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 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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June 1, 2022

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Page(s)**

### Cases

**Constitution**

**Statutes**



**Rules**



**Other Authorities**

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

Pursuant to Supreme Court Rule 37.3, Americans for Prosperity Foundation ("AFPF") respectfully submits this *amicus curiae* brief in support of Petitioners.[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

[1] All parties have consented to the filing of this brief. *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.

accommodations law to compel speech overreaches state authority by a wide mark.

Respondents' ("State" or "Colorado") desire to compel speech cannot succeed by taking a road through the First Amendment. That road would be very short as there is no precedent to support compelled creation of private speech. And so, the State must try to do indirectly what it cannot do directly, importing inapposite bodies of law that have never applied to personal expression—antitrust and public accommodation—to supersede the clear constitutional defect inherent in ordering creative professionals to express a message dictated by others.

The State argues "the Act is a straightforward regulation of commercial conduct." Brief in Opposition to Petition for Certiorari ("BIO") at 2. Not so. But regardless of whether the Act was written as commercial regulation and typically operates as such, that is not how it was applied here. Instead, the State argued below, and the panel majority agreed, the Act could be applied to compel 303 Creative's speech.

The panel majority, acknowledging 303 Creative's "creation of wedding websites is pure speech," purported to apply strict scrutiny instead of the lesser standard applicable to commercial regulation with no, or merely incidental, burden on speech. *See Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011). The issue thus is not, as the State would have it, whether the Act regulates commercial conduct, but whether strict scrutiny is satisfied by importing business law concepts to defend undisputed compulsion of creative speech in a commercial setting.

The panel majority held that it was, relying on 303 Creative's "unique" business to satisfy narrow

tailoring and least-restrictive-means. But it is *the law* that must be narrowly tailored, not the speaker. Applying a broad law to a unique person is not "narrow tailoring." Moreover, public accommodation law, which is broadly applied to ensure "access to the marketplace *generally*," *303 Creative LLC v. Elenis*, 6 F.4th 1160, 1180 (2021) ("Opinion") (emphasis in original), is, by definition, not narrow vis-à-vis the marketplace. Indeed, a less "narrow" approach is hardly conceivable. Nor would any law that compels an individual to use her mind, body, or spirit to perform personal services for another ever satisfy even the most fulsome interpretation of "public accommodation."

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 panel majority confected to uphold that approach.

The Colorado public accommodation law[2] guarantees access to public accommodations to groups and individuals who otherwise may struggle to fully enjoy a society that unites the creativity of multifarious voices. But both the State and the decision below would imperil pluralistic society and undermine the very constitutional and common law

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[2] CO Rev. Stat. § 24-34-601 (2016) [hereinafter "CADA"] (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 equal enjoyment of "a place of public accommodation.").

doctrines that enable diversity and inclusion in the first place. To reach this result, the panel majority imported antitrust law, 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. If this theory were accepted, it would subsume entire bodies of law regarding paid expression and professional speech and create tension with how monopolies are defined and how market power may be remedied—none of which purport to compel speech.

But perhaps the greatest risk presented by this case is the lack of limiting principle. The panel majority 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 innocuous and incidental. But that is not the case. Nothing in the panel majority's interpretation requires the speaker to open the door to a specific product or service offering before being compelled to produce custom work on demand. The holding here would invert the relationship between speaker and listener by compelling the speaker to express the viewpoint someone else dictates. The State accepts this interpretation but argues "there is little likelihood" of the message being attributed to the speaker so the speaker is not endorsing any particular viewpoint. "Endorsement," of course, is not the test for whether compelled speech can be squared with the Constitution.

The profusion of novel doctrines littered throughout the opinion and promoted by the State provides hazardous entree for creative litigants bent on furthering public policy through individualized

demands for compliance from anyone who does not bend the knee and profess their creed. The remedy to compulsion is simple: public accommodation law 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. COMPELLED SPEECH ENJOYS THE HIGHEST CONSTITUTIONAL PROTECTION.

