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 OF NEW YORK STATE BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Pursuant to Supreme Court Rule 37.3, the New York State Bar Association ("NYSBA"), as amicus curiae, respectfully submits this brief in support of the Respondent. NYSBA has been the voice of the legal profession in New York State for more than 140 years and is the largest voluntary state bar association in the United States. With members practicing in every state in the United States and a throughout the world, NYSBA's mission includes shaping the development of law and facilitating the administration of Justice.

Among its many roles, NYSBA is committed to developing forward-looking policies relevant to the profession; in that role, it takes positions in litigation concerning matters of interest to its members and the legal profession. As part of its mission, NYSBA has a history of taking a stand in promoting equality in the law on behalf of all of its members, our members' clients, and for people in all sectors of society.

Moreover, NYSBA is an association of lawyers licensed to practice before all courts of New York State, including the Commercial Division, which is a major center for resolution of interstate and international business disputes. In such disputes, the application of New York jurisdiction, law, and/or forum is widespread and common.

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1. All parties have filed blanket consents to the filing of *amicus curiae* briefs in this case. In accordance with Rule 37.6, counsel of record confirms that no counsel for a party authored this brief in whole or in part, and that no person or entity other than *amicus curiae*, its members, or its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

As such, NYSBA has a strong interest in promoting interstate business generally, as well as a reputation for standing for reason, efficiency, and consistency in commercial law.

NYSBA views these objectives as requiring proper application and reasonable interpretation of First Amendment and other constitutional rights of all parties to business transactions. In such regard, NYSBA has and will continue to be a strong voice in support of the elimination of discrimination in interstate commerce based upon such factors, *inter alia*, as actual or perceived race, ethnicity, sex, sexual orientation, gender identity, or differences in physical ability or medical status. Discrimination against any protected class of the U.S. public on such bases—especially where a right to do so is enshrined in state law—is anti-business as well as fundamentally unjust and un-American.

SUMMARY OF THE ARGUMENT

Ample historical evidence shows a tradition of supporting the Government's compelling interest in applying anti-discrimination laws to those who choose to offer products and services to the public. Even prior to the founding of our American Constitutional Republic, as early as the 16th century, the English common law enforced principles of equity requiring that those who choose to be open to the public be open to all. There is a lengthy common understanding solidly grounded in history and tradition that ensures equitable access to all members of our civic community when a person engaged in public commerce opens their doors to the general public.

Petitioners' challenge to Colorado's Anti-Discrimination Act (Colo. Rev. Stat. §24-34-601(2)(a) (2020), "CADA")) is based upon their announced intention to (i) violate the Accommodations Clause of CADA by denying their otherwise publicly-offered wedding website design services to persons who seek to celebrate same-sex marriages (and unavoidably and manifestly, to gay and lesbian customers in general, a protected class); and (ii) to violate the Communications Clause by publicly advertising their intention to violate the Accommodations Clause. The surviving question granted appeal here is highly tailored: "whether applying a public-accommodation law to compel an artist to speak or stay silent violates the Free Speech Clause of the First Amendment." The question as presented denies review of such issues as whether Respondents are in fact "artists" and whether the law is, in fact, compelling or restraining speech in the first instance—questions the amicus believes are highly questionable under the circumstances of this case. The Court is not addressing, at least in this matter at this time, any further review of the issues of religious conscience, Establishment Clause, and standards of scrutiny under *Employment Division v. Smith*, 494 U.S. 872 (1990), which has remained undisturbed precedent in numerous recent cases. *See Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission,* 138 S. Ct. 1719 (2018). *See also, Fulton v. City of Philadelphia,* 141 S. Ct. 1868 (2021); *Kennedy v. Bremerton School District*, 142 S. Ct. 2407 (2022).

The question certified here necessarily comprises the issue of whether the "artist's" "speech," "compelled" (or prevented) by a public accommodation law similar to the Act under the circumstances of this case, constitutes

protected speech under the First Amendment. This *amicus* contends that it is not protected speech and respectfully urges the Court to consider the unavoidable impact that granting the Petitioner's challenge would have upon the longstanding historic balance between free speech and public interest generally, as well as to a specific broad-reaching public interest—the rights of gay and lesbian individuals to obtain "whatever products and services they choose on the same terms and conditions as are offered to other members of the public"[2]—already held by the Court to be compelling.

