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 *Amicus Curiae* American Bar Association in Support of Respondent

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INTEREST OF *AMICUS CURIAE*[1]

The American Bar Association ("ABA") as *amicus curiae* respectfully submits this brief in support of respondents. As the country's leading association of legal professionals, the ABA is acutely aware that lawyers historically argued that their "constitutional rights of expression or association" provided legal shelter from antidiscrimination laws. *Hishon* v. *King & Spalding*, 467 U.S. 69, 78 (1984). But this Court has long held that such claims are *not* entitled to "affirmative constitutional protection[]." *Ibid.* (citation omitted). The ABA urges this Court to reject the equivalent arguments pressed by petitioners here and hold that Colorado may constitutionally apply its public accommodations law to bar a design firm from refusing to sell its wedding websites to same-sex couples. A decision for petitioners would uproot decades of precedent holding that commercial enterprises have no right to discriminate and vitiate state and federal antidiscrimination laws.

The ABA is the largest voluntary association of attorneys and legal professionals in the world. Its membership comprises attorneys in private firms, corporations, non-profit organizations, and government agencies. Membership also includes judges,[2]

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* certify that no counsel for any party authored this brief in whole or in part, and no party or counsel for a party, or any other person other than *amicus* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for all parties have filed blanket consents to the filing of *amicus* briefs.

[2] Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the ABA. No inference should be drawn that any members of the

legislators, law professors, law students, and non-lawyers in related fields.

The ABA's mission is to serve the legal profession and the public "by defending liberty and delivering justice." *About Us*, https://www.americanbar.org/about_the_aba/. Consistent with that mission, the ABA has long advocated against discrimination based on sexual orientation. For example, in 1973—two decades before this Court's landmark decision in *Lawrence* v. *Texas*, 539 U.S. 558 (2003)—the ABA adopted a policy urging the repeal of laws criminalizing private sexual relations between consenting adults.[3] The ABA has since then adopted numerous other policies, including, in 1987, a policy that condemned bias-motivated crimes and urged prosecution of perpetrators thereof; in 1991, that supported federal legislation requiring a study of bias in the judicial system; and in 1992, that supported university policies opposing discrimination based on sexual orientation.[4]

The ABA also has worked to eliminate discrimination against gay and lesbian people who are, or who wish to become, lawyers. In 1992, the ABA amended its constitution to make the National Lesbian and

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Judicial Division Council participated in the adoption or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Counsel prior to filing.

[3] Generally recommendations must be presented to and adopted by the ABA's House of Delegates to become ABA policy. See *ABA House of Delegates*, https://www.americanbar.org/groups/leadership/house_of_delegates/.

[4] ABA Resolution 87A110A (Aug. 1987); ABA Resolution 91A10D (Aug. 1991); ABA Resolution 92M115 (Feb. 1992).

Gay Law Association an affiliated organization with a vote in the House of Delegates.[5] In 1994, the ABA incorporated into its Standards of Approval of Law Schools a requirement that accredited law schools not discriminate on the basis of sexual orientation.[6] In 2002, the ABA amended its constitution to prohibit state and local bar associations that discriminate on the basis of sexual orientation from being represented in the House of Delegates.[7]

Of special relevance here, the ABA in 1989 adopted a policy advocating against discrimination based on sexual orientation in employment, housing, and public accommodations;[8] in 2006, adopted a similar resolution with respect to discrimination based on actual or perceived gender identity;[9] and in 2010, adopted a policy urging the elimination of all legal barriers to civil marriage between two persons of the same sex.[10] And the ABA has filed *amicus* briefs in several cases in which this Court has considered the equal dignity of gay and lesbian people, including *Romer* v. *Evans*, 517 U.S. 620 (1996), *Lawrence* v. *Texas*, 539 U.S. 558 (2003), *United States* v. *Windsor*, 570 U.S. 744 (2013), *Obergefell* v. *Hodges*, 576 U.S. 644 (2015), and *Masterpiece Cakeshop, Ltd.* v. *Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018).

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[5] ABA Resolution 92A11-3 (Aug. 1992). Now codified in section 6.8(a) of the ABA Constitution recognizing the National LGBT Bar Association as an affiliated organization.

[6] ABA Resolution 94A106A (Aug. 1994).

[7] ABA Resolution 02A11-2 (Aug. 2002).

[8] ABA Resolution 89M8 (Feb. 1989).

[9] ABA Resolution 06A122B (Aug. 2006).

