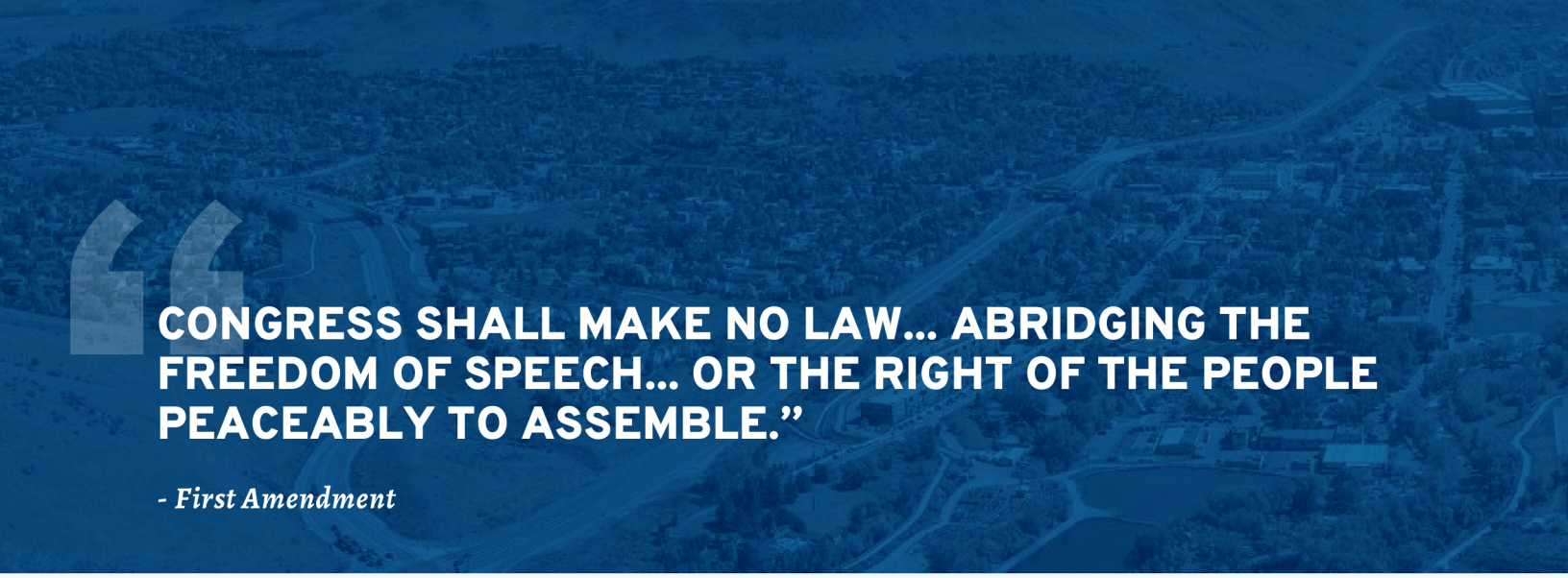
THE LITIGATOR

THE FIRST AMENDMENT

VOL 3, 2022

MOUNTAIN STATES LEGAL FOUNDATION



“CONGRESS SHALL MAKE NO LAW… ABRIDGING THE FREEDOM OF SPEECH… OR THE RIGHT OF THE PEOPLE PEACEABLY TO ASSEMBLE.”

- First Amendment

MSLF has a First Amendment practice group dedicated to securing the rights of Americans to speak freely and associate freely. At a time when the government has tried to squelch free speech, and in some cases even mandated that individuals express government-approved messages, the time is now to fight back and secure the promises of the First Amendment.

WHERE WE SEE THE PRACTICE AREA GOING

The Framers of our Constitution recognized that the ability to criticize the government and other social forces was essential to the Republic. George Washington noted that “if the freedom of speech is taken away then dumb and silent, we may be lead, like sheep to the slaughter.” In the struggle to preserve our Nation, there is no room for faint-hearted attorneys.

Mountain States Legal Foundation does not operate like a traditional law firm. We don’t charge our clients legal fees. We don’t worry about making headlines. And we only litigate cases that will have precedential value, that are transformational to our future.

Recently, MSLF CEO, Cristen Wohlgemuth, encouraged staff to read an article about one of our Nation’s most prominent public interest lawyers as inspiration for our burgeoning practice group. Thurgood Marshall set the gold standard for running a healthy and principled public interest law firm, abiding by five strategies. First, establish a long-term litigation plan. Second, use a “test case" to develop a favorable precedent. Third, search for a sympathetic plaintiff. Fourth, use statistics and non-legal information to bolster arguments. And fifth, as all 501(c)(3) organizations must do, secure funding. It can be easy to lose sight of the broader strategy when confronting daily threats to freedom of speech. But despite being several decades old, Marshall’s strategies mirror our own at MSLF. Our litigation plan flows from these principles.

