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 THE NATIONAL LEAGUE OF CITIES, UNITED STATES CONFERENCE OF MAYORS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS


Pratik A. Shah
Juliana C. DeVries
AKIN GUMP STRAUSS HAUER & FELD LLP
2001 K Street NW
Washington, DC 20006

Aileen M. McGrath
*Counsel of Record*
AKIN GUMP STRAUSS HAUER & FELD LLP
580 California Street, Suite 1500
San Francisco, CA 94104
(415) 765-9500
amcgrath@akingump.com

*Counsel for Amici Curiae*

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Page(s)**

**Cases**

**Statutes, Codes, and Ordinances**

**Other Authorities**

## INTEREST OF *AMICI CURIAE*[1]

*Amici* are national organizations representing elected and appointed local government officials and their attorneys. Many local governments that belong to these national organizations have adopted public accommodations laws and ordinances, including laws prohibiting discrimination on the basis of sexual orientation. These local governments have an interest in the validity of these laws and ordinances and their effective enforcement against all businesses serving the public, including businesses that provide wedding-related services.

The National League of Cities ("NLC") is the oldest and largest organization representing municipal governments throughout the United States. Its mission is to strengthen and promote cities as centers of opportunity, leadership, and governance. Working in partnership with forty-nine State municipal leagues, NLC serves as a national advocate for more than 19,000 cities and towns, representing more than 218 million Americans.

The U.S. Conference of Mayors ("USCM"), founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000 people, which includes

---

[1] Letters of consent are on file with the Clerk. No counsel for either party authored this brief in whole or in part, nor did any party or other person or entity other than *amici curiae*, their members, or their counsel make a monetary contribution to the brief's preparation or submission.

over 1,400 cities at present. Each city is represented in the USCM by its chief elected official, the mayor.

The International City/County Management Association ("ICMA") is a nonprofit professional and educational organization of over 9,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating and developing the professional management of local governments throughout the world.

The International Municipal Lawyers Association ("IMLA") is a nonprofit professional organization of over 2,500 local government attorneys. Since 1935, IMLA has served as a national, and now international, resource for legal information and cooperation on municipal legal matters. Its mission is to advance the development of just and effective municipal law and to advocate for the legal interests of local governments. It does so in part through extensive amicus briefing before the U.S. Supreme Court, the U.S. Courts of Appeals, and State supreme and appellate courts.

## INTRODUCTION AND SUMMARY OF ARGUMENT

Local governments have a long history of enacting public accommodations laws to protect members of their communities from invidious discrimination. For many localities, this includes laws and ordinances prohibiting businesses that serve the public from discriminating based on LGBTQ status. These laws and ordinances represent a considered political decision to protect LGBTQ community

members, and they reflect local interests, priorities, and community values. These laws are part of our Nation's rich history of citizens deciding—at the level of government closest to the people—to ensure the equal treatment of every person, and to provide cascading benefits for all members of the local community. Any First Amendment carve-out for "expressive" or "custom" businesses (Pet'rs Br. 12) would gut the effectiveness of such long-established laws and ordinances, and resurrect the unfair discrimination that local governments have endeavored to stamp out.

Besides imposing those harms on communities, Petitioners' proposed First Amendment exception would also be unworkable. Local government officials and community members enforcing public accommodations laws are often non-lawyers who are tasked (sometimes on a volunteer basis) with investigating and addressing claims of discrimination. Such workers may find it difficult to make complex judgment calls—which even lawyers and judges struggle to make—about whether services are "custom" or "expressive," and thus entitled to the exception Petitioners seek. And the stakes of those decisions—which may be subject to strict scrutiny review, according to Petitioners (Br. 36)—will be exceptionally high. What were once routine enforcement investigations will now become fraught with the potential for costly litigation over a (according to Petitioners) First Amendment exception. Many local governments will struggle to absorb these costs, and may be deterred from robustly enforcing their anti-discrimination laws and ordinances.

Any speech-related exception to public accommodations laws would have those consequences. But the specific exception Petitioners champion would be doubly destructive. Colorado's public accommodations law does not compel or restrict Petitioner Smith's *speech*. Smith remains free to post on her website about her personal views about marriage. Colorado seeks to regulate only her *conduct* of refusing to serve same-sex couples. Petitioners' proposed rule would dramatically expand the scope of "protected speech" without basis, widening the hole that their First Amendment exception would create in many public accommodations laws.

A better solution exists: The Court should uphold the rights of state and local governments to protect their residents with public accommodations laws, confirm that the application of those laws remains subject to rational basis review, and affirm the Tenth Circuit's judgment. But at a minimum, the Court should narrow any First Amendment exception to public accommodations laws to exclude claims, like Petitioners', that are about conduct rather than speech.

