No. 21-476

In the Supreme Court of the United States

303 CREATIVE LLC, A LIMITED LIABILITY COMPANY; LORIE SMITH, PETITIONERS

v.

AUBREY ELENIS; CHARLES GARCIA; AJAY MENON; MIGUEL RENE ELIAS; RICHARD LEWIS; KENDRA ANDERSON; SERGIO CORDOVA; JESSICA POCOCK; PHIL WEISER, RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR LAW AND ECONOMICS SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether applying a public-accommodation law to compel an artist to speak or stay silent violates the Free Speech Clause of the First Amendment.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Codes and Ordinances

Other Authorities

SUMMARY OF ARGUMENT AND INTEREST OF *AMICI CURIAE*[1]

This case presents a question at the intersection of antidiscrimination laws and free-speech rights: Does the government's interest in equal access to public accommodations justify compelling speech from artists by deeming their products monopolies?

The court below said yes—even while conceding that such products involve "pure speech." The court held that compulsion is justified to ensure a "free and open economy" and "access to publicly available goods and services." According to the court, even if consumers can get similar products from thousands of other providers, the work of an artist is "unique" and "nonfungible." Effectively, the court reasoned that each creative individual enjoys a monopoly. And their speech may be compelled to ensure that protected classes may access that monopoly market.

This reasoning violates fundamental economics.

First, the court's definition of monopoly is unprecedented. As this Court has long recognized, under basic economic principles, there is no monopoly where there are market alternatives. And those alternatives (i.e., substitutes) may differ. They need not be fungible but only "reasonably interchangeable." Or, in economic terms, the products need only have negative cross-elasticity of demand—meaning that if Product 1 drops in price, consumers will switch *to* Product 1 *from*

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[1] No party or counsel for a party authored this brief in whole or in part. No one other than *Amici* or their counsel made a monetary contribution to preparing or submitting this brief. Each of the parties has filed a letter granting blanket consent to the filing of amicus briefs.

Product 2. When that is the case, there is no monopoly. Ignoring this principle, the court below fabricated a novel definition of monopoly just to compel speech.

Now picture courts combining that limitless definition of monopoly with the expansive protected categories under many antidiscrimination laws. Courts will have free rein to force artists to speak on diverse topics. That is what happened here. The court below held that the State's interest in ensuring access to services justified compelling a creative professional to "create artistic expression that celebrates same-sex marriages," despite her religious convictions. That reasoning has no stopping point. Other personal convictions—for example, political affiliations and opinions—will be invaded and speech compelled. This Court should clarify that the lower court's conception of a monopoly is mistaken and dangerous.

Second, there was no *need* to rewrite the law of monopolies to protect disfavored groups. Market forces ensure that consumers will find willing artists precisely because there *was* no monopoly here. And those same market forces will ensure that only those few artists with substantial conscience objections will seek an exception from antidiscrimination laws.

In contrast, allowing the State to compel speech from objecting artists will hurt consumers. It will force mismatched associations between artists and customers, drive artists from the market, and prevent entry by others. As a result, consumers will suffer.

Amici curiae, listed in the Appendix, are scholars in law, economics, and philosophy who study, teach, and publish on the application of economic principles to the law and to public policy. *Amici* submit this brief to bring to the Court's attention the flawed economic

reasoning of the court below, which will chill speech and impoverish the marketplace.

STATEMENT

A. How markets work

It is now beyond debate that markets premised on voluntary exchange serve as bulwarks that protect individual freedom, advance innovation, and enhance social welfare. See, *e.g.*, Milton Friedman, Capitalism and Freedom 8–21 (2002); Clifford Winston, Government Failure versus Market Failure: Microeconomics Policy Research and Government Performance 1-6 (2006). After all, markets "yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions." *N. Pac. Ry. Co.* v. *United States*, 356 U.S. 1, 4 (1958).

Because both sides gain from voluntary transactions, competitive market dynamics most efficiently allocate goods and services. While economists typically focus on price and quality, markets match providers and consumers based on myriad other preferences.