[10] ABA Resolution 10A111 (Aug. 2010).

INTRODUCTION AND SUMMARY OF THE ARGUMENT

For centuries, public accommodations laws have protected the right of persons to obtain goods and services, including custom goods and services, in the common marketplace on equal terms. And since the Civil Rights Era, Congress and this Court have considered arguments by commercial entities claiming constitutional exemptions, including First Amendment exemptions, from laws forbidding race discrimination in the provision of public accommodations. By decisively rejecting those arguments, Congress and this Court ensured that basic protections against status discrimination, though controversial when first introduced, matured into enduring norms that command broad acceptance and mark our progress as a nation.

In this case, the Court must decide whether it will once again reject those same arguments in situations involving the denial of public accommodations on the basis of sexual orientation. It should. If, as Coloradans clearly intend, gay and lesbian people are to be equal citizens and not "social outcasts," *Masterpiece Cakeshop, Ltd.* v. *Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1727 (2018), it is imperative that this Court reject petitioners' request for a constitutional exemption, just as it did a half-century ago when business owners sought similar exemptions from laws prohibiting race discrimination.

I. In 1964, Congress passed the Civil Rights Act, Title II of which outlawed discrimination on the basis of race, religion, or national origin in the provision of public accommodations affecting interstate commerce. It is easy to forget that the maintenance of racial segregation was then still seen by many Ameri-

cans as a moral imperative. Senator Robert Byrd gave voice to millions when he opined that "God's statutes . . . recognize the natural order of the separateness of things." 110 Cong. Rec. 13,206 (1964). Senator J. Lister Hill of Alabama, among others, invoked the First Amendment, arguing that Title II violated individuals' "fundamental right[]" to choose their associates. 110 Cong. Rec. 8444 (1964). In the end, Congress rejected the view that Title II would burden "free association" and passed the statute. H.R. Rep. No.88-914, at 9 (1963).

After Title II went into effect, business owners continued to assert a right of conscience, appealing to this Court for recognition of a constitutional right to choose whether, and on what terms, to deal with certain classes of customers. Those arguments failed time and again. In a series of decisions, this Court rejected business owners' arguments that the First Amendment and other constitutional provisions afforded them the right to decline to deny Black customers the full slate of accommodations offered to all other customers. See *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 260 (1964); *Katzenbach* v. *McClung*, 379 U.S. 294, 303 (1964); *Newman* v. *Piggie Park Enters., Inc*., 390 U.S. 400, 402 n.5 (1968). The right that Petitioner Smith asserts here—to choose, based on her religious beliefs, which of her business's customers will be relegated to second-class status—is indistinguishable from the arguments that this Court resoundingly rejected in those earlier decisions.

II. This Court should not recognize the novel First Amendment right that petitioners seek. This Court recently affirmed that, although "religious and philosophical objections [to same-sex marriage] are pro-

tected, it is a general rule that such 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[.]" *Masterpiece*, 138 S. Ct. at 1727 (2018) (citing *Piggie Park*, 390 U.S. at 402 n.5). To be sure, there is an important exception to that general rule: a public accommodations law may not be applied to an expressive association whose purpose is to communicate its members' message, when doing so would force the association to alter its message. *Hurley* v. *Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995), *Boy Scouts of America* v. *Dale*, 530 U.S. 640 (2000). This case is governed by the rule, however, and not the exception. Petitioner 303 Creative is a commercial entity and petitioner Smith is its proprietor. Neither is an expressive association. Recognizing petitioners' claim to a conscience exemption would convert the narrow exception recognized in *Hurley* and *Dale* into a gaping hole that would permit virtually any business to assert a First Amendment right to treat any group of persons as second-class citizens unworthy of full participation in the life of the community.

The briefing in this case confirms that ruling for the petitioners should have far-reaching consequences at every level. There is no principled way to limit petitioners' claimed exemption to products or services that are supposedly "expressive" in nature, or to commercial products with a nexus to same-sex weddings. Nor should the Court single out gays and lesbians for "disfavored legal status" even if such a limiting principle were workable. *Romer* v. *Evans*, 517 U.S. 620, 633 (1996). Moreover, if commercial entities may assert a First Amendment right to discriminate among classes of customers, then there is no reason that commercial entities should not be able to assert

a concomitant right to discriminate among classes of potential employees. To accept petitioners' novel theories would vitiate antidiscrimination laws and would have profoundly destabilizing consequences. This Court should not take that step.