## ARGUMENT

### I. THIS COURT SHOULD NOT WEAKEN LOCAL ANTI-DISCRIMINATION EFFORTS BY CREATING AN EXCEPTION TO PUBLIC ACCOMMODATIONS LAWS

#### A. State and Local Governments Have Long Worked to Combat Harmful Discrimination

State and local governments have historically pioneered the expansion of public accommodations laws to counter discrimination and protect vulnerable members of their communities. For instance, in 1865 (in the wake of the Civil War), Massachusetts became the first State to enact legislation prohibiting racial discrimination in places of public accommodation. *See Hurley v. Irish-American Gay, Lesbian and Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 571 (1995). Over the next decade, six southern and four northern states followed suit.[2] When this Court struck down the first federal version of these laws, the Court emphasized that states have a unique interest in ensuring equal access to public accommodations. *See The Civil Rights Cases*, 109 U.S. 3, 15 (1883).

In response to the *Civil Rights Cases* decision, many more states enacted statutory protections against racial discrimination in places of public accommodation. *See Romer v. Evans*, 517 U.S. 620,

---

[2] Will Maslow & Joseph B. Robison, *Civil Rights Legislation and the Fight for Equality, 1862-1952*, 20 U. CHI. L. REV. 363, 405 (1953).

628 (1996). By as early as 1909, eighteen states had enacted their own prohibitions on the denial of goods and services based on race.[3] "These laws provided the primary means for protecting the civil rights of historically disadvantaged groups until the Federal Government reentered the field in 1957." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 624 (1984). By the time Congress enacted a federal public accommodations law for interstate businesses, 32 states and many cities already had their own public accommodations laws. *See Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241, 258 (1964).

Many state and local governments have continued to embrace, and expand upon, that rich tradition by extending public accommodations protections to other groups. In particular, they have often led the way in seeking to eliminate discrimination against people who identify as LGBTQ. Today, 28 states and the District of Columbia prohibit discrimination based on sexual orientation and gender identity as part of their public accommodations laws.[4]

---

[3] *Id.* at 405 n.222 (California, Colorado, Connecticut, Illinois, Indiana, Iowa, Kansas, Massachusetts, Michigan, Minnesota, Nebraska, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Washington, and Wisconsin).

[4] University of Wisconsin System, *Non-discrimination Laws, Public Accommodations Laws* (July 13, 2022), https://www.wisconsin.edu/lgbtq-resources/employment-non-discrimination-laws/ (Alaska, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Illinois, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia,

Municipalities in every region of the country have enacted similar provisions.[5] Some of these municipalities are large;[6] others are small.[7] 135 cities have explicit non-discrimination provisions for LGBTQ people that go beyond the express protections offered in their states, and those numbers continue to increase each year.[8]

Local governments typically enact enhanced protections for LGBTQ community members in response to local priorities and needs, as legislative findings and supporting evidence demonstrate. In Jackson, Wyoming, for example, officials cited reports of discrimination against LGBTQ residents, who were unprotected by state and federal public

---

Washington, and the District of Columbia). Wisconsin prohibits discrimination based on sexual orientation but not gender identity. *Id.*

[5] Human Rights Campaign, *Municipal Equality Index 2021: 10 Years of Progress and Change* (2021), https://reports.hrc.org/municipal-equality-index-2021?_ga=2.211108565.1746183659.1654528125-739850050.1654528125#heading-1-introduction.

[6] Large cities include Chicago, Boston, New York, and Dallas. *See* CHI., ILL., MUN. CODE § 2-160-070 (2016); BOS., MASS., MUN. CODE § 12-9.7 (2002); N.Y.C., N.Y., ADMIN. CODE § 8-107(4) (2022); DALL., TEX., CODE § 46-6.1 (2019).

[7] Smaller communities include Coralville, Iowa; Danville, Kentucky; Orono, Maine; Folly Beach, South Carolina; and Laramie, Wyoming. *See* CORALVILLE, IOWA, CODE § 26.05 (2007); DANVILLE, KY., CODE § 5.5-5 (2014); ORONO, ME., CODE § 24-44 (1996); FOLLY BEACH, S.C., CODE § 96.06 (2012); LARAMIE, WYO., CODE § 9.32.040 (2015).

[8] Human Rights Campaign, *Municipal Equality Index 2021*, *supra* note 5.

accommodations laws, as the basis for an anti-discrimination ordinance.[9] In Livonia, Michigan, Mayor Maureen Miller Brosnan supported an LGBTQ anti-discrimination ordinance by pointing to similar gaps in state and federal protections and explaining that "[d]iversity, equity and inclusion are *** priorities that Livonia residents have come together to ask [local officials] to advance in real ways. *** A non-discrimination ordinance will help [local officials] build on our work in transparency and accountability that Livonia residents and community members expect from their City government."[10]

Boston similarly passed a public accommodations law protecting its LGBTQ community members to promote local values of "understanding and respect among all residents" and "a free and open society."[11] Orono, Maine, when passing a similar non-discrimination law, included findings describing how LGBTQ individuals "are family members, neighbors, friends, employees, taxpayers, landlords and tenants, lenders and borrowers" and that they "may be reluctant to report acts of harassment or violence

---

[9] JACKSON, WYO., CODE § 9.26.010 (2018); *see also, e.g.*, MISSOULA, MONT., CODE § 9.64.010 (2010) (similar); WHITEFISH, MONT., ORDINANCE 16-07 (2014) (similar).

[10] Press Release, Off. of the Mayor, Livonia, Mich., Livonia Chamber of Commerce Supports Efforts to Pass Non-Discrimination Ordinance (Oct. 4, 2021), https://livonia.gov/DocumentCenter/View/5259/Livonia-Non-Discrimination-Ordinance-PR-100321.

[11] BOS., MASS., MUN. CODE § 12-9.1 (2002).

because of a lack of legal protection."[12] And Terre Haute, Indiana passed its anti-discrimination ordinance because "prejudice and the practice of invidious discrimination in *** public accommodations *** are a menace to the public peace and welfare, inimical to democracy, and harmful to the health and welfare of our citizens."[13]

### B. Public Accommodations Laws Further Important Interests in Economic Vitality and Democratic Participation

The many state and local governments that have decided to protect their citizens from discrimination in public accommodations have acted after careful and thoughtful deliberation. These States and cities recognize their obligation to create and maintain vibrant, safe, and healthy communities that are attractive places to live and work. Allowing pernicious discrimination, including against LGBTQ community members, countermands those important interests and imposes real harms. Those harms include the well-documented dignitary harms discrimination inflicts on individuals. *See* Br. of Local Gov'ts and Mayors as *Amici Curiae* in Support of Respondents, at Part I.A. They include other serious costs as well, such as "den[ying] society the benefits of wide participation in political, economic, and cultural life." *Jaycees*, 468 U.S. at 625.

---

[12] ORONO, ME., CODE § 24-40 (1999).

[13] TERRE HAUTE, IND., ORDINANCE 7 (2015).

Discrimination indeed reduces community-member involvement in civic and public life. For example, it causes transgender people to avoid stores, restaurants, public transport, and other necessary services.[14] It also increases reliance on social safety net services, leaving local governments to cover the cost. Discrimination against LGBTQ people, for instance, contributes to higher rates of homelessness and housing instability in that population. [15] Discrimination can also cause and exacerbate poverty and food insecurity, both of which already disproportionately affect LGBTQ people and their families. [16] And in states without LGBTQ anti-discrimination protections, LGBTQ people are less likely to have health insurance than non-LGBTQ

---

[14] Sejal Singh & Lauren E. Durso, *Widespread Discrimination Continues to Shape LGBT People's Lives in Both Subtle and Significant Ways*, CTR. AM. PROGRESS (May 2, 2017), https://www.americanprogress.org/article/widespread-discrimination-continues-shape-lgbt-peoples-lives-subtle-significant-ways/; *see also* Christy Mallory et al., WILLIAMS INST., *The Impact of Stigma and Discrimination Against LGBT People in Texas* 30 (Apr. 2017) ("[O]f respondents who visited a place of public accommodation where staff or employees knew or suspected they were transgender, 24% experienced at least one form of discrimination or harassment because of their gender identity or expression[.]").

[15] Adam P. Romero et al., WILLIAMS INST., *LGBT People and Housing Affordability, Discrimination, and Homelessness* 4 (Apr. 2020), https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Housing-Apr-2020.pdf.

[16] Mallory et al., *supra* note 14, at 38-39.

people, while their counterparts in states with protections report no disparity.[17]

Local governments have recognized those social costs, borne by all their residents, as justification for their public accommodations laws. For instance, the City of Missoula, Montana, found that "[d]iscrimination *** deprives the city of its full capacity for economic development by decreasing productivity and increasing demand for city services[.]" [18] Similarly, the City of Laramie, Wyoming, deemed its public accommodations law critical to ensure "the ability of its residents to fully participate in the cultural, social and economic life of the city" and to "prevent activities that disturb or jeopardize the public health[.]"[19]

---

[17] Amira Hasenbush et al., WILLIAMS INST., *The LGBT Divide: A Data Portrait of LGBT People in the Midwestern, Mountain & Southern States* 16 (2014), https://williamsinstitute.law.ucla.edu/publications/lgbt-divide-mw-mountain-south/; *see also* Singh & Durso, *supra* note 14, at 9 (discrimination by healthcare providers results in LGBTQ residents postponing healthcare, passing on emergency treatment costs to localities).