For example, merchants who favor "socially responsible" business practices will match with consumers who prefer those practices. Merchants who sell only products "Made in America" will match with consumers who prefer those products. And merchants who hire ex-convicts to help them rebuild their lives will match with consumers who share that objective. Meanwhile, other merchants will aim for a larger audience and systematically work to avoid offending certain political, ethnic, or religious groups.

In other words, markets let merchants cater to consumer preferences. Merchants may, and frequently do, cater to certain ethnicities, religious groups, age groups, occupations, and economic groups. By the same token, consumers may choose the merchants who best suit their preferences.

The central insight here is that neither providers nor consumers are homogeneous. There is great variety beyond simple product differentiation. This diversity is a social good because it expands opportunities for producers and consumers alike.

In a monopoly, consumers face one supplier who could decide to refuse to deal for all sorts of reasons, including invidious reasons. But when there is no monopoly, consumers may choose among providers who most closely serve their tastes. In the context of web designers, for instance, consumers may select a designer for many reasons other than price and quality—such as seeking to support minority-owned businesses, preferring designers of a particular political persuasion, or, say, enjoying the novelty of buying from a former professional athlete. By facilitating the accurate matching of consumer and merchant preferences, markets enhance social welfare.

The presence of alternatives also greatly mitigates, if not eliminates, the effects of discrimination. See Friedman, *supra*, at 108–115; Richard A. Epstein, Forbidden Grounds: The Case Against Employment Discrimination Laws 15–58 (1992); Gary S. Becker, The Economics of Discrimination 39–47 (2d ed. 1971). Markets ensure that consumers facing potential discrimination can find better-suited merchants, and markets punish merchants who discriminate by cutting their revenues.

B. What happened here

Lorie Smith is a website designer. She is the sole owner of 303 Creative, one of hundreds of website design companies in her local area and thousands nationwide. Pet. App. 6a, 190a. Smith is willing to work with all people, regardless of "race, creed, sexual orientation, [or] gender." *Id.* at 11a–12a. She is, in particular, willing to create "custom graphics and websites for gay, lesbian, or bisexual clients." *Id.* at 12a.

Smith desires to use her talents to create wedding websites. Pet. App. 186a–187a. But it would violate her "sincerely held religious beliefs to create a wedding website for a same-sex wedding" because, by doing so, she "would be expressing a message celebrating and promoting a conception of marriage" contrary to her beliefs. *Id.* at 189a.

Colorado law prohibits places of public accommodation from refusing to provide services because of "sexual orientation." Colo. Rev. Stat. § 24-34-601(2)(a)). Smith brought a lawsuit to determine whether she could offer wedding-website design services but decline to offer such services for same-sex weddings. Pet. App. 7a. The district court said no and entered summary judgment against Smith. *Id.* at 8a.

The Tenth Circuit acknowledged that Smith's "creation of wedding websites is pure speech" and that the Colorado antidiscrimination law would compel Smith "to create speech that celebrates same-sex marriages." Pet. App. 9a–19a, 20a, 22a. Yet the court still held that the State could compel Smith to speak against her religious convictions to ensure "'equal access to publicly available goods and services.'" Pet. App. 26a (quoting *Roberts* v. *United States Jaycees*, 468 U.S. 609, 624 (1984)). According to the Tenth Circuit,

compulsion is needed because "[t]his case does not present a competitive market." *Id.* at 29a. Although "LGBT consumers may be able to obtain wedding-website design services from other businesses," the State has a compelling interest in forcing Smith to express ideas contrary to her religious beliefs because her services are "unique," "inherently not fungible," and "by definition, unavailable elsewhere." *Id.* at 28a.