ARGUMENT

I. Congress and This Court Squarely Rejected Conscience Exemptions from Federal Antidiscrimination Laws.

As long as public accommodations laws have existed, they have been challenged based on businesses' asserted right to choose their customers. Congress itself considered and rejected many such arguments when it enacted the Civil Rights Act of 1964. The bases for these constitutional challenges varied over time, from the the Fifth and Thirteenth Amendments, to the Free Speech and Free Exercise clauses of the First Amendment. But this Court has been consistent in its response. In each instance, this Court has reaffirmed that if a business chooses to offer its goods and services to the public, it must offer them to all comers on equal terms.

A. In Enacting the Civil Rights Act of 1964, Congress Rejected the Argument That Laws Mandating Equal Service Violate the Constitution.

1. Contemporary antidiscrimination laws such as Title II of the Civil Rights Act of 1964 are modeled on the traditional right of access that existed at common law, when "innkeepers, smiths, and others who 'made profession of a public employment[]' were prohibited from refusing, without good reason, to serve a customer." *Hurley*, 515 U.S. at 571 (quoting *Lane* v. *Cotton*, 88 Eng. Rep. 1458, 1464-1465 (K.B. 1701)

(Holt, C.J., dissenting)). Engaging in "public employment" meant practicing one's trade commonly, for the benefit of the public. *Lane*, 88 Eng. Rep. at 1465; see also Edward A. Adler, *Business Jurisprudence*, 28 Harv. L. Rev. 135, 152 (1914) ("[T]he word 'common' describes the nature of the undertaking and marks off the [common] carrier . . . from that carrier who carries . . . for himself or some particular employer."); *Biden* v. *Knight First Amend. Inst.*, 141 S. Ct. 1220, 1223 (2021) (Thomas, J., concurring) (describing public accommodations as including "companies that hold themselves out to the public but do not 'carry' freight, passengers, or communications").

In the antebellum period, any business that "invite[d] the public in to do business" had a corresponding duty to serve all comers. Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 Nw. U. L. Rev. 1283, 1322-1325 (1996). Even in the immediate aftermath of the Civil War, this broad view of common businesses endured. See *Bell* v. *Maryland*, 378 U.S. 226, 298-300 (1964) (Goldberg, J., concurring) (citing congressional discussions of the Civil Rights Act of 1875). The end of Reconstruction, however, saw "the replacement of a general right of access [to businesses] with a general right [of businesses] to exclude … in order to promote a racial caste system." Singer, 90 Nw. U. L. Rev. at 1295. Thus, only in the late nineteenth century did the right of access to common businesses become a privilege that could only be bestowed by positive law.

2. In 1963—the year of the Jackson Woolworth's Sit-In and Martin Luther King, Jr.'s "Letter from a Birmingham Jail"—Congress finally resolved to address "the humiliation, frustration, and embarrass-

ment that a person must surely feel when he is told that he is unacceptable as a member of the public because of his race or color." S. Rep. No. 88-872, at 16 (1964). Although general antidiscrimination principles received broad endorsement in Congress, debates around the bill featured passionate arguments that those principles should be subordinated to the rights of business owners to discriminate based on their personal beliefs—including their beliefs about interracial marriage. Anti-miscegenation laws would not be struck down for another three years, when this Court, in *Loving* v. *Virginia*, 388 U.S. 1 (1967), abrogated what the Virginia high court called the "divine" law against "social amalgamation." *Naim* v. *Naim*, 197 Va. 80, 84, vacated on other grounds by 350 U.S. 891 (1955), and adhered to, 197 Va. 734 (1956). Senator Robert Byrd spoke for many Americans when he opined during the debate over Title II that "God's statutes . . . recognize the natural order of the separateness of things." 110 Cong. Rec. 13,206 (1964).

Opponents of Title II believed that the statute would force business owners to betray God's laws, thereby infringing on First Amendment rights. Senator Sam Ervin, Jr., for example, penned an article warning of "the immense price in personal liberty and freedom that will be the cost" of antidiscrimination laws. Sam J. Ervin, Jr., *The United States Congress and Civil Rights Legislation*, 42 N.C. L. Rev. 3, 10 (1963). Senator J. Lister Hill argued that Congress could not compel "association" with customers: "Just as freedom of thought and belief are fundamental rights reserved to an individual, so is freedom to choose one's associates, and, conversely, freedom from compulsion to associate, for forced association is not free." 110 Cong. Rec. 8444 (1964). And Senator John Tower objected that Title II would "deny to millions of

employers and employees any freedom to speak or to act on the basis of their religious convictions or their deep-rooted preferences for associating or not associating with certain classifications of people." 110 Cong. Rec. 7778 (1964).