In this edition of *The Litigator*, we want to share our history, work and future of our First Amendment efforts. We’re training for our next fight against the government, but the wait won’t be long.

> ***“If the freedom of speech is taken away then dumb and silent, we may be lead, like sheep to the slaughter.”***
>
> *- George Washington*

RELIGION AS SPEECH

The First Amendment mentions 5 concepts: the establishment of religion, free exercise of religion, speech, press, and the right to peaceably assemble. Courts have also recognized that flowing from these rights is the right to freely associate. MSLF's First Amendment practice group focuses on the right to free speech and the right to free association.

While MSLF does not bring religious freedom cases, religion and speech are often closely intertwined. Individuals often assert their right to free speech *on the basis of their sincerely held religious beliefs*. We've all watched government insist that someone bake a cake for same-sex weddings, or use specific pronouns, etc., in violation of the person's beliefs. That's compelled speech, and that we do litigate.

Thus, some of our recent work in the First Amendment arena involves cases that include freedom of religion components. In *Kennedy v. Bremerton School District*, for instance, Coach Joseph Kennedy sought the right to pray—in other words, the right to *speak freely* in alignment with his sincerely held religious beliefs. In *Vlaming v. West Point School Board*, Mr. Vlaming sought freedom from compelled speech—the school wanted to force him to use pronouns that did not match a student's biological sex, which violated Vlaming's religious belief that sex is unchangeable.

No one should be forced to express ideas they disagree with, regardless of whether their disagreement is based on religion, science, logic, or anything else.

Historically, the Supreme Court agrees. In *West Virginia State Board of Education v. Barnette* (1943), the high Court struck down a compulsory flag salute in public schools on free speech grounds. Justice Robert Jackson wrote, "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."

More recently, in *Rumsfeld v. Forum for Academic and Institutional Rights* (2006), Chief Justice John Roberts stated, "Some of this Court's leading First Amendment precedents have established the principle that freedom of speech prohibits the government from telling people what they must say."

Free speech is free speech, and if speech is compelled, it is by definition not free. Here at MSLF, we fight for the constitutional rights of all Americans to speak—or not to speak—as they see fit.

THE POWER OF THE AMICUS CURIAE

As First Amendment attorneys, we author amicus briefs as a way to voice support for causes that are integral to Mountain States' mission, while also providing a fresh perspective on nuanced areas of the law. Inviting other organizations to sign on to an amicus brief is an excellent way to add strength to a brief, foster collegiality within the liberty movement, and tap into an entirely new source of expertise outside our organization. Mountain States is a principled organization, which in this case means that we craft each amicus with a long-term strategy in mind that advances the freedoms of the American people. Our arguments are not driven by trends, but by an unwavering belief in our Constitution and its principles. Here are a few of our recently authored amicus briefs.

"...the Constitution demands that Americans cannot be turned into state's ideological puppets."

Kennedy v. Bremerton School District:
Joseph Kennedy was a football coach at Bremerton High School in Washington state. As a devout Christian, Coach Kennedy felt compelled to give a brief, quiet prayer at the 50-yard line following each game, win or lose. Coach Kennedy initially prayed alone, but students often voluntarily joined him. The school district asked Coach Kennedy to stop these prayers and, when he didn't, ultimately fired him, arguing that his prayers constituted a violation of the Establishment Clause. We submitted an amicus brief in favor of Coach Kennedy, arguing that the Establishment Clause should be interpreted in a way that more closely aligns with the text and history of the Clause, and that the Ninth Circuit's overly broad interpretation of the Establishment Clause quashes the free speech rights of public employees. The Supreme Court ruled 6-3 in Coach Kennedy's favor!

Lorie Smith and 303 Creative:
Lorie Smith's vision of expanding her business and offering wedding website design services was thwarted when Colorado's public accommodation law was passed. Colorado's law puts words in Lorie's mouth—it compels her to endorse same-sex marriage despite her sincerely held religious belief that marriage is a union between one man and one woman. Lorie would be forced to create same-sex wedding websites or run afoul of the law. We filed an amicus brief in support of Lorie Smith and her business, 303 Creative. Freedom of speech encompasses many forms of speech, including website creation. The government cannot compel Lorie to express an opinion with which she disagrees; compelled speech is unconstitutional. The Supreme Court will hear oral arguments for this case in the fall.