In short, compelling Smith to speak in support of same-sex marriage was necessary because Smith is effectively "a monopoly." Pet. App. 29a. According to the court, the "product at issue is not merely 'custom-made wedding websites,' but rather 'custom-made wedding websites of the same quality and nature as those made by [Smith].'" *Ibid.* "In that market, only [Smith] exist[s]." *Ibid.* If Smith were *not* compelled to employ her "unique creative talents" to express ideas anathema to her religious beliefs, LGBT consumers would be relegated "to an inferior market." *Id.* at 21a, 28a. Without State coercion, the court feared widespread "market harm." Pet. App. 30a. "It is not difficult to imagine the problems created where a wide range of custom-made services are available to a favored group of people, and a disfavored group is relegated to a narrower selection of generic services." *Ibid.*

ARGUMENT

I. The lower court's distortion of the concept of monopoly threatens great social harm.

The Tenth Circuit justified its compulsion of speech by finding that Smith is, in effect, a "monopoly." But the court's definition of monopoly perverts the very economic concept on which it relies. The court recognized that LGBT consumers could obtain wedding-website design services from businesses other than

Smith's. Pet. App. 28a. Smith competes with hundreds of local web-design companies and thousands nationwide. *Id.* at 190a. Yet the court held that the market was not competitive, that Smith is a monopolist, and that compelling her to speak is justified because Smith's web-design services are "unique" and "not fungible." *Id.* at 28a.

This reasoning dangerously misconstrues economics, competition, and monopoly. If not corrected, it will chill speech and harm consumers.

A. Defining each artist as a "monopoly" because individual artistic expression is "unique" defies basic economics.

What defines a monopoly is not uniqueness of a product or service but lack of alternatives. "When a product is controlled by one interest, *without substitutes available in the market*, there is monopoly power." *United States* v. *E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 394 (1956) (emphasis added); see also *Nat'l Collegiate Athletic Ass'n* v. *Bd. of Regents*, 468 U.S. 85, 112 (1984) (same). But so long as "there are market alternatives that buyers may readily use," a "monopoly does not exist merely because the product said to be monopolized differs from others." *du Pont*, 351 U.S. at 394.

Thus, contrary to the decision below, alternatives need not be "identical" or "fungible." *du Pont*, 351 U.S. at 394 (substitutes not limited to "identical products"); see also *United States* v. *Cont'l Can Co.*, 378 U.S. 441, 449 (1964) (substitutes need not be "fungible"). They need only be "reasonably interchangeable." *United States* v. *Grinnell Corp.*, 384 U.S. 563, 571 (1966). In economic terms, a product is a substitute if there is "cross-elasticity of demand between the product itself

and substitutes for it." *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 325 (1962).

Applying this standard, courts combine "different products or services into 'a single market' when 'that combination reflects commercial realities.'" *Ohio* v. *Am. Express Co.*, 138 S. Ct. 2274, 2285 (2018). And those realities show that products and services that are unique—or "differentiated"—may still be reasonably interchangeable. *E.g.*, *LifeWatch Servs.* v. *Highmark Inc.*, 902 F.3d 323, 339 (3d Cir. 2018) ("differentiation is often present among competing products in the same market"); *DSM Desotech Inc.* v. *3D Sys. Corp.*, 749 F.3d 1332, 1339–1340 (Fed. Cir. 2014) ("When products are not identical or fungible, they still may be in the same market as differentiated products."); Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law, ¶ 563a at 383–384 (3d. ed. 2007) ("Many machines performing the same function—such as copiers, computers, or automobiles—differ not only in brand name but also in performance, physical appearance, size, capacity, cost, price, reliability, ease of use, service, customer support, and other features. Nevertheless, they generally compete with one another[.]").

Indeed, products may have substitutes even when recognized as unique by the government's grant of a trademark or patent. *E.g.*, *du Pont*, 351 U.S. at 393 (substitutes may exist for trademarked products); *Walker Process Equip., Inc.* v. *Food Mach. & Chem. Corp.*, 382 U.S. 172, 178 (1965) ("[t]here may be effective substitutes" for a patented product); see also *Ill. Tool Works Inc.* v. *Indep. Ink, Inc.*, 547 U.S. 28, 45–46 (2006) ("a patent does not necessarily confer market power upon the patentee"); *id.* at 43 n.4 ("'[C]overage of one's product with an intellectual property right does not confer a monopoly'") (quoting 1 Herbert

Hovenkamp, Mark Janis & Mark Lemley, IP and Antitrust § 4.2a (2005 Supp.)).