The House of Representatives rejected the argument that "title II invades rights of privacy and of free association," because "the types of establishment[s] involved in title II are those regularly held open to the public in general." H.R. Rep. No. 88-914, at 9 (1963). And the Senate concluded that "[t]here is no serious question of the right of association or of property or of privacy as a barrier to the legislation, applicable as it is to commercial places of public accommodation." S. Rep. No. 88-872, at 92 (1964); see also *id.* at 22 (concluding that no "right of the private property owner to serve or sell to whom he pleased" existed at common law). The Civil Rights Act passed in 1964 by overwhelming margins.

B. This Court Upheld Title II Against Claims That Laws Mandating Equal Service Are Unconstitutional.

1. Resistance to Title II's mandate of equal service did not end with its passage. The statute's opponents pressed the same constitutional arguments in the courts that Congress had rejected. These claims to a right of conscience failed to persuade this Court, just as they had failed to persuade the 88th Congress.

In *Heart of Atlanta Motel, Inc.* v. *United States*, the plaintiff contended that the Act violated the Fifth and Thirteenth Amendments by "tak[ing] away the personal liberty of an individual to run his business as he sees fit with respect to the selection and service of his customers." Brief for Appellant at 32, *Heart of*

Atlanta Motel, Inc. v. *United States*, 379 U.S. 241 (1964), 1964 WL 81380. This Court upheld Title II, noting that "a long line of cases . . . [has] rejected the claim that the prohibition of racial discrimination in public accommodations interferes with personal liberty" and that the constitutionality of public accommodations laws "stands unquestioned." 379 U.S. 241, 260 (1964).

In the same term, this Court rejected the argument that Title II violated a restaurant owner's constitutional right to "deal or refuse to deal with whomever he pleases." Brief for Appellees at 31-32, *Katzenbach* v. *McClung*, 379 U.S. 294 (1964), 1964 WL 81100. Ollie McClung, owner of Ollie's BBQ, argued that Title II unconstitutionally infringed the "personal rights of persons in their personal convictions" to refuse service, because McClung's "personal convictions" against integration precluded him from serving African Americans onsite alongside Whites. *Id.* at 33. McClung even invoked two of this Court's landmark free-speech decisions in support of this argument. See *ibid.* (citing *W. Va. State Bd. of Educ.* v. *Barnette*, 319 U.S. 624 (1943), and *International Ass'n of Machinists* v. *Street*, 367 U.S. 740 (1961)). The Court rejected McClung's claimed exemption, affirming that even deeply-held beliefs about human relationships and the organization of society do not give rise to any right to exclude once a business owner chooses to enter the marketplace and assumes a duty to serve the public. *McClung*, 379 U.S. at 298 n.1. Importantly, Ollie's BBQ served food to African-American customers;[11] what McClung

[11] See Brief for NAACP Legal Defense Fund as Amicus Curiae at 4 n.5, *Katzenbach* v. *McClung*, 379 U.S. 294 (1964), 1964 WL 72713 (explaining that Ollie's BBQ refused table service to

sought from the First Amendment, and what this Court declined to find within that Amendment, was a license to deny them the full menu of accommodations on offer.

In *Newman* v. *Piggie Park Enterprises, Inc*., this Court again rejected a business owner's attempt to claim a constitutional conscience exemption from Title II. 390 U.S. 400 (1968). There, Maurice Bessinger, owner of Maurice's Piggie Park, argued that, because he "believe[d] as a matter of religious faith that racial intermixing or any contribution thereto contravenes the will of God," any statute that required him to "contribut[e]" to racial integration infringed religious liberty. Second Am. Answer, *Piggie Park* Pet. App. 21a; see also *Piggie Park* Pet. App. 125a-127a. The district court disagreed, noting that it would "refuse[] to lend credence or support to [Bessinger's] position that he has a constitutional right to refuse to serve members of the Negro race in his business establishments upon the ground that to do so would violate his sacred religious beliefs." *Newman* v. *Piggie Park Enters., Inc*., 256 F. Supp. 941, 945 (D.S.C. 1966). When the case reached this Court, Bessinger's claimed First Amendment exemption was dismissed as "patently frivolous." *Piggie Park*, 390 U.S. at 402 n.5.

