

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 PETITION FOR A 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, contrary to the artist's sincerely held religious beliefs, on the theory that creative professionals are per se monopolists, violates the First Amendment.

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

This case presents a pressing question at the intersection of antidiscrimination laws and free-speech rights: Does a state interest in equal access to public accommodations justify compelling speech from creative professionals by deeming them monopolists?

The court below said yes, when the speech is the product of an individual’s “unique creative talents.” Despite recognizing such products as “pure speech,” the court held that compulsion is justified to ensure a “free and open economy.” According to the court, even if consumers can obtain similar products from thousands of other providers, because such products are the creation of an individual’s talents, each is “unique” and not “fungible.” The court thus reasoned that each creative individual enjoys a monopoly, and their speech may be compelled to ensure that protected classes may access “monopoly” markets.

This definition of monopoly is unprecedented. As this Court has long recognized, under fundamental 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 cross-elasticity of demand. The court below thus created a unique definition of monopoly just to compel speech.

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. *Amici* gave timely notice and each of the parties has consented to the filing of this amicus brief.

The combination of the court’s unique-equals-monopoly fallacy and the expansive protected categories under many antidiscrimination laws gives local government authorities *carte blanche* to force creative professionals to speak on diverse topics. Here, the State’s interest in ensuring access to services justified compelling a creative professional, despite her religious convictions, to “create speech that celebrates same-sex marriages.” Other protected categories, such as “political affiliation” and “political opinion,” for example, will expose creative professionals to compelled speech violating their political views.

That result is squarely at odds with this Court’s First Amendment jurisprudence. Indeed, in the cases of newspapers and public utilities, the presence of *actual* monopoly cannot justify requiring entities to “foster” “religious, political, and ideological causes.” *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

If allowed to stand, the decision below will not only chill speech, but it will result in fewer creative professionals offering their services to the public. That is not in the interests of the marketplace of ideas or the marketplace for goods and services.

Amici curiae, listed in the Appendix, are scholars in law, economics, and philosophy who study, teach, and have published 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 diminish social welfare.

STATEMENT OF THE CASE

Lorie Smith is a website designer. She is the sole owner of 303 Creative, which is one of hundreds of website design companies in her local area and

thousands nationwide. Pet. 6a, 190a. Smith is willing to work with all people, regardless of “race, creed, sexual orientation, [or] gender.” *Id.* at 11a–12a. She is therefore 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. 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.

Because 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. 7a. The district court said no and entered summary judgment against Smith. *Id.* at 8a.

The Tenth Circuit held that Smith had standing, her “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. 9a–19a, 20a, 22a.

The circuit court nevertheless held that the State could compel Smith to speak against her religious convictions to ensure “equal access to publicly available goods and services.” Pet. 26a (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 624 (1984)). According to the court, 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 court held that 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, the court held that compelling Smith to speak in support of same-sex marriage was justified because Smith is, in effect, “a monopoly.” Pet. 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.

REASONS FOR GRANTING THE PETITION

I. Review is needed because the decision below flouts basic economics and will chill the speech of creative professionals.

The lower court justified its compulsion of speech by relying on the State’s interest in keeping a “free and open economy.” Pet. 26a. But the court’s reasoning perverts the very economic concepts on which it relies. The court recognized that LGBT consumers could obtain wedding-website design services from businesses other than Smith’s. *Id.* at 28a. Indeed, the record shows that Smith competes with hundreds of local web-design companies and thousands nationwide. Pet. 190a. Yet the court held that the relevant market was not competitive; Smith is a monopolist; and compelling her to speak in favor same-sex weddings is

justified because Smith’s web-design services were “unique” and “not fungible.” *Id.* at 28a.

This reasoning dangerously misconstrues economics, competition, and monopoly. If not corrected, it will chill speech in many professions and reduce market-place alternatives.

A. The decision below defies economics as articulated in this Court’s precedents.

What defines a monopoly is not the uniqueness of a product or service but a lack of alternatives. As this Court put it, “[w]hen 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 needn’t 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”). Rather, the test is whether products or services are “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).

Under this test, 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). In other words, consistent with commercial realities, products and services that are unique—i.e., 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 undoubtedly “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). And the UCLA women’s soccer program may be “unique,” but it competes with other programs for student-athletes, and the programs are thus “interchangeable.” *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1063–1064 (9th Cir. 2001).

Indeed, courts across the country have 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). And this Court essentially did so as well 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 far short of supporting a claim that

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

petitioners enjoy an abiding monopoly of access to spectators.”).

Products produced by artists and other creative professionals, 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 unique, and some say world-changing, 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. Smith’s “*unique* services are, by definition, unavailable elsewhere.” Pet. 28a (emphasis original). But given the availability of hundreds, if not thousands, of alternative website-design services, it cannot be said that compelling Smith to speak in support of same-sex weddings is necessary to ensure “access to the marketplace.” *Ibid.*

B. The decision below would justify compelling speech from any creative professional who serves the public.

The lower court’s holding is not just wrong, it is dangerous. The court’s reasoning will chill speech in a wide variety of professions. All that is needed to justify compulsion is that the products or services be “unique” in some sense. And those affected are not limited to religiously motivated speakers.

Most obviously, the court’s holding means that antidiscrimination laws may be used to compel speech from religious creative professionals offering services to the public. 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. 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. 69a (Tymkovich, C.J., dissenting). Religious videographers and calligraphers could be compelled to create speech that violates their religious convictions. See Pet. 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); *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

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, 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

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 doesn’t take much imagination to realize the broad scope of professionals whose speech could be compelled. Just think of artists such as Amanda Gorman, the poet for the most recent presidential inaugural, whose work reflects her convictions concerning “the world’s 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 has written several commissioned poems. See Amanda Gorman, <https://perma.cc/T9KE-ULAK>. Under the circuit court’s reasoning, given that she offers her services to the public, what would stop a county or municipality from requiring Ms. Gorman to accept a commission for a poem supporting political opinions contrary to her own?

Perhaps a court would find that Ms. Gorman has not accepted sufficient 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>.

§ 9.21.020 (“political affiliation”); Urbana, Ill., Code of Ordinances §§ 12-39, 12-63 (“political affiliation”).

Or take the many famous musicians who have refused to allow political candidates to use their music for campaigns 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, according that court, "unique goods and services are where public accommodation laws are most necessary to ensuring equal access." Pet. 30a.

These examples are not far-fetched. For instance, one municipality has already taken the position 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 decision below gives such municipalities license to compel speech.

Left to stand, the decision will hurt consumers in one of two ways. It will force either (a) unwilling associations; or (b) the exit of a class of market

participants. The former market distortion results in poorly matched providers and consumers. The latter removes from the market merchants whom some consumers may prefer (regardless of the merchant's religious or political views). A smaller marketplace is necessarily less diverse and less competitive than a larger market with a diverse set of providers.

II. Review is needed to clarify that the government may not compel speech from creative professionals even if their “unique” products are considered a “monopoly” in some sense.

Even if one were to accept the lower court's redefinition of monopoly, review is needed to clarify that the presence of a so-called monopoly in products created by creative professionals cannot justify compelling their speech.

In other contexts, this Court has held that the First Amendment precludes restrictions on or compulsion of speech, even in the presence of an *actual* monopoly. For instance, the First Amendment prevented a State from requiring newspapers to print political candidates' replies to press criticisms, even though press, television, and radio companies had consolidated, creating a “monopoly of the means of communication.” *Miami Herald Pub. Co., Div. of Knight Newspapers, Inc. v. Tornillo*, 418 U.S. 241, 250 (1974). It did not matter that reaching the public through print media was “almost impossible” thanks to this monopoly. *Id.* at 251. The statute could not be justified even by the “concededly important interest of ensuring free and fair elections by means of an electorate informed about the issues.” *Id.* at 260 (White, J., concurring).

Likewise, this Court found unconstitutional a government order requiring a utility to “include in its

billing envelopes speech of a third party with which the utility disagrees.” *Pac. Gas & Elec. Co. v. Pub. Utils. Com.*, 475 U.S. 1, 4 & n. 1 (1986). The same concerns that required invalidating “the compelled-access rule in *Tornillo* apply to [the utility] as well as to the institutional press.” *Id.* at 11.

By the same token, a utility could not be *barred* from including in monthly bills “inserts discussing controversial issues of public policy,” even though the utility was a “government regulated monopoly.” *Consol. Edison Co. v. Pub. Serv. Comm’n*, 447 U.S. 530, 532 & n.1 (1980). The regulation was not justified by state interests in protecting the privacy of the utility’s “captive audience” of customers, ensuring that limited resources were allocated in the public interest, or ensuring that customers were not forced to subsidize the utility’s speech. *Id.* at 540–543.

What is more, the presence of a monopoly does not justify restricting *commercial* speech. In *Central Hudson*, this Court struck down a regulation banning advertising by a public utility that promoted electricity use, reasoning that “[e]ven in monopoly markets, the suppression of advertising * * * defeats the purpose of the First Amendment.” *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 567 (1980). The restriction was not justified even by a “direct link” to the State’s “important” interest in “energy conservation.” *Id.* at 569–570.

Here, of course, we are not dealing with faceless public utilities but flesh-and-blood creative individuals. 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).

The question here is whether the government may invade the spirit and intellect of individuals precisely *because* they are especially talented, thereby producing “unique” goods and services offered to the public. Under a sound reading of the First Amendment and this Court’s precedents, it may not.

CONCLUSION

Certiorari should be granted.

Respectfully submitted.

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