No. 21-476

IN THE

# Supreme Court of the United States

303 CREATIVE LLC, LORIE SMITH,

*Petitioners*,

—v.—

AUBREY ELENIS, SERGIO CORDOVA, CHARLES GARCIA, RICHARD LEE LEWIS, JR., MAYUKO FIEWEGER, CHERYLIN PENISTON, JEREMY ROSS, DANIEL WARD, PHIL WEISER,

*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

## BRIEF FOR *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION OF COLORADO IN SUPPORT OF RESPONDENTS


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The American Civil Liberties Union Foundation (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 2 million members and supporters dedicated to the principles of liberty and equality embodied in the Constitution. The ACLU of Colorado is one of the ACLU's statewide affiliates. As organizations that advocate for First Amendment liberties as well as equal rights for lesbian, gay, bisexual, and transgender people, the ACLU, the ACLU of Colorado, and their members have a strong interest in the application of proper standards when evaluating constitutional challenges to civil rights laws. The ACLU and ACLU of Colorado have appeared as counsel-of-record and as amicus curiae in many cases nationwide in which businesses challenge laws barring discrimination in public accommodations on First Amendment grounds, including as counsel-of-record in *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719 (2018).

## SUMMARY OF ARGUMENT

The question presented—"[w]hether applying a public-accommodation law to compel an artist to speak or stay silent violates the free speech clause of the First Amendment"—is inaccurate. Properly framed, the question presented is whether an artist *who has chosen to open a business to the public at*

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[1] No counsel for either party authored this brief in whole or in part, and no person other than amici and their counsel made any monetary contribution toward the preparation and submission of this brief. Blanket letters of consent to the filing of amicus briefs have been lodged by both parties with the Clerk of Court.

*large* can constitutionally be prohibited, on the same terms as all other public accommodations, from discriminating against customers on the basis of a protected characteristic.

The Colorado Anti-Discrimination Act (CADA) does not prescribe any particular message that artists—or anyone else—must express. If it did, the ACLU would challenge the law as a content-based compulsion of speech.

CADA, however, does not regulate artists as such, but only businesses that choose to sell to the public at large. And even as to such businesses, CADA does not compel them to produce or sell any particular product or service, but only requires that they not discriminate in sales on the basis of race, sex, sexual orientation, or other protected characteristics. Under Colorado's law, artists are free not to offer their services "to the public," and are also free to select the goods and services they want to sell to the public.

Many artists and writers, including those who make a living at their craft, do not offer their services to the public at large, and therefore are not covered by CADA. The celebrated portrait photographer Annie Leibovitz, or any other photographer who does not offer their photographic services "to the public," would not be bound by CADA. Such artists are free to choose their subjects on any basis they choose, including race or sex. By contrast, a photographer who opened a business "to the public" to take annual school student portraits could not refuse to take photos of Black students, even if she objected to the public education of Black children. CADA regulates only those who affirmatively choose to take

advantage of the commercial marketplace by opening a business "to the public." 303 Creative concedes that it seeks to do so. It is governed by CADA only because of that voluntary—and revocable—decision.

II. The critical inquiry is not whether 303 Creative's website design service is expressive, but whether Colorado's interest in prohibiting discrimination in sales by businesses open to the public is "unrelated to the suppression of free expression." *United States v. O'Brien*, 391 U.S. 367, 377 (1968). As *O'Brien* illustrates, where the state's regulatory interest is unrelated to expression, the fact that its law incidentally affects expression triggers, at most, intermediate scrutiny. *Id*. No one disputed that O'Brien's burning of a draft card to protest the Vietnam War was expressive. But because the government's interest in prohibiting destruction of draft cards was unrelated to what any particular act of destruction communicated, intermediate scrutiny applied. And the result would have been precisely the same had O'Brien burned his draft card as performance art rather than political protest.

Because CADA merely prohibits discrimination *in sales* by businesses that choose to sell to the public, without regard to whether a business is "expressive" or "artistic," it is a content-neutral regulation of commercial conduct, not a content-based regulation of speech. Colorado's regulatory interest in ensuring nondiscriminatory access to the commercial marketplace is unrelated to the suppression of expression. CADA therefore triggers, at most, intermediate scrutiny.

Laws banning discrimination are "textbook viewpoint neutral" regulations of conduct. *Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 694–95 (2010). For that reason, discrimination by businesses open to the public "has never been accorded affirmative constitutional protections." *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984). As the Court recently reaffirmed in a case presenting the same First Amendment issue, "[religious and philosophical] objections 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 neutral and generally applicable public accommodations law." *Masterpiece Cakeshop*, 138 S. Ct. at 1727.

CADA follows in that tradition. It leaves businesses free to select the content of products or services they sell to the public, and merely requires them to offer those goods for sale in a nondiscriminatory manner. Thus, under CADA, a Christmas store may choose to sell only Christmas-related goods, and it need not sell Hanukkah products. But it cannot refuse to sell its Christmas products to Jewish customers. So, too, here, 303 Creative need not offer any particular website service to the public, but once it chooses to sell wedding-website design services to the public at large, it cannot selectively decline to sell those same services to same-sex couples.

CADA satisfies intermediate scrutiny, and indeed would satisfy even strict scrutiny. The state's interest in ending invidious discrimination in the public marketplace is compelling. It protects the dignity of all citizens, and ensures equal opportunity

to participate in the "transactions and endeavors that constitute ordinary civic life in a free society." *Romer v. Evans*, 517 U.S. 620, 631 (1996).

The law is narrowly tailored. It regulates only businesses that *choose* to open "to the public," leaving all those who earn a living instead through personal, individualized contracts unregulated. And it allows those businesses it covers the freedom to choose what products or services to sell. An exemption for any business that might be deemed "expressive" (theaters, bookstores, architecture firms, hair salons, gardeners, florists, and caterers, to name just a few) would defeat the law's purpose.

