

No. 21-476

IN THE
Supreme Court of the United States

303 CREATIVE LLC, A LIMITED LIABILITY COMPANY;

LORIE SMITH,
Petitioners,

v.

AUBREY ELENIS; *ET AL.*,
Respondents.

**On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit**

**BRIEF FOR *AMICUS CURIAE*
AMERICANS FOR PROSPERITY FOUNDATION
IN SUPPORT OF PETITIONERS**

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BRIEF OF *AMICUS CURIAE*
AMERICANS FOR PROSPERITY FOUNDATION
IN SUPPORT OF PETITIONER

Pursuant to Supreme Court Rule 37.2, Americans for Prosperity Foundation (“AFPF”) respectfully submits this *amicus curiae* brief in support of Respondents.¹

INTEREST OF *AMICUS CURIAE*

Amicus curiae AFPF is a 501(c)(3) nonprofit organization committed to educating and empowering Americans to address the most important issues facing our country, including civil liberties and constitutionally limited government. As part of this mission, it appears as *amicus curiae* before federal and state courts. Throughout our nation’s history, the fights for civil rights for women, African-Americans, LGBTQ, and all people have relied on the exercise of civil liberties, which is one reason they must be protected. AFPF is interested in this case because the protection of the freedoms of expression and association, guaranteed by the First Amendment, are necessary for an open and diverse society.

SUMMARY OF ARGUMENT

This case presents the challenge of upholding rights crucial to a pluralistic society when good intentions may urge otherwise. But use of public accommodations law to compel speech overreaches state authority by a wide mark. Like the road to

¹ All parties have consented to the filing of this brief after receiving timely notice. *Amicus* states that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* or its counsel made any monetary contributions to fund the preparation or submission of this brief.

perdition, disregarding the Constitution can lead one astray—good intentions notwithstanding

As Justice Sutherland noted in another case that upset well-worn constitutional doctrines in the name of empathy,

whether the legislation under review is wise or unwise is a matter with which we have nothing to do. Whether it is likely to work well or work ill presents a question entirely irrelevant to the issue. The only legitimate inquiry we can make is whether it is constitutional. If it is not, its virtues, if it have any, cannot save it; if it is, its faults cannot be invoked to accomplish its destruction. If the provisions of the Constitution be not upheld when they pinch as well as when they comfort, they may as well be abandoned.

Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 483 (1934) (Sutherland, J. dissenting).

Here, it is not public accommodations *per se* that are at issue, but rather how Colorado employs the public accommodation statute to compel speech promoting the State's viewpoint, and the novel legal theories the Tenth Circuit concocted to uphold that approach. The Colorado public accommodations law²

² CO Rev. Stat. § 24-34-601 (2016) (defining “place of public accommodation” as “any place of business engaged in any sales to the public and any place offering services, facilities, privileges, advantages, or accommodations to the public” and “discriminatory practice” as withholding or denying the full and

guarantees access to public accommodations to certain groups and individuals who may otherwise struggle to enjoy the abundance of a society whose depth and diversity depend on the creativity of multifarious voices.

But both Respondents and the court below would imperil pluralistic society and undermine the very constitutional and common law doctrines that enable diversity and inclusion in the first place. To reach this result, the court imported unrelated legal doctrines to supplant constitutional precedent, opining that an expressive professional's very uniqueness can be used against her on the grounds that she holds a monopoly over the market for herself and thus can be compelled to speak on topics with which she disagrees. If this theory were accepted, it would subsume entire bodies of law regarding paid expression and professional speech, which protect speech where there is a monetary incentive. And, it would create tension with how monopolies are defined and remedies to market power—none of which purport to compel speech.

But perhaps the greatest risk presented by this case is the lack of limiting principle. The Court of Appeals appears to have assumed its holding would apply only in narrow and symmetrical circumstances, such as: providers of service X must also provide service $X+1$ —where $+1$ is an innocuous and simple addendum. But that is not the case. There is nothing in the Court of Appeals' interpretation that requires the speaker to open the door to a specific product or service offering before being compelled to produce

equal enjoyment of “a place of public accommodation.”). (altogether, “CADA”).

custom work on demand so long as the speaker is unique in some way. The holding here would invert the relationship between speaker and listener by compelling the speaker to express the viewpoint the someone else dictates.

It is unlikely this case alone could rework centuries of common, statutory, and constitutional law. But the profusion of novel doctrines littered throughout the opinion provides hazardous entrees for creative litigants bent on furthering public policy through individualized demands for compliance from anyone that does not bend the knee and profess their creed. The remedy to compulsion is simple: public accommodations laws cannot be interpreted contrary to the First Amendment to convert a speaker into a public accommodation or to compel the creation of expressive products or services.

ARGUMENT

I. PAID EXPRESSION IS PROTECTED BY THE FIRST AMENDMENT.

The background principle against which this case must be decided is the indubitable protection of paid expression. Whether artistic, journalistic, legal, medical, academic, or fictional—to name just a few—the fact that expression may lead to remuneration does not strip it of First Amendment protection.

Economic regulation that targets speech is not new, whether directly through prior restraints on publishing, indirectly through taxation, or by expansive application of the doctrine of professional speech. “As early as 1644, John Milton, in an ‘Appeal for the Liberty of Unlicensed Printing,’ assailed an act of Parliament which had just been passed providing

for censorship of the press previous to publication. He vigorously defended the right of every man to make public his honest views ‘without previous censure’; and declared the impossibility of finding any man base enough to accept the office of censor and at the same time good enough to be allowed to perform its duties.” *Grosjean v. Am. Press Co.*, 297 U.S. 233, 245–46 (1936). Labeling a regulation “economic” cannot defeat speech protections. The Louisiana surcharge tax, for example, on gross advertising receipts of newspapers in the state with a weekly circulation of over 20,000 copies only affected thirteen of over 120 newspapers. *Id.* at 240–41. But this Court invalidated it as a “calculated device . . . to limit the circulation of information to which the public is entitled.” *Id.* at 250.

By contrast, the prospect of commercial enterprise supporting the pursuit of freedom of conscience has been with us from the beginning. Indeed, the Pilgrims themselves were both a for-profit enterprise and aiming to exercise what would later become First Amendment freedoms.³

A. Commercial Trappings do Not Strip Creative Work of First Amendment Protection.

The Court of Appeals recognized that the profit motive does not “transform Appellants’ speech into ‘commercial conduct,’” and that strict scrutiny should apply. *303 Creative LLC v. Elenis*, 6 F.4th 1160, 1177 (2021) (“Opinion”). Nevertheless, the court equated

³ See generally Peggy M. Baker, *The Plymouth Colony Patent: setting the stage*, Pilgrim Society & Pilgrim Hall Museum (2007), available at: https://pilgrimhall.org/pdf/The_Plymouth_Colony_Patent.pdf.

speech with commercial accommodations, such as hotels, to check the box on state interest without further analysis. *Opinion*. 6 F. 4th at 1179 (“although the commercial nature of Appellants’ business does not diminish their speech interest, it does provide Colorado with a state interest absent when regulating non-commercial activity.”). This approach is far afield from the protection of expressive works provided by the First Amendment, which does not allow speech to be simply cloaked within a commercial transaction to displace the First Amendment with commercial law.

Rather, in examining speech-based offerings, such as movies, the Court has separated the business aspects: “production, distribution, and exhibition . . . conducted for private profit,” from the speech element of the movie itself. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952). Moreover, for movies, like “books, newspapers, and magazines,” being “published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment.” *Id. Burstyn* is instructive here, because, like CADA, the New York statute was a presumably well-intentioned effort to shield protected qualities—in that case religion—from potential disapproval. “It is simply this: that no religion . . . shall be treated with contempt, mockery, scorn and ridicule.” *Id.* at 504. But like CADA, it was “far from the kind of narrow exception to freedom of expression which a state may carve out to satisfy the adverse demands of other interests of society.” *Id.*

Indeed, the question of whether commercial trappings can be used to excuse regulation of speech has been before this Court many times. *Virginia Pharmacy Board v. Virginia Citizens Consumer*

Council, 425 U.S. 748, 761 (1976) (collecting cases illustrating that “speech does not lose its First Amendment protection because money is spent to project it”). Time and again, the Court has focused on the speech element and turned aside attempts to cloak regulation of speech as something else to evade the First Amendment. And yet the font of state attempts to limit or compel speech never seems to run dry.