Simply put, unique does not equal monopoly. It may be that "The Only Thing Like Coca-Cola is Coca-Cola Itself,"[2] but Coca-Cola is not a monopoly. *Pepsico, Inc.* v. *Coca-Cola Co.*, 315 F.3d 101, 107 (2d Cir. 2002). An education from Yale is no doubt "unique," but Yale is not a monopoly; other prestigious universities are substitutes. *Hack* v. *President & Fellows of Yale Coll.*, 237 F.3d 81, 86 (2d Cir. 2000). The UCLA women's soccer program may be "unique," but it competes with other programs for athletes, and the programs are thus "interchangeable." *Tanaka* v. *Univ. of S. Cal.*, 252 F.3d 1059, 1063–1064 (9th Cir. 2001).

Lower courts have consistently rejected the unique-equals-monopoly fallacy. See*, e.g.*, *Queen City Pizza* v. *Domino's Pizza*, 124 F.3d 430, 438 (3d Cir. 1997) (no monopoly market for pizza ingredients and supplies "approved by Domino's Pizza, Inc. for use by Domino's franchisees"); *Right Field Rooftops, LLC* v. *Chi. Baseball Holdings*, LLC, 87 F. Supp. 3d 874, 886–887 (N.D. Ill. 2015) (live Cubs baseball games at Wrigley field not a monopoly market); *Subsolutions, Inc.* v. *Doctor's Ass'n*, 62 F. Supp. 2d 616, 625 (D. Conn. 1999) (market could not be limited to Subway franchises). This Court essentially did so in the context of compelled free speech. *Hurley* v. *Irish-Am. Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 577–578 (1995) ("True, the size and success of petitioners' parade makes it an enviable vehicle for the dissemination of GLIB's views, but that fact, without more, would fall

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[2] History of Coca-Cola Advertising Slogans, https://perma.cc/M2FU-UCXM.

far short of supporting a claim that petitioners enjoy an abiding monopoly of access to spectators.").

Products produced by artists, including world-famous artists, are no different. *E.g.*, *Theatre Party Ass'n, Inc.* v. *Shubert Org., Inc.*, 695 F. Supp. 150, 155 (S.D.N.Y. 1988) (tickets to Phantom of the Opera not a monopoly market). Even the singular music of the iconoclastic Bob Marley is not a monopoly; it competes with other reggae music. See *Rock River Communs., Inc.* v. *Universal Music Grp., Inc.*, 2011 U.S. Dist. LEXIS 46023 *47 (C.D. Cal. 2011); Mikal Gilmore, *The Life and Times of Bob Marley: How he changed the world*, Rolling Stone (Mar. 10, 2005) (describing Marley's body of music as "unlike any other we've ever known" and his lyrical talent as "like nobody before or since"), https://perma.cc/SK9L-JS3T.

This is not to say that a unique product can *never* be a monopoly. This Court has recognized that in certain circumstances, the market for replacement parts for a specific brand of durable good may be monopolized. *Eastman Kodak Co.* v. *Image Tech. Servs.*, 504 U.S. 451, 482 (1992).

But no such circumstances exist here. Given the availability of hundreds, if not thousands, of alternative web designers, it cannot be said that compelling one particular artist to speak is necessary to ensure access to the marketplace.

B. Defining each artist as a "monopoly" would justify compelling speech from a broad range of professionals.

If adopted by this Court, the Tenth Circuit's reasoning will chill speech across the artistic professions. All that will be needed to justify compulsion is that the products or services be "unique" in some sense.