Requiring 303 Creative to produce creative work with which it disagrees would be compelled speech that is both content-based and viewpoint-specific, targeting only those who disagree with the State's view. *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 v. Becerra*, 138 S. Ct. 2361, 2372 (2018) (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). Here the issue is 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).

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 improve the asserted access problem rather than make it worse by driving creative professionals from the market for custom design services.[3] Indeed, the State's action

[3] 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

here, which has deprived the market of access to *any* wedding website design by 303 Creative during the six years this litigation has been ongoing, rebuts its asserted interest in expanding access to this individual speaker.

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.

## II. THE FIRST AMENDMENT CANNOT BE NEUTERED BY CHARACTERIZING SPEECH AS COMMERCIAL ACTIVITY.

The principle on which this case must be decided—indeed the entirety of the State's argument—hinges on whether the indubitable protection of paid expression can by neutered by displacing the First Amendment with commercial law.

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

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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.

> 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. *Id.* at 240–41, 250 (invalidating a surcharge tax on gross advertising receipts of newspapers as a "calculated device . . . to limit the circulation of information to which the public is entitled."). By contrast, commercial enterprises supporting freedom of conscience have been with us from the beginning. Indeed, the Pilgrims themselves were both a for-profit enterprise as well as a venture to exercise what would later become religious freedoms protected by the First Amendment.[4]

### A. Waiver of Constitutional Rights Cannot Be a Condition of Doing Business.

The State argues CADA merely regulates a licensed business. But whether a business is licensed has no bearing on whether the State may limit its speech rights. Nor can the State condition authorization to do business on waiver of constitutional rights. The State may not "deny a

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[4] *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.

benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit." *United States v. Am. Libr. Ass'n, Inc.*, 539 U.S. 194, 210 (2003) (cleaned up). *See also Frost v. R.R. Comm'n of State of Cal.*, 271 U.S. 583, 593–600 (1926) (collecting cases holding a state may not impose conditions repugnant to the Constitution and laws of the United States on grants of authority to do business in a state). There is no question here that Colorado could not gratuitously compel 303 Creative to speak. Accordingly, it cannot use its licensing power to indirectly compel it to do so, for "government cannot accomplish through threats of adverse government action what the Constitution prohibits it from doing directly." *Biden v. Knight First Amend. Inst. at Columbia Univ.*, 141 S. Ct. 1220, 1226 (2021) (Thomas, J. concurring).

Here, the State demands a general waiver of speech rights as a condition of doing business in the state. This unconstitutional condition is broad and pervasive because the creative speech the State seeks to compel is hopelessly vague and speculative. Unlike disclosure regimes that require a business to disclose "purely factual and uncontroversial information about the terms under which . . . services will be available," *Zauderer v. Off. of Disciplinary Couns. of Supreme Ct. of Ohio*, 471 U.S. 626, 651 (1985), here, the compelled speech is neither "purely factual" and "uncontroversial," nor "terms under which services will be available." Rather, the compulsion applies to bespoke services resulting from a creative process engaged afresh for each client.

No compulsive law could ever be narrowly tailored to speech that has not yet been conceived. Instead, the

law acts as a waiver of future right to decline, not just delivery of any message, but also the private creative thought process necessary to craft a message promoting beliefs the artist disavows. In that sense the waiver goes further than the compulsory salutation of the American flag deemed unconstitutional in *Barnette*, by first compelling thought before downstream speech even comes into play. *Board of Education v. Barnette*, 319 U.S. 624, 641 (1943).

### B. Commercial Trappings do not Strip Creative Professionals of First Amendment Protection.

This Court has recognized that underlying the commercial trappings of a business enterprise are individual human beings whose rights must be protected. As the Court noted in *Burwell v. Hobby Lobby Stores, Inc.*, even where the corporate form is used, the rights of human beings are at stake:

> A corporation is simply a form of organization used by human beings to achieve desired ends. An established body of law specifies the rights and obligations of the people (including shareholders, officers, and employees) who are associated with a corporation in one way or another. When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people.