Emilee Carpenter Photography:
Emilee Carpenter is a photographer in New York whose story is similar to that of Lorie Smith. Emilee is a photographer who does not wish to photograph same-sex weddings because of her Christian faith. But under New York law, she must. We filed an amicus brief in the Second Circuit in support of Emilee, advancing the argument that compulsion of speech is simply unconstitutional. No matter what cause the government is advancing, the Constitution demands that Americans cannot be turned into state's ideological puppets. Oral argument for this case will be heard in the fall before the Second Circuit.

Vlaming v. West Point School Board:
High school French teacher Peter Vlaming was fired under the guise of Title IX, for discriminating on the basis of sex. Why? Peter accidentally "misgendered" a transgender student on one occasion and avoided pronouns altogether when speaking to this student. Avoiding pronouns was the only way Peter could still adhere to his religious tenets that sex is unchangeable, while also respecting the student. But the school wanted ideological compliance. To be clear, a Title IX violation occurs only when harassment is severe, pervasive, and objectively offensive. We argued that one instance of misgendering alongside pronoun elimination altogether could never reach that high standard. Also, Title IX is not meant to, nor can, overshadow constitutional protections under the First Amendment. This case is currently being appealed to the Virginia Supreme Court.

College of the Ozarks:
College of the Ozarks is a private, Christian college in Missouri. The school housed male and female students separately. However, the Biden Administration's Department of Housing and Urban Development (HUD) began forcing housing providers—like College of the Ozarks—to stop "discriminating" on the basis of "gender identity or sexual orientation." This meant the College would have to allow biological males, based on their gender identity, to live in female housing on campus. In fact, HUD tried to force the College to make affirmative statements that its residence halls aren't separated by biological sex, sexual orientation, or gender identity. MSLF wrote an amicus brief on the chilling effect this has on the school's freedom of speech. This case is still pending before the 8th Circuit Court of Appeals.

UPCOMING AMICUS WORK

Klein v. Oregon Bureau of Labor:
Aaron and Melissa Klein owned a bakery in Oregon called "Sweet Cakes by Melissa." Like Lorie Smith and Emilee Carpenter, the Kleins believe that marriage is between a man and a woman. As such, they declined to make custom cakes celebrating same-sex weddings, as doing so would violate their sincerely held religious beliefs. The Oregon Bureau of Labor and Industries determined that, in refusing to serve same-sex weddings, the Kleins violated public accommodation laws. We are writing a brief arguing that public accommodation laws cannot be worded to infringe on a business owner's free speech rights, and that creating custom cakes constitutes artistic expression that should be protected by the First Amendment.

Ilya Shapiro Letter:
At the beginning of 2022, constitutional law and Supreme Court expert Ilya Shapiro joined the faculty at the Georgetown University Law Center. Just weeks later, however, he was placed on administrative leave pending an investigation into whether remarks he made on Twitter violated the University's policies on discrimination. Shapiro's (admittedly poorly worded) tweet took exception to President Biden limiting the field of candidates for his Supreme Court nominee to only black women. MSLF wrote a letter to GULC urging the school to reconsider its investigation and apologize to Shapiro, rather than indulge those who intentionally misinterpreted Shapiro's meaning to be racially motivated. In June, after a 122-day investigation, GULC reinstated Shapiro. But Shapiro, recognizing that he could never effectively teach in such an environment, resigned as a statement protesting the University's unfair application of its harassment code. Although this was not a First Amendment case, because it involved a private school and not the government, MSLF believes that its First Amendment practice group can play a role in increasing the recognition that speech can be hindered in a number of ways, even outside of direct government action.

"...speech can be hindered in a number of ways, even outside of direct government action."

Speech in Architecture

The Supreme Court denied certiorari in *Burns v. Town of Palm Beach* earlier this year, leaving the legal world wondering—is creative architecture covered by the First Amendment? Donald Burns, a resident of Palm Beach, wanted to demolish his traditional-style home and construct a modern home reflective of minimalistic living. Local officials cringed at the proposed design when Burns submitted it to the governing board for approval, remarking that it was too unsightly for the neighborhood. Burns brought a First Amendment claim stating architecture is expressive and worthy of constitutional protection. The Eleventh Circuit disagreed, and the Supreme Court denied certiorari.

If architecture cannot communicate a message, then why create magnificent buildings for the government? Why not just put the Supreme Court in a make-shift tent, or turn the White House into a series of mobile homes? As one scholar noted, "[i]f nude barroom-type dancing, black armbands, and flags sewn on pant seats may at times be protected as 'speech,' it is unclear why the creative expression of one of the twentieth century's most influential architects is not."[1]

Famed architect Frank Lloyd Wright once said, "[t]he mother art is architecture. A tenant of, Fallingwater—one Wright's most famous homes—claimed "[i]t has served well as a home, yet has always been more than that: a work of art, beyond any measures of excellence."