Most obviously, the court's holding means that antidiscrimination laws may be used to compel speech from religious artists. According to the logic of the court below, any product or service resulting from "creative talents" will be "unique" and "by definition, unavailable elsewhere," justifying compulsion. Pet. App. 21a, 28a. Thus, "the State could wield [antidiscrimination laws] as a sword, forcing an unwilling Muslim movie director to make a film with a Zionist message or requiring an atheist muralist to accept a commission celebrating Evangelical zeal." Pet. App. 69a (Tymkovich, C.J., dissenting). Videographers and calligraphers could be compelled to create speech that violates their religious convictions. See Pet. App. 30a (agreeing that custom wedding invitations are "speech" but disagreeing with the holding in *Brush & Nib Studios, LC* v. *City of Phx.*, 448 P.3d 890, 916 (Ariz. 2019), that antidiscrimination laws cannot be used to compel such speech); *cf. Telescope Media Grp.* v. *Lucero*, 936 F.3d 740, 758 (8th Cir. 2019) (holding that a state antidiscrimination law "interferes with [videographers'] message by requiring them to say something they otherwise would not").

But the breadth of the circuit court's holding is not limited to sweeping aside religious convictions. It will sweep aside political convictions, as well.

Many county and municipal public accommodation ordinances, as well as the District of Columbia Code, prohibit discrimination based on political opinion or affiliation.[3] And such laws have been used to require

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[3] *E.g.*, D.C. Code §§ 2-1401.02(25), 2-1402.31(a) ("political affiliation"); Broward County, Fla., Code of Ordinances §§ 16½-3, 16½-34 ("political affiliation"); Orange County,

proprietors to open their venues for politically charged events. See*, e.g.*, Jason Rantz, *Seattle bar tried to deny service to Republicans celebrating Kavanaugh*, 770 KTTH (Oct. 8, 2018), https://perma.cc/LPF5-ZL8K.

Under the lower court's reasoning, it is easy to envision the broad scope of professionals whose speech could be compelled. Think of artists like Amanda Gorman, the youngest inaugural poet in U.S. history, whose work reflects her convictions about "the world's

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N.C., Code of Ordinances §§ 12-52, 12-54 ("political affiliation"); Harford County, Md., Code of Ordinances §§ 95-3, 95-5 ("political opinion") Howard County, Md., Code of Ordinances § 12.210 ("political opinion"); Wayne County, Mich., Ordinance No. 2020-586 ("political affiliation"); Ann Arbor, Mich., Code of Ordinances §§ 9:151, 9:153 ("political beliefs," which includes a person's "opinion, whether or not manifested in speech or association, concerning the social, economic, and governmental structure of society and its institutions"); Champaign, Ill., Code of Ordinances § 17-3, 17-56 ("political affiliation," which includes "belonging to or endorsing any political party or organization or taking part in any activities of a political nature"); City of College Park, MD, Charter § C1-2 ("political affiliation"); Ft. Lauderdale, Fla., Code of Ordinances §§ 29-2, 29-16 ("political affiliation"); Lansing, Mich., Code of Ordinances §§ 297.02, 297.04 ("political affiliation or belief"); Madison, Wisc., Mun. Code §§ 39.03(1), 39.03(5) ("political beliefs"); Miami Beach, Fla., Code of Ordinances §§ 62-31, 62-87 ("political affiliation," which includes "ideological support of or opposition to … to an organization or person which is engaged in supporting or opposing candidates for public office …"); Seattle, Wash., Mun. Code §§ 14.06.020, 14.06.030 ("political ideology"); Shreveport, La., Code of Ordinances §§ 39-1, 39-2 ("political … affiliations"); Sun Prairie, Wisc., Code of Ordinances § 9.21.020 ("political affiliation"); Urbana, Ill., Code of Ordinances §§ 12-39, 12-63 ("political affiliation").

social ills, be it racism, sexism, police brutality, the climate crisis, human trafficking or animal cruelty." Lauren Dukoff, *Amanda Gorman Talks Writing, the Power of Change and Her Own Presidential Aspirations*, Variety Magazine, https://perma.cc/QEP2-MSWW. Ms. Gorman writes commissioned poems. See Amanda Gorman, https://perma.cc/T9KE-ULAK. Under the circuit court's reasoning, what would stop a city or county from requiring Ms. Gorman to accept a commission for a poem *endorsing* racism, sexism, or police brutality?