573 U.S. 682, 706–07 (2014). *See also Citizens United v. Federal Election Com'n,* 558 U.S. 310, 365 (2010) (recognizing speech rights of speakers with a corporate identity).

The panel majority recognized the profit motive does not "transform Appellants' speech into 'commercial conduct,'" and admitted strict scrutiny should apply. *Opinion*, 6 F.4th at 1177. Nevertheless, this nod to the appropriately high legal standard was nullified by equating speech with commercial accommodations, such as hotels, to check the box on state interest without further analysis. *Opinion*. 6 F.4th at 1179 ("[A]lthough 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 or a speaker to be diminished to a corporate form to displace the First Amendment with commercial law.

Rather, in examining speech-based offerings, such as movies, this 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). So too for "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 that regulated speech was presumably a well-intentioned effort to shield protected qualities—in that case religion—from potential disapprobation: "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 "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.

### C. 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." *Nat'l Inst. of Family & Life Advocates*, 138 S. Ct. at 2371. 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 line 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*, 471 U.S. at 651–52. 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-nonverbal 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.

### D. An Imported and Misplaced Theory of Monopoly Regulation Cannot Displace Established Rules Against Compelled Performance.

The panel majority 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 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, whether a creator has a limited monopoly over a particular creation does not determine market power, negate the creator's right to control the creation, or limit the creator's personal autonomy. For example, the Constitution grants Congress the power to issue patents and copyrights.[5] These government-sanctioned monopolies over unique creations demonstrate 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

[5] U.S. Const. Art. I, § 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").

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 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 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 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 decision below "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 unique[6] 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.

## III. RENDERING A PERSON AN ACCOMMODATION NULLIFIES ANY LIMITING PRINCIPLE ON GOVERNMENT REGULATION OF EXPRESSIVE ENTERPRISE.

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

[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.

products or services.[7] Read in such a light, CADA has built-in limits. The panel majority bypassed this natural limitation by conflating the artist with the public accommodation and conflating the customer with the product. The State, likewise, argues an individual artist may be regulated as a common carrier, BIO at 24–25, and there is no difference between a customer and what the customer purchases. BIO at 26.

Moreover, the panel majority 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 the decision below 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 or a Public Accommodation*.

The State argues "public accommodations laws serve as a modern regulatory counterpart to the common carrier principle adopted at common law—requiring businesses to serve all comers." BIO at 24–25. The State is wrong. Public accommodation laws and common carrier laws both have venerable common law histories that predate the Revolution and have informed commercial regulation in this country

[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.

since the founding. Both have nothing whatsoever to do with compelling an individual to speak and neither status can be unilaterally imposed on a business that does not hold itself out as such.

Public accommodations, far from being a newfangled invention of regulatory law, have a long history. And while the exact contours of the definition of public accommodation and which types of businesses the term includes have been the subject of dispute, certain types of businesses, such blacksmiths and inns, have been seen as "public accommodations." *See De Wolf v. Ford*, 86 N.E. 527, 529 (N.Y. 1908) ("For centuries it has been settled in all jurisdictions where the common law prevails that the business of an innkeeper is of a quasi public character, invested with many privileges, and burdened with correspondingly great responsibilities[.]"); Joseph William Singer, *No Right To Exclude: Public Accommodations and Private Property*, 90 Nw. U.L. Rev. 1283, 1321 (1996) (citing Lord Holt's opinion in *Lane v. Cotton*, 88 Eng. Rep. 1458 (K.B. 1701) for the proposition that blacksmiths have been identified as having a duty to serve the public).