ARGUMENT

I. AMPLE HISTORICAL EVIDENCE SUPPORTS THE GOVERNMENT'S COMPELLING INTEREST IN APPLYING ANTI-DISCRIMINATION LAWS TO THOSE WHO CHOOSE TO OFFER PRODUCTS AND SERVICES TO THE PUBLIC.

A. Common Law and Statutory History and Tradition Long Support the Legal Maxim that a Place of Commerce Open to the Public Must be Open to All Free to Discrimination

As this Court emphasized recently in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen,* ___U.S.___, 142 S. Ct. 2111, 2130 (2022), when this Court confronts a free speech challenge to a generally applicable law, "the government

2. *Masterpiece Cakeshop* at 1728. See also *Roberts v. U.S. Jaycees,* 468 U.S. 609, 628 (1984) ("[A]cts of invidious discrimination in the distribution of publicly available goods, services, and other advantages cause unique evils that government has a compelling interest to prevent").

must generally point to historical evidence about the reach of the First Amendment's protections." *Id.* (quoting *United States v. Stevens*, 559 U.S. 460, 468-471 [2010]). The First Amendment's protections for free speech here do not override the government's compelling interest in ensuring the public marketplace is free from discrimination. Indeed, the history of public accommodations laws limiting the rights of providers of public services and accommodations to discriminate stretches in common law long before our nation's founding, and it was formally adopted into our own history and tradition as the federal and state governments have acted to combat the overt discrimination that has long plagued our public squares.

As early as the 16th century, the English common law enforced principles of equity requiring those who choose to be open to the public be open to all. *See* Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 Nw. U. L. Rev. 1283, 1304-05 (1996) (quoting *White's Case*, 2 Dyer 343 [1586]). The principle, the English courts explained, is straightforward: if a business owner voluntarily chooses to provide their services to the public, common law principles of equity impose upon them a duty to their fellow citizens and require them to serve every person equally who wishes to use those services:

> [W]here-ever any subject takes upon himself a public trust for the benefit of the rest of his fellow-subjects, he is eo ipso bound to serve the subject in all the things that are within the reach and comprehension of such an office, under the pain of an action against him . . . . If on the road a shoe fall off my horse, and I come

> to a smith to have one put on, and the smith refuse to do it, an action will lie against him, because he has made a profession of a trade which is for the public good, and has thereby exposed and vested an interest of himself in all the King's subjects that will employ him in the way of his trade. If an innkeeper refuses to entertain a guest where his house is not full, an action will lie against him, and so against a carrier, if his horses be not loaded, and he refuse to take a packet proper to be sent by a carrier.

Singer, at 1306 (quoting *Lane v. Cotton*, 88 Eng. Rep. 1458 [K.B. 1701] [Holt, C.J., dissenting]).

Sir William Blackstone, in his 1756 treatise *Commentaries on the Laws of England*,[3] reiterated that a duty of non-discrimination is imposed on those who choose to conduct business in the public marketplace, but based his conclusion on implied contract theory rather than principles of common law equity. *See* 3 William Blackstone, *Commentaries on the Laws of England*, ch. 9, at 164 ("if an inn-keeper, or other victualler, hangs out a sign and opens his house for travelers, it is an implied engagement to entertain all persons who travel that way; and upon this universal assumpsit an action on the case will lie against him for damages, if he without good reason refuses to admit a traveler"). As Blackstone explained, the owner of a business who hangs a shingle offering their services to the public assumes a duty of non-discrimination

3. Available at https://avalon.law.yale.edu/18th_century/blackstone_bk3ch9.asp.

in the provision of those services, merely because they have chosen to enter the public marketplace; the act of holding their business out as open to the public imposes a contract implied in law when a customer accepts the offer and pays the fee for the services offered. *See id.* Refusal then to provide those services was a breach of the implied contract, subjecting the business owner to liability. *See id.* at 164-165; *see also* Singer, at 1309-10 ("Being open to the public they create a 'universal assumpsit' -- effectively, a promise to the world to accept and serve any traveler who seeks such service. They have a duty to do what they have represented they would do -- provide shelter for any travelers who come to them, as long as they have room. This may rest on the fact that members of the public rely on their fulfilling their implied representations of availability, or it may rest on the inherent moral obligation that businesses have to do what they purport to do 'with integrity, diligence, and skill.' In either case, the crucial act is the act of 'hanging out a sign' -- holding oneself out as having made a public invitation to come to one's property for certain services.").