B. Professional Speech is Protected.

Although the notion of “professional speech”—speech uttered within a professional relationship or based on expert knowledge or judgment—has been floated as a rationale for excepting speech from full First Amendment protection, “this Court has not recognized ‘professional speech’ as a separate category of speech.” *National Institute of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018). And speech does not lose its protection merely because it is uttered by professionals. *Id.* at 2371–72. Indeed, the Court has afforded reduced protection to “professional speech” in only two circumstances: (1) where laws require the disclosure of factual, noncontroversial information within commercial speech; and (2) where conduct is regulated and that conduct incidentally involves speech *Id.* at 2372. Neither of these two lines of precedent applies here.

The first category would apply where, for example, a professional such as a lawyer were required to disclose circumstances in which a client might be required to pay certain fees. *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651–52 (1985). This requirement, when applied to a professional, would be merely a subcategory of generally applicable compelled

disclosures in commercial advertising. *Id.* at 651. There is no such required disclosure of factual information here.

The second category would apply to regulation of conduct that incidentally burdens speech. For example, “nonverbal expressive activity can be banned because of the action it entails, but not because of the ideas it expresses—so that burning a flag in violation of an ordinance against outdoor fires could be punishable, whereas burning a flag in violation of an ordinance against dishonoring the flag is not.” *R.A.V. v. St. Paul*, 505 U.S. 377, 385 (1992). While in other contexts, CADA could apply to non-verbal expressive activity, here there is no such regulated behavior. *Opinion*, 6 F.4th at 1176 (“Appellants’ creation of wedding websites is pure speech.”). Nor has there been any claim that web design is a regulated activity.

II. AN IMPORTED AND MISPLACED THEORY OF MONOPOLY REGULATION CANNOT DISPLACE ESTABLISHED RULES AGAINST COMPELLED PERFORMANCE.

A. Compelled Speech Enjoys the Highest Protection.

Requiring 303 Creative to produce creative work with which it disagrees would be compelled speech that is both content-based and viewpoint specific (directed only at people who disagree). *Opinion*, 6 F.4th at 1178 (“Eliminating such ideas is CADA’s very purpose.”). As such, it is fundamentally at odds with the First Amendment. “Compelling individuals to mouth support for views they find objectionable violates that cardinal constitutional command, and in most contexts, any such effort would be universally

condemned.” *Janus v. Am. Fed’n of State, Cnty, & Mun. Emps, Council 31*, 138 S. Ct. 2448, 2463 (2018).

The burden falls squarely on the government to rebut the presumption that discrimination against speech due to its message is unconstitutional. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828–29 (1995). When the government targets “particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant.” *Id.* at 829. And, “[t]his Court’s precedents do not permit governments to impose content-based restrictions on speech without persuasive evidence of a long (if heretofore unrecognized) tradition to that effect.” *Nat’l Inst. of Family & Life Advocates*, 138 S. Ct. at 2372 (cleaned up).

To carry its burden of showing the infringement “is justified by a compelling government interest and is narrowly drawn to serve that interest,” the “State must specifically identify an actual problem in need of solving, . . . and the curtailment of free speech must be actually necessary to the solution.” *Brown v. Entm’t Merchants Ass’n*, 564 U.S. 786, 799 (2011) (cleaned up). This case presents the issue of compelled rather than restricted speech, but the principle is at least as strong: “where the State’s interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual’s First Amendment right to avoid becoming the courier for such message.” *Wooley v. Maynard*, 430 U.S. 705, 717 (1977).

Here, the State has identified no long tradition of compelling speech. The State, likewise, while asserting an historical problem regarding access to

public accommodations, has not identified any “actual problem in need of solving” regarding custom web design or any other expressive activity that would require one speaker to mouth the words of another. Nor has the State demonstrated that compelling speech by creative professionals would address the asserted access problem rather than make it worse by driving creative professionals from the market for custom design services.⁴ Accordingly, this novel application of compelled speech lacks any of the stringent requirements to carve out an exception from First Amendment protections and compel delivery of a message the State wants to send.

B. The Uniqueness of a Product Does Not Make Its Seller A “Monopolist.”

The Tenth Circuit asserted that “due to the unique nature of Appellants’ services, this case is more similar to a monopoly. 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 Appellants.’ In that market, only Appellants exist.” *Opinion*, 6 F.4th at 1180. The court presented no authority for the novel

⁴ The Court of Appeals referenced *amici* who argued that enforcing this interpretation of CADA would reduce market access. The court found that argument “beside the point” because the issue was not access to the competitive market, but rather access to this individual speaker. *Opinion* 6 F.4th at 1180. This framing turns the only possible justification for compelling speech on its head by disregarding the asserted “problem in need of solving”, *i.e.* access to public accommodations, in favor of a hypothetical problem of compelling speech that no public has ever accessed.

concept that an individual person or company becomes a monopoly simply because it is unique.

This approach is inconsistent with traditional concepts of monopoly or restraint of trade doctrine, which focus on whether there are viable substitutes for a seller’s goods or services. *Nat’l Collegiate Athletic Ass’n v. Alston*, 468 U.S. 85, 111 (2021). Mere differences between two products does not place them in separate relevant markets—and a customer’s preference for a specific product does not automatically render its seller a monopolist.

Moreover, the Constitution grants Congress the power to issue patents and copyrights.⁵ These government-sanctioned monopolies over unique creations demonstrate the longstanding common law and constitutional support for recognizing and upholding a creator’s right to control her own work—even where it does not carry the additional protection provided by the First Amendment for speech. And where there is such First Amendment protection, there is no tension between the clauses, with each adding to the protections enjoyed by the author. “The Copyright Clause and First Amendment were adopted close in time. This proximity indicates that, in the Framers’ view, copyright’s limited monopolies are compatible with free speech principles.” *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003).

These individualized monopoly grants do not “necessarily confer market power” that would allow a

⁵ U.S. Const. Art. I, Sec. 8 (“To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries”).

court to dispense with proving market power. *Illinois Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28, 45–46, (2006) (“Congress, the antitrust enforcement agencies, and most economists have all reached the conclusion that a patent does not necessarily confer market power upon the patentee. . . . therefore . . . the plaintiff must prove that the defendant has market power.”).

So while 303 Creative may be unique in some ways, there is no indication that it has market power—and without it, how could its refusal to deal have any effect beyond costing it a customer? The free market will rapidly address profitable unmet market demands, especially where, as here, the service could be provided from literally any corner of the globe.

To be sure, as the Court of Appeals argued, “[i]t 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.” *Opinion*, 6 F.4th at 1181 (emphasis added). But this is not such a case. Nor is there any showing that any “disfavored group has been or will be relegated to a narrow selection of generic services.” Instead, as noted by the dissent, the Court of Appeal “premises this argument on the idea (novel to the First Amendment) of a ‘monopoly of one,’ . . . justifying regulation of a market in which ‘only [Ms. Smith] exist[s].’” *Opinion*, 6 F.4th at 1204 (Tymkovich, C. J., dissenting).

Just as the parade in *Hurley*, was unique⁶ and was “an enviable vehicle for the dissemination” of certain views, this, “without more, [fell] far short of supporting a claim that petitioners enjoy an abiding monopoly of access to spectators.” *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 577–78 (1995). The notion that any individual speaker is a monopoly of one that must be busted is inconsistent with trade law, the Patent and Copyright Clauses, and common sense, and threatens the speech rights of anyone with an enviable vehicle for delivering their message.

Also, taken to its logical conclusion, this approach would undermine virtually all association law. Just as the prevalence of “business activity” in private clubs provided the hook to overcome associational rights in *New York State Club Ass’n, Inc. v. City of New York*, 487 U.S. 1, 16 (1988), so too could applying the monopoly-of-one theory to any unique entity—even those with no discernable market—be sufficient to bypass associational rights that, so far, have survived challenge by being “expressive.” *E.g.*, *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 640 (2000).

III. THE TENTH CIRCUIT’S THEORIES HAVE NO LIMITING PRINCIPLE.

CADA declares it unlawful to refuse “to an individual or a group, because of disability, race, creed, color, sex, sexual orientation, marital status,

⁶ Indeed, every year since 1947, when the mayor granted authority to the South Boston Allied War Veterans Council to organize and conduct parade, the Council has applied for and received a permit for the parade. No other applicant has ever applied for the permit. 515 U.S. at 560–61.

national origin, or ancestry, the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation”. CO Rev. Stat. § 24-34-601 (2)(a) (2016). This protection most naturally would be read, to protect people and not to compel the creation of new products or services.⁷ Read in such a light, CADA has built in limits. The Tenth Circuit bypassed this natural limitation by conflating the artist with the public accommodation and conflating the customer with the product.

Moreover, the Court of Appeals appears to presume symmetry among services—or at least causation independently triggered by the artist—that would limit compelled creation to mirror-image services of voluntarily offered services. But there is nothing in that court’s holding, nor in CADA as interpreted by that court, that places any such limit on demands for new services. This lack of limiting principle should doom the theory.