[18] MISSOULA, MONT., MUN. CODE § 9.64.010 (2010).

[19] LARAMIE, WYO., ORDINANCE 1681 (2015); *see also* GLENDALE, ARIZ., ORDINANCE 021-39 (2021) ("WHEREAS, the City Council believes that discriminatory practices impede the social and economic progress of the City by preventing all people from contributing to and fully participating in the cultural, social and economic growth of the community, which is essential to the growth and vitality of the City's neighborhoods and businesses[.]").

Likewise, local governments have recognized the critical relationship between preventing discrimination against LGBTQ people and ensuring economic growth. As the Brookings Institution has found, "[t]he key to success in the knowledge-based economy is *** human capital" and "a city's *** level of tolerance for a wide range of people *** is key to its success in attracting talented people." [20] Discrimination undermines those goals and stunts the growth of local economies by alienating large employers and investors that prefer localities with strong anti-discrimination policies.[21]

Real-world examples abound. Amazon identified "presence and support of a diverse population" as a requirement for the location it would select for its second headquarters.[22] Salesforce and Angie's List pulled out of planned events and expansions in Indiana after the state passed a law allowing businesses to discriminate against LGBTQ individuals.[23] And over 200 major companies recently

---

[20] *See* Gary Gates & Richard Florida, *Technology and Tolerance: The Importance of Diversity and High Tech Growth*, BROOKINGS (Dec. 1, 2002), https://www.brookings.edu/articles/technology-and-tolerance-diversity-and-high-tech-growth/.

[21] *Id.*

[22] Amazon HQ2 Request for Proposal, at 5, https://images-na.ssl-images-amazon.com/images/G/01/Anything/test/images/usa/RFP_3._V516043504_.pdf.

[23] Arik Hesseldahl, *Salesforce CEO Benioff Takes Stand Against Indiana Anti-Gay Law*, VOX (Mar. 26, 2015), https://www.vox.com/2015/3/26/11560746/salesforce-ceo-benioff-takes-stand-against-indiana-anti-gay-law; Jeff Swiatek, *Angie's List Nixes Indy Deal Over 'Religious Freedom' Law*, USA TODAY

signed a statement condemning discrimination against LGBTQ families and transgender youth.[24] Business leaders at those companies "report that they have difficulty with recruitment, retention, and tourism in states that debate or pass legislation that excludes LGBTQ+ people from full participation in daily life[.]"[25] They made clear that "[l]egislation promoting discrimination directly affects our businesses, whether or not it occurs in the workplace."[26]

Many local governments have adopted public accommodations laws in response. Hammond, Indiana, for example, passed an LGBTQ anti-discrimination ordinance to prevent "economic harm," citing Angie's List and Salesforce pulling out of the state.[27] In Osceola, Florida, an ordinance prohibiting LGBTQ discrimination in public accommodations was

---

(Mar. 28, 2015), https://www.usatoday.com/story/money/business/2015/03/28/angies-list-cancels-indy-expansion-religious-freedom-law/70598270/; *see also* Movement Advancement Project, *LGBT Policy Spotlight: Public Accommodations Nondiscrimination Laws* 13 (2018), https://www.lgbtmap.org/file/Spotlight-Public-Accommodations-FINAL.pdf (between 2015 and 2018, 83% of new investments and 58% of new jobs in Indiana went to municipalities with non-discrimination laws).

[24] Press Release, Human Rights Campaign, 200+ Major U.S. Companies Oppose Anti-LGBTQ+ State Legislation (Mar. 31, 2022), https://www.hrc.org/press-releases/200-major-u-s-companies-oppose-anti-lgbtq-state-legislation.

[25] *Id*.

[26] *Id*.

[27] HAMMOND, IND., ORDINANCE 9293 (2015).

meant to send "a message about [the county's] level of commitment to grow and attract the top level of workforce talent that is imperative for Osceola's economic success."[28] Similarly, Jackson, Wyoming supported its anti-LGBTQ discrimination ordinance by explaining that "[d]iscrimination in places of public accommodation is economically harmful to a prosperous community[,] *** is otherwise detrimental to the welfare and economic growth of the Town[,] and may cause citizens to seek public accommodations outside the Town."[29] And when the City of Medina, Ohio passed an ordinance prohibiting discrimination on the basis of sexual orientation and gender identity in housing and public accommodations,[30] the Medina City Council President championed the ordinance on economic development grounds, saying, "[w]e want

[28] Cindy Barth, *Osceola County Approves Human Rights Ordinance*, ORLANDO BUS. J. (Aug. 19, 2015), https://www.bizjournals.com/orlando/morning_call/2015/08/osceola-county-approves-human-rights-ordinance.html.

[29] JACKSON, WYO., CODE § 9.26.010 (2018); *see also* HARRISBURG, PA., CODE § 4-101.1 (1992) ("Discrimination involving places of public accommodation *** causes loss of access to services *** and is detrimental to the *** economic growth of the City."); ANCHORAGE, ALASKA, CODE § 5.10.010 (2015) ("[I]nvidious discrimination in *** public accommodations *** based upon [protected class status, including sexual orientation and gender identity], adversely affects the welfare of the community. Accordingly, such discrimination is prohibited[.]").

[30] MEDINA, OHIO, ORDINANCE 112-19 (2019).

people to come to Medina and say, '[t]hat's a great community and I want to live there.'"[31]

### C. Public Accommodations Laws Benefit Many Members of Diverse Communities

The anti-discrimination and economic benefits flowing from public accommodations laws benefit many members of local communities. Those laws generally provide broad protections, not only to LGBTQ people but also to anyone who may be subject to discrimination based on race, disability, or religion, among many other characteristics.[32]

For example, the same public accommodations laws that protect LGBTQ New Yorkers have been used to assert protections for religious missionaries whose reservation with a resort facility was canceled because of their beliefs. *Jews for Jesus, Inc. v. Jewish Cmty.*

---

[31] Clayton Howard, *Gay is Good for Business: LGBTQ Rights and the Economic Development of America's Cities and Suburbs*, ORIGINS (Apr. 2021), https://origins.osu.edu/article/gay-good-business-lgbtq-rights-and-economic-development-america-s-cities-and-suburbs?language_content_entity=en.

[32] *See, e.g.*, MISSOULA, MONT., MUN. CODE § 9.64.010 (2010) (prohibiting discrimination in public accommodations based on "actual or perceived race, color, national origin, ancestry, religion, creed, sex, age, marital or familial status, physical or mental disability, sexual orientation, gender identity or expression, or because of their association with a person or group of people so identified"); DANVILLE, KY., CODE § 5.5-5 (2014) (prohibiting same based on "race, color, religion, national origin, sex, disability, gender identity or sexual orientation"); CHI., ILL., MUN. CODE § 2-160-070 (2016) (prohibiting same based on "race, color, gender identity, age, religion, disability, national origin, ancestry, sexual orientation, marital status, parental status, military status, or source of income").

*Rels. Council, Inc.*, 968 F.2d 286, 289, 293-297 (2d Cir. 1992). Local public accommodations laws have similarly protected Catholic groups seeking printing services for membership cards in Vermont, *Paquette v. Regal Art Press, Inc.*, 656 A.2d 209 (Vt. 1994); Christians passing out religious materials at a public festival in Oregon, *deParrie v. Portland-Guadalajara Sister City Ass'n*, No. 06-117-PK, 2006 WL 2045851 (D. Or. July 19, 2006); Muslim customers who were declined service at a Connecticut restaurant, *Khedr v. IHOP Rests., LLC*, 197 F. Supp. 3d 384 (D. Conn. 2016); and a New Jersey prisoner asserting the right to practice his Taino faith, *Santiago v. Elchebli*, No. 20-650 (MAS) (DEA), 2021 WL 4473179 (D.N.J. Sept. 30, 2021). Far from a sword used to target people of faith, public accommodations laws are an important shield that helps prevent discrimination on the basis of religion.

***

Creating an exception for "custom" or "expressive" businesses would blow a gaping hole into public accommodations laws, undermining the protections they provide and diminishing the interests they serve. These protections and benefits redound to many members of the local community, including the religious groups that Petitioners wrongly claim are required to "speak against [their] conscience." Br. 15, 19. Public accommodations laws are part of a vast tradition of local protection for vulnerable communities. The Court should reaffirm that state and local governments have a unique interest in providing these protections, *see* pp. 5-6, *supra*, and decline to intrude on local authority by creating an

unwarranted First Amendment exception, Resp'ts Br. 13-23.

## II. AN EXCEPTION TO PUBLIC ACCOMMODATIONS LAWS FOR "EXPRESSIVE BUSINESS CONDUCT" WOULD BE UNWORKABLE

Besides unnecessarily intruding on local authority and diluting the important benefits that public accommodations laws provide, Petitioners' proposed rule will have other negative effects. Local government officials and workers will be left to administer Petitioners' bespoke First Amendment "custom" or "expressive" exception (Br. 12), with no way to readily determine when a business's activity falls into these categories. *See* Resp'ts Br. 29-32. And the risks of a wrong choice are substantial: If Petitioners' standard is adopted, routine public enforcement decisions will be clouded by the threat of expensive litigation. That prospect will strain local budgets and chill robust enforcement of anti-discrimination protections, compounding the harms from Petitioners' proposed approach.

### A. Local Governments Will Struggle to Determine What Is a "Custom" or "Expressive" Business Service

If Petitioners' proposed standard is adopted, local governments will be required to exempt business owners from broadly applicable public accommodations laws whenever those owners provide services that can be characterized as "custom" or "expressive." *See, e.g.*, Pet'rs Br. 12. Petitioners'

standard will impair the otherwise straightforward enforcement of public accommodations laws.

To start, localities will have no practical way to discern the meaning of "custom." Petitioners offer no real guidance on the meaning of this term, and it is easy to imagine difficult scenarios. For instance: Would the work of a clothing tailor fit the definition? Tailoring services are paradigmatically custom in that they are unique to each customer—but it is difficult to discern why, even accepting Petitioners' arguments, tailors have any constitutional interest in refusing customers based on their LGBTQ (or any other protected) status. Likewise, consider a landscaping artist who designs and plants gardens. That work is "custom" and individual for each home—but, again, it is difficult to see why the First Amendment would allow that landscaping artist to decline to serve certain customers. Are these services nonetheless subject to Petitioners' exception? Petitioners give local governments no real answers to these questions.

It is also unclear whether localities must accept a business's subjective characterization of its services. Petitioner Smith, for example, claims she is providing "custom" services, in contrast to "off-the-shelf" websites. Br. 19, 21. But most wedding websites follow a familiar organizational structure with only slight individualization. For example, 303 Creative's website reveals that at least some of the websites it designs use products including Squarespace and WordPress, [33] which offer a limited number of

---

[33] *Website design services*, 303 Creative, https://303creative.com/websites/ (last visited Aug. 15, 2022).

templates, are well-suited for one-off events like a wedding, and are easy to use with basic computer skills and no training. Is a local government official required to accept a business's say-so about what is "custom?" If so, any number of business owners seeking license to discriminate will be able to claim to fall into this category, leaving local governments with little clarity on how to apply public accommodations laws to those businesses.

Designating certain public accommodations as "expressive" is a similarly unworkable standard. Because multiple people often contribute to a final business product, an expressiveness test would require determining whose message is being expressed at any given stage of production. Many workers may see their contributions as expressive, but local governments would have to determine whether this subjective understanding has constitutional significance. Chefs, for example, often view cooking as a form of expression. Br. for Chefs, et. al. as *Amici Curiae* Supporting Respondents at 3, *Masterpiece Cakeshop, Ltd. v. Colorado Civ. Rts. Comm'n*, 138 S. Ct. 1719 (2018). But is this subjective characterization determinative? May any sous chef claim First Amendment protection, or just the head chef? Courts have had trouble answering these questions,[34] and

[34] *Compare, e.g.*, *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 751 (8th Cir. 2019) (attempting to draw line between wedding videographers who make "simple recordings" and those who "shoot, assemble, and edit the videos with the goal of expressing their own views about the sanctity of marriage"), *and Chelsey Nelson Photography LLC v. Louisville/Jefferson Cnty.*

there is no reason to think local governments will be able to do so more easily.

### B. Local Government Officials Will Find It Difficult to Make These Determinations

The real-world context in which local governments enforce anti-discrimination laws underlines why Petitioners' standard is unworkable. State and local enforcement decisions are often made by local government officials. Those officials often do not have law degrees or other legal background. And the majority are unpaid or low-paid volunteers.[35] Requiring these local officials to apply a complicated exception to public accommodations laws that turns on whether a business service is "custom" or "expressive" is unreasonable and unrealistic—especially given how

---

*Metro Gov't*, 479 F. Supp. 3d 543, 557 (W.D. Ky. 2020) (attempting to draw line between wedding photography where photo taken "accidentally" and where "photographer's artistic talents are combined to tell a story about the beauty and joy of marriage"), *with State v. Arlene's Flowers, Inc.*, 441 P.3d 1203, 1228 (Wash. 2019) (finding no exception to public accommodations laws for "expressive" businesses because that would create different rules for "dime-store lunch counter[s]" and "upscale bistro[s]"), *and Elane Photography, LLC v. Willock*, 309 P.3d 53, 71 (N.M. 2013) (courts "cannot be in the business of deciding which businesses are sufficiently artistic to warrant exemptions from antidiscrimination laws").

[35] Prisca Tarimo, Bos. Human Rts. Comm'n, *Achievements and Challenges of Human Rights Commissions in U.S. Cities* 14 (July 2021), https://www.boston.gov/sites/default/files/file/2022/03/Achievements-Challenges-Human-Rights-Commissioners-US-cities.pdf.

thorny those questions have proven to be for trained lawyers and judges. *See* pp. 19-20, *supra*.

Take Harrisburg, Pennsylvania, for example. Complaints made under its public accommodations law are investigated and decided by the Harrisburg Human Relations Commission.[36] Members of the Commission need not have law degrees. Recent members have included, for example, a former program coordinator for the YWCA;[37] a self-described "recording artist, performer, songwriter, insightful vlogger, producer and creative designer";[38] and a government training manager and church deacon.[39] These community members serve without compensation.[40] Bend, Oregon likewise uses a volunteer-based Human Rights and Equity Commission to implement its Equal Rights Ordinance.[41] Current volunteers include the Director

---

[36] HARRISBURG, PA., CODE §§ 4-101.6, 4-107.1-4-107.8 (1992).

[37] Amanda Arbour, bio, https://s3.amazonaws.com/harrisburgpa.gov/wp-content/uploads/2018/01/23140731/HHRC_Bio_Amanda-L-Arbour_Dec2017.pdf.

[38] Shay Banks, bio, https://s3.amazonaws.com/harrisburgpa.gov/wp-content/uploads/20190628163800/HHRC_Bio_Shay_Banks_May_2019.pdf.

[39] Kevin Burrell, bio, https://harrisburgpa.gov/wp-content/uploads/2021/07/HHRC-Bio-Kevin-Burrell.pdf.

[40] HARRISBURG, PA., CODE § 4-103-7 (1992).

[41] BEND, OR., CODE §§ 1.20.010, 1.20.120 (2020).

of People at a healthcare company;[42] a wilderness therapist in private practice;[43] and an "ethnographer and brand strategist."[44]

State-level enforcement often follows a similar pattern. South Carolina's public accommodations law, for example, is primarily enforced by the South Carolina Human Affairs Commission.[45] The Commission includes representatives from each congressional district as well as two at-large members.[46] There is no requirement that members have any legal background, and they receive compensation only in "per diem, mileage and subsistence."[47] Maine, as well, requires its Human Rights Commission to enforce its public accommodations law.[48] The only requirement for these local government officials is that no more than

---

[42] Jody Saffert, https://www.bendoregon.gov/home/showpublisheddocument/53372/637920095487570000.

[43] Mo Mitchell, https://www.bendoregon.gov/home/showpublisheddocument/53376/637920095951670000.

[44] Manoj Alipuria, https://www.bendoregon.gov/home/showpublisheddocument/53388/637920097038600000.

[45] S.C. CODE OF LAWS § 45-9-40 (1990).

[46] *Id.* § 1-13-40(b) (2012); *see also Governing Board*, S.C. HUM. AFFS. COMM'N, https://schac.sc.gov/about-us/who-we-are/board-meetings/governing-board (listing current members of Commission).

[47] S.C. CODE OF LAWS § 1-13-40(i) (2012).

[48] MAINE REV. STAT. §§ 5-4561 (1989), 5-4566 (2019).

three members of the same political party may sit at a time, and they receive a maximum compensation of $1,000 per year.[49]

### C. A Strict Scrutiny Test Will Exacerbate the Burdens on Local Governments

Petitioners' proposed strict scrutiny standard will compound the difficulties facing local governments. Strict scrutiny review will necessarily increase the odds of expensive and unpredictable litigation. As other contexts have shown, that is not an abstract concern. For example, the town of Greenburgh, New York paid $6.5 million to settle a lawsuit brought under the Religious Land Use and Institutionalized Persons Act, which requires municipalities to demonstrate a compelling interest for zoning laws affecting religion.[50] Similar recent lawsuits in Bernards and Bridgewater townships in New Jersey cost the townships $3.5 million and $8 million, respectively.[51]

---

[49] *Id.* §§ 5-4561, 12004-G(15) (1989); *see also* COLO. REV. STAT. § 24-34-303 (2019) (enforcement commission includes two business owners, two government representatives, and three community-at-large representatives, with no legal background required; they receive per diem).

[50] Greg Shillinglaw & Akiko Matsuda, *Communities pay a high price when religious groups invoke land-use law*, LOHUD (May 17, 2014), https://www.lohud.com/story/news/politics/2014/05/17/communities-pay-high-price-religious-groups-invoke-land-use-law/9237531/.

[51] Merrit Kennedy, *N.J. Town Must Pay Islamic Group $3.25 Million to Settle Discrimination Lawsuit*, N.P.R. (May 30,

Litigation exposure will have several negative ramifications. For one thing, litigation itself and any resulting liability will impose direct economic harms on local governments, with cascading consequences. The fees and multi-million dollar damages awards typical in these cases could be ruinous for small localities. And even if larger governments can absorb those costs, they may have to reduce their budgets in other ways, such as by cutting services provided to residents. [52] For another, the mere prospect of expensive litigation (even if it never arises) will have a chilling effect on enforcement of public accommodations laws. At a minimum, localities that continue to pursue robust enforcement will have to absorb the additional costs of demonstrating a compelling interest for each enforcement decision potentially implicating "custom" or "expressive" conduct. Under any of these scenarios, Petitioners' strict scrutiny test will impose significant burdens on state and local governments.