Following independence, these English common law equitable and implied contract duties of non-discrimination in the provision of public services migrated to early American law. *See e.g.* 2 James Kent, *Commentaries on American Law* (1826–1830), Lecture 40[4] ("Common carriers are those persons who undertake to carry goods generally, and for all people indifferently, for hire, and with or without a special agreement as to price. . . . They are bound to do what is required of them in the course of

4. Available at https://lonang.com/library/reference/kent-commentaries-american-law/kent-40/.

their employment, if they have the requisite convenience to carry, and are offered a reasonable or customary price; and if they refuse without some just ground, they are liable to an action."); Singer, *supra*, at 1314-15 ("Hilliard's [1859] treatise is the first on the law of torts and justifies the liabilities of innkeepers and common carriers as based not on contract (or the voluntary assent of the parties), but on positive law, meaning that the duty is imposed by the state. 'The obligation of a common carrier does not arise out of contract, in the usual sense of that expression, but it is declared by law, and his responsibilities are fixed by considerations of public policy.'").

Early American courts, including this Court, similarly adopted these principles of non-discrimination. *See, e.g., Pearson v. Duane*, 71 U.S. 605, 615 (1866) ("Common carriers of passengers, like the steamship Stevens, are obliged to carry all persons who apply for passage, if the accommodations are sufficient, unless there is a proper excuse for refusal."); *Markham v. Brown*, 8 N.H. 523, 529-30 (1837) ("There seems to be no good reason why the landlord should have the power to discriminate in such cases, and to say that one shall be admitted and another excluded, so long as each has the same connection with his guests--the same lawful purpose--comes in a like suitable condition, and with as proper a demeanor; any more than he has the right to admit one traveler and exclude another, merely because it is his pleasure."); *Madden v. Queens Cnty. Jockey Club, Inc.*, 296 N.Y. 249, 253 (1947). So too does historical support exist for the Tenth Circuit's view that, as a functional monopoly in the public marketplace, Petitioner's business adopts a special duty to serve all of the public and not to exclude any particular group of customers based upon their sex. *See 303 Creative LLC v.*

Elenis, 6 F.4th 1160, 1180-81 (10th Cir. 2021); *Shepard v. Milwaukee Gas Light Co.*, 6 Wis. 539, 547 (1857) ("Odious as were monopolies to the common law, they are still more repugnant to the genius and spirit of our republican institutions, and are only to be tolerated on the occasion of great public convenience or necessity; and they always imply a corresponding duty to the public to meet the convenience or necessity which tolerates their existence.").

Although equity in English common law imposed that duty of non-discrimination upon those who openly offered their services to the public generally, the federal and state governments soon saw that businesses could avoid the duty by advertising that they were open only for certain classes of persons—e.g., posting signs communicating that the businesses would serve "Whites Only" or "Gentiles Only" (*see e.g. State Div. of Hum. Rts. v. McHarris Gift Ctr.*, 52 N.Y.2d 813, 817 [1980] [Jasen, J., dissenting])—and refusing to provide services equally to all. Although English common law and Blackstone's implied contract theories could be manipulated to permit that selective discrimination by business owners, American history and tradition cannot.

As this Court acknowledged in *Obergefell v. Hodges* (576 U.S. 644 [2015]):

> The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning.

Id. at 664. That's precisely what the federal and state governments did in combating continuing discrimination in public accommodations.

