No. 21-476

IN THE
Supreme Court of the United States

303 CREATIVE LLC, ET AL.,
Petitioners,

v.

AUBREY ELENIS, ET AL.,
Respondents.

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

BRIEF OF FIRST AMENDMENT SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici are First Amendment scholars, each of whom teaches or has taught courses in constitutional law or the First Amendment and has devoted significant attention to studying the First Amendment. A full listing of *amici* appears in the Appendix.

INTRODUCTION AND SUMMARY OF ARGUMENT

In 2008, against the backdrop of a long history of discrimination against and hostility toward the lesbian, gay, bisexual, transgender, and queer (LGBTQ) community, Colorado amended its anti-discrimination statute to make it "unlawful for a person . . . to refuse . . . to an individual or group, because of . . . sexual orientation . . . the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation," Colo. Rev. Stat. § 24-34-601(2)(a). In extending these protections, Colorado built upon a long and venerated American tradition of enacting laws to protect "the civil rights of historically disadvantaged groups." *Roberts v. United States Jaycees*, 468 U.S. 609, 624 (1984). In fact, the statute that now protects LGBTQ Coloradoans against discrimination in public accommodations traces its history to the 1880s. *See* An Act to Protect All Citizens

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[1] The parties have consented to the filing of this brief. Under Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

in Their Civil Rights, 1885 Colo. Sess. Laws at 132-33. As this Court recently put it, "[i]t is unexceptional that Colorado law can protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public." *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1728 (2018).

Petitioners, however, do not want to offer same-sex couples the same wedding website design services that they offer to other members of the public and thus brought a pre-enforcement lawsuit seeking a broad declaration that Colorado's Anti-Discrimination Act (CADA) violates their First Amendment rights. Arguing that their web design services involve "personal imagination and content creation," Petitioners insist that the Constitution exempts them and other similar businesses from having to comply with neutral and generally applicable state antidiscrimination laws. Pet'rs Br. 23. Significantly, Petitioners have identified no actual design or message to which they object. Instead, Petitioners argue that CADA compels their speech in violation of the First Amendment simply by requiring them to offer the same services to same-sex couples that they offer to different-sex couples.

Petitioners are wrong. Their claim both "exaggerates the significance of the expressive component" of the potential websites they intend to design and "denigrates the importance of the rule of law" they seek to violate. *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 430 (1990). Accepting their arguments would wreak havoc with established First Amendment principles.

The First Amendment, of course, "includes both the right to speak freely and the right to refrain from speaking at all," *Wooley v. Maynard*, 430 U.S. 705, 714 (1977), but laws like Colorado's that forbid discrimination by commercial entities do not compel speech. Heeding CADA does not compel Petitioners to speak, to deliver a state-sponsored message, or to conform to an official orthodoxy. "There is nothing in this case approaching a Government-mandated pledge or motto that the [business] must endorse." *Rumsfeld v. Forum for Acad. & Inst. Rights*, 547 U.S. 47, 62 (2006) ("*FAIR*"). Colorado simply insists that business owners treat same-sex couples on the basis of "equal dignity," *Obergefell v. Hodges*, 576 U.S. 644, 681 (2015), prohibiting discrimination against LGBTQ people that "serves to disrespect and subordinate them," *id.* at 675. The First Amendment does not give—and has never been understood to give—commercial businesses the right to violate public accommodations laws that prohibit discrimination.

Public accommodations laws "affect what [commercial businesses] must *do* . . . not what they may or may not *say*." *FAIR*, 547 U.S. at 60. Such laws regulate the market, not the marketplace of ideas. "The compelled speech to which [303 Creative] point[s] is plainly incidental to the . . . regulation of conduct, and 'it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Id.* at 62 (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)).

Rather, this Court's cases have consistently upheld the government's broad power to enact generally applicable, content-neutral rules, even when

such restrictions may have an incidental impact on expression. *See, e.g.*, *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011) ("[T]he First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech."). On the basis of these principles, this Court has repeatedly rejected First Amendment challenges to prohibitions on discrimination contained in federal, state, and local public accommodations laws. *See, e.g.*, *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400 (1968); *Roberts*, 468 U.S. at 609; *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987); *N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1 (1988). Even *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995), on which 303 Creative relies, recognizes that public accommodations laws "do not, as a general matter, violate the First or Fourteenth Amendments." *Id.* at 572. And most recently, in *Masterpiece Cakeshop*, this Court reiterated that "it is a general rule that" objections to same-sex marriage "do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutrally and generally applicable public accommodations law." 138 S. Ct. at 1727.

The fact that designing websites for sale to the public—like other commercial endeavors—may be "carried out by means of language," *FAIR*, 547 U.S. at 62, does not change the general rule or give 303 Creative and other similar commercial businesses "special protection from governmental regulations of general applicability simply by virtue of their First Amendment protected activities," *Arcara v. Cloud Books, Inc.,* 478 U.S. 697, 705 (1986). Designing a website may have creative aspects—much like dancing, making music, or designing furniture—but

providing website design services in exchange for payment is not protected First Amendment expression. Thus, a commercial website designer—just like any other business—must comply with content-neutral rules regulating its business. *See Ward v. Rock Against Racism*, 491 U.S. 781 (1989) (music); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991) (nude dancing); *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000) (same).

Petitioners hang their hat on two cases in which this Court held that public accommodations laws could not be constitutionally applied to noncommercial entities—a parade in one instance, *see Hurley*, 515 U.S. at 572, and a private membership organization in the other, *see Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000). The Court reasoned that, in each case, "forced inclusion . . . would significantly affect [the group's] expression," *id.* at 656, because the expansive application of those states' public accommodation laws meant that they applied to speakers with their own independent messages. As a result, "the complaining speaker's own message was affected by the speech it was forced to accommodate." *FAIR*, 547 U.S. at 63. 303 Creative cannot make a similar showing. Colorado's statutory requirement that a public business must serve all customers without regard to race, gender, creed, or, as in this case, sexual orientation, "does not sufficiently interfere with any message of the [business]," *id.* at 64. 303 Creative's argument would rip *Hurley* and *Dale* from their moorings, inventing a new, sweeping exemption from neutral antidiscrimination laws.

Petitioners' theory would not only distort established First Amendment principles, it would also open the door to a host of new claims for constitutional exemptions. Were Petitioners to prevail on their claim

that they are entitled to an exemption from Colorado's Anti-Discrimination Act on the basis that the services they sell involve customization, countless other businesses could argue that they too are entitled to exemptions, resulting in a "gaping hole in the fabric of those laws," *Superior Court Trial Lawyers Ass'n*, 493 U.S. at 431-32. Furthermore, if Petitioners were to prevail here, the same arguments could be made by wedding vendors and other service providers who wish to refuse to serve interracial couples, interreligious couples, or couples of a particular religious faith, such as Christian couples. If merely serving an individual implies an expression of views about the individual's core traits like race, religion, or sexual orientation, any vendor could refuse to serve any member of the public on that basis and argue that such discrimination is freedom of expression.

In short, a straightforward application of Petitioners' theory would inevitably corrode public accommodations laws, which have for centuries ensured that businesses do not turn away members of the public for discriminatory reasons. The First Amendment does not require that result.

ARGUMENT

I. The First Amendment Does Not Prohibit States from Regulating Conduct in a Content-Neutral Manner, Even Though Such Regulation May Have an Incidental Effect on Speech.

"[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *United States v. Alvarez*, 132 S. Ct. 2537, 2543 (2012) (quoting *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002)) (alteration in original). And

just as the government may not restrict expression on the basis of content, it also may not compel speech based on content. *FAIR*, 547 U.S. at 61 ("[F]reedom of speech prohibits the government from telling people what they must say."). Thus, this Court has held that the First Amendment prohibits the government from compelling drivers to use their cars "as a 'mobile billboard' for the State's ideological message," *Wooley*, 430 U.S. at 715, compelling newspapers to print a political candidate's replies to "criticism and attacks on his record," *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 243 (1974), compelling students to salute the flag, *W. Va. State Bd. of Edu. v. Barnette*, 319 U.S. 624, 642 (1943), or compelling recipients of federal aid "to pledge allegiance to the Government's policy of eradicating prostitution," *Agency for Int'l Dev. v. All. for Open Soc'y Int'l*, 133 S. Ct. 2321, 2332 (2013). In all of these cases, the Court held that the First Amendment limited the power of government to require an individual to "personally speak the government's message" or "to host or accommodate another speaker's message." *FAIR*, 547 U.S. at 63.

The First Amendment does not apply with the same force when the government enacts generally applicable, content-neutral rules that regulate conduct, not speech. "Virtually *every* law restricts conduct, and virtually *any* prohibited conduct can be performed for an expressive purpose—if only expressive of the fact that the actor disagrees with the prohibition." *Barnes*, 501 U.S. at 576 (Scalia, J., concurring). This Court has consistently refused to apply strict scrutiny when a plaintiff demands an exemption from a generally applicable, content-neutral law regulating conduct. "'[I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the

conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.'" *FAIR*, 547 U.S. at 62 (quoting *Giboney*, 336 U.S. at 502); *see Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1151 (2017); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 389 (1992) ("[W]ords can in some circumstances violate laws directed not against speech but against conduct."). Indeed, "the distinction between content-based and content-neutral regulations of speech serves as the keystone of First Amendment law." Elena Kagan, *Private Speech, Public Purpose: The Role of Government Motive in First Amendment Doctrine*, 63 U. Chi. L. Rev. 413, 443 (1996).

This Court has repeatedly held that "'an incidental burden on speech . . . is permissible . . . so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'" *FAIR*, 547 U.S. at 67 (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)). This is true whether a plaintiff challenges a regulation for compelling speech or restricting it, *see Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 797 (1988) (discussing the "constitutional equivalence of compelled speech and compelled silence"), and whether it affects certain kinds of speech more than others. "[A] facially neutral law does not become content based simply because it may disproportionately affect speech on certain topics." *McCullen v. Coakley*, 573 U.S. 464, 480 (2014).

Thus, the fact that a content-neutral regulation may incidentally compel or limit expressive activities is no reason for exempting the speaker. Subjecting any incidental burden on speech to rigorous First Amendment review would open the floodgates to a host of claims for exemptions, inviting courts to

second-guess a legislature's decision to prohibit certain forms of conduct.

This Court has repeatedly declined this invitation. *See, e.g.*, *Arcara*, 478 U.S. at 705 ("[N]either the press nor booksellers may claim special protection from governmental regulations of general applicability simply by virtue of their First Amendment protected activities."); *Superior Court Trial Lawyers Ass'n*, 493 U.S. at 431 ("Every concerted refusal to do business with a potential customer or supplier has an expressive component . . . . The most blatant, naked price-fixing agreement is a product of communication, but that is surely not a reason for viewing it with special solicitude."); *FAIR*, 547 U.S. at 66 ("If combining speech and conduct were enough to create expressive conduct, a regulated party could always transform conduct into 'speech' simply by talking about it.").

Under these principles, "the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech." *Sorrell*, 564 U.S. at 567. Thus, this Court has recognized that "Congress . . . can prohibit employers from discriminating in hiring on the basis of race," and thereby "require an employer to take down a sign reading 'White Applicants Only.'" *FAIR*, 547 U.S. at 62. The words on the sign may be speech, but that fact "hardly means that the law should be analyzed as one regulating the employer's speech rather than conduct," *id.* Likewise, a newspaper can be prohibited from publishing "help wanted" advertisements offering employment opportunities restricted to persons of one sex. "Any First Amendment interest . . . is altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity." *Pittsburgh*

Press v. Human Relations Comm'n, 413 U.S. 376, 389 (1973). "Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express [an] idea or philosophy." *R.A.V.*, 505 U.S. at 390.

There is no exception to these principles for expressive businesses. Art galleries and theaters, for example, can both be required to obey content-neutral laws that require serving customers without discriminating against them. Web design businesses are no different.

Consistent with the principle that content-neutral regulations of conduct do not run afoul of the First Amendment, this Court held in *FAIR* that Congress could require law schools to grant equal access to military recruiters without violating the First Amendment because the law "regulates conduct, not speech." 547 U.S. at 60; *id.* (the statute "affects what law schools must *do*—afford equal access to military recruiters—not what they may or may not *say*"). The law schools had argued that being forced to "treat military and nonmilitary recruiters alike" would compel their speech by "sending the message that they see nothing wrong with the military's policies, when they do." *Id.* at 64-65.

This Court rejected that argument, explaining that the law "neither limits what law schools may say nor requires them to say anything," and that in fact it "does not dictate the content of the [schools'] speech at all," noting that the requirement to ensure military recruiters campus access is only triggered "if, and to the extent, the school provides such speech for other recruiters." *Id.* at 62. This Court reasoned that "[l]aw schools remain free under the statute to express whatever views they may have on the military's . . .

employment policy." *Id.* at 60; *id.* at 65 ("[n]othing about recruiting suggests that law schools agree with any speech by recruiters, and nothing in the [law] restricts what the law schools may say about the military's policies"); *see PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 85-87 (1980) (rejecting the argument that a private property owner "has a First Amendment right not to be forced by the State to use his property as a forum for the speech of others," because the shopping center was a "business establishment that is open to the public," and "[t]he views expressed by members of the public in passing out pamphlets or seeking signatures for a petition . . . will not likely be identified with those of the owner").

In *FAIR*, this Court also rejected the law schools' argument that "'conduct can be labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea,'" *id.* at 65-66 (quoting *United States v. O'Brien*, 391 U.S. 367, 376 (1968)). Otherwise, "a regulated party could always transform conduct into 'speech' simply by talking about it." *Id.* at 66. In *FAIR*, the Court agreed that "law schools 'expressed' their disagreement with the military by treating military recruiters differently from other recruiters," but concluded that "these actions were expressive only because the law schools accompanied their conduct with speech explaining it." *Id.* "The fact that such explanatory speech is necessary is strong evidence that the conduct at issue here is not so inherently expressive that it warrants [heightened First Amendment] protection." *Id.*

So too here. Turning down a same-sex couple's business is not expressive absent additional speech explaining why the business owner did so. 303 Creative's own speech demonstrates as much: 303 Creative sought to include a statement on its website

explaining that it would turn down requests to create wedding websites for same-sex couples because of its opposition to same-sex marriage. Pet. App. 6a-7a. Just as "[a]n observer who sees military recruiters interviewing away from the law school has no way of knowing whether the law school is expressing its disapproval of the military, all the school's interview rooms are full, or the military recruiters decided for reasons of their own that they would rather interview someplace else," *FAIR*, 547 U.S. at 66, no one would think that 303 Creative was trying to send a message by turning down a potential client absent some additional, explanatory statements. After all, no one could know whether 303 Creative turned down a particular request because of its views on same-sex marriage, because it was too busy, or because of creative differences unrelated to the sexual orientation of its clientele.

II. Petitioners' Argument Is Inconsistent with this Court's Cases Upholding the Constitutionality of Public Accommodations Laws.

A. Public Accommodations Laws Have Been Repeatedly Upheld Against First Amendment Challenge.

It has been "customary in England from time immemorial, and in this country from its first colonization," for the government "to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, [and] innkeepers." *Munn v. Illinois*, 94 U.S. 113, 125 (1876). Public accommodations laws, which have existed for centuries—long before the proliferation of ready-made consumer products—require "one that has made profession of a public employment," like innkeepers or blacksmiths, to be "bound to the utmost extent of that employment to

serve the public." *Lane v. Cotton*, (1701) 88 Eng. Rep. 1458 (K.B.). Beginning in 1865, states began to codify prohibitions on discrimination by places of public accommodation, and by 1885, more than a dozen states had passed such nondiscrimination laws. *See* Milton R. Konvitz, *A Century of Civil Rights* 157 (1961).

Those opposed to public accommodations laws have long argued that such laws violate the First Amendment. But this Court has never accepted that argument. To the contrary, this Court has repeatedly upheld civil rights laws forbidding discriminatory conduct against First Amendment challenges, concluding that public accommodations laws "are well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general matter, violate the First or Fourteenth Amendments," *Hurley*, 515 U.S. at 572; *cf. City of Austin, Tex. v. Reagan Nat'l Advertising, LLC*, 142 S. Ct. 1464, 1475 (2022) (refusing to adopt "novel" First Amendment rule that would call into question an "unbroken tradition" of state regulation).

In *Newman v. Piggie Park Enterprises, Inc.*, 256 F. Supp. 941, 943-44 (D.S.C. 1966), *aff'd in relevant part and rev'd in part on other grounds*, 377 F.2d 433 (4th Cir. 1967), *aff'd and modified on other grounds*, 390 U.S. 400 (1968), a restaurant owner claimed that it would violate his faith to serve African Americans. This Court called the owner's claim that he could not be required to serve African Americans "patently frivolous." 390 U.S. at 402 n.5. Likewise, in *Runyon v. McCrary*, this Court held that a federal law prohibiting racial discrimination in the making of contracts could be constitutionally applied to bar private schools from choosing students on the basis of race. 427 U.S. 160, 176-77 (1976). As this Court noted,

"the Constitution . . . places no value on discrimination," *id.* at 176 (quoting *Norwood v. Harrison*, 413 U.S. 455, 469 (1973)), and it grants Congress the authority to guarantee that "a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man," *id.* at 179 (quoting *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 443 (1968)); *id.* at 176 ("It may be assumed that parents have a First Amendment right to send their children to educational institutions that promote the belief that racial segregation is desirable, and that the children have an equal right to attend such institutions. But it does not follow that the practice of excluding racial minorities from such institutions is also protected by the same principle."). Much of what happens at private schools involves expression protected by the First Amendment, but that does not give such schools a license to discriminate.

This Court has also upheld state public accommodations laws that prohibit gender discrimination, rejecting arguments made by private clubs that they had a First Amendment right to keep out women. In *Roberts v. U.S. Jaycees*, this Court held that a Minnesota law prohibiting places of public accommodation from discriminating on the basis of gender did not violate a private organization's First Amendment right to expressive association. 468 U.S. at 612, 615. The Court emphasized that the law was a content-neutral regulation of conduct. As the Court explained, the law "does not aim at the suppression of speech" or distinguish action "on the basis of viewpoint," but rather "eliminat[es] discrimination and assur[es] . . . citizens equal access to publicly available goods and services." *Id.* at 623-24. "That goal, which is unrelated to the suppression of expression, plainly serves compelling state interests of

the highest order." *Id.* at 624. Moreover, "even if enforcement of the Act causes *some incidental abridgement* of [the organization's] protected speech, that effect is no greater than is necessary to accomplish the State's legitimate purposes." *Id.* at 628 (emphasis added). As the Court reasoned, "Minnesota's compelling interest in eradicating discrimination against its female citizens justifies the impact that application of the statute to [an organization] may have on the male members' associational freedoms." *Id.* at 623.

Likewise, in *Board of Directors of Rotary International v. Rotary Club of Duarte*, this Court held that the California Civil Rights Act's requirement that Rotary Clubs accept women did not violate the clubs' First Amendment rights to expressive association. 481 U.S. at 548-49. Even if the statute "work[s] *some slight infringement* on Rotary members' right of expressive association, that infringement is justified because it serves the State's compelling interest in eliminating discrimination against women." *Id.* at 549 (emphasis added); *see N.Y. State Club Ass'n*, 487 U.S. at 12 (upholding local ban on discrimination by private clubs because although "a considerable amount of private or intimate association occurs in such a setting, as is also true in many restaurants and other places of public accommodation," "that fact alone does not afford the entity as a whole any constitutional immunity to practice discrimination when the government has barred it from doing so").

Further, this Court has upheld Title VII's ban on sex discrimination in employment, rejecting a law firm's First Amendment challenge. *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984) (holding that Title VII's prohibition on sex-based discrimination in hiring did not "infringe" a law firm's "constitutional rights of

expression or association"). The work of law firms and other legal organizations often involves core First Amendment speech, *see Legal Servs. Corp. v. Velasquez*, 531 U.S. 533, 548-49 (2001); *NAACP v. Button*, 371 U.S. 415, 429-31 (1963), but that does not mean lawyers can discriminate in hiring.

This Court has also upheld against First Amendment challenge legal rules that ensure equal treatment regardless of sexual orientation. In *Christian Legal Society v. Martinez*, this Court rejected a First Amendment challenge to a law school's policy requiring officially recognized student groups to accept all students, refusing to provide a "preferential exemption" to a student group that sought to discriminate based on sexual orientation and religion, 561 U.S. 661, 669 (2010). The Court held that the university's all-comers policy was content-neutral and "help[ed] . . . to police the written terms of [the school's] Nondiscrimination Policy." *Id.* at 688; *id.* at 689 (rejecting argument that CLS "does not exclude individuals because of sexual orientation" because "[o]ur decisions have declined to distinguish between status and conduct in this context"); *id.* at 701 (Stevens, J., concurring) (recognizing that university rules can "safeguard students from invidious forms of discrimination, including sexual orientation discrimination").

It did not matter in *Christian Legal Society* that the university's policy might have a disproportionate effect on certain student groups. "'[A] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.'" *Id.* at 695 (quoting *Ward*, 491 U.S. at 791). Thus, "[e]ven if a regulation has a differential impact on groups wishing to enforce exclusionary membership policies, '[w]here

the [State] does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy.'" *Id.* at 696 (quoting *R.A.V.*, 505 U.S. at 390). Because the law school's policy "aims at the *act* of rejecting would-be group members," its policy is "reasonable and viewpoint neutral" and therefore constitutional. *Id.* at 696-97.

In the face of this Court's repeated rejection of First Amendment challenges to laws prohibiting discrimination by places of public accommodation and other commercial establishments, Petitioners point to only two cases in which this Court has concluded that the application of public accommodations laws was constitutionally infirm. And Petitioners dramatically overread both of these precedents. Indeed, even under the broadest reading of those cases, a commercial business cannot claim a constitutional exemption from state prohibitions on discrimination.

In *Hurley*, this Court held that a public accommodations law could not be applied to require a parade organizer to include in its parade a group with which it disagreed. The Court accepted that public accommodations laws that prohibit "discriminating against individuals in the provision of publicly available goods, privileges, and services" "do not, as a general matter, violate the First or Fourteenth Amendments." *Hurley*, 515 U.S. at 572. But the Massachusetts law in question was "applied in a peculiar way," *id.* at 572, because "in the context of an expressive parade . . . the parade's overall message is distilled from the individual presentations along the way, and each unit's expression is perceived by spectators as part of the whole," *id.* at 577. For that reason, requiring the parade to include a particular

group would require the organizers "to modify the content of their expression to whatever extent beneficiaries of the law choose to alter it with messages of their own." *Id.* at 572, 578. Thus, contrasting a typical public accommodations provision—which would ensure that "gays and lesbians . . . will not be turned away merely on the proprietor's exercise of personal preference," *id.*—this Court held that the Massachusetts law, as applied, forced the parade organizers to alter the parade's message for no legitimate reason, *id.*

In *Dale*, this Court held that applying New Jersey's public accommodations law to require the Boy Scouts to accept a gay man as a scoutmaster violated the organization's First Amendment rights. 530 U.S. at 644. As in *Hurley*, the linchpin of the Court's analysis was that "forced inclusion of Dale would significantly affect [the Boy Scouts'] expression," *id.* at 656, by "interfer[ing] with the Boy Scouts' choice not to propound a point of view contrary to its beliefs," *id.* at 654; *see Christian Legal Soc'y*, 561 U.S. at 680 ("Insisting that an organization embrace unwelcome members . . . 'directly and immediately affects associational rights.'" (quoting *Dale*, 530 U.S. at 659)).

As in *Hurley*, the First Amendment issue was a product of the fact that the New Jersey public accommodations law, as interpreted by the state courts, was "extremely broad." *Dale*, 530 U.S. at 657. The law prohibited discrimination by some places "one would expect to be places where the public is invited": "taverns, restaurants, retail shops, and public libraries." *Id.* But the statute was also interpreted to "include[] places that often may not carry with them open invitations to the public, like summer camps and roof gardens." This Court explained that the "potential for conflict between state public

accommodations laws and the First Amendment rights of organizations has increased" as "the definition of 'public accommodation' has expanded *from clearly commercial entities* . . . to membership organizations such as the Boy Scouts." *Id.* (emphasis added).

In sum, neither *Hurley* nor *Dale* supports 303 Creative's First Amendment claims. Those cases had nothing to do with a business entity selling goods and services to the general public. And aside from these two narrow rulings, which did not concern actual commercial public accommodations broadly open to all, this Court has consistently upheld content-neutral nondiscrimination provisions against First Amendment challenges. Indeed, this Court has never questioned the constitutionality of applying public accommodations laws, like CADA, to commercial entities, like 303 Creative. *See Roberts*, 468 U.S. at 625 (treating as obvious the "state interest in assuring equal access . . . to the provision of purely tangible goods and services").

B. Petitioners Are Not Entitled to an Exemption from Colorado's Prohibition on Discrimination in the Provision of Publicly Available Goods and Services.

Like other public accommodations laws that have long been upheld by this Court, Colorado's Anti-Discrimination Act is a generally applicable, content-neutral regulation of commercial conduct. It prohibits all business owners from refusing to serve customers on the basis of protected characteristics like race, creed, and sexual orientation, no matter the reason they wish to engage in such discrimination. For that reason, it falls well within the State's ordinary power to regulate commercial conduct and does not unconstitutionally compel speech.

303 Creative's compelled-speech claim is foreclosed by *FAIR*. Like the Solomon Amendment upheld in that case, Colorado's public accommodations law "neither limits what [businesses] may say nor requires them to say anything." *FAIR*, 547 U.S. at 60. Businesses like 303 Creative "remain free under the statute to express whatever views they may have on" same-sex marriage. *Id.* Rather, the statute simply "affects what [businesses] must *do*—afford equal access to [paying customers]—not what they may or may not *say*." *Id.*

Moreover, any impact on 303 Creative's speech is "attenuated at best," *Roberts*, 468 U.S. at 627. Petitioners insist that 303 Creative's web designs "express approval of the couple's marriage." Pet'rs Br. 6. But, as in *FAIR*, "[n]othing about [providing website design services] suggests that [Petitioners] agree with any speech by [a same-sex couple], and nothing in the [Act] restricts what [Petitioners] may say about" same-sex marriage, *FAIR*, 547 U.S. at 65. Applying Colorado's antidiscrimination law here does not "affect[] in a significant way the [business]'s ability to advocate public or private viewpoints," *Dale*, 530 U.S. at 648. Petitioners claim that "[p]eople understand" that businesses "actively choose" their clients and that somehow this means the clients' message is imputed to the business. Pet'rs Br. 29. But, as noted earlier, Petitioners' own actions belie that statement. 303 Creative sought to include a message on its website explaining that it did not want to serve same-sex couples due to its opposition to same-sex marriage. Pet. App. 6a-7a. In other words, even 303 Creative did not think that, absent this additional speech, "[p]eople [would] understand" its decision to serve a particular couple to be an endorsement of any aspect of their relationship or beliefs. "The fact that such explanatory

speech is necessary is strong evidence that the conduct at issue here is not so inherently expressive that it warrants [heightened First Amendment] protection." *FAIR*, 547 U.S at 66.

Reasonable observers would not understand a web designer to broadcast any particular message when selling (or refusing to sell) web design services to a couple. No one assumes a wedding website designer has adopted or endorsed the religious beliefs of a client couple, even if the website is designed in a way that reflects the importance of those views to the couple. *See State v. Arlene's Flowers, Inc.*, 441 P.3d 1203, 1212 (Wash. 2019) (noting that the florist "acknowledged that selling flowers for an atheistic or Muslim wedding would not be tantamount to endorsing those systems of belief"), *cert. denied*, 141 S. Ct. 2884 (2021). And this Court has repeatedly recognized that views that an entity is required to accommodate "will not likely be identified with those of" the accommodating entity, especially not a "business establishment that is open to the public." *Pruneyard Shopping Ctr.*, 447 U.S. at 87; *see FAIR*, 547 U.S. at 65 ("We have held that high school students can appreciate the difference between speech a school sponsors and speech the school permits because legally required to do so, pursuant to an equal access policy."); *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 655 (1994) ("[T]here appears little risk that cable viewers would assume that the broadcast stations carried on a cable system convey ideas or messages endorsed by the cable operator.").

Under *FAIR*, Colorado's application of its public accommodations law to 303 Creative—a "clearly commercial entit[y]," *Dale*, 530 U.S. at 657, open to the public—must be upheld "'so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent

the regulation." *FAIR*, 547 U.S at 67 (quoting *Albertini*, 472 U.S. at 689); *see Albertini*, 472 U.S. at 688 ("The First Amendment does not bar application of a neutral regulation that incidentally burdens speech merely because a party contends that allowing an exception in the particular case will not threaten important government interests."). As this Court's precedents make clear, "the validity" of content-neutral regulations "does not turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests." *Id.* at 689. The First Amendment does not "endow the judiciary with the competence" to second-guess a legislature's decision to prohibit discrimination by commercial businesses. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 299 (1984).

Under these principles, 303 Creative is not entitled to an exemption from Colorado's requirement that commercial businesses treat all customers equally. CADA serves the government's interest in ensuring equal dignity for all without discrimination: its "focal point" is "the act of discriminating against individuals in the provision of publicly available goods, privileges, and services." *Hurley*, 515 U.S. at 572. This Court has long held that "acts 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—wholly apart from the point of view such conduct may transmit." *Roberts*, 468 U.S. at 628; *see Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983) ("[T]he Government has a fundamental, overriding interest in eradicating racial discrimination."). Thus, CADA "'responds precisely to the substantive problem which legitimately concerns'

the State and abridges no more speech . . . than is necessary to accomplish that purpose." *Roberts*, 468 U.S. at 629 (quoting *City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 810 (1984)). For that reason, requiring 303 Creative to abide by Colorado's content-neutral and generally applicable requirements does not violate the First Amendment.

III. Petitioners' Theory, If Accepted, Would Inevitably Corrode Nondiscrimination Protections Applicable to Places of Public Accommodation.

Petitioners' view of the First Amendment would open the door to a host of new claims by commercial businesses that seek exemptions from content-neutral laws, inevitably undermining all manner of legal protections prohibiting discrimination against members of the public. *First*, Petitioners' expansive definition of conduct that the government may not regulate through generally applicable and content-neutral regulations could insulate from regulation under public accommodations laws discrimination by all types of wedding vendors and other commercial businesses. Permitting a business to refuse to serve an individual whenever it can claim that the business has an "expressive component" "would create a gaping hole in the fabric of those laws," *Superior Court Trial Lawyers Ass'n*, 493 U.S. at 431-32. *Second*, Petitioners' theory, if accepted, could allow any commercial vendor that offers services involving customization to refuse to serve individuals because of their race, creed, marital status, sex, or other classifications ordinarily protected under CADA. In other words, accepting Petitioners' theory would threaten to distort well-established First Amendment principles, which up until now have allowed states to regulate a commercial entity's discriminatory conduct.

A. Acceptance of Petitioners' Theory Would Encourage Other Commercial Providers of Wedding Services to Discriminate Against Same-Sex Couples.

As this Court put it in *Masterpiece Cakeshop*, if any exception to public accommodations laws were not carefully "confined," "then a long list of persons who provide goods and services for marriages and weddings might refuse to do so for gay persons, thus resulting in a community-wide stigma inconsistent with the history and dynamics of civil rights laws that ensure equal access to goods, services, and public accommodations." *Masterpiece Cakeshop, Ltd.*, 138 S. Ct. at 1727. Petitioners' theory would lead to precisely that scenario.

According to Petitioners, *any* wedding website they design for a same-sex couple would express "approval of the couple's marriage," Pet'rs Br. 6, and of same-sex marriage itself. It makes no difference what words, colors, or design the couple desired. Petitioners go so far as to insist that even the exact same website used for a different-sex couple's wedding would not be "suitable for use" for a same-sex couple. *Id.* at 23 n.2 (quotation marks omitted). Merely requiring Petitioners to associate with any same-sex couple's wedding would be enough, in Petitioners' view, to impermissibly compel Petitioners' expression in violation of the First Amendment.

This extraordinary "association" theory is breathtaking in its scope. Under Petitioners' view, any business that offers services imbued with creative aspects could post a "No Same-Sex Couples Served" sign, shutting their doors to those couples simply because of who they are. In other words, as Petitioners acknowledge, public accommodations laws would not apply to any "publisher, writer, printer, painter,

calligrapher, website designer, tattoo artist, photographer, [or] videographer." Pet'rs Br. 30. In this way, their theory would inevitably sweep away innumerable "protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society," *Romer v. Evans*, 517 U.S. 620, 631 (1996).

And Petitioners' theory extends even further. For example, under Petitioners' theory, a florist could refuse to serve a same-sex couple because the intricate bouquets and centerpieces he creates are "'affirmative act[s]' of personal imagination and content creation," *id.* at 23, and applying an anti-discrimination law to him could "forc[e him] to . . . express[] a message celebrating and promoting a conception of marriage" with which he disagrees, *id.* at 32. A caterer too could refuse to cater a lesbian couple's wedding, on the theory that the creation of a multi-course meal is considered by many chefs to be a type of creative expression. Likewise, a DJ playing songs during a wedding ceremony's procession or during the couple's first dance could argue that he is engaging in expressive activity and thus should be allowed to discriminate against same-sex couples. Similar arguments could be made by invitation designers and wedding planners refusing to serve same-sex couples.

Under Petitioners' theory, all of these businesses should be allowed to discriminate against same-sex couples simply because creating *any* type of flowers, food, music, stationery, or photography for a same-sex couple's wedding would make these business owners "express approval" of marriage equality. Pet'rs Br. 6. Tellingly, one of Petitioners' proposals for a "less intrusive alternative," Pet'rs Br. 47, is an "exemption[] for the wedding industry," *id.* at 48, suggesting that Petitioners understand that their view of the First

Amendment would apply extremely broadly to all manner of wedding vendors.

Indeed, a variety of wedding vendors are already bringing these claims—and while some are being rejected under existing First Amendment principles, *see Arlene's Flowers, Inc.*, 441 P.3d at 1225-28 (rejecting claim of florist who refused to serve same-sex couple); *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013) (rejecting claim of photographer who refused to serve same-sex couple), *cert. denied*, 134 S. Ct. 1787 (2014), others have succeeded in "carv[ing] out an exception of staggering breadth" from these principles to immunize private discrimination, *Telescope Media Group v. Lucero*, 936 F.3d 740, 779 (8th Cir. 2019) (Kelly, J., dissenting) (wedding video services); *see Brush & Nib, LC v. City of Phoenix*, 448 P.3d 890, 937 (Ariz. 2019) (wedding invitation design business).

In short, by arguing that the First Amendment allows a web designer to refuse to serve a same-sex couple not because of any disagreement about the actual web design but simply because of who the couple is, Petitioners could open a hole in public accommodations law the size and scope of which is difficult to define. As same-sex couples increasingly exercise their right to marry, Petitioners' argument would inevitably put them at risk of being turned away from businesses that provide wedding services to the public despite state protections to the contrary. Such a loophole in public accommodations laws would "disparage [same-sex couples'] choices and diminish their personhood," *Obergefell*, 576 U.S. at 672, by "depriv[ing] [them] of their individual dignity," *Roberts*, 468 U.S. at 625; *see Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250 (1964) (a "fundamental object" of public accommodations laws is

to "vindicate the deprivation of personal dignity that surely accompanies denials of equal access to public establishments" (citation and quotation marks omitted)). The First Amendment permits a legislature to insist on a bright-line anti-discrimination rule rather than one shot through with exceptions. *See Superior Court Trial Lawyers Ass'n*, 493 U.S. at 430 (noting "government's interest in adhering to a uniform rule").

Rather than address these consequences of their position, Petitioners prefer to focus on hypothetical future cases that will *not* be governed by the decision in this case. They argue, for example, that ruling for Respondents would require a speechwriter to compose speeches she finds objectionable. *See* Pet'rs Br. 30. But, as noted earlier, 303 Creative did not refuse to serve any couple because of the web design requested.

Had 303 Creative refused service because of a disagreement over an actual web design, and if state law gave customers a right to sue in such circumstances, that hypothetical case might raise First Amendment questions about the extent to which the law may compel the actual content of a web designer's creative expression. "While [Petitioners'] arguments that the government may not interfere with artistic judgment may have much force in other contexts, they are inapplicable to the facts of this case." *Ward*, 491 U.S. at 792. Holding that the government may prohibit a wedding vendor from refusing to serve same-sex couples solely because of their sexual orientation does not threaten the freedom of florists, painters, poets, bakers, or web designers to direct the content of their creative expression.

B. Petitioners' Theory Would Allow Commercial Businesses to Refuse to Offer Services Involving Customization to Potential Clients Based on Race, Creed, and Other Protected Classifications.

Petitioners' theory could also shield the discriminatory conduct of business owners who refuse to serve other groups of people ordinarily protected under public accommodations laws like Colorado's. CADA prohibits "any place of business engaged in any sales to the public" from denying service "because of disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry." Colo. Rev. Stat. § 24-34-601(1), (2)(a). In Petitioners' view, each of these groups enjoys protection only until a business owner claims that complying with the public accommodations law would violate his right to free expression.

For instance, under Petitioners' theory, a web designer (or other wedding vendor) who believed that interracial marriage was wrong would be entitled under the First Amendment to express his opposition to interracial marriage by refusing to design a custom website for an interracial couple, despite Colorado's prohibition on discrimination based on race, color, national origin, or ancestry. *Cf. Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 892 (11th Cir. 1986) ("Where a plaintiff claims discrimination based upon an interracial marriage or association, he alleges, by definition, that he has been discriminated against because of *his* race."). Likewise, a wedding vendor who believed that interfaith marriage was wrong could refuse to provide services for a wedding between a Jew and a non-Jew, despite Colorado's prohibition on discrimination based on creed. So too

could a wedding vendor refuse to serve divorcées who sought to remarry if the vendor believed that such marriages are wrong, even though Colorado prohibits discrimination based on marital status.

Moreover, the consequences that might follow from accepting Petitioners' theory are not limited to weddings and marriages. A web designer could refuse to create a web page celebrating a female CEO's retirement—violating Colorado's prohibition on sex discrimination—if he believed all women have a duty to stay home and raise children. Similarly, a furniture-maker—who considers his furniture pieces to be artistically expressive—could refuse to serve an interracial couple if he believed that interracial couples should not share a home together. Or an architect could refuse to design a home for an interfaith couple. Petitioners fail to explain why their First Amendment theory would not extend to commercial establishments providing non-wedding services to the public.

In short, just like litigants of the past, Petitioners "attempt[] to stretch a number of First Amendment doctrines well beyond the sort of activities these doctrines protect." *FAIR*, 547 U.S. at 70. Stretching their theory to its logical conclusion, Petitioners would have this Court create loopholes in public accommodations laws through which all manner of discrimination by all sorts of businesses might pass. Rather than go down that path, this Court should hold that 303 Creative, like other commercial businesses providing goods and services to the public, must comply with Colorado's Anti-Discrimination Act.

CONCLUSION

For the foregoing reasons, the judgment of the Colorado Court of Appeals should be affirmed.

Respectfully submitted,

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