By contrast, places of public amusement have generated a saga of hot debate over whether they have a duty to accept all comers. *See, e.g.*, Alfred Avins, *What is a Place of "Public" Accommodation?*, 52 Marq. L. Rev. 1, 6–8 (1968) (providing overview of English law relating to theaters, public dance-halls, music halls, and skating rinks and the changes wrought by the Civil Rights Act of 1875 and related legal developments). But "under English and Commonwealth law, a tavern, bar, restaurant, refreshment stand, licensed public-house where

liquor is sold by the drink, or other shop selling food or drink for consumption on the premises is not an inn, and the owner has the legal right to refuse service to anyone and ask them to leave. The same rule is true in American law." *Id.* at 3 (citing *State v. Brown*, 212 P. 663 (Kan. 1923)). Thus, while the common law did not provide a hard-edged definition of public accommodations, certain similarities pertained, such as reliance by travelers on inns and blacksmiths to ensure their safety. *See id.* at 5; Singer, 90 Nw. U.L. Rev. at 1292 ("[N]ecessity required special obligations to protect travelers from hardship when they had no place to sleep at night and were vulnerable to bandits on the highways.").

Modern statutes, such as CADA, have extended the definition of public accommodation to a variety of businesses, facilities, and locations.[8] But such definitions do not purport to lump human beings—regardless how creative—into the notion of a public accommodation.

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[8] Under CADA, place of public accommodation incudes, but is not limited to "any business offering wholesale or retail sales to the public; any place to eat, drink, sleep, or rest, or any combination thereof; any sporting or recreational area and facility; any public transportation facility; a barber shop, bathhouse, swimming pool, bath, steam or massage parlor, gymnasium, or other establishment conducted to serve the health, appearance, or physical condition of a person; a campsite or trailer camp; a dispensary, clinic, hospital, convalescent home, or other institution for the sick, ailing, aged, or infirm; a mortuary, undertaking parlor, or cemetery; an educational institution; or any public building, park, arena, theater, hall, auditorium, museum, library, exhibit, or public facility of any kind whether indoor or outdoor." CO Rev. Stat. § 24-34-601 (2016).

Similarly, the common law understanding of common carrier status has distinct characteristics that apply only to certain types of enterprises, such as ferries, railways, and carters, each of which carries goods or persons for hire, generally, though not necessarily, based on a posted fare. *Interstate Com. Comm'n v. Baltimore & O. R. Co.*, 145 U.S. 263, 275 (1892) ("the principles of the common law applicable to common carriers . . . demanded little more than that they should carry for all persons who applied, in the order in which the goods were delivered at the particular station, and that their charges for transportation should be reasonable. It was even doubted whether they were bound to make the same charge to all persons for the same service."). Common carrier status conferred certain duties not applicable to private carriers. For example, "[i]t was long ago settled that common carriers of goods 'are liable for the loss of goods entrusted to their care, in all cases, except where the loss arises from the act of God, the enemies of the state, or the default of the party sending them." *Hunt v. Clifford*, 209 A.2d 182, 183–84 (Conn. 1965) (cleaned up). "This same standard of care was extended to common carriers of passengers except that it was necessarily made less rigorous because . . . [common carriers] have not the same absolute controul [sic] over passengers, that they have over goods entrusted to their care." *Id.* at 184 (cleaned up).

These extended duties, which do not apply to private party contracts, limit government's ability to impose common carrier designation involuntarily or by fiat. *Frost*, 271 U.S. at 593 ("the power to compel a private carrier to assume against his will the duties and burdens of a common carrier, the state does not possess."). Moreover, any attempt by a state to do so,

implicates the constitutional rights of the carrier. *See id*. at 592 ("[C]onsistently with the due process clause of the Fourteenth Amendment, a private carrier cannot be converted against his will into a common carrier by mere legislative command."); *Michigan Pub. Utilities Comm'n v. Duke*, 266 U.S. 570 (1925) (statute making persons transporting property over public highways common carriers violated due process rights of private carriers).

Nor does common carrier status automatically adhere based on the type of service. Bus service, for example, may be provided as a common carrier, but not if its services are limited to certain passengers, such as students. *See, e.g.*, *Hunt*, 209 A.2d at 183 ("A common carrier of passengers undertakes to carry for hire, indiscriminately, all persons who may apply for passage, provided there is sufficient space or room available and no legal excuse exists for refusing to accept them. Since passengers were not accepted on this school bus indiscriminately but were restricted to pupils embraced in the contract of transportation, the bus was not being operated as a common carrier of passengers.").

Notably, common carriers have limited duties, which do not include carrying traffic to any place the customers demand if outside the carrier's regular offerings or granting access for purposes outside its regular terms. Passengers on a train, for example, cannot demand to be taken to a different destination than the destinations served by the railway. Nor must all comers be allowed to enter a train station and stay there if they do not have a ticket. *See, e.g., Harris v. Stevens*, 31 Vt. 79 (1858).

Common carrier designation has been extended to utilities, but those applications maintain traditional characteristics. *E.g.*, *F.C.C. v. Sanders Bros. Radio Station*, 309 U.S. 470, 474 (1940) ("communication by telephone and telegraph . . . the Communications Act recognizes as a common carrier activity and regulates accordingly in analogy to the regulation of rail and other carriers by the Interstate Commerce Commission").

Private artists, by contrast, have none of the characteristics that delineate a common carrier under the common law and cannot be rendered common carriers by fiat. Nor do they resemble modern examples of common carriers, which, in narrow circumstances may be required to carry the speech of others in a similar way to how carters, railways, or ferry operators could be required under the common law to carry freight for any customer that met its terms. 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 Educ. Telecomms. Consortium v. FCC*, 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 ("[T]he 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.*, 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; the message is created and published by the designer—not just carried; 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,[9] 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 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, contrary to the State's assertion that under *Pruneyard* businesses are free to disassociate themselves from the views they are compelled to host, BIO at 31, here, Petitioner's right to expressly

[9] *Amicus* has previously argued that the Court should reconsider *Pruneyard*. *See Amicus* Br. of AFPF 19, *Cedar Point v. Hassid*, No. 20-107 (filed January 5, 2021).

disavow any connection with the message is prohibited by law, which the Circuit Court affirmed.[10]

*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," and not targeted to speech or content. *Id.* 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 Clause here focuses on customers, not services.[11]

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[10] "Having concluded that the First Amendment does not protect Appellants' proposed denial of services, we also conclude that the First Amendment does not protect the Proposed Statement" *Opinion*, 6 F.4th at 1183.

[11] *See* 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 panel majority presumed 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 and opening the door to additional customers securing identical services.[12] Indeed, the panel majority implied the opposite, relying on the "quality and nature" of the artist's services generally and not the demonstrable existence of any particular service—a "publicly available good"—she offers.[13] It was enough that she offers some service of unique quality to expose her to demands for any service. By basing the holding on access to the artist, the Court of Appeals removed any natural limit on 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 mere fancy. There is no *if-*

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[12] This interpretation is not fanciful considering that Ms. Smith has already received a request for a same-sex wedding website despite not having entered the market for wedding websites. *See, e.g.* Cert. Pet. at 5 ("Yet Lorie still received a request for a same-sex-wedding website.").

[13] *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).

*then*; there is only *then*. A customer need only find an artist 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, with no identified standard for legal significance. In a single paragraph, the panel majority 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 service offerings 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.[14] 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 welfare of native American children could not refuse to represent an adversary (based on ancestry).[15] Or, a therapist

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[14] A married couple could commission a portrait of a child; a Russian could commission a Celtic website; a Christian could order custom Wicka jewelry; and a deaf customer could arrange a party for a blind child. The services remain the same regardless of the characteristics of the customer.

[15] 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 acceding that CADA is viewpoint-based, the court highlighted the arbitrary enforcement of CADA, which raises the specter of Due Process and Equal Protection harms. There is nothing in the opinion or the statute that indicates which messages will be enforced or how the State would choose, for example, among 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

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). Similarly, a school that focuses its teaching on a particular language could be compelled to develop and teach classes in whatever other language a student demands—even if that would undermine the focus and purpose of the school.

This lack of limiting principle is the sword by which diversity may be destroyed through compelling speech-based occupations to deliver whatever message the state dictates should be heard by all.

## CONCLUSION

The remedy is straightforward: public accommodation laws cannot be interpreted to conflict with the First Amendment to convert a speaker into a public accommodation.

Respectfully submitted,

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June 1, 2022

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professional conduct notwithstanding—if message could be dictated by the government.