As discrimination against African Americans and others proliferated following the end of the Civil War, the federal government adopted many anti-discrimination statutes to ensure equal access and rights in the public sphere. The first of those statutes was the Civil Rights Act of 1875, which provided that "all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law, and *applicable alike to citizens of every race and color, regardless of any previous condition of servitude*." *Civil Rights Cases*, 109 U.S. 3, 9 (1883). Although this Court struck the law down, as exceeding Congress's power under the Constitution, this Court recognized that the anti-discrimination laws fell within the legislative power of the states. *See id.* at 14-15 ("The truth is that the implication of a power to legislate in this manner is based upon the assumption that if the States are forbidden to legislate or act in a particular way on a particular subject, and power is conferred upon Congress to enforce the prohibition, this gives Congress power to legislate generally upon that subject, and not merely power to provide modes of redress against such State legislation or action. The assumption is certainly unsound. It is repugnant to the Tenth Amendment of the Constitution, which declares that powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people.").

Significantly, Justice Harlan dissented and would have upheld the Civil Rights Act, relying on the same principles of non-discrimination in public accommodations that came over from English common law. He explained that anti-discrimination laws, like the Civil Rights Act, were fundamentally necessary to eliminate the vestiges of slavery that still persisted, even after the ratification of the Thirteenth, Fourteenth, and Fifteenth Amendments. *See id.* at 37-43 (Harlan, J., dissenting). In fact, quoting from Lord Chief Justice Hale, Justice Harlan emphasized that the same simple principle has underlaid anti-discrimination laws since the 1500s:

> When, therefore, one devotes his property to a use in which the public has an interest, he in effect grants to the public an interest in that use, and must submit to be controlled by the public for the common good to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use, but, so long as he maintains the use, he must submit to the control. *Id.* at 42.

Of course, following the recognition of Congress's explicit powers under the Commerce Clause, Congress adopted the anti-discrimination provisions in public accommodations once again in the Civil Rights Act of 1964, this time tailored to activity that impacts interstate commerce. *See Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250-51 (1964); *see also, e.g., Blow v. North Carolina*, 379 U.S. 684, 685 (1965) ("The Civil Rights Act of 1964 forbids discrimination in places of public accommodation and removes peaceful attempts to be served on an equal basis from the category of

punishable activities."). Congress extended those protections in public accommodations to protect against disability discrimination. *See* 42 U.S.C. § 12182(a) (prohibiting discrimination on the basis of disability "in the full and equal enjoyment of the goods, services, facilities, privileges, advantages or accommodations of any place of public accommodation").

B. Several States Have a Long History of Supporting Both Common Law and Statute in Insuring That Their Commercial Spaces Are Free of Discrimination and Open to All

Many states have also long regulated conduct in the public marketplace by forbidding discrimination in public accommodations on the basis of protected characteristics like race, sex, national origin, and religion. *See* Justin Muehlmeyer, *Toward A New Age of Consumer Access Rights: Creating Space in the Public Accommodation for the LGBT Community*, 19 Cardozo JL & Gender 781, 786, 787 n.40 (2013) (noting that "[i]n 1865, [in] the wake of the Civil War, Massachusetts passed the first public accommodations law" and "[i]n the South, only Tennessee enacted a public accommodations law. On the other hand, in the North and West, eleven states passed public accommodation laws between 1883 and 1885"). As history has shown the need for additional protections against discrimination on the basis of other characteristics, like sexual orientation, the states have expanded those laws to further their compelling governmental interest in ensuring equal access to the public marketplace and in removing the remaining vestiges of discrimination. *See e.g. Roberts v. U.S. Jaycees*, 468 U.S. 609, 624 (1984) (the Minnesota public accommodation law's goals of

"eliminating discrimination and assuring its citizens equal access to publicly available goods and services . . . plainly serves compelling state interests of the highest order").

New York's history and tradition of protecting all New Yorkers against invidious discrimination in public accommodations is a good example. In 1873, the New York State Legislature adopted New York's first civil rights law. *See* 1873 N.Y. Laws ch. 186; Evan Friss, *Blacks, Jews, and Civil Rights Law in New York, 1895-1913*, 24 J. Am. Ethnic Hist. 70, 72 (2005). The 1873 act prohibited discrimination in places of public accommodation based on "race, color, or previous condition of servitude." *Id.*