2. Over the following decades, this Court reaffirmed that antidiscrimination laws are enforceable regardless of the regulated party's sincere moral or religious beliefs. In *Bob Jones University* v. *United States*, 461 U.S. 574 (1983), all nine justices rejected, or would have rejected, the University's

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African Americans and offered service only from the take-out window).

First Amendment challenge to the denial of tax-exempt status based on "its religious doctrinal conviction that . . . the Scriptures forbid interracial dating and marriage." Reply Brief for Petitioner at 2, *Bob Jones University* v. *United States*, 461 U.S. 574 (1983), 1982 WL 1044669 (citation and internal quotation marks omited). Although Justice Rehnquist disagreed with the Court's statutory construction, he agreed that Congress has the power to deny tax-exempt "status to organizations that practice racial discrimination," and that "such a requirement [of nondiscrimination] would not infringe on petitioners' First Amendment rights." *Bob Jones*, 461 U.S. at 622 & n.4 (Rehnquist, J., dissenting). The following year, this Court rejected an as-applied challenge to Title VII of the Civil Rights Act on the grounds that the law interfered with a law firm's "rights of expression or association" by prohibiting sex discrimination in hiring. *Hishon* v. *King & Spalding*, 467 U.S. 69, 78 (1984). The Court noted that there are no "affirmative constitutional protections" for status discrimination. *Ibid.* (quoting *Norwood* v. *Harrison*, 413 U.S. 455, 470 (1973)).

Out of the Civil Rights Era, then, a "settled social consensus" emerged that commercial businesses cannot claim constitutional cover from public accommodations laws. Singer, 90 Nw. U. L. Rev. at 1291. Petitioners' effort to revive such constitutional arguments by recasting them as compelled-speech claims should not prevail in light of this Court's unbroken line of precedent refusing to recognize a business owner's individual right to avoid compliance with a valid antidiscrimination law.

II. Petitioners' Claimed Conscience Exemption Would Vitiate Public Accommodations Laws.

Petitioners' arguments are strikingly similar to those that this Court has repeatedly rejected. Like McClung and Bessinger, petitioners assert a constitutional right to offer a limited menu of goods and services to certain customers on the basis of Smith's personal beliefs. See Pet. Br. 2, 12, 14, 16, 17, 23. Just as McClung argued that his "personal convictions" regarding racial intermingling prevented him from providing equal service, *McClung* Br. 33, petitioners invoke Smith's sincere belief that same-sex marriage "conflicts with God's design for marriage" and "harms society and children" (Pet. App. 185a-186a). And just as Bessinger argued that serving his food to African Americans onsite would violate his religious beliefs because "any contribution [to racial mixing] contravenes the will of God," Second Am. Answer, *Piggie Park* Pet. App. 21a, petitioners believe that "it would violate Smith's sincerely held religious beliefs" to customize a wedding website for a same-sex wedding because, "by doing so, [petitioners] would be expressing a message celebrating and promoting a conception of marriage that [Smith] believe[s] is contrary to God's design for marriage," Pet. App. 189a.

This Court should make clear that—just as it held in its Civil Rights Act decisions—commercial firms have no constitutional right to espouse their beliefs by denying equal service to certain customers on the basis of a protected characteristic. One such characteristic is sexual orientation. Over the last quarter-century, this Court has issued a series of landmark decisions recognizing that gay and lesbian people are entitled to "equal dignity in the eyes of the law." *Obergefell*, 576 U.S. at 681. And, although legal pro-

tections for same-sex marriage remain the subject of principled disagreement, the people of Colorado have elected to extend the guarantees of that State's 150-year old antidiscrimination law to gays and lesbians. Much like Title II, the Colorado Anti-Discrimination Act ("CADA"), Colo. Rev. Stat. 24-34601(2)(a), is a neutral and generally applicable law that prohibits proprietors in Colorado from refusing goods or services to a customer because of who their parents are, whom they worship, or whom they love. As such, the law is subject to rational basis review, even if the law incidentally compels petitioners to create graphics and written text on their customers' behalf.

Recognizing a First Amendment right to deny equal service to a class of customers based on a business owner's religious beliefs would invite myriad challenges to the enforcement of public accommodations laws, as much business activity can be characterized as expressive. More broadly, there would be no principled way to recognize a conscience exemption only in the context of sexual-orientation discrimination while rejecting claims based on race or sex discrimination. The argument pressed by petitioners thus threatens to cripple the effectiveness of all federal antidiscrimination laws, as well as comparable state and local laws.

