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 U.S. COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR *AMICI CURIAE* GLBTQ LEGAL ADVOCATES & DEFENDERS, THE HUMAN RIGHTS CAMPAIGN, LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC., THE NATIONAL CENTER FOR LESBIAN RIGHTS, AND THE NATIONAL LGBTQ TASK FORCE IN SUPPORT OF RESPONDENTS

CLAUDINE COLUMBRES
KIMBERLY A. HAVLIN
WHITE & CASE LLP
1221 Avenue of the Americas
New York, NY 10020
(212) 819-8200
ccolumbres@whitecase.com
kim.havlin@whitecase.com

MARY L. BONAUTO
Counsel of Record
GARY D. BUSECK
CHRIS ERCHULL
GLBTQ LEGAL ADVOCATES & DEFENDERS
18 Tremont Street, Suite 950
Boston, MA 02108
(617) 426-1350
mbonauto@glad.org

Counsel for Amici Curiae

(Additional Counsel Listed on Inside Cover)

315157

Jennifer C. Pizer
Lambda Legal Defense and
Education Fund, Inc.
4221 Wilshire Boulevard,
Suite 280
Los Angeles, CA 90010
(213) 382-7600
jpizer@lambdalegal.org

Shannon Minter
Christopher F. Stoll
National Center for
Lesbian Rights
870 Market Street, Suite 370
San Francisco, CA 94102
(415) 392-6257
sminter@nclrights.org
cstoll@nclrights.org

Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES AND RULES

SECONDARY SOURCES

OTHER AUTHORITIES

INTEREST OF *AMICI CURIAE* [1]

Amici are nonprofit legal and advocacy organizations seeking to ensure lesbian, gay, bisexual, and transgender (LGBT) people are fully included in and can contribute to our communities and our nation without regard to our sexual orientation or transgender status. We are committed to advancing equal citizenship and the rule of law through litigation in state and federal courts, including in this Court, and/or in legislative and agency policy arenas. *Amici* include the following: GLBTQ Legal Advocates & Defenders, the Human Rights Campaign, Lambda Legal Defense & Education Fund, the National Center for Lesbian Rights, and the National LGBTQ Task Force.

---

[1] No counsel for a party authored this brief in whole or in part and no person other than *amici curiae* and their counsel made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief.

SUMMARY OF THE ARGUMENT

Public accommodations laws have long protected a core right of citizenship: "to be treated as equal members of the community with respect to public accommodations." *Bell v. Maryland*, 378 U.S. 226, 317 (1964). Petitioners challenge this bedrock civil rights promise by requesting an unprecedented "free speech exemption" from the Colorado Anti-Discrimination Act ("CADA"). This does not just undermine the protections of public accommodations laws for LGBT people. It undermines them for all.

This Court has repeatedly rejected attempts to create First Amendment exemptions to public accommodations and other anti-discrimination laws. The departure urged by Petitioners from this longstanding settlement of civil rights law invites a regression to segregated marketplaces.

Petitioners' position that LGBT consumers can simply "go elsewhere" for their goods and services is not only often untrue, but also conflicts with the purpose of public accommodations laws. Moreover, there is no limiting principle to Petitioners' proposed exemption, which would equally jeopardize other groups and reintroduce the type of division and harm experienced in the past—and sometimes still—by Catholic, Irish, Asian, and Black people, women, and others.

We urge this Court to preserve the principles of public accommodations that have protected these groups for many years, and to reject Petitioners' proposed new rule that would undo the protections

provided by public accommodations laws by legitimizing discrimination through the First Amendment.

ARGUMENT

I. FOR DECADES, PUBLIC ACCOMMODATIONS LAWS HAVE MAINTAINED A MARKETPLACE OPEN TO ALL

A. Public Accommodations Laws Create a Civil Society Where Everyone Can Access and Participate Equally in the Marketplace Free from Discrimination.

For more than a century, states and the federal government have enacted and enforced public accommodations laws to create a shared civil society and marketplace in which all Americans can interact free of discrimination.[2] Starting with the federal "Act to protect all citizens in their civil and legal rights," 18 Stat. 335–37 (1875)[3] and state statutes such as the Act

---

[2] These principles go back much farther. *See, e.g.*, *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 261 (1964) ("These [public accommodations] laws but codify the common-law innkeeper rule which long predated the Thirteenth Amendment.").