Perhaps a court would find that Ms. Gorman has not accepted enough commissions to be a public accommodation. But what about the Poetry Society of New York, which offers commissioned poetry to the public and even provides poets for "public events, private parties, and commercial environments"? The Poetry Society of New York, https://perma.cc/WZ5K-MK4W.

Or take the many famous musicians who have refused to allow political campaigns to use their music but license it for other purposes, such as commercials. See Alex Heigl, *The Many, Many Musicians Who Have Told Politicians to Stop Using Their Songs*, People Magazine (Oct. 11, 2019) (chronicling refusals by Rihanna, Bruce Springsteen, John Mellencamp, Bobby McFerrin, Tom Petty, Sting, and others), https://perma.cc/U2EB-WLQ8. Many of these artists freely explain their reasons for such refusals: disagreement with the candidate's political views or affiliation. See*, e.g.*, Laura Snapes, *Tom Petty estate issues cease and desist over Trump's use of song*, The Guardian (June 21, 2020), https://perma.cc/DE7H-GPEZ; Charles Stockdale & John Harrington, *35 musicians who famously told politicians: Don't use my song*, USA Today (July 16, 2018), https://perma.cc/5R6M-Q7LT.

These refusals would be unlawful under the circuit court's reasoning. After all, "unique goods and services are where public accommodation laws are most necessary to ensuring equal access." Pet. App. 30a.

These examples are not far-fetched. For instance, one municipality has already claimed that the "First Amendment would not stop a government from compelling a freelance speechwriter * * * 'to provide that service to the climate change deniers' even if she wants to work only for environmentalist causes." *Chelsey Nelson Photography LLC* v. *Louisville/Jefferson Cty. Metro Gov't*, 479 F. Supp. 3d 543, 558 n.119 (W.D. Ky. 2020).

The lower court's distorted definition of monopoly thus threatens great harm. It should be corrected.

II. Absent monopoly, market forces will allocate artistic services, prevent exclusion, and enhance social welfare; in contrast, compelling speech will harm social welfare.

Nor can compelled speech be justified by any supposed need to prevent market exclusion.

A. Market forces ensure only those with sincere and compelling conscience objections will refuse service.

For starters, significant market forces will limit the number of artists who refuse to create speech celebrating same-sex marriage. *Cf.* Becker, *supra*, at 39–45 (describing how competitive forces tend to drive out most forms of market discrimination). Those who object to speaking in favor of same-sex marriage will lose business and face social costs, which will winnow out the insincere, leaving only those whose consciences would force them to exit the market in the face of State

coercion. See, *e.g.*, Colleen Shalby, *Winery that refused to hold a wedding for same-sex couple reverses course following criticism*, Los Angeles Times, Sept. 13, 2019, https://tinyurl.com/rbz5ajk.

First, objecting artists bear the cost of lost sales, not only from turning down work but also from others who disagree with the artist's stance and stay away. Merchants who have declined to provide services for same-sex weddings have faced social-media-led boycotts and a flood of negative reviews on sites like Yelp. See Amelia Irvine, *How technology and the free market can eliminate discrimination*, The Examiner (Washington D.C.), July 13, 2017; Chris Taylor, *Anti-equality Indiana pizza joint gets seriously trolled, shuts up shop*, Mashable.com, Apr. 2, 2015; Emily Pfund, *Walkerton police still investigating threats to 'burn down' Memories Pizza, prosecutors say*, The Elkhart Truth (Indiana), Apr. 3, 2015; Steve Mocarsky, *Venue reportedly receives threats after refusing to host gay wedding receptions*, The Times Leader (Wilkes-Barre, Pennsylvania), July 11, 2014.

Potential losses include other customers who fear retribution for doing business with such artists. For instance, the Human Rights Campaign—which rates workplaces on "LGBT equality," reviews the policies of over 1,200 companies, and boasts that "258 of the Fortune 500-ranked businesses achieved a 100 percent rating"—penalizes companies "found to have a connection with an anti-LGBTQ+ organization or activity." Human Rights Campaign, Corporate Quality Index (2022), https://perma.cc/8CU6-JJVX. This kind of pressure can force businesses to close. See, *e.g.*, George Brown, *Bakery Forced to Close Over Gay Wedding Denial*, CBS-3 WREG (Memphis, Tennessee), Sept. 4, 2013.

Second, artists who decline to create products for same-sex marriages may also face significant social costs, even including *illegitimate* forms of aggressive behaviors, such as death threats, abusive phone calls, and a torrent of vitriolic hate mail. See, *e.g.*, Nikki Krize, *Bridal Shop Owners Get Death Threats Over Same-Sex Policy*, ABC-16 WNEP (Wilkes Barre, Scranton, Pennsylvania), Aug. 2, 2017; Warren Richey, *For those on front lines of religious liberty battle, a very human cost,* The Christian Science Monitor, July 16, 2016.

Third, artists who seek an exception from antidiscrimination laws, like petitioners here, must defend against legal challenges. Even if the Court rules for petitioners, artists seeking to be excepted from antidiscrimination laws will often still have to prove their right to an exception.

These economic and social costs moot the need to compel artists to speak against their consciences.

B. Market forces ensure the availability of alternatives.

As the record shows, market forces also ensure the availability of alternative providers. Consider the hundreds of alternative local web-design providers and thousands nationwide. And new providers can enter the market any time, guaranteeing that objecting artists will never dominate the market.

On the flipside, only a tiny fraction of the market seeks a conscience-based exception. Nor is that surprising—because objectors will be identified, raising social and economic costs. And if, as is the case today, "gay people are generally protected against discrimination, then a few outliers won't make any difference." Andrew Koppelman, *Gay Rights, Religious*

Accommodations, and the Purposes of Antidiscrimination Law, 88 S. Cal. L. Rev. 619, 627–628 (2015); see also Thomas C. Berg, *Symposium: Religious Accommodation and The Welfare State*, 38 Harv. J.L. & Gender 103, 138 (2015) (when balancing interests, if "the patrons have access, without hardship, to another provider, then the legal burden on the provider is the more serious one"). Preventing the State from compelling speech from those outliers thus does not present "a threat to meaningful participation in commercial life." Nathan B. Oman, *Doux Commerce, Religion, and the Limits of Antidiscrimination Law*, 92 Ind. L.J. 693, 719 (2017). Competitive forces prevent the objectors' individual preferences from dominating the market.

Still, some insist there can be *no* exceptions to the antidiscrimination laws, invariably citing Title II of the 1964 Civil Rights Act. See, *e.g.*, *Elane Photography, LLC* v. *Willock*, 309 P.3d 53, 79 (N.M. 2013) (Bosson, J., concurring). They say that the Jim Crow South proves that markets do not mitigate discrimination.

But the analogy is inapt. Under Jim Crow, *public institutions* supported private aggression and backstopped pervasive private discrimination. At the time, therefore, the "best practical argument for Title II was that it functioned as a corrective against private force and public abuse in government." Richard A. Epstein, *Public Accommodations Under the Civil Rights Act of 1964: Why Freedom of Association Counts as a Human Right*, 66 Stan. L. Rev. 1241, 1254–1261 (2014). Such conditions do not exist today. To the contrary, public institutions stand foursquare against discrimination, as do powerful media and educational institutions.

C. Coercing artists to speak against their consciences will diminish social welfare.

Compelling artists to speak will undermine the working of the market. Artists who bow to the antidiscrimination law's demands will do so reluctantly, decreasing their incentives to provide their best efforts. But given the threat of legal retaliation, such artists will likely hide their reluctance—making it harder for consumers to tell whether a given artist is suitable. Social welfare is diminished by the resulting poor match between provider and consumer.

Alternatively, objecting artists will exit the market (or never enter in the first place), reducing the number and variety of available artists. But consumers may prefer such excluded artists for many nondiscriminatory reasons. For instance, they may respect or value the artist's commitment to his or her convictions, even if they do not share those convictions. Or the artist's convictions may closely align with *other* religious or moral convictions that consumers *do* value. Still other consumers may not even know of or care about the artist's convictions; they just like the artist's work.