A. Under this Court's Precedents, Applying a Public Accommodations Law to Commercial Artisans Like Smith Raises No First Amendment Concerns.

1. This Court has repeatedly reaffirmed that the normal rule is that generally applicable public accommodations laws like CADA are subject at most to deferential First Amendment review. See *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 389 (1992); see also

Rumsfeld v. *Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006) ("FAIR"). The Court has viewed such statutes as fundamentally directed to economic rather than expressive activity, even though they incidentally require regulated individuals and businesses to communicate (or not communicate) in order to comply. See *R.A.V.*, 505 U.S. at 389; *FAIR*, 547 U.S. at 62. The Court has also made clear that the general rule applies when a business owner opposes same-sex marriage: that opposition, even if religiously or philosophically based, does "not allow business owners . . . to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law." *Masterpiece*, 138 S. Ct. at 1727 (citing *Piggie Park*, 390 U.S. at 402 n.5).

2. Petitioners claim to find support for a broad conscience exemption in *Hurley* and *Dale,* Pet. Br. 17-18, but the limitation on public accommodations laws recognized by this Court in those cases is inapplicable here because 303 Creative is a commercial enterprise, not an expressive association.

In *Hurley,* the Court held that requiring the organizers of a private parade to permit a pro-gay-rights group to march in the parade under the (literal) banner of LGBTQ pride unconstitutionally compelled the organizers to change their parade's message. 515 U.S. at 576. The Court was careful to note that public accommodations laws "do not, as a general matter, violate the First . . . Amendment[]" because they focus on "the act of discriminating against individuals in the provision of publicly available goods, privileges, and services on the proscribed grounds," rather than on the content of speech. *Id.* at 572. In the case of the parade, however, the State had

attempted to apply its public accommodations law to "the sponsors' speech itself," by requiring the organizers to accommodate a marching unit with a message they did not condone. *Id.* at 573. The Court emphasized that the parade was a "form of expression" in which the organizers chose to communicate a message of Irish pride. *Id.* at 568. The parade had no reason for existing other than for the expression of a "collective point." *Ibid.* Forcing the organizers to add a message of LGBTQ pride to their parade, then, unconstitutionally compelled the organization to alter their parade's overall message.

Similarly, in *Dale*, the Court held that applying a public accommodations law to compel the Boy Scouts to permit a gay man to be an assistant scoutmaster violated the Scouts' right of expressive association. 530 U.S. at 660. The Court emphasized that the Boy Scouts' purpose was to "transmit . . . a system of values" to young people—in other words, to engage in expression—and that the Boy Scouts transmitted those values through scout leaders. *Id.* at 650. Again, the Court observed that applying public accommodations laws to "clearly commercial entities, such as restaurants, bars, and hotels," gave rise to relatively little "potential for conflict" between those laws and First Amendment rights. *Id.* at 657. Applying the public accommodations law to the Boy Scouts, however, expanded that law well beyond its traditional commercial focus to "places that often may not carry with them open invitations to the public" and, in the case of the Boy Scouts, private "membership organizations" that exist for expressive purposes. *Id.* at 657; see also *id.* at 659 n.4 (suggesting that the Boy Scouts are not a public accommodation at all). That application, the Court concluded, was unconstitutional: because the Boy Scouts' values included a belief that

homosexuality was immoral, requiring them to include a gay scout leader would necessarily force them to alter their message. *Id.* at 649-651.

In *Dale* and *Hurley*, then, the Court viewed the expressive associations at issue as different in kind from businesses that have been the traditional subject of public accommodations laws. *Dale,* 530 U.S. at 657; *Hurley,* 515 U.S. at 572-573. Commercial enterprises have long been subject to public accommodations laws, and such laws have always had an incidental effect on speech. *FAIR,* 547 U.S. at 62 (antidiscrimination statutes require businesses to take down "White Applicants Only" signs). Applying public accommodations laws to expressive associations raises unique First Amendment issues that do not arise when such laws are applied to "clearly commercial entities." *Dale,* 530 U.S. at 657.

That conclusion follows from the historical consensus (originating at common law, and adopted by Congress, the States, and the courts) that when a business offers goods or services for commercial purposes, it assumes an obligation to be generally open to the public. While expressive associations exist to communicate a message, and therefore must make decisions about the content of that message, the law has historically held that commercial establishments *must* be open to the public because they exist for commercial purposes, and any speech they engage in is incidental to those purposes. As a result, commercial establishments have never had discretion under the law to make expressive decisions about whom to exclude. "A shopkeeper has no constitutional right to deal only with persons of one sex." *Roberts* v. *U.S. Jaycees*, 468 U.S. 609, 634 (1984) (O'Connor, J., concurring in part).

3. Petitioners attempt to argue that their business is more similar to the expressive associations at issue in *Hurley* and *Dale* than it is to traditional businesses that historically have been subject to public accommodations laws. Those arguments lack merit.

Petitioners are analogous not to the parade organizers in *Hurley*, but rather to a designer of custom banners for parade marchers, who may not engage in status discrimination in the provision of banners. Whether a business is a purveyor of ready-made goods or custom services like wedding websites, the public does not perceive the proprietor to exercise creative control over its customer base in the way that a parade exercises creative control over its marching units. In a parade, "every participating unit affects the message conveyed" by the parade, and so the public infers that the parade's organizer has deemed each unit's message to be "worthy of presentation." *Hurley*, 515 U.S. at 572, 575. A commercial business, by contrast, does not express an "overall message" that is "distilled" from each commercial transaction "perceived by spectators as part of the whole." *Id*. at 577. The public does not imagine that petitioners hand-select their customers as an editor selects speech for publication on a cable network, or in a newspaper or book. Cf. *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 636 (1994); *Miami Herald Pub. Co.* v. *Tornillo*, 418 U.S. 241, 258 (1974); *Denver Area Educ. Telecomm'ns Consortium, Inc.* v. *FCC*, 518 U.S. 727, 816 (1996) (Thomas, J., concurring in part) (analogizing to the editor of an essay collection). That reality disposes of petitioners' contention, Pet. Br. 23, that creating a website for a particular couple somehow conveys petitioners' endorsement of that couple's marriage in the way that parade organizers'

inclusion of a particular marching group communicates endorsement of that group's message.

Moreover, applying public accommodations laws to petitioners' business does not compel petitioners to communicate a message that they otherwise would refuse to provide for any customer. Nothing in CADA prevents petitioners from limiting the *type* of wedding websites they offer (for instance, those celebrating Christian principles of marriage), and nothing in CADA requires petitioners to alter their offerings by, for instance, providing websites with content specially tailored to same-sex marriages. Cf. *Lexington Fayette Urb. Cnty. Hum. Rts. Comm'n* v. *Hands on Originals, Inc.*, No. 15-745, 2017 WL 2211381, at *7 (Ky. Ct. App. May 12, 2017), *aff'd* 592 S.W.3d 291 (Ky. 2019) (custom-merchandise business engaged in permissible message discrimination when it refused to print message promoting LGBT "pride" for an organization comprising allies of the LGBT community). Rather, CADA merely requires petitioners, once they hold themselves out as creating a particular type of website, to create materially identical websites for all willing customers, regardless of their sexual orientation. See *FAIR*, 547 U.S. at 62 (equal-access rule "does not dictate the content of the [resulting] speech at all, which is only 'compelled' if, and to the extent, [petitioner] provides such speech for other [customers]"). Once again, that is fundamentally different from *Hurley* and *Dale*, where the expressive nature of the association meant that including the plaintiff in the association would fundamentally alter the content of the association's speech.[12]

[12] Petitioners nonetheless insist that when the couple is a same-sex couple, the "context" of petitioners' websites is different,

An extension of *Hurley* and *Dale* to the facts of this case would have the effect of declaring the running of a business itself an expressive activity and the choice of customers protected speech. State and federal laws prohibiting discrimination in private employment would therefore become newly vulnerable to constitutional attack. The Court's decision in *Hishon* v. *King & Spalding*, for example, relied on the conclusion that elevating a woman to partner at a commercial law firm is not expressive conduct entitled to First Amendment protection, regardless of the firm's views on the proper role of women in the family and in society. If commercial enterprises like 303 Creative are recognized as the equivalent of expressive associations for First Amendment purposes, then employers—including law firms, which likewise communicate messages on behalf of their clients—may again claim the right to discriminate among prospective attorneys and clients on the basis of sex, race, religion, or sexual orientation. This Court should not endorse an approach that would lead to such untenable results.

B. Because Virtually Any Business Activity Can Be Recast as Expressive in Nature, Petitioners' Claimed Exemption Is Unworkable.

1. In *Masterpiece Cakeshop*, this Court warned that if exemptions from public accommodations laws "were not confined, then a long list of persons who

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even if the content of the speech itself is not. Pet. Br. 23 n.2 (citing *Spence* v. *Washington*, 418 U.S. 405, 410 (1974)). In fact, only the status of the customers—their sexual orientation—changes. That is why this Court has rejected similar arguments in the context of race discrimination. See *McClung*, 379 U.S. at 298 n.1; Part I.B, *supra*.

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*, 138 S. Ct. at 1727. Recognizing petitioners' claimed conscience exemption would provide carte blanche for commercial entities to deny gays and lesbians equal access to goods and services based on their own subjective view of the "message" conveyed by providing their services.

Because many activities can be cast as expressive in nature, a conscience exemption could not be cabined to web designers. Chefs, printers, florists, tailors, jewelers, barbers, bartenders, and bakers could all refuse to provide wedding-related services to gays and lesbians on the grounds that their conscience precludes them from applying their skills to enhance the wedding celebration. If all that is required to invoke the protection of the Free Speech Clause is to assert that the identity of the customer changes the "context" of the product and therefore its inherent meaning, Pet. Br. 23 n.2, then any commercial artisan could claim an exemption from public accommodations laws on the grounds that assisting a same-sex couple would be providing a "vehicle for a message anathema to [their] beliefs." Pet. App. 69a. For this reason, a conscience exemption cannot logically be limited to weddings. A designer could refuse to develop any number of websites for gays and lesbians announcing life milestones on the grounds that the couple's engagement, home purchase, or adoption violates "God's design for marriage," Pet. App. 185a, thereby relegating same-sex couples to the status of "social outcasts" nationwide. *Masterpiece*, 138 S. Ct. at 1727.

Nor could petitioners' conscience exemption be limited to sexual-orientation discrimination. The logic of petitioners' argument would confer a First Amendment right on a designer to refuse to create, for example, a wedding announcement for a Black woman and a White man on the grounds that doing so would celebrate interracial marriage; or a website for a female small-business owner on the grounds that doing so would abide women working outside the home; or an invitation to a baptism for a Catholic family on the grounds that doing so would support infant baptism. All that is required of a public accommodation to claim petitioners' exemption is a sincere belief that to provide the product at issue would "promote a message [it] disagrees with." Pet. Br. 23.

2. Professors Carpenter and Volokh offer a proposed classification system for commercial entities, but it lacks an analytic principle to guide the States or the courts. For example, *amici* assert that "caterers" could not claim the conscience exemption sought by 303 Creative because caterers are not "co-creators of the speech involved in the wedding," Brief of *Amici Curiae* Profs. Dale Carpenter, Eugene Volokh, *et al.* at 4—but that assertion is conclusory and counterintuitive. Why does the caterer—who must design the menu, prepare the food, and physically attend the wedding to serve the couple and their guests—have any less of a claim to the shelter of the Free Speech Clause than the designer of the online invitation? The caterer's service, after all, is integral to the expressive character of the wedding celebration. By contrast, *amici* assert that "printers" cannot be compelled to "promote events they disapprove of, including same-sex weddings" (Br. 7)—even though Kinko's does not participate in the conception, design, or dissemination of the message conveyed by the wedding

invitations, programs, or photos printed on its machines. If commercial printers cannot constitutionally be compelled to employ their equipment to produce wedding invitations—which cannot be the case, because printers could then refuse to produce any number of materials with which they take issue, from product labels to event flyers to daily newspapers—then it follows that "hotel operators" likewise could not be compelled to employ their facilities to host the ceremony itself.[13] And yet, *amici* specifically exclude "hotel operators" from their list of professionals who may claim a conscience exemption. Br. 4. For good reason—such an expansive (indeed, limitless) exception to antidiscrimination laws cannot be squared with landmark decisions by this Court rejecting the argument that hotels, restaurants, and entertainment venues had the right to close their doors to African Americans because they did not wish to promote integration. This Court should not expand the narrow and workable exemption from public accommodations laws that that sometimes applies in the context of expressive associations to common businesses that seek to deny their full menu of goods and services to certain classes of customers.

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[13] See, *e.g.*, *Country Mill Farms, LLC* v. *City of E. Lansing*, No. 17-487, 2019 WL 13164267, at *4 (W.D. Mich. Dec. 18, 2019) (asserting "the right to deny a request for services that would require [venue] to . . . host expression that violates the owners' sincerely held religious beliefs and conscience" (citation omitted)).

CONCLUSION

The decision of the court of appeals should be affirmed.

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Respectfully submitted,

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