A. People Cannot be Conflated With Places and Things.

1. *An Artist is Not a Common Carrier.*

Private artists are not common carriers, which, in narrow circumstances can be required to carry the speech of others. Cable operators, for example, which “depend upon government permission and government facilities (streets, rights-of-way) to string the cable necessary for their services” *Denver Area*

⁷ The similar statutory provision in *Hurley*, protected access to public accommodations but did not covert speakers into couriers of specified viewpoints. 515 U.S. at 578.

Educ. Telecomms. Consortium, 518 U.S. 727, 739 (1996), may be required to set aside channels for designated broadcast signals. *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994). But even recipients of government licenses, such as broadcasters, are not required to carry all speech on demand. *Denver Area Educ. Telecomms. Consortium*, 518 U.S. at 737 (“the First Amendment, the terms of which apply to governmental action, ordinarily does not itself throw into constitutional doubt the decisions of private citizens to permit, or to restrict, speech—and this is so *ordinarily* even where those decisions take place within the framework of a regulatory regime such as broadcasting.”) (emphasis in original).

In the narrow instances where a duty to carry has been upheld, it has been justified on two grounds. First, that certain resources are limited in quantity and belong to the public, so no one has a right to monopolize them. *Columbia Broad. Sys., Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 101–02 (1973). Second, that in contexts with a long history of serving as a conduit for broadcast signals, “there appears little risk that . . . viewers would assume that the broadcast stations . . . convey ideas or messages endorsed by the cable operator.” *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. at 655. In addition, it is “common practice for broadcasters to disclaim any identity of viewpoint between the management and the speakers who use the broadcast facility.” *Id.* at 655.

Here, web design is not a limited resource held in trust for the people, and CADA expressly prohibits commonplace disclaimers like those used by broadcasters to separate their own viewpoints from the viewpoints transmitted.

This Court has rejected the notion that wholly private actors may be deemed mere conduits for the speech of others, losing their right to control the use of their own property. *See Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 390 (1993). Thus, private entities such as newspapers, retain First Amendment protection—even from being compelled to include speech clearly attributable to someone else. *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974). These protections are not limited to the press but apply equally outside the media. *E.g., Hurley*, 515 U.S. at 575–76.

Even in *Pruneyard Shopping Center v. Robins*, the highwater mark for state power to compel private parties to host the speech of others,⁸ the Court based it holding on narrow facts: (1) the shopping center was open to the public to come and go as they please and thus “views expressed by members of the public . . . will not likely be identified with those of the owner;” (2) “no specific message is dictated by the State” and thus there was “no danger of governmental discrimination for or against a particular message;” and (3) “appellants can expressly disavow any connection with the message” . . . “disclaim[ing] any sponsorship of the message” and “explain[ing] that the persons are communicating their own messages by virtue of state law.” 447 U.S. 74, 87 (1980). Here, of course, the lower court acknowledged that Petitioner is compelled to speak and not simply host speech. Her services are not open to the public to come

⁸ *Amicus* has previously argued that the Court should reconsider *Pruneyard*, Brief for Americans for Prosperity Foundation as Amicus Curiae Supporting Petitioner, at 19, *Cedar Point v. Hassid*, No. 20-107 (January 5, 2021).

and go as they please but must be customized. Governmental discrimination for or against a particular message is the very point of the law. And, Petitioner’s right to expressly disavow any connection with the message is prohibited.

2. *A Customer is not a Product.*

In *Hurley*, speech itself was alleged to be the public accommodation. 515 U.S. at 572–73. This framing was designed to substitute respondents and their message for the Council and its message, making the speaker a proxy for the message. That is, by declining the message, the Council was alleged to have denied the speaker. This Court rejected that approach because the public accommodation law’s “prohibition [was] on the act of discriminating against individuals in the provision of publicly available goods, privileges, and services,” and not targeted to speech or content. *Hurley*, 515 U.S. at 572. The distinction between access for a person and promotion of a message was dispositive in *Hurley* and should have been dispositive here as well.

Instead, the Court of Appeals accepted the argument that was rejected in *Hurley*, using the message as a proxy for the customer and turning mandatory accommodation of a person into compelled promotion of a message. That was error. Like the law in *Hurley*, which addressed who was served and not what was served, the Accommodation Clause⁹ here focuses on customers, not services.

⁹ CO Rev. Stat. § 24-34-601 (2)(a) (2016) (making it unlawful to refuse “to an individual or a group”).

B. Artists Need Not Open the Door Before Speech Can Be Compelled, Putting Their Unique Contributions at Risk.

The opinion presumes symmetry and voluntary entry into a particular market. But there are no such guardrails to the holding, which does not limit compelled services to those already being provided to the public.

There is, for example, no requirement that an artist take a voluntary first step by publicly offering a service that opens the door to additional customers securing identical services.¹⁰ Indeed, the opinion implies the opposite by relying on the “quality and nature” of the artist’s services and not the demonstrable existence of any particular service—a “publicly available good”—she offers.¹¹ By basing the holding on access to the artist, the Court of Appeals removed any natural limit from demands that may be placed on her, including the presumption that she take the initial voluntary step of offering a “publicly available good.”

Thus, the presumption that only an artist who has supplied *X* for one customer must supply the same *X* for another customer, is abolished. There is no *if-then*; there is only *then*. A customer need only find an artist

¹⁰ This interpretation is not fanciful considering that Lorie has already received a request for a same-sex wedding website. *See, e.g.* Petition at 5 (“Yet Lorie still received a request for a same-sex-wedding website.”).

¹¹ *See also, Opinion* 6 F.4th at 1181 (equating the human artist with a public accommodation by attributing a sincere belief to a public accommodation).

with “unique services” to demand other services without limitation.

In the end, whether a provider has complied or defied CADA is in the eye of the beholder, relying on subjective insertion of adjectives to describe the demanded service and with no identified standard for legal significance. Thus, in a single paragraph, the Court of Appeals leapt effortlessly from: “wedding-website design services” (fairly specific); to “wedding-related services” (broader); and finally to “those types of services” (vague and ambiguous) without reference to any statutory definition. *Opinion*, 6 F.4th at 1180. This lack of limiting principle would open the door to compelled or prohibited speech ranging from the generic to the highly specialized.

Focusing on the characteristics of the provider with no limitation to existing services creates special risk for artists who provide unique and nuanced services, fulfilling niche markets and providing texture and depth to society. Specialists, such as a portrait painter who specializes in children could be compelled to paint adult couples (based on marital status). A web designer who specializes in custom Celtic websites—available to all—could be compelled to design Russian websites (based on national origin or ancestry). A jeweler who specializes in Wicka pieces could be forced to create crucifixes (based on religion). A party planner skilled in parties for blind children could be accused of discrimination for not providing other types of parties (based on disability). Liability would be created even though none of these artists would deny services to a customer based on the customer’s characteristics, but solely on the service requested. Indeed, any business intended to preserve

distinctive art, history, or literature, would, by definition, be vulnerable by virtue of its chosen focus.

These examples may seem trivial. But to individual artists, such choices are the basis of their livelihoods and lives.

Moreover, the definition of public accommodation on which CADA relies, 42 U.S.C. § 12181(7), includes lawyer offices, health care providers, and schools, as well as numerous other private entities that rely on speech for their existence. Were this theory applied to attorneys, for example, an attorney uniquely persuasive in protecting the interests of a particular native American tribe could be compelled to support the interests of an adversary if a potential client tried to hire him to do so—which the attorney could not refuse (based on ancestry).¹² Or, a therapist uniquely effective in providing post-abortion grief counseling could be compelled to provide pre-abortion support if approached by a CADA-protected client (based on multiple factors).

¹² The Court of Appeals noted that Colorado has declined to enforce CADA against certain providers who agree with the State's viewpoint: "those cases involved businesses that *supported* same-sex marriage". *Opinion* 6 F.4th at 1174 (emphasis in original). In addition to highlighting the arbitrary enforcement of CADA, there is nothing in the Opinion or the statute that indicates which messages will be enforced, and thus, how the State would choose, for example, between native American tribes in case of dispute where each sought the services of the same expressive professional who could not ethically take adversarial positions, nor how an attorney could select which legal positions to advocate or client to represent—rules of professional conduct notwithstanding—if message could be dictated.

The Tenth Circuit's interpretation of public accommodations law as a basis for compelling speech merits review and reversal. The remedy here is straightforward: public accommodations laws cannot be interpreted to conflict with the First Amendment to convert a speaker into a public accommodation or to compel the creation of expressive products or services.

CONCLUSION

The Court should grant the petition and reverse the Tenth Circuit.

Respectfully submitted,

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