[3] This Court invalidated the public accommodations portions of the Civil Rights Act of 1875, which guaranteed full and equal enjoyment of "inns, public conveyances on land or water, theatres, and other places of public amusement" as exceeding Congress's powers under the Thirteenth and Fourteenth Amendments. *Civil Rights Cases*, 109 U.S. 3, 25 (1883). Justice Harlan dissented. *Id.* at 26–62. In the wake of that decision, eighteen states passed public accommodations laws. Milton R. Konvitz & Theodore Leskes, *A Century of Civil Rights* 157 (1961). Today, 45 U.S. states have public accommodations laws that protect against discrimination on certain protected grounds. Nat'l Conf. of State

Forbidding Unjust Discrimination on Account of Color or Race, 1865 Mass. Acts, ch. 277 § I (May 16, 1865) and culminating in the Civil Rights Act of 1964, 42 U.S.C. § 2000a, these laws have been enacted in response to the social and economic fragmentation arising from the denial of services to individuals because of their membership in various disfavored groups—particularly racial minorities, but also groups identified by religious faith, disability, sex, sexual orientation, and transgender status, or on multiple bases.[4]

In the post-Civil War period, faced with systemic Jim Crow segregation and violence, Black Americans persevered to achieve laws protecting a broad right of equal access to goods and services in many states, localities, and at the federal level.[5] The Civil Rights Act of 1964 is the signal achievement, which opened up "full and equal enjoyment" of places of public accommodation without regard to "race, color, religion or national origin" of the customer. 42 U.S.C. § 2000a (b). The Americans with Disabilities Act of 1990, 42 U.S.C. § 12101, built on this landmark framework. Today, these laws represent an enduring and well-established civil rights settlement that continues to

---

Legis., *State Public Accommodation Laws* (Aug. 11, 2022), http://www.ncsl.org/research/civil-and-criminaljustice/state-public-accommodation-laws.aspx.

[4] *See* Elizabeth Sepper, *The Original Meaning of "Full and Equal Enjoyment" of Public Accommodations*, 11 Cal. L. R. 572, 577–80 (2021) (discussing the development of federal and state public accommodations laws).

[5] *See id.*

protect a core right of citizenship: "to be treated as equal members of the community with respect to public accommodations." *Bell v. Maryland*, 378 U.S. 226, 317 (1964) (Goldberg, J. concurring).

In very real ways, these laws reflect, as the Court recognized in *Bell*, that Americans "'are born equal' . . . in the eyes of the law" and may not "be denied rights fundamental to freedom and citizenship," including the full and equal enjoyment of places of public accommodation. 378 U.S. at 317–18. Such laws regulate discriminatory conduct that has a uniquely pernicious effect on the fundamental freedoms of all Americans to live, travel, work, and participate in ordinary civil society on equal terms. In this way, they are a people's counterpart to the constitutional commitment that our "government and each of its parts remain open on impartial terms to all who seek its assistance." *Romer v. Evans*, 517 U.S. 620, 633 (1996). Public accommodations laws ensure all people can partake in the "almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society." *Id.* at 631.

B. Throughout History, Various Groups Have Been Turned Away From Public Accommodations.

Excluding protected classes from places of public accommodation has a long history, even as the particular groups targeted have changed over time. For Black Americans, the "first Jim Crow law" was enacted in the state of Tennessee, requiring railroad companies to provide separate seating for Black passengers in 1881, perpetuating Black exclusion from

the marketplace and society at large. Lisa D. Cook et al., *The Evolution of Access to Public Accommodations in the United States*, Q. J. Econ. 1, 9–10 (forthcoming 2022). In the South, legal segregation penetrated almost every facet of social life, extending to churches, schools, libraries, housing, employment, restaurants, public transportation, sports, hospitals, orphanages, prisons, asylums, funeral homes, and morgues.[6] *Id.* at 10.

Many areas outside of the South practiced forms of de facto segregation as well. *Id.* Consequently, for 30 years between the 1930s and 1960s, demand remained for the "Green Book" travel guides of welcoming places to lodge and eat for Black motorists, published by Victor Green and his associates. *Id.* at 3. This discrimination continued legally until the Civil Rights Act of 1964, and its vigorous judicial enforcement led to a far more open and accessible marketplace.