In 1888, the New York Court of Appeals issued one of the nation's most influential state court decisions affirming the state legislature's power to adopt an anti-discrimination law ensuring equality in public accommodations irrespective of race. *See* David McBride, *Fourteenth Amendment Idealism: The New York State Civil Rights Law, 1873–1918*, 71 N.Y. History 207, 214 (1990). In *People v. King* (110 N.Y. 418 [1888]), the New York Court of Appeals, faced with an owner of a skating rink who argued that he should be able to exclude persons of color from his establishment, held that the common law obligations of innkeepers and common carriers similarly applied to other types of privately held businesses as well. *Id.* at 428. The Court reasoned that no such discriminatory restriction was permissible because,

> [i]n the judgment of the legislature, the public had an interest in preventing race discrimination between citizens on the part of persons maintaining places of public

> amusement; and the quasi-public use to which the owner of such a place devoted his property gave the legislature a right to interfere. *Id.*

Indeed, the Court "found no sociological or legal grounds strong enough to preclude the state antidiscrimination law's applicability to businesses open to the public, which this statute was clearly intended to regulate." McBride, at 207.

The New York legislature amended the civil rights statute in 1893 and 1895 to significantly expand its scope. *See* 1892 N.Y. Laws ch. 692, (amending Penal Code § 383 to include places "of public resort" or recreation); 1895 N.Y. Laws ch. 1042, § 1 (significantly increasing the list of covered institutions and facilities that the legislature deemed public accommodations). As New York courts acknowledged, the intent of the Legislature in doing so was to "eliminate race discrimination," because "the slightest trace of African places a man under the ban of belonging to that race. However respectable and worthy he may be, he is ostracized socially." *Burks v. Bosso*, 81 App. Div. 530, 534 (N.Y. App. Div. 1903), *rev'd* 180 N.Y. 341 (1905) (reversed only on the ground that the particular place was not a place of public accommodation).

New York's anti-discrimination laws were strengthened by the Consolidated Laws of 1909 which prohibited discrimination because of race, creed, or color in jury service, in the right to practice law, in admission to the public schools, or in places of public accommodation, resort or amusement. N.Y. Civ. Rights Law §§ 13, 40, 41; N.Y. Jud. Law § 467; N.Y. Educ. Law § 920. A 1913 law even "prohibited public announcements or advertisements

by public-serving facilities that would suggest racial exclusion." McBride, at 228; *see* 1913 N.Y. Penal Law § 1191. In 1938, New York added a first of its kind in the nation protection against discrimination to its state constitution: "No person shall because of race, color, creed or religion be subjected to any discrimination in his civil rights by any other person or by any firm, corporation, or institution or by the state or any agency or subdivision of the state." N.Y. Const., Art. I, § 11 (approved Nov. 8, 1938).

New York's current Human Rights Law ("NYSHRL") protections against discrimination in public accommodations are "an inevitable outgrowth of [such] precursory legislation." Terry Lichtash, *Ives-Quinn Act--The Law Against Discrimination*, 19 St. John's L. Rev. 170, 170, 172-175 (2013). Although enacted initially to combat discrimination in employment, the NYSHRL's protections have been expanded consistently in scope and characteristic, and it now protects against discrimination in "retail stores and establishments dealing with goods or services of any kind" (1962 N.Y. Sess. Law ch. 370 § 1; *see also U.S. Power Squadrons v. State Hum. Rts. Appeal Bd.*, 59 N.Y.2d 401, 410 [1983]) (the 1960 amendment was "a clear indication that the Legislature intended that the definition of place of accommodation should be interpreted broadly") and includes places that "provide services to the public," even if "they may be conducted on private premises and by appointment, [as long as] such places are generally open to all comers." *Cahill v. Rosa*, 89 N.Y.2d 14, 21 (1996).

In fact, in 2002, the legislature extended the protections of the NYSHRL (and those of other laws) to lesbian, gay, and bisexual New Yorkers in the Sexual

Orientation Non-Discrimination Act ("SONDA").[5] The legislative findings in support of that bill are notable and expansive, recognizing the underlying societal need to protect all against discrimination and New York's commitment to eradicate discrimination:

> The legislature reaffirms that the state has the responsibility to act to assure that every individual within this state is afforded an equal opportunity to enjoy a full and productive life, and that the failure to provide such equal opportunity, whether because of discrimination, prejudice, intolerance or inadequate education, training, housing or health care not only threatens the rights and proper privileges of its inhabitants, but menaces the institutions and foundation of a free democratic state and threatens the peace, order, health, safety and general welfare of the state and its inhabitants.
>
> The legislature further finds that many residents of this state have encountered prejudice on account of their sexual orientation, and that this prejudice has severely limited or actually prevented access to employment, housing and other basic necessities of life, leading to deprivation and suffering. The legislature further recognizes that this prejudice has fostered a general climate of

5. Although SONDA did not explicitly add protections for people who are transgender or gender-nonconforming, those protections were explicitly added in 2019. 2019 N.Y. Sess. Law ch. 8, §§ 5-13.

> hostility and distrust, leading in some instances to physical violence against those perceived to be homosexual or bisexual.

2002 N.Y. Sess. Law 2, § 1, (eff. Jan 16, 2003).

Like marriage, whether between couples of the same or opposite sexes, is "a right of privacy older than the Bill of Rights" (*Griswold v. Connecticut*, 381 U.S. 479, 486 (1965); *see also Obergefell*, 576 U.S. at 666-67), so too is the right of consumers to be free from discrimination by businesses that choose to offer their services on the public marketplace. That choice necessarily implies an attendant duty, long visible in the nation's history and tradition, to serve all customers equally without discrimination on the basis of a protected class. That is precisely the legal duty that anti-discrimination laws impose to serve the state's compelling governmental interest in ensuring that all consumers may participate in the services free from invidious discrimination on the basis of their "race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, disability, marital status, or status as a victim of domestic violence." N.Y. Exec. Law § 296(2)(a) (McKinney).

In sum, the history and tradition of the public marketplace has enjoyed a lengthy legal understanding that when someone opens their doors to engage in public commercial activity you also close the door to being able to limit that public commercial activity to only those chosen members of the public whom you choose to serve.

II. THE ANTI-DISCRIMINATION ACT'S ACCOMMODATIONS CLAUSE DOES NOT VIOLATE THE FREE SPEECH CLAUSE.

A. The Anti-Discrimination Act's Accommodations Clause does not restrict protected speech.

Where the speech at issue constitutes the very discrimination made illegal by the Act, it cannot logically be afforded protection by the First Amendment. To do so would permit hotel owners to post demeaning or hostile signage discouraging hotel guests of color. It would permit adoption agencies to make exclusive references to "mother and father" in their websites and documentation. Indeed, it would permit a wide range of vendors, such as wedding planners, photographers, and caterers, whose service or product either comprises or could include expressive or creative content of any kind, to tailor that content to foreclose or discourage protected classes of customers. A holding for Petitioner would create a facile "loophole" by which a business might entirely avoid the consequences of otherwise illegal discrimination by merely linking the provision or content of its good and services to verbal or graphic expression, which goes against a lengthy understanding of public accommodations and the inability to discriminate in those accommodations by using the First Amendment as a shield.

Contrary to Petitioners' argument, it is not "tacit approval" or "compulsion" of expressive content by the State that is at stake in this case. Businesses like Petitioners, in electing to provide a public product or service in interstate commerce which inherently comprises bespoke elements—elements which Petitioners

themselves choose to cast as protected speech—have themselves put the matter at issue. Having chosen to publicly provide a product customized to each of its clients, for Petitioners to then proceed to refuse to customize it in a manner which would give it equal commercial value to a protected class of users is itself the very discrimination proscribed by the Act. In short, what Petitioner has styled as protected speech is in fact an integral component of its product and service offering as provided to its non-protected customers.

In Petitioners' case, little more than the correct identification and reference to the sexes of the married couple would be required to render the customer website of equal value to gay and lesbian users, making it compliant with the Accommodations Clause of the Act. If such minimal reference were held protected creative expression, bakers could avoid the Act despite providing only cake ornaments depicting white couples; photographers could refuse to frame their camera angles low enough to accommodate newlyweds in wheelchairs; and Petitioners could also refuse to depict or omit certain religious symbols on her "custom" website on "aesthetic" grounds.

B. To elevate Petitioners' argument above the state's interest under the circumstances of this case would bar the application of anti-discrimination law in a wide range of other settings.

It is not governmental approval of content, tacit or otherwise, that is at issue here, but ultimately the discriminatory effect of the subject content in the

public commercial forum. Whether by speech or action, if a product or service sold as a public accommodation is deliberately and unnecessarily tailored to make it unsuitable or valueless to a target protected group, it manifestly constitutes discrimination against which the government may choose to act in the public interest.

The question of whether the state has a compelling interest in this matter extends beyond an Establishment Clause analysis under *Smith*. Indeed, the boundaries of the Free Speech Clause have also been defined in consideration of such interests as public safety (*State v. Schenk*, 2018 VT 45 (2018)), criminal investigation and enforcement (*White v. Baker*, 696 F. Supp. 2d 1289 (N.D.Ga 2010)), infrastructural requirements (*Congregation Rabbinical College of Tartikov, Inc. v. Vill. Of Pomona*, 945 F. 3d 83 (S.D.N.Y. 2019)), in addition to equal protection (*Williamson v. Brevard Cty*, 276 F. Supp. 3d 1260 (M. D. Fl. 2017)).

In many of these settings, even content that is speech is often held not to be protected under the Free Speech Clause. To hold that all of these interests could be trumped, and civil or criminal sanctions avoided by the mere incorporation of what might be deemed expression by the actor would render the state powerless to uphold public values and objectives long held by this court to be compelling. *Procunier v. Martinez*, 416 U.S. 396 (1974). For example, enhanced sentencing for hate crimes has been held constitutional, despite the fact that nothing more than a suspect's verbal utterances or writings exist to prove the necessary intent. *See R.A.V. v. St. Paul*, 505 U.S. 377 (1992), *see also Wisconsin v. Mitchell*, 508 U.S. 476 (1993). The Court does not deem the State to be punishing

such offenders for thought or words it disapproves of; instead, the Court regards it as promoting the rights and safety of a class of victims in need of enhanced protection in cases where the offender's speech is incidental to the violence and/or probative of its motive. We respectfully urge the Court to carefully consider both the logic and potential ramifications of the broad standard sought by Petitioner before inverting such longstanding priorities.

III. THE ANTI-DISCRIMINATION ACT'S COMMUNICATIONS CLAUSE DOES NOT VIOLATE THE FREE SPEECH CLAUSE.

The First Amendment poses no bar to the government's regulation of commercial speech incidental to, or in furtherance of, *a priori* illegal acts, such as discrimination.

Failing Petitioner's attempt to cast its core service offering as protected "speech" under the Accommodations Clause of Colorado's Anti-Discrimination Act, Petitioner further seeks protection for publicly announcing its intention to violate that clause. The Communications Clause of the Anti-Discrimination Act is more than a mere "tag on." It addresses the fact that actions taken, including acts of communication, to dissuade targeted protected classes of the public from dealing with a business not only supports or enables violation of the Accommodations Clause, but also that such communications themselves constitute discriminatory conduct. Petitioner's public announcement of its intention to discriminate against gay couples in its website service has the same effect as a "Straight Couples Only" sign on a dance hall. Lesbian and gay customers are unlikely to walk in to find out how

serious the business might be about its discriminatory intentions.

CONCLUSION

Anti-discrimination laws, which have their roots in 16th century English common law and are deeply rooted in our nation's history and tradition, stand in the way of restricting open and free access to public accommodations throughout the country to ensure that vestiges of discrimination are eradicated from our public squares. The fact that owners of businesses may hold discriminatory religious beliefs privately does not afford them the right to discriminate against equal members of our populace when they offer business services to the public. Indeed, their choice to enter the public marketplace comes with an attendant duty to serve all members of the public equally, even when they disagree with the message of love and equality that their customers may wish to communicate.

This court would not tolerate a business owner proclaiming in the name of free speech or free expression that its business is open to whites only. Nor should it tolerate a business owner communicating to the public that only one man and one woman may use its wedding services. The message of discrimination is the same —one group is worthy of respect and equality and the other is not. And the Free Speech clause treats each communication the same: neither is protected because the state has a compelling governmental interest in ensuring public accommodations are free from discrimination.

Dated: August 18, 2022

Respectfully Submitted,

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