III. 303 Creative's proposal that businesses should be exempt from generally applicable rules of nondiscrimination in sales where the business's product or service is "expressive," "artistic," or "customized," is not merely contrary to precedent and principle; it is also unworkable. Because an almost limitless range of conduct can be deemed "expressive," "artistic," or "customized," 303 Creative's proposed exemption would either swallow the rule or impose on judges the impossible task of assessing when a product or service is sufficiently expressive, artistic, or customized to permit its provider to discriminate.

If 303 Creative is correct, could a bakery that opposed celebrating Black families refuse to sell a birthday cake to a Black mother? Could an architecture firm that serves the public refuse to design homes for Muslims because it opposes their religion? Could a test preparation business that objected to the number of Asians in elite colleges turn away Asian students? Could a restauranteur

opposed to "mixed marriage" put up a sign in its window saying "No inter-racial or inter-faith couples served"? 303 Creative makes no effort to answer any of these questions.

The very unworkability of 303 Creative's approach underscores that the critical constitutional inquiry is not whether the business's product is expressive, but whether Colorado's interest in proscribing discriminatory sales is unrelated to the suppression of expression. Just as Mr. O'Brien's indisputably expressive act of draft card burning did not insulate him from the equal application of the draft card regulation, so 303 Creative is bound, like all other businesses that choose to serve the public, not to discriminate in its sales on invidious grounds.

## ARGUMENT

### I. Colorado's Anti-Discrimination Law Does Not Regulate Artists, But Rather Businesses That Choose to Sell "to the Public."

Petitioners portray this case as implicating the rights of artists to paint who they want and writers to write what they want. But that is inaccurate. Because no artist is compelled to sell their services or products to the public at large, the question presented here is not whether a state can require an artist to express a message with which they disagree. The question, rather, is whether an artist may claim the benefits of doing business with the general public while refusing to abide by commercial regulations barring discrimination in sales that apply to all businesses open to the public.

### A. CADA Regulates Only Businesses that Choose to Sell "to the Public."

CADA governs only businesses that sell goods or services "to the public." Colo. Rev. Stat. Ann. § 24–34–601(1) (West 2021) (defining public accommodation as "any place of business engaged in any sales *to the public* and any place offering services, facilities, privileges, advantages, or accommodations *to the public*") (emphasis added). As a rule, public accommodations laws govern "commercial relationship[s] offered generally or widely," and not "personal contractual relationships…where the offeror selects those with whom he desires to bargain on an individualized basis, or where the contract is the foundation of a close association and there is reason to assume that the choice made reflects a purpose of exclusiveness." *Runyon v. McCrary*, 427 U.S. 160, 187, 189 (Powell, J., concurring) (cleaned up); *see Roberts v. U.S. Jaycees*, 468 U.S. 609, 616, 621 (1984) (explaining that Minnesota Supreme Court found public accommodations statute covered Jaycees because it "is a 'public' business in that it solicits and recruits dues-paying members based on unselective criteria").

This limitation is true of public accommodations laws generally. They are either explicitly limited to businesses that are open to the general public or have been so construed by state courts.[2] Most such laws apply only to a business open "to the general public" (23 states) or "to the public"

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[2] *See generally* Nat'l Conf. of St. Legs., *State Public Accommodation Laws*, (June 25, 2021), https://www.ncsl.org/research/civil-and-criminal-justice/state-public-accommodation-laws.aspx#1.

(10 states, including Colorado).[3] Some states, and the federal government in Title II of the Civil Rights Act, instead list specific types of businesses that qualify as a public accommodation—but what unites the places listed is that they are open to the public. In addition, many state laws, like Colorado's, expressly exempt entities generally not open to the public, such as places principally used for religious purposes, *e.g.*, Colo. Rev. Stat. Ann. § 24–34–601(1) (West 2021), or private clubs, *e.g.*, Mont. Code Ann. § 49-2-101(20)(b); *see also* Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a(e).

Consequently, public accommodations laws do not apply to businesses that have not affirmatively chosen to serve the public at large. *See, e.g., Jankey v. Twentieth Century Fox Film Corp.*, 212 F.3d 1159, 1161 (9th Cir. 2000) (holding that the Americans With Disabilities Act ("ADA"), which applies to public accommodations, does not apply to Fox production studio because it is an "*establishment not in fact open to the public.*" (emphasis in original) (quoting 42 U.S.C. § 2000a(e)); *Jenkins v. Wholesale Alley, Inc.*, No. 1:05-CV-03266-JEC, 2007 WL 9701996 (N.D. Ga. Sep. 11, 2007) (holding the ADA does not apply to privately-owned wholesale market that sells only to member-customers and their guests because it was not open to the public); *see generally* 14 C.J.S. *Civil Rights* § 96 (2022) (photography business that "was hired by certain clients but did not offer its services to the general public … was not [a] public accommodation, and a state's Human Rights Act would not apply to the business's choice of whom to photograph or not").

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[3] See Appendix for list of state public accommodation laws.

Artists who do not offer their services to the public are therefore not governed by CADA. If celebrity portrait photographer Annie Leibovitz, for example, lived in Colorado, she would be entirely free to choose the subjects of her photographs. She has not offered for sale to the public at large the service of taking portrait photographs, so CADA does not apply to her choice of subjects. Nor would CADA regulate to whom she sells her photographs, unless she affirmatively chooses to offer them for sale "to the public." (If an art gallery offered her portraits for sale to the public at large, it could not refuse a sale because a customer was Asian or Catholic, but Leibowitz would remain free to select her subjects as she deemed fit).

By contrast, JCPenney Portrait Studios, which welcomes any member of the public to schedule a photo portrait session,[4] offers its portrait services "to the public," and therefore may not refuse to take portraits of customers because they are female or male, Jewish or Catholic, Black or Asian, heterosexual or gay. The same would be true of a sketch artist at a street fair who offered caricature sketches to the public at large.

Many craftsmen, artisans, and artists build a career and earn a living without ever opening a business to the public. They may be highly selective about the clients from whom they accept commissions or about the human subjects they choose to portray. They produce work of their own choosing. CADA does not regulate those choices at

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[4] JCPenney Portraits by Lifetouch, https://jcpportraits.com/ (last visited Aug. 16, 2022).

all, because they are not businesses open "to the public."

As a result, CADA permits a sculptor who has not offered her sculpting services to the public to cast bronzes only of Black women. She may similarly elect to cast only those bronzes even if she offers her final products for sale to the general public (though she then could not discriminate against customers seeking to purchase her artwork). And it permits a writer who has not offered his writing services to the public to sell his stories only to Christian magazines.

Artists are governed by CADA and other public accommodations laws, therefore, only if and to the extent they affirmatively choose to sell their services or products to the public.

### B. 303 Creative Is Covered by CADA Only Because It Has Chosen to Sell Its Services "to the Public."

303 Creative concedes that its business is open to the public. *See, e.g.*, Pet'rs' Br. at 37 (arguing that 303 Creative "will happily serve everyone"). Unlike many artists, 303 Creative does not "select[] those with whom [it] desires to bargain on an individualized basis." *Runyon*, 427 U.S. at 187 (Powell, J., concurring). It offers its services to the public generally without a "plan or purpose of exclusiveness." *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 236 (1969).

303 Creative did not need to make this choice. CADA requires no one to open a business to the public—or to maintain it as a public business if they object to the generally applicable conditions for doing so. But those who opt to avail themselves of the

benefits of the open market are bound by the nondiscrimination laws that apply to all public-facing businesses.

Petitioner Lorie Smith, as 303 Creative's owner, has chosen to enjoy the benefits of selling to the public at large. Pet. App. 197a. But she remains free to offer design services instead on a selective basis for particular patrons. It is only because of her voluntary—and revocable—choice to open a business "to the public" that CADA regulates her actions at all.

## II. Colorado's Antidiscrimination Law is a Content Neutral Regulation Directed at Conduct, and Satisfies Intermediate Scrutiny.

A law that required artists, writers, or anyone else for that matter, to express a particular state-dictated message would plainly violate the First Amendment as a content-based regulation of speech. *W. Va. St. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). But CADA regulates only businesses that choose to sell to the public at large, a choice artists and writers often do not make. And it is content-neutral; it governs only the commercial conduct of sales to the public. It treats all businesses open "to the public" the same, whether they sell expressive services or products (*e.g.*, photo printing services like Shutterfly or bookstores like Amazon) or non-expressive services or products (*e.g.*, plumbing services or hardware stores).

303 Creative's principal argument is that it should be treated differently than other businesses open to the public because its website design service is speech protected by the First Amendment. But

that does not follow. "[T]he First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech," *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011), so long as the incidental restriction advances an important governmental interest unrelated to expression and burdens no more expression than necessary to further that interest. "That is why a ban on race-based hiring may require employers to remove 'White Applicants Only' signs; why an ordinance against outdoor fires might forbid burning a flag; and why antitrust laws can prohibit agreements in restraint of trade." *Id.* (cleaned up).

The fact that 303 Creative's web design service is expressive does not insulate its sales conduct from CADA's regulation—any more than it would shield the sales practices of theaters, concert halls, jewelry design shops, dress making stores, hair salons, architecture firms, interior decorators, educational test preparation companies, landscape design companies, or any other business that chooses to offer expressive goods or services "to the public."

### A. The Relevant Question Is Not Whether 303 Creative's Conduct is Expressive, But Whether the State's Interest in Regulating It is Related to the Suppression of Expression.

CADA regulates sales of any goods or services a business chooses to offer "to the public." Some of those goods and services will be expressive. But CADA regulates all businesses that serve the public at large regardless of the character of their products or services. Colorado's interest in requiring

nondiscriminatory treatment of customers has nothing to do with expression, but is a content-neutral, generally applicable regulation of the commercial conduct of sales.

Where, as here, both conduct (sales) and expression (website design) are involved, the level of First Amendment scrutiny does not depend on whether the business is engaged in expression, but whether the state's regulation is targeted at conduct or expression. Laws that regulate conduct will often include within their ambit some speech or expressive conduct. A law prohibiting trespass on a government building will bar those who seek to enter public property to protest government policy, and a law banning public burning will encompass those who seek to burn a flag in protest. But one who trespasses or engages in public burning is not immune from the laws that bar that conduct merely because the conduct is expressive.

*United States v. O'Brien,* 391 U.S. 367 (1968), illustrates the point. There, an individual burned his draft card to protest the Vietnam War, and objected on First Amendment grounds when he was prosecuted for destroying his draft card. No one disputed that O'Brien's conduct was expressive; indeed, it was political expression, which receives the First Amendment's highest protection. *Barnette*, 319 U.S. at 642. But the Court focused instead on the government's reason for regulating, and upheld the prosecution under intermediate scrutiny because the government's interest in prohibiting O'Brien's conduct was efficient administration of the draft, an interest unrelated to the message communicated by the destruction. *O'Brien*, 391 U.S. at 376–77 (finding government interest "unrelated to the suppression of

free expression" and applying intermediate scrutiny).

The same reasoning applied in *Clark v. Community for Creative Non-Violence*, 468 US 288 (1984). There, an advocacy group sought to camp overnight in Lafayette Park to protest the government's treatment of the homeless. CCNV's conduct was indisputably expressive. But that did not trigger strict scrutiny or invalidate the law's application. Rather, because the law barring overnight sleeping in the park served conservation interests "unrelated to suppression of expression," the Court upheld the prohibition under intermediate scrutiny. *Id.* at 299.

The critical inquiry, then, is not whether a *business's act* is expressive, as 303 Creative insists, but whether *the government's interest* in regulating it is aimed at expression. If the government seeks to regulate conduct without regard to its communicative content (as with laws banning destruction of draft cards or overnight sleeping in the park), the law is content-neutral and subject to, at most, intermediate scrutiny. If, by contrast, the government seeks to regulate conduct because of what it communicates, the law is content-based and triggers strict scrutiny.

That is why the government can punish a flag burner for violating a law banning all public burning, but not for violating a law that bans flag desecration in particular. The act of flag burning in both cases is precisely the same, and equally expressive. But the government's interest under the former law (public safety or air pollution) is unrelated to expression, while its interest in the latter is inextricably tied to

the message expressed by burning a flag. *Compare O'Brien*, 391 U.S. at 376–77 (applying intermediate scrutiny), *with Texas v. Johnson*, 491 U.S. 397, 412 (1989) (applying strict scrutiny because the interest in banning flag desecration was directly related to what such conduct communicates). If 303 Creative's focus on whether the individual's act is expressive controlled, strict scrutiny would have applied in both cases. It did not.

303 Creative's contention that strict scrutiny applies because its service is expressive is therefore wrong. Newspaper publishers' product, for example, is unquestionably expressive. Yet, they can be subject "to generally applicable economic regulations" without violating the First Amendment. *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 581 (1983). "The fact that the publisher handles news while others handle food does not ... afford the publisher a peculiar constitutional sanctuary in which he can with impunity violate laws regulating ... business practices." *Associated Press v. United States*, 326 U.S. 1, 7 (1945); *Associated Press v. NLRB*, 301 U.S. 103, 132 (1937).

By contrast, a law specifically requiring a newspaper to print particular content (or forbidding the same) would trigger strict scrutiny. *See, e.g.*, *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974). Even with respect to newspapers, a quintessential object of First Amendment protection, the critical question is not whether a business's product is expressive, but whether the government's interest in regulating is related to expression.

The newspaper cases also demonstrate that 303 Creative's objection that it engages in "pure speech," *see, e.g.*, Pet'rs' Br. at 19-20, is off the mark, for two reasons. First, CADA regulates sales, not the content of 303 Creative's speech, and a commercial sale not "pure speech." And second, as the newspaper cases illustrate, even entities that produce "pure speech" can be regulated where the state's regulatory interest is unrelated to expression.

The same principle applies to laws against discrimination. The fact that they may incidentally compel or restrict speech does not trigger strict scrutiny. "Congress, for example, can prohibit employers from discriminating in hiring on the basis of race. The fact that this will require an employer to take down a sign reading 'White Applicants Only' hardly means that the law should be analyzed as one regulating the employer's speech rather than conduct." *Rumsfeld v. FAIR, Inc.*, 547 U.S. 47, 62 (2006). And a law requiring a restaurant to charge $10 for sandwiches would not unconstitutionally compel speech despite the fact that the restaurant will "have to put '$10' on its menus or have its employees tell customers that price" because "the law's effect on speech would be only incidental to its primary effect on conduct." *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1150–51 (2017).[5]

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[5] Indeed, 303 Creative acknowledges this principle. Pet'rs' Br. at 33–35. It concedes that if this Court rejects its claim that the First Amendment guarantees it a right to discriminate, it can as a constitutional matter be prohibited from publishing discriminatory advertisements or other notices "that indicate[] that the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of

In *Hishon v. King & Spalding*, a law firm argued that applying Title VII to require it to consider a woman for partnership "would infringe [its] constitutional rights of expression or association." 467 U.S. 69, 78 (1984). Although law firms plainly provide "expressive" services, and the partnership was an act of "association," the Court dismissed the law firm's First Amendment defense, holding that there is "no constitutional right ... to discriminate." *Id.* By contrast, a law specifically targeting a law firm's speech by preventing it from bringing cases that "challenge existing welfare laws," would "implicat[e] central First Amendment concerns." *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 547–48 (2001).

For similar reasons, this Court rejected a First Amendment challenge to a nondiscrimination law in *Rumsfeld v. FAIR*. Law schools maintained that a law prohibiting them from discriminating against military recruiters would compel them to express support for the military's exclusion of gay and lesbian applicants. *FAIR*, 547 U.S. at 52. The Court acknowledged that law schools would be compelled to provide assistance that "often includes elements of speech," including emails and bulletin notices, but rejected FAIR's First Amendment claim, reasoning

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a place of public accommodation will be refused…," Colo. Rev. Stat. Ann. § 24–34–601(2)(a) (West 2021), as that restriction is incidental to a valid limitation on conduct. *Pittsburgh Press Co. v. Pittsburgh Comm'n on Hum. Rels.*, 413 U.S. 376, 383–84 (1973) (upholding injunction preventing newspaper from advertising jobs in sex-segregated columns). But the very same reasoning, permitting regulations of conduct that incidentally restrict expression, also dooms 303 Creative's challenge to the requirement that it not discriminate against customers in the first place.

that, "[a]s a general matter, the [law] regulates conduct, not speech. It affects what law schools must *do*—afford equal access to military recruiters—not what they may or may not *say*." *Id.* at 60–61 (emphasis in original). Here, again, the Court upheld a law that affected a business whose service is indisputably "expressive" because the government's interest in nondiscrimination was unrelated to expression.

In short, 303 Creative has it backwards. Instead of asking whether its website design service is expressive, the Court must ask whether Colorado's interest in requiring it to serve all customers equally is related to expression. If not, at most intermediate scrutiny applies, *no matter how expressive 303 Creative's service is.*

### B. CADA's Prohibition on Discriminatory Sales Practices Is Unrelated to the Suppression of Expression.

CADA, like public accommodations laws generally, is directed at conduct, not speech. It prohibits "the act of discriminating against individuals in the provision of publicly available goods, privileges, and services," does not "target speech or discriminate on the basis of its content," and therefore easily satisfies intermediate scrutiny. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 572 (1995). The government's interest in preventing discrimination in access to public accommodations is unrelated to the suppression of expression. It applies equally to all businesses, regardless of whether they are expressive or not. As this Court has recognized,

antidiscrimination laws "do[] not aim at the suppression of speech" and instead "reflect[] [a state's] strong historical commitment to eliminating discrimination and assuring its citizens equal access to publicly available goods and services." *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 623–24 (1984); *Christian Legal Soc'y*, 561 U.S. at 694–95 (antidiscrimination policies are "textbook viewpoint neutral").

Accordingly, just as the indisputably expressive character of O'Brien's draft card burning and CCNV's sleep-in did not trigger strict scrutiny, neither does the expressive character of 303 Creative's website design service.

CADA does not tell 303 Creative what kind of design services to offer for sale or what features to include; it leaves those content decisions to each business. Under CADA, a Christmas shop need not sell Hanukkah products, so long as it will sell Christmas items to all customers. *See, e.g.*, *Halton v. Great Clips, Inc.*, 94 F. Supp. 2d 856, 867 (N.D. Ohio 2000) (rejecting argument that salon had to provide relaxers, where "relaxers were not a service they offered to any customers," even though "relaxers are most often requested by African-American women"); *see also Masterpiece Cakeshop,* 138 S. Ct. at 1733 (Kagan, J., concurring) (explaining that a bakery that refused to "make a cake…that they would not have made for any customer…. treat[s the customer] in the same way they would have treated anyone else—just as CADA requires"); *Brush & Nib Studio, LC v. City of Phoenix*, 448 P.3d 890, 930 (Ariz. 2019) (Bales, J., dissenting) ("A baker, for example, might choose to sell only special-order Easter cakes decorated with the symbol of a cross, but having

made that choice, the baker cannot refuse to sell those cakes to non-Christians").[6]

Thus, CADA regulates 303 Creative's commercial conduct—to whom it offers its services—and not the content of its website services. And as a result, no more than intermediate scrutiny applies.

### C. 303 Creative's Arguments for Heightened Scrutiny Are Without Merit.

303 Creative's arguments for strict scrutiny are unpersuasive. As we showed in Point II.A., *supra*, its principal argument that strict scrutiny should apply because its service is expressive is refuted by a long line of this Court's cases.

303 Creative's other arguments for strict scrutiny all rest on mischaracterizations of what CADA does. For example, it argues that CADA is content-based because its application is triggered by 303 Creative's decision to sell wedding websites as opposed to websites "promoting environmentalism." Pet'rs' Br. at 32. But CADA's application is not

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[6] 303 Creative cannot evade the law's dictates by re-characterizing its service as "website design for opposite-sex weddings," just as it could not offer to the public "website design for white people's weddings." *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 769–70 (8th Cir. 2019) (Kelly, J., concurring in part and dissenting in part) (videographers "cannot define their service as 'opposite-sex wedding videos' any more than a hotel can recast its services as 'whites-only lodgings.'"). If a business has to know who a service is for to decide whether to sell it, its decision is not about the content of the product, but about the identity of the customer.

triggered by the content of any particular service. It is triggered by the voluntary decision to offer the service "to the public." The environmental promotion websites would equally be subject to CADA if the company offered its services to the public.

Similarly, 303 Creative argues that CADA tolerates only viewpoints that "celebrate" a same-sex couple's marriage. *Id.* at 33. But that is also wrong. CADA does not require any business to "celebrate" anything, no matter how that term is understood. It is entirely agnostic as to whether businesses "celebrate" or "condemn" marriages; it merely requires that businesses that offer services to the public offer the same services to all customers, whatever those services may be.

Finally, 303 Creative invokes two cases involving unusual applications of public accommodations laws to noncommercial, private associations to support its contention that strict scrutiny applies. *Id.* at 20-23 (relying on *Hurley* and *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000)). But both cases are clearly distinguishable, and do not call into question the general rule that states may require businesses open to the public not to discriminate in sales.

*Hurley* involved a "peculiar" application of a public accommodation law to a privately organized non-profit parade. 515 U.S. at 572. The Court characterized the parade as "inherent[ly] expressive[]," akin to "a speaker who takes to the street corner to express his views." *Id.* at 568, 572, 579. In this peculiar setting, the law's application did not regulate conduct with only an incidental effect on

expression, but directly regulated the content of the private parade.

The circumstances here could not be more different. 303 Creative is a business, not a private parade; it has voluntarily chosen to solicit sales from the public generally, not to form an exclusive demonstration; and CADA's application does not alter the content of any website, but merely requires 303 Creative to offer to same-sex couples the same service it offers to heterosexual couples. The *Hurley* Court itself recognized the distinction, stressing that the standard application of public accommodation laws to businesses is constitutional. *Id.* at 572.[7]

*Dale* was a similarly peculiar case, in which the state sought to impose a business regulation on a nonprofit ideological association in order to directly regulate the terms of its association. Dale, an openly gay man, filed a discrimination complaint after he was terminated as a scout leader of the Boy Scouts, a private, nonprofit ideological organization that claimed being gay was inconsistent with scouting. *Dale*, 530 U.S. at 651–52. The Court expressly

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[7] In addition, in *Hurley*, there was no way for the parade to distinguish its expression from those who marched with it. "Parades and demonstrations…are not understood to be [] neutrally presented" and their private sponsors cannot "disavow 'any identity of viewpoint' between themselves and the selected participants…. [S]uch disclaimers would be quite curious in a moving parade." *Id.* at 576–77. 303 Creative, by contrast, can easily affix a notice to its website designs stating that it does not endorse its customers' messages. *FAIR*, 547 U.S. at 65 (law schools free to post disclaimer that they don't endorse military's policy); *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 87 (1980) (same for shopping mall owner).

distinguished "clearly commercial entities" from "membership organizations such as the Boy Scouts." *Id.* at 657. To tell a private ideological association to admit leaders who contravene its very purpose for associating is a direct infringement of First Amendment rights, not a regulation of conduct with an incidental effect on expression or association.

The same cannot be said for the routine application of a nondiscrimination requirement to commercial sales by a business that has affirmatively chosen to solicit sales from the public at large. As Justice O'Connor explained in a related case rejecting a First Amendment challenge to a public accommodations law, "[t]he First Amendment is offended by direct state control of the membership of a private organization engaged exclusively in protected expressive activity, but no First Amendment interest stands in the way of a State's rational regulation of economic transactions by or within a commercial association." *U.S. Jaycees*, 468 U.S. at 638 (O'Connor, J., concurring).

Accordingly, CADA is subject to, at most, intermediate scrutiny, which it clearly satisfies. Indeed, as we now show, it would survive even strict scrutiny.

### D. CADA Satisfies Any Level of Scrutiny.

The state's interest in eliminating invidious discrimination in the open marketplace is compelling, and unrelated to the suppression of ideas. *See U.S. Jaycees*, 468 U.S. at 623, 625 (discrimination "deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural

life"). While many take for granted equal access to goods and services in the marketplace, members of minority groups often cannot. The state has a compelling interest in ensuring equal opportunity to participate in the "transactions and endeavors that constitute ordinary civic life in a free society." *Romer*, 517 U.S. at 631.

Equally compelling is the "fundamental object" of public accommodations laws, to "vindicate the deprivation of personal dignity that surely accompanies denials of equal access to public establishments." *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250 (internal quotation marks omitted); *see also U.S. Jaycees*, 468 U.S. at 624 (state has compelling interest in fighting discrimination); *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (same).

CADA is "narrowly drawn to serve that interest." *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 799 (2011). It is limited to businesses that choose to access the public marketplace. As noted above, Point I, *supra*, it thereby leaves unregulated a wide array of artists, writers, and artisans who elect not to offer their services to the public at large, but instead to pursue a freelance business for particular clients or patrons. And even as to those public businesses it does govern, CADA regulates only the conduct of sales, affording businesses the freedom to choose what goods or services they want to offer.

Any incidental burden these laws impose on public accommodations that sell expressive goods and services is no greater than necessary to vindicate the government's anti-discrimination interest. Where the goal is to end discrimination in the public

marketplace, an exemption for all businesses that might be deemed "expressive" (theaters, bookstores, architecture and law firms, hairdressers, gardeners, florists, caterers, and the like) would defeat the law's very purpose.

### III. Granting Businesses that Choose to Sell to the Public a Free Speech Right to Discriminate if Their Product is Expressive is Unworkable.

The right that 303 Creative seeks is either exceptionally broad or exceptionally ill-defined, or both. It would provide carte blanche to discriminate whenever a business's product or service could be characterized as "expressive." An architecture firm, a student portrait photography business, or any of a wide range of other businesses offering "expressive" services could announce that "We Do Not Serve Blacks, Gays, or Muslims." *See Masterpiece Cakeshop*, 138 S. Ct. at 1727–29 (noting that a broad expressive exemption would do widespread harm).

Because almost any product or service can have expressive elements, from luggage to linens to landscaping, the exemption 303 Creative proposes would either swallow the rule or impose on judges the impossible task of assessing which products and services are sufficiently "expressive" or "artistic" to warrant an exemption.

Counsel for 303 Creative, when previously before this Court representing Masterpiece Cakeshop, similarly argued that "artistic expression" should be exempt from CADA. Br. for Pet'rs at 18, *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, No. 16-111, 2017 WL 3913762. But counsel's exchanges with the Court at oral argument made

evident that this test was unworkable. *See* Oral Arg. Tr. 11–19, *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, No. 16-111, 2017 WL 8231968 (asserting a cake maker, florist, and invitation designer may be "artists" and therefore free to discriminate, but a hairstylist is "absolutely not," nor is a "makeup artist," tailor, or chef). Counsel argued "generally speaking, architecture would not be protected" "because buildings are functionable, not communicative," and so, as Justice Breyer incredulously asked, "Michelangelo… is not protected when he creates the Laurentian steps, but this cake baker is protected when he creates the cake?" *Id.* at 17–18. Counsel was unable to provide any principle to meaningfully delineate which businesses are free to discriminate and which are not.

303 Creative does not do any better here. It argues that the exemption turns on the "expressive quality" of the product or service, Pet'rs' Br. at 17, and would extend to "artists," including "painters, photographers, writers, graphic designers, and musicians." *Id.* at 3. And it maintains that "custom" products should be exempt. *Id.* at 5, 6, 12, 19, 20, 46. But "artistic" does no more work than "expressive" in the constitutional analysis; surely the results in *O'Brien* or *Clark* would not have been different had the speakers been artists rather than political protesters.

And an almost limitless range of products and services may be customized.[8] A "custom" exemption

[8] Aviva Freudmann, *Customers Want Customization, and Companies are Giving it to Them*, N.Y. Times (Mar. 18, 2020), https://www.nytimes.com/2020/03/18/business/customization-

would sweep in virtually everyone who offers individually tailored services to the public, from tailors themselves to gardeners, house painters, hairdressers, home designers and builders, and law firms.

To cite just one arena, products associated with weddings are often customized with names, images, and wedding details, including match boxes,[9] mason jar drinking glasses[10] and engraved champagne flutes,[11] wedding sign-in boards,[12] temporary tattoos,[13] wood ring boxes,[14] monogramed wedding cake toppers,[15] digital wedding monograms,[16] custom digital map drawings of the

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personalized-products.html ("More and more industries and companies are joining the mass-customization bandwagon."); Deloitte, *Made-to-order: The rise of mass personalization*, The Deloitte Consumer Review, 2, 12 (2019), https://www2.deloitte.com/content/dam/Deloitte/ch/Documents/consumer-business/ch-en-consumer-business-made-to-order-consumer-review.pdf ("[B]usinesses that do not incorporate an element of personalisation into their offering risk losing revenue and customer loyalty.")

[9] LemonBox, Zazzle, https://perma.cc/3MU9-WNWP ("The perfect match Elegant & chic wedding matchbox").

[10] Weddingstar Inc., The Knot Shop Powered by Weddingstar, https://perma.cc/UM7D-J46C ("Glass Mason Jar Mugs").

[11] 1-800flowers.com, https://perma.cc/6HFA-EQF7 ("Gold Hammered Engraved Wedding Champagne Flute Set").

[12] EvermoreSigns, Etsy, https://perma.cc/5HQR-B579 ("Wedding Canvas Guest Book Alternative").

[13] Cookillu, Etsy, https://perma.cc/E9GX-2DSM ("Custom Temporary Tattoos").

[14] FortisFinds, Etsy, https://perma.cc/5UCN-EHCV ("Custom Wedding Ring Box").

[15] Evertwin, Etsy, https://perma.cc/MZQ8-3S3H ("Custom initials cake topper").

[16] Linvit, Etsy, https://perma.cc/XV24-7L4Z ("Wedding Monogram").

wedding venue,[17] anniversary date digital prints,[18] vows printed as art,[19] and an engraved wooden spoon declaring the couple to be "the perfect mix."[20] Could all these businesses advertise their services to the public at large but refuse to sell to inter-faith, inter-racial, or same-sex couples?

Even M&M'S can be customized to express a particular message for a particular wedding. The Personalizable M&M'S Just Married Favors "will tell your unique love story in words, images, and a romantic photo."[21] The candies can include a photo of the couple, their names, or other wedding-themed images or words. Like 303 Creative's web designs, the Personalizable M&M'S Just Married Favors contain "words, images, and… photo[s]," and are custom-designed to tell the "story" of the couple and celebrate their marriage.[22] Thus, on 303 Creative's theory, M&M'S would have a First Amendment right to refuse to sell its Just Married Favors to a same-sex couple. *See* Pet'rs' Br. at 22–23. That result seems absurd. But on what principle can one distinguish between 303 Creative and M&M'S?[23]

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[17] jamesandjosieco, Etsy, https://perma.cc/5HKS-GJFS ("Custom Map").

[18] BelovedPrintShop, Etsy,https://perma.cc/999J-ATT4 ) ("Custom Date Print").

[19] minted., https://perma.cc/K4BZ-3B8A ("Your Vows as an Art Print").

[20] OakKnollCreations, Etsy, https://perma.cc/92AP-NH52 ("Laser Engraved Wood Spoon").

[21] M&M's, *Personalizable M&M's Just Married Favors*, https://perma.cc/9DGT-NUKC.

[22] *Id.*

[23] Professors Dale Carpenter, et al., do no better. *See* Amici Br. of Carpenter, Volokh, & Shapiro at 4, 5, 18, 19. They

In short, an "expressive," "artistic," or "custom" exemption from public accommodations laws, in addition to being contrary to principle and precedent, is unmanageable. And its very unworkability only underscores that the Court has long been correct in looking not to how "expressive" or "artistic" an individual's conduct is, but instead to whether the government's regulation is aimed at the suppression of expression or not.

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argue that businesses selling "inherently expressive" products or services should be permitted to discriminate—a rule that would allow, among others, newspapers, bookstores, and law schools to discriminate on the basis of race. They acknowledge that "[d]istinguishing expressive from non-expressive products in some contexts might be hard." But they then simply assert, without reasoning, that a bakery's cake would be expressive but a tailor shop's custom-made bespoke suit would not be. Like 303 Creative, they offer no administrable principle—nor any explanation for why the plainly expressive character of O'Brien's draft card burning did not earn him the exemption they support for 303 Creative.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

August 19, 2022

Respectfully submitted,

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## APPENDIX

- Alaska Stat. Ann. § 18.80.300(16) (West 2022) ("'public accommodation' means a place that caters or offers its services, goods, or facilities ***to the general public***");
- Ariz. Rev. Stat. Ann. § 41-1441(2) ("'Places of public accommodation' means all public places of entertainment, amusement or recreation, all public places where food or beverages are sold for consumption on the premises, all public places which are conducted for the lodging of transients or for the benefit, use or accommodation of those seeking health or recreation and all establishments which cater or offer their services, facilities or goods to or solicit patronage from the ***members of the general public***.");
- Ark. Code Ann. § 16-123-102(7) (West 2022) ("'Place of public resort, accommodation, assemblage, or amusement' means any place, store, or other establishment, either licensed or unlicensed, that supplies accommodations, goods, or services to the general public, or that solicits or accepts the patronage or trade ***of the general public***");
- Conn. Gen. Stat. Ann. § 46a-63(1) (West 2022) ("'Place of public accommodation, resort or amusement' means any establishment which caters or offers its services or facilities or goods ***to the general public***");
- Del. Code Ann. tit. 6, § 4502(18) (West 2022) ("'Place of public accommodation' means any establishment which caters to or offers goods or services or facilities to, or solicits patronage from, ***the general public***.");

- Haw. Rev. Stat. Ann. § 489-2 (West 2022) ("'Place of public accommodation' means a business, accommodation, refreshment, entertainment, recreation, or transportation facility of any kind whose goods, services, facilities, privileges, advantages, or accommodations are extended, offered, sold, or otherwise made available ***to the general public*** as customers, clients, or visitors.");
- Ind. Code Ann. § 22-9-1-3(m) (West 2022) ("'Public accommodation' means any establishment that caters or offers its services or facilities or goods ***to the general public***.");
- Ky. Rev. Stat. Ann. § 344.130 (West 2022) ("'place of public accommodation, resort, or amusement' includes any place, store, or other establishment, either licensed or unlicensed, which supplies goods or services ***to the general public*** or which solicits or accepts the patronage or trade of the ***general public*** or which is supported directly or indirectly by government funds");
- La. Stat. Ann. § 51:2232(9) (2022) ("'Place of public accommodation, resort, or amusement' means any place, store, or other establishment, either licensed or unlicensed, which supplies goods or services to the general public or which solicits or accepts the patronage or trade of ***the general public***, or which is supported directly or indirectly by government funds");
- Me. Rev. Stat. Ann. tit. 5, § 4553(8)(N) (West 2022) ("'Place of public accommodation' means a facility, operated by a public or private entity, whose operations fall within at least one of the following categories: … Any establishment that in fact caters to, or offers its goods, facilities or

services to, or solicits or accepts patronage from, ***the general public***.);

- Mass. Gen. Laws Ann. ch. 272, § 92A (West 2022) ("A place of public accommodation, resort or amusement within the meaning hereof shall be defined as and shall be deemed to include any place, whether licensed or unlicensed, which is open to and accepts or solicits the patronage of ***the general public***");
- Mo. Ann. Stat. § 213.010(16) (West 2022) ("'Places of public accommodation', all places or businesses offering or holding out ***to the general public***, goods, services, privileges, facilities, advantages or accommodations for the peace, comfort, health, welfare and safety of ***the general public*** or such public places providing food, shelter, recreation and amusement");
- Mont. Code Ann. § 49-2-101(20)(a) (West 2021) ("'Public accommodation' means a place that caters or offers its services, goods, or facilities ***to the general public*** subject only to the conditions and limitations established by law and applicable to all persons.");
- Neb. Rev. Stat. Ann. § 20-133 (West 2022) ("As used in sections 20-132 to 20-143, unless the context otherwise requires, places of public accommodation shall mean all places or businesses offering or holding out ***to the general public*** goods, services, privileges, facilities, advantages, and accommodations for the peace, comfort, health, welfare, and safety of the general public and such public places providing food, shelter, recreation, and amusement");
- N.H. Rev. Stat. Ann. § 354-A:2(XIV) (2018) ("'Place of public accommodation' includes any

inn, tavern or hotel, whether conducted for entertainment, the housing or lodging of transient guests, or for the benefit, use or accommodations of those seeking health, recreation or rest, any restaurant, eating house, public conveyance on land or water, bathhouse, barbershop, theater, golf course, sports arena, health care provider, and music or other public hall, store or other establishment which caters or offers its services or facilities or goods ***to the general public***.");

- N.D. Cent. Code Ann. § 14-02.4-02(14) (West 2021) ("'Public accommodation' means every place, establishment, or facility of whatever kind, nature, or class that caters or offers services, facilities, or goods ***to the general public*** for a fee, charge, or gratuity.");
- Okla. Stat. Ann. tit. 25, § 1401(1) (West 2022) ("'place of public accommodation' includes any place, store or other establishment, either licensed or unlicensed, which supplies goods or services ***to the general public*** or which solicits or accepts the patronage or trade of ***the general public*** or which is supported directly or indirectly by government funds");
- 43 Pa. Stat. And Cons. Stat. § 954(l) ("The term 'public accommodation, resort or amusement' means any accommodation, resort or amusement which is open to, accepts or solicits the patronage of ***the general public***");
- S.D. Codified Laws § 20-13-1(13) (2022) ("'Public accommodations,' any place, establishment, or facility of whatever kind, nature, or class that caters or offers services, facilities, or goods ***to the general public*** for a fee, charge, or gratuitously.");

- Tenn. Code Ann. § 4-21-102(15) (West 2022) ("'Places of public accommodation, resort or amusement' includes any place, store or other establishment, either licensed or unlicensed, that supplies goods or services ***to the general public*** or that solicits or accepts the patronage or trade of ***the general public***, or that is supported directly or indirectly by government funds");
- Utah Code Ann. § 13-7-2(3)(a) (West 2022) ("'Place of public accommodation' includes: (i) every place, establishment, or facility of whatever kind, nature, or class that caters or offers services, facilities, or goods ***to the general public*** for a fee or charge");
- Vt. Stat. Ann. tit. 9, § 4501(1) (West 2022) ("'Place of public accommodation' means any school, restaurant, store, establishment, or other facility at which services, facilities, goods, privileges, advantages, benefits, or accommodations are offered ***to the general public***.");
- W. Va. Code Ann. § 5-11-3(j) (West 2022) ("The term 'place of public accommodations' means any establishment or person, as defined herein, including the state, or any political or civil subdivision thereof, which offers its services, goods, facilities or accommodations ***to the general public***");
- Idaho Code Ann. § 67-5902(9) (West 2022) ("'Place of public accommodation' means a business, accommodation, refreshment, entertainment, recreation, or transportation facility of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages or accommodations are extended, offered, sold, or otherwise made available ***to the public***");

- Kan. Stat. Ann. § 44-1002(h) (West 2022) ("'Public accommodations' means any person who caters or offers goods, services, facilities and accommodations ***to the public***.");
- Mich. Comp. Laws Ann. § 37.2301(a) (West 2022) ("'Place of public accommodation' means a business, or an educational, refreshment, entertainment, recreation, health, or transportation facility, or institution of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages, or accommodations are extended, offered, sold, or otherwise made available ***to the public***.);
- Minn. Stat. Ann. § 363A.03 Subd. 34 (West 2022) ("'Place of public accommodation' means a business, accommodation, refreshment, entertainment, recreation, or transportation facility of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages or accommodations are extended, offered, sold, or otherwise made available ***to the public***.");
- Nev. Rev. Stat. Ann. § 651.050(4) (West 2022) ("'Place of public accommodation' means: … (n) Any other establishment or place ***to which the public*** is invited or which is intended for public use");
- N.M. Stat. Ann. § 28-1-2(H) (West 2021) ("'public accommodation' means any establishment that provides or offers its services, facilities, accommodations or goods ***to the public***");
- Ohio Rev. Code Ann. § 4112.01(9) (West 2022) ("'Place of public accommodation' means any inn, restaurant, eating house, barbershop, public conveyance by air, land, or water, theater, store,

other place for the sale of merchandise, or any other place of public accommodation or amusement of which the accommodations, advantages, facilities, or privileges are available ***to the public***.");

- Or. Rev. Stat. Ann. § 659A.400(1) (West 2022) ("A place of public accommodation… means: (a) Any place or service offering ***to the public*** accommodations, advantages, facilities or privileges whether in the nature of goods, services, lodgings, amusements, transportation or otherwise.");
- Wyo. Stat. Ann. § 6-9-101(a) (West 2022) ("All persons of good deportment are entitled to the full and equal enjoyment of all accommodations, advantages, facilities and privileges of all places or agencies which are public in nature, or which invite the patronage ***of the public***").