The Civil Rights Act of 1964 did not prohibit sex discrimination in public accommodations, however, and many businesses continued to deny services to women well into the 1960s and 1970s. Elizabeth Sepper & Deborah Dinner, *Sex in Public*, 129 Yale L.J. 78, 80–81 (2019). Bars, restaurants, and hotels

---

[6] *See, e.g.*, *Berea Coll. v. Kentucky*, 94 S.W. 623, 626 (1906), *aff'd*, 211 U.S. 45 (1908) (upholding a law prohibiting integrated schools because "separation of the human family into races, distinguished . . . by color . . . is as certain as anything in nature" and is "divinely ordered."); *West Chester & Phila. R.R. v. Miles*, 55 Pa. 209, 209, 213 (1867) (justifying segregation on railroads because "the Creator" made two distinct races and that "He intends that they shall not overstep the natural boundaries He has assigned to them.").

regularly refused to serve women who were unescorted by men; credit institutions refused to lend money to married women in their own names; and institutions from Little League baseball to the Junior Chamber of Commerce excluded girls and women. *Id.* at 81; *see also* Shaun Ossei-Owusu, *Velvet Rope Discrimination*, 107 Va. L. Rev. 683, 713–17 (2021).

Throughout our nation's history, religious groups have also been subject to widespread discrimination and exclusion. Catholic immigrants were one of the earliest groups to experience systemic discrimination, including being banned from certain colonies and legally precluded from holding office under about half the states' constitutions at the Founding.[7] Anti-Catholic sentiment persisted in the nineteenth century as well, amid "[a] wave of immigration" from Ireland and Germany. *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2269 (2020) (Alito, J. concurring). Efforts to exclude and subordinate Catholic immigrants were pervasive, including a political party (the Know Nothings) dedicated to limiting Catholic political influence and broad public animus toward Catholic education. *Id.* at 2269–71. The portrayal of Catholics as a menace to children

---

[7] Kenneth C. Davis, *America's True History of Religious Tolerance*, Smithsonian Mag. (2010), https://www.smithsonianmag.com/history/americas-true-history-of-religious-tolerance-61312684/; Timon Cline, *Our Distinctly Protestant States*, Am. Reformer (Apr. 28, 2022), https://americanreformer.org/2022/04/our-distinctly-protestant-states/; *see* John T. McGreevy, *Catholicism and American Freedom* 11 (2003) ("Protestant migrants to the British North American colonies had nurtured a powerful anti-Catholicism since the seventeenth century.").

even led to violence. In Philadelphia, anti-Catholic sentiment, combined with the country's anti-immigrant mood, fueled the Bible Riots of 1844, in which houses were torched, Catholic churches were destroyed, and at least 20 people were killed. Kenneth C. Davis, *America's True History of Religious Tolerance*, Smithsonian Mag. (2010)*; see also* Sharon Davies, *When America Feared and Reviled Catholics*, L.A. Times (Oct. 10, 2010); McGreevy, *supra* at 11–14 ("In Boston, in 1834, a mob destroyed an Ursuline convent."). This anti-Catholic sentiment bled into the workplace as well, as many Irish-Catholic immigrants were denied employment opportunities with the terse inclusion of "No Irish need apply" or "NINA" disclaimers in job postings. Rebecca A. Fried, *No Irish Need Deny: Evidence for the Historicity of NINA Restrictions in Advertisements and Signs*, 49 J. Soc. Hist. 829 (2016).[8]

Jewish Americans were also widely denied services in the nineteenth and twentieth centuries.[9] Hotels

---

[8] Despite progress, anti-Catholic sentiment still exists. *See*, *e.g.*, Andrew M. Greeley, *An Ugly Little Secret, Anti-Catholicism in North America* (1977) (a Catholic sociologist's reflections on an abiding "anti-Catholic nativism," particularly among "the nation's intellectual and cultural elites"); *Nappi v. Holland Christian Home Ass'n*, No. 11-cv-2832, 2015 WL 5023007 *2–3 (D.N.J. Aug. 21, 2015) (addressing Catholic worker's allegations of harassment by Protestant and Reformed Christian supervisor and colleagues who mocked Catholicism, encouraged plaintiff to leave his church, "wanted to shoot [him]" and fired him "because, as a Roman Catholic, he . . . did not 'fit in.'").