Notably, one of the masterminds behind the design of One World Trade Center wanted "the building to both mark the site of the old towers and be a beacon for the future, like a lighthouse." The building is a towering, "historically symbolic height of 1,776 feet."

But in zoning disputes like Burns, courts have shied away from categorizing architecture as worthy of First Amendment protection.

[1] John J. Costonis, Law and Aesthetics: A Critique and a Reformulation of the Dilemmas, 80 Mich. L. Rev. 355, 448 (1982).

HISTORICAL CASES

Mont. Chamber of Com. v. Argenbright (2000):
MSLF successfully won on the issue of corporate speech when the Ninth Circuit held that a Montana election law was unconstitutional. The law restricted "corporate speech on public issues" by disallowing corporations "from making a contribution or an expenditure in connection with a ballot issue." This election law not only chilled the speech of the corporations, but also its CEOs. If CEOs spoke out about ballot issues, it would be nearly impossible to avoid appearing that they were speaking on behalf of the company, thus "making a contribution . . . in connection with a ballot issue" and violating the law. The court found no compelling interest that could overcome violating First Amendment principles.

Masson v. The New Yorker Magazine, Inc. (1991):
This case involved what should be a simple question—in a media article, do quotation marks mean that the words are actually those of the quoted speaker? At least for purposes of a defamation lawsuit under California law (which required actual malice for libel alleged by a public figure), the Courts —including the Federal District Court, the Ninth Circuit Court of Appeals, and the U.S. Supreme Court—held that quotations need not be the actual words of the quoted speaker, as long as the purported quotations were "substantially true" or "rational interpretations" of actual statements. MSLF argued that this standard gives too much power to reporters to impute their own interpretations of ambiguous statements to public figures, which chills both public figures' willingness to speak with the media and the American public's willingness to believe the media.

Pacific Gas & Electric Co. V. California Public Utilities Commission (1986):
This case involved a requirement by the California Public Utility Commission that a San Francisco-based utility company, Pacific Gas and Electric Company, give unused space in the newsletter it included in its billing envelope to a public interest group whose message Pacific Gas disagreed with. The Supreme Court struck down the requirement as unconstitutional, stating "the choice to speak includes within it the choice of what not to say." MSLF's amicus brief argued that allocating newsletter space to one consumer group infringed on competing groups' First Amendment rights and caused the Commission to unconstitutionally discriminate among competing groups based on the identity or viewpoint of those seeking space.

Friedman v. Bd. of Cty. Comm'rs of Bernalillo Cty. (1985):
While MSLF's First Amendment practice currently focuses on free speech and free association, MSLF has taken some free exercise cases in the past. In 1985, MSLF secured a victory at the Tenth Circuit when the court held that a New Mexico county's seal that contained a Latin cross, the phrase "With This We Conquer," and a flock of sheep did not violate the Establishment or Free Exercise Clauses under the First Amendment. The cross was challenged by an atheist who "contended that the seal propagated the Christian faith" and violated the Constitution. The court looked to the purpose of the seal, the seal's effect, and the threat of entanglement between the government and religion. The seal had a non-religious purpose, to highlight the history of the county—"the predominant sheep raising industry, the Catholic missionaries, and the mountainous region all affected the settlement and development of the county." The effect of the seal did not advance nor inhibit religion, in fact, it "made only a benign reference to religion." Further, the seal did not impermissibly entangle the government with religion. The court was not persuaded that the seal violated the Constitution.

Featuring Former U.S Secretary of the Interior, **David Bernhardt**

RECEPTION & DINNER

Tickets available now

Join us for a discussion on the West's continuing challenges and opportunities with water and drought.

Time:	Date:	Location:
5:00 PM	**Oct. 6. 2022**	**Boise, ID**

GET YOUR TICKETS BEFORE THEY RUN OUT!

Visit *www.mslegal.org/about/events* for more information.

SPECIAL UPDATE

This spring, MSLF's Board came together to challenge you to stand with them to defend the Constitution. They issued a $105,000 challenge to help fight back against President Biden and the bureaucrats in his administration. You did not shy away from the call! Together, we far surpassed our goal and raised **$147,072.91!** This is a tremendous credit to you and a testament to your commitment to restoring and protecting our Constitution. We are proud to call you our partners in the battle for liberty.

Thank you

MOUNTAIN STATES LEGAL FOUNDATION

2596 South Lewis Way
Lakewood, Colorado 80227
mslegal.org | 303.292.2021

mountainstateslegalfoundation
@MSLF

THE LITIGATOR

THE FIRST AMENDMENT

VOL 3, 2022

"Congress shall make no law... abridging the freedom of speech... or the right of the people peaceably to assemble."