---

2017), https://www.npr.org/sections/thetwo-way/2017/05/30/530766018/n-j-town-must-pay-islamic-group-3-25-million-to-settle-discrimination-lawsuit.

[52] *See* National Conference of State Legislatures, *NCSL Fiscal Brief: State Balanced Budget Provisions* 2 (Oct. 2010), https://www.ncsl.org/documents/fiscal/StateBalancedBudgetProvisions2010.pdf ("Most states have formal balanced budget requirements with some degree of stringency[.]"); *4 Factors Influencing Local Government Financial Decisions*, INT'L CITY/CNTY. MGMT. ASS'N (Apr. 26, 2016), https://icma.org/blog-posts/4-factors-influencing-local-government-financial-decisions ("[L]ocal budgets are extremely sensitive to their political, economic, social, and legal environments.").

## III. IF THIS COURT DOES ADOPT A FIRST AMENDMENT EXCEPTION TO PUBLIC ACCOMMODATIONS LAWS, IT SHOULD NARROW THAT EXCEPTION TO REACH ONLY PURE SPEECH, WHICH WOULD NOT PROTECT PETITIONERS' ACTIVITY

Adopting any version of Petitioners' proposed "expressive business conduct" exception will undermine localities' efforts to combat discrimination, particularly against LGBTQ members of their communities. For those reasons, and those Respondents have described (Br. 9-45), the Court should reject Petitioners' request to create such an exception.

But if this Court does recognize a First Amendment-based exception to public accommodations laws, it should limit the reach of that exception to mitigate the harms to localities' anti-discrimination interests. Narrowing that exception to reach only pure speech would cabin some of those harms. It would mean that a reporter for the local paper could choose to report only opposite-sex couples' engagement announcements, but the newspaper could not refuse to sell its daily to LGBTQ readers. Such an exception would exclude claims, like Petitioners', based on a refusal to provide products or services because of the recipient's protected characteristics.

As Respondents describe, *see* Br. 12-13, this case does not concern speech. This case seeks to protect Colorado's interest in ensuring that businesses do not withhold goods or services based on recipients' LGBTQ (or other protected) status. Petitioner Smith remains

free to include statements on her website detailing her support for opposite-sex marriage and her personal reasons for entering the wedding business. Nothing in Colorado's public accommodations law prevents her from making those statements, or constrains other Colorado businesses from doing the same. Rather, Colorado seeks to prohibit 303 Creative's *conduct* of refusing to serve all people on an equal basis and its statements informing the public of the refusal. *See* Resp'ts Br. 13-23, 45.

The First Amendment does not protect that conduct. *See* Resp'ts Br. 13-23. Creating wedding websites does not involve *the website designer's* inherent expression. *Contra Hurley*, 515 U.S. at 568 (recognizing "inherent expressiveness of marching to make a point"). The speech components involved—such as the text on the website—come from the couple, not the designer. This is clear from the sample sites in the record, which Petitioners prepared. The anecdotes appearing on the sites are written from the first-person perspective of the couples—clearly identifiable as them telling *their* story, not Petitioner Smith telling hers. J.A. 51-72.

For similar reasons, the "likelihood" is not "great" that any readers or viewers will understand a wedding website to convey Smith's—rather than the couple's—personal message. *See Texas v. Johnson*, 491 U.S. 397, 404 (1989) (quoting *Spence v. Washington*, 418 U.S. 405, 410-411 (1974)). To the extent viewers perceive a website as sending any message of "support" regarding the wedding it portrays (Pet'rs Br. 14), that message belongs to the couple, not the designer. Smith's subjective view that providing services conveys a

message of endorsement does not transform her conduct into protected speech. *See United States v. O'Brien*, 391 U.S. 367, 376 (1968) (explaining that subjective intent to communicate an idea does not transform action into protected speech); *accord Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 65-66 (2006).

As Colorado's brief makes clear, these First Amendment principles support affirming the Tenth Circuit's decision without creating any First Amendment exception to public accommodations laws. Resp'ts Br. 13-23, 45. But at a minimum, they limit any such exception that the Court might wish to adopt. That exception cannot reach conduct, like Petitioners', that does not objectively convey the individual's personal message. Limiting any such exception would be consistent with the First Amendment and the Court's existing jurisprudence. It would also, by necessity, cabin the otherwise sweeping impact of Petitioners' proposed rule. And it will diminish some of the uncertainty, litigation risks, and chilling effects that will otherwise plague local governments if Petitioners' preferred approach is adopted.

## CONCLUSION

The Court should affirm the Tenth Circuit's judgment.

Respectfully submitted.

Aileen M. McGrath
*Counsel of Record*
Pratik A. Shah
Juliana C. DeVries
AKIN GUMP STRAUSS
HAUER & FELD LLP

August 19, 2022