By forcing such artists out of the market, therefore, application of the antidiscrimination law not only harms the artists, it also harms other market participants. As one English court recognized nearly three hundred years ago, restraints that drive away market players cannot "be endured; because the publick loses the benefit of the party's labour, and the party himself is rendered an useless member of the community." *Chessman* v. *Nainby*, 93 Eng. Rep. 819, 821 (1726).

III. Negative externalities cannot justify compelling speech.

Finally, using government power to coerce artists to speak against their consciences cannot be justified on notions of protecting dignity interests. Each side has claims to violations of their dignity. See Oman, *supra*, at 701. There is an indignity in being forced to speak in violation of one's conscience or to exit one's profession. See Thomas C. Berg, *What Same-Sex-Marriage and Religious-Liberty Claims Have in Common*, 5 N.W. J.L. & Soc. Pol'y 206, 207–208 (2010). As this Court has recognized, laws that compel speech "invade the sphere of intellect and spirit which is the purpose of the First Amendment to our Constitution to reserve from all official control." *W. Va. State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 642 (1943). Indeed, at "the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Turner Broad. Sys.* v. *FCC*, 512 U.S. 622, 641 (1994).

Despite this harm to the artist, states like Colorado place no such restrictions on consumers. *Consumers* may discriminate against any artist for any reason. Such states condemn discrimination by one set of market actors but not the other. That makes no sense.

It is no answer to say that enduring such state coercion or being forced out of the market is "the price of citizenship." *Elane Photography*, 309 P.3d at 80 (Bosson, J., concurring). Why should the "price of citizenship" instead not include being turned down by artists who object to one's message?

Nor can laws like Colorado's be justified by insisting that they prevent negative externalities because

declining to create certain art offends not only the requester but also segments of the community. Under standard economic theory, externalities merit intervention only to prevent an *overall* reduction in social welfare.

Rather than preserving overall welfare, however, intervention based on offense taken by others will harm overall welfare. It will allow groups to veto the activities of others based on a subjective offense, which, in turn, will encourage people to gain an advantage by becoming ever angrier and more restive. Let everyone adopt this strategy, and society will splinter as every segment is pitted against the others. If society is to splinter, that splintering should not be encouraged by the government. As this Court explained, "a speech burden based on audience reactions is simply government hostility and intervention in a different guise." See *Matal* v. *Tam*, 137 S. Ct. 1744, 1767 (2017).

CONCLUSION

Compelling artists to speak cannot be justified by any legitimate theory of monopoly, or any state interest in ensuring equal access to goods and services. The Court should hold that such compelled speech violates the First Amendment.

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APPENDIX

Appendix

List of *Amici Curiae**

Lloyd Cohen, J.D., Ph.D., is Professor of Law at the Antonin Scalia Law School, George Mason University.

Richard A. Epstein is the Laurence A. Tisch Professor of Law at the New York University School of Law. He is also the James Parker Hall Distinguished Service Professor of Law Emeritus and a senior lecturer at the University of Chicago, and the Peter and Kirstin Bedford Senior Fellow at the Hoover Institution.

Allen Mendenhall, M.A., J.D., LL.M., Ph.D., is Associate Dean and Grady Rosier Professor in the Sorrell College of Business at Troy University.

Catherine R. Pakaluk, Ph.D., is Assistant Professor of Social Research and Economic Thought, The Busch School of Business and Economics, The Catholic University of America.

Eric Rasmusen is the former Dan and Catherine Dalton Professor of Business Economics and Public Policy, Kelley School of Business, Indiana University.

Jay W. Richards, Ph.D., is the William E. Simon Senior Research Fellow at The Heritage Foundation and Adjunct Professor, The Busch School of Business, The Catholic University of America.

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* Amici appear in their individual capacities. Institutional affiliations are listed for identification purposes only.