[9] Anti-Semitic sentiment persists, with anti-Semitic attacks in 2021 reaching an all-time high of 2,717 incidents of assault,

and resorts across the country regularly refused to serve Jewish patrons,[10] resulting in signs and advertisements in newspapers and magazines announcing, for example, "No Dogs. No Jews. No Consumptives." Naomi W. Cohen, *Encounter with Emancipation: The German Jews in the United States*, 1830-1914 250 (1984). At the university level, the efforts of Harvard University to limit Jewish enrollment were well-publicized, as academia increasingly embraced an anti-Jewish culture in the late nineteenth century.[11] In the legal sphere, Jewish Americans were regularly discriminated against by established law firms, spurring many of them to found their own firms in the 1950s onwards.[12]

---

harassment and vandalism, which was a 34% increase from the year before. *Audit Finds Anti-Semitic Incidents in United States Reached All-Time High in 2021*, Anti-Defamation League (April 25, 2022), https://www.adl.org/resources/press-release/adl-audit-finds-antisemitic-incidents-united-states-reached-all-time-high.

[10] *See* 110 Cong. Rec. H1615 (daily ed. Feb. 1, 1964) (statement of Rep. Teague) (noting that Title II barred discrimination against Jews, who were "not allowed in certain hotels"); *A Bill to Eliminate Discrimination in Public Accommodations Affecting Interstate Commerce: Hearing on S. 1732 Before the S. Comm. on Commerce*, 88th Cong 735 (1963) (statement of Franklin D. Roosevelt Jr., Under Secretary of Commerce) (explaining that in New York "it has been traditional, among some of our resort places, to refuse to take members of the Jewish faith").

[11] *See* Brief for the Louis D. Brandeis Center for Human Rights Under Law and the Silicon Valley Chinese Association Foundation as Amici Curiae Supporting Petitioner, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 142 S. Ct. 895 (2022) (No. 20-119), at 3.

[12] *See* Eli Wald, *The Rise and Fall of the Wasp and Jewish Law Firms*, 60 Stan. L. Rev. 1803, 1838–39 (2008).

Adherents of other religions such as Islam, Sikhism, and Hinduism, among others, have likewise suffered discriminatory treatment and exclusion, with anti-Muslim sentiment following the September 11 attacks as only the most recent example.[13] Hindus and Sikhs similarly still experience systematic suspicion, violence, and exclusion.[14]

LGBT people are another group that have been marked as outsiders and excluded from many aspects of common social life. "Gays and lesbians were prohibited from most government employment, barred from military service, excluded under immigration laws, targeted by police, and burdened in their rights to associate." *Obergefell v. Hodges*, 576 U.S. 644, 661 (2015). LGBT people also have experienced a history of being excluded from many businesses and commercial establishments. Historically, it was not uncommon for bars to post signs stating, "We Do Not

---

[13] *See, e.g.*, Pew Research Center, *Muslims are a Growing Presence in U.S., but Still Face Negative Views from the Public* (Sept. 1, 2021), https://www.pewresearch.org/fact-tank/2021/09/01/muslims-are-a-growing-presence-in-u-s-but-still-face-negative-views-from-the-public/ (reporting that 78% of U.S. adults say that Muslims face discrimination, more than any other religious group); Erik Love, *Islamophobia and Racism in America* 41, 86–89 (2017).

[14] *See, e.g.*, A. C. Thompson, *Sikhs in America: A History of Hate,* ProPublica (Aug. 4, 2017), https://www.propublica.org/article/sikhs-in-america-hate-crime-victims-and-bias; Sumitra Badrinathan et al., *Social Realities of Indian Americans: Results From the 2020 Indian American Attitudes Survey*, Carnegie Endowment for International Peace (June 9, 2021), https://carnegieendowment.org/2021/06/09/social-realities-of-indian-americans-results-from-2020-indian-american-attitudes-survey-pub-84667.

Serve Homosexuals." Brief for Public Accommodation Law Scholars as Amici Curiae Supporting Respondents at 27, *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n*, 138 S. Ct. 1719 (2018) (No. 16-111). Hotels have refused to rent rooms to same-sex couples, and other businesses have expelled them for showing affection. *Id.* Although no federal law currently prohibits public accommodations discrimination based on sexual orientation or transgender status, about half the states do so. Aryn Fields, *The Human Rights Campaign Releases Annual State Equality Index Ratings*, Hum. Rts Campaign (Jan. 25, 2021), https://www.hrc.org/press-releases/the-human-rights-campaign-releases-annual-state-equality-index-ratings. Enforceability of these laws matters because discrimination against LGBT people is not a thing of the past—it remains widely prevalent today. *See, e.g.*, Sejal Singh & Laura E. Durso, *Widespread Discrimination Continues to Shape LGBT People's Lives in Both Subtle and Significant Ways*, Center for Am. Progress (May 2, 2017), https://www.americanprogress.org/article/widespread-discrimination-continues-shape-lgbt-peoples-lives-subtle-significant-ways/.[15]

---

[15] For a compilation of recent examples of public accommodations discrimination against LGBT people throughout public life, often without warning in places where most people would not expect to be denied service, *see* Brief for Lambda Legal Defense and Education Fund, Inc., Family Equity Council, et al. as Amici Curiae Supporting Respondents, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (2018) (No. 16-111); *see also* Christy Mallory & Brad Sears, *Evidence of Discrimination in Public Accommodations*

All these groups and others benefit from the protections of the public accommodations laws that Petitioners seek to undermine.

C. The Through Line of the Court's Public Accommodation Precedents Reinforces the Civil Rights Settlement.

While the goal of equal access for all remains aspirational, the enormous progress that has been made in creating a shared civil society and marketplace in which all Americans may participate has been fostered by decisions of this Court, which have consistently rejected attempts to undermine the compelling public interests that public accommodations laws serve. There have been many attempts over the years to create First Amendment and due process exemptions to public accommodations and other anti-discrimination statutes. But this Court has always declined to do so. *See, e.g.*, *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 261–62 (1964) (upholding the public accommodations provision of the Civil Rights Act of 1964 against a motel that refused to serve Black customers, and noting that public accommodations laws prohibiting discrimination were "unquestionab[ly]"

Based on Sexual Orientation and Gender Identity: An Analysis of Complaints Filed with State Enforcement Agencies, 2008–2014, Williams Inst. (2016), https://williamsinstitute.law.ucla.edu/publications/lgbt-public-accomm-discrimination/ (documenting high rates of public accommodations discrimination against LGBT people, and even more so when they were also people of color or people with disabilities).

constitutional); *Katzenbach v. McClung,* 379 U.S. 294, 304–05 (1964) (rejecting a restaurant owner's personal convictions as a lawful basis for racially segregating the business's dining room); *Newman v. Piggie Park Enters., Inc*, 390 U.S. 400, 402 n.5 (1968) (rejecting restaurant owner's claim that he could refuse to serve Black customers because of his religious beliefs about racial intermixing and his religious compulsion to oppose integration of the races); *Masterpiece Cakeshop,* 138 S.Ct. at 1727 (2018) (neutral and generally applicable public accommodations laws are within "the State's usual power to enact when a legislature has reason to believe that a given group is a target of discrimination" and generally do not violate the First or Fourteenth Amendments) (citing *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557, 572 (1995)).

This Court has reached the same or similar conclusions when assessing disparate treatment of LGBT people under statutes and the Constitution. *Masterpiece Cakeshop*, 138 S. Ct. at 1727 (acknowledging right of LGBT people to "exercise of their civil rights" and of "freedom" "on terms equal to others" in accessing public accommodations); *Romer*, 517 U.S. at 627–28 (discussing public accommodations laws); *id.* at 635 (rejecting "citizens' freedom of association" and "liberties of landlords or employers who have personal or religious objections to homosexuality" as justifications for excluding LGBT people from state legal protections).[16] Accordingly,

[16] *Romer* rejected the notion that LGBT people were "stranger[s]" to the law or to the Constitution. 517 U.S. at 635. Likewise,

this Court has reaffirmed these tenets in its modern public accommodations decisions.

These principles have been consistently applied even where the proposed exemptions from public accommodation are grounded in religious belief. *Piggie Park*, 390 U.S. at 402–03, was decided by a unanimous Court. There, a restaurant owner believed that serving Black customers "violate[d] his freedom of religion under the First Amendment" as he believed that racial intermixing contravened the will of God such that "his religious beliefs compel[led] him to oppose any integration of the races whatever." *Piggie Park*, 256 F. Supp. 941, 943–44 (D.S.C. 1966). But this Court rejected that argument out of hand, recognizing that opening the door to such claims would eviscerate the federal law. *Piggie Park,* 390 U.S. at 402 n.5. And most recently, in *Masterpiece Cakeshop,* the Court explained, unambiguously and citing *Piggie Park*, that while "religious and philosophical objections are protected, it is a general rule that such objections do not allow business owners and other actors in the

---

Lawrence v. Texas, 539 U.S. 558, 577–79 (2003) rejected the idea that moral condemnation could justify disparate treatment of same-sex sexual intimacy or the denial of equal liberty to LGBT people. In *United States v. Windsor*, 570. U.S. 744, 774–775 (2013) (federal Defense of Marriage Act violates equal protection guarantee) and *Obergefell*, 576 U.S. 644 at 671, 675–76 (2015) (marriage exclusion violates Fourteenth Amendment due process and equal protection clauses), the Court has protected the citizenship rights of LGBT people to join in marriage and be treated as others are in their marriages. Taken together, these decisions and legislative changes in states have made it possible for more LGBT people to fully participate in our society, reach their full potential and support their families and communities.

economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law." 138 S. Ct. at 1727 (noting the "long list of persons who provide goods and services" that might refuse to service LGBT persons if a First Amendment exemption were allowed).[17]

Petitioners now urge the Court to fundamentally reject the through line of its public accommodations precedents and disturb settled law that has protected these critical civil rights for over half of a century. The principles established in these early decisions have endured for decades, and they recognize the twin harms of denying an individual's right to be served and the principle of equal citizenship. To eviscerate this longstanding consensus in favor of a commercial right to exclude, as Petitioners urge here, would substantially undercut principles that have been carefully protected and have served our society well for decades.

Moreover, our society is diverse, and both new and old modes of social division and discrimination persist. Granting public-facing businesses a license to pick and choose customers based on their personal

---

[17] The Court's rulings in *Hurley*, 515 U.S. 557 and *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000), striking down state efforts to prohibit discrimination in an expressive event and an expressive association respectively, and are inapplicable to the commercial businesses at the heart of the civil rights settlement and at issue here. The Court's decision in *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1873 (2021), is also inapplicable because the Court found that neither the city nor state public accommodations law applied to the case.

characteristics or group membership would invite social chaos and fragmentation. As this Court has durably held in each iteration of attacks on public accommodations laws, the principles that must prevail are those of removing obstacles to the free flow of interstate commerce and securing the time-honored convention that businesses open to the public must truly be open to all.[18]

II. THE FIRST AMENDMENT'S FREE SPEECH CLAUSE DOES NOT EXEMPT COMMERCIAL BUSINESSES FROM COMPLIANCE WITH PUBLIC ACCOMMODATIONS LAWS

Petitioners' proposed exemption from public accommodations laws based on an asserted expressive element in its commercial conduct would result in a dangerous departure from well-settled law and open the door to a wide range of potential future exemptions. The Amicus Curiae Brief of the National Women's Law Center (NWLC) demonstrates why, under the Court's sensible and well-established precedents, CADA does not violate Petitioners' free speech rights. Brief for National Women's Law Center and 35 Additional Organizations as Amici Curiae Supporting Respondents, 303 *Creative LLC, et al. v.*

[18] In protecting the civil rights settlement, the Court has been careful to draw a distinct line between broadly public-facing businesses and freedom of association within private organizations, so long as those organizations had a "plan or purpose of exclusiveness." *See*, *e.g.*, *Tillman v. Wheaton-Haven Recreation Ass'n*, 410 U.S. 431, 438 (1973) (a swim club open to all white people in a geographic area could not bar participation based on race).

Elenis, et al. (Aug. 18, 2022) (No. 21-476) (hereinafter "NWLC Brief"). This Brief endorses that legal analysis and provides additional grounds for upholding CADA.

A. CADA's Public Accommodations Clause Regulates Commercial Conduct, Not Speech.

As the NWLC Brief explains, CADA regulates commercial conduct, not speech. Both this Court and lower courts have consistently held that laws may prohibit discriminatory commercial conduct regardless of whether a business owner or employee wishes to send a message by engaging in the prohibited discrimination.

Petitioners cannot escape the anti-discrimination requirements of CADA by describing their website services as "creative." This Court's precedents are clear that conduct does not qualify as protected speech simply because "the person engaging in [it] intends thereby to express an idea." *United States v. O'Brien*, 391 U.S. 367, 376 (1968). Instead, "[t]o determine whether conduct is sufficiently expressive, the Court also asks whether it 'in context, would reasonably be understood by the viewer to be communicative.'" *Masterpiece Cakeshop*, 138 S. Ct. at 1742 (citing *Clark v. Community for Creative Non-Violence,* 468 U.S. 288, 294 (1984)). In other words, a subjective intent to communicate a message through conduct is not enough; the conduct must be objectively understandable by the reasonable viewer as communicating that message. If that were not so, any person could convert an action into "expressive

conduct" by thinking privately that it conveys a message, regardless of whether the action conveys anything at all to objective observers.

While the content of a website may communicate a message, it is not one reasonably imputed to the business, but to the client who requested its design. Visitors to a wedding website reasonably view the information displayed as the customers' message to their friends and family. Viewers have no reason to know the website maker's identity, let alone to be interested in her beliefs about marriage or anything else. Nor would anyone think that Smith is communicating a personal view that the couple is a good fit and should get married. The website conveys the couple's story and message, not the designer's.

It is telling that Smith felt the need to add an explanatory note on her Company's website stating that she would only design wedding websites about different-sex couples' marriages. This Court found in *Rumsfeld v. Forum for Academic and Institutional Rts., Inc.*, 547 U.S. 47 (2006), that law schools' different treatment of military recruiters as compared to other recruiters was "expressive only because the law schools accompanie[d] their conduct with speech explaining it." *Id.* at 66. "The fact that such explanatory speech [was] necessary [was] strong evidence that the conduct at issue [was] not so inherently expressive that it warrant[ed] protection under *O'Brien*." *Id.* So too here. Absent Smith's statement explaining her intentions and motivations in adding a wedding website component to her business, no one would have discerned her beliefs from her business conduct. Her need to explain is "strong

evidence" that her commercial conduct is not inherently expressive.

The Tenth Circuit's conclusion that CADA survives even strict scrutiny is correct. As the NWLC has demonstrated, CADA serves a compelling government interest "of the highest order," and it is narrowly tailored to that interest. NWLC Brief 13, 29. To be sure, CADA does not limit Smith from publicly expressing her belief that marriage should be limited to different-sex couples. She has done so extensively and effectively, sharing her opinions about same-sex couples and marriage and thereby communicating her message in numerous forums.[19]

B. A Free Speech Exemption to CADA Would Undo the Protections Provided By Public Accommodations Law.

As a practical matter, the requested free speech exception to CADA would significantly undo the protections provided by public accommodations laws and instantiated by this Court's decisions. If Petitioners can exempt themselves from public

---

[19] Alliance Defending Freedom, *Lorie Smith's Story*, YouTube (Jan. 7, 2022), https://www.youtube.com/watch?v=NazjCxnw3Yg; NTD News, *ADF Lorie Smith and ADF Lawyer Jake Warner on NTD News,* YouTube (Jul. 14, 2022), https://www.youtube.com/watch?v=QXhN16c__-c (interviewing Lorie Smith); Steve West, *The Right Not to Create*, World (September 28, 2021), https://wng.org/roundups/the-right-not-to-create-hold-1632846954; Ronn Blitzer, *Lorie Smith Says Colorado is Violating Her First Amendment Rights by Requiring Her to Design Websites for Same-Sex Marriages*, Fox News (Mar. 14, 2022), https://www.foxnews.com/politics/lorie-smith-web-designer-free-speech.

accommodations laws merely because their product involves an element of creativity or craft, or consists of words and images, then the array of similarly situated businesses is virtually unlimited. Humans have used their hands to design, cut, shape and mold products, whether with clay, stone, cloth, metal or edible substances. Dr. Martin Luther King spoke of the "street sweeper" who could "Sweep streets like Michelangelo painted pictures; sweep streets like Handel and Beethoven composed music; sweep streets like Shakespeare wrote poetry."[20] A free speech exception would uproot the foundation of public accommodations laws—the basic idea that public providers are free to express their subjective preferences and beliefs in the *marketplace of ideas*, but not by the conduct of discriminating among would-be customers when selling goods or services in the *commercial marketplace*. *See* NWLC Brief § III.

Petitioners' argument depends on the contention that merely by making a customized product for a same-sex couple, they are conveying an implicit message approving their customers' relationship. But if this Court were to accept a rule that simply providing commercial goods or services conveys a message of approval and endorsement that cannot be compelled, then public accommodations protections will evaporate. Even if somehow cabined to wedding-related goods or services, the likely ramifications of such a rule would be extensive and profound. Vendors who sew gowns, design place setting graphics, perform

[20] Martin Luther King, Jr., Facing the Challenge of a New Age, Address at University of the West Indies Valedictory Service (June 20, 1965).

music, cater food, or decorate wedding limousines would have free rein to deny wedding services to Jewish and Muslim couples who do not accept Jesus Christ as their lord and savior, to Christians who do, and to those customers lacking any faith at all. And if the Court were to adopt such a rule in one context, there would be no principled way to prevent its application in a multitude of others.

This Court grappled with the difficulty of where to draw the line in determining "creative" expressive conduct in *Masterpiece Cakeshop*. When asked about which wedding service providers engage in expressive conduct, the petitioner in that case was stuck awkwardly arguing that bakers and florists engage in expressive conduct, but chefs, tailors and makeup artists do not. Transcript of Oral Argument, at 11–19, *Masterpiece Cakeshop*, 138 S. Ct. 1719. This Court stressed that "any decision in favor of the baker would have to be sufficiently constrained, lest all purveyors of goods and services who object to gay marriages for moral and religious reasons in effect be allowed to put up signs saying 'no goods or services will be sold if they will be used for gay marriages,' something that would impose a serious stigma on gay persons." *Masterpiece Cakeshop*, 138 S. Ct. at 1728–29. By arguing for a broad free speech exception to CADA, this is precisely what Petitioners are seeking permission to do.

Notably, both sides here contend that a ruling against them will open the floodgates to unwanted results. *See* Brief for the Petitioners at 26, *303 Creative LLC, et al. v. Elenis, et al.*, No. 21-478 (May 26, 2022). The difference is that the current law of the land, which enforces public accommodations laws

irrespective of claims of creativity, has been in place and enforced by this Court for decades without such problematic results. By contrast, no one can think that the exception proposed by Petitioners will end here. The Court should preserve the law as it is for the benefit of all protected groups.

III. THE "GO ELSEWHERE" ARGUMENT CONTRADICTS THE BASIC FUNCTION OF PUBLIC ACCOMMODATIONS LAWS

Petitioners and many of their amici argue that recognizing a new free speech exemption to public accommodations laws will cause no significant harm because LGBT consumers can simply "go elsewhere" for their goods and services. That position misunderstands the purpose and history of public accommodations laws and, more importantly, is just wrong.

A. A Requirement to "Go Elsewhere" is Incompatible with Public Accommodations Laws.

Claiming that the free market will supply other options to consumers excluded from access to goods and services misses the larger point of public accommodations laws. The purpose is not simply to ensure that the excluded group is able to obtain a hamburger or haircut somewhere. It is also that all persons may "enter the *public world of the market* without being treated as a being who is not human or is a member of a lower caste." Joseph William Singer, *We Don't Serve Your Kind Here: Public Accommodations and the Mark of Sodom*, 95 B. U. L.

Rev. 929, 938 (2015) (hereinafter "Singer") (internal citations omitted) (emphasis in original).

More than 50 years of American legal thinking and deeply rooted social norms have ingrained the expectation that businesses operating in the public marketplace are and should be open to all. *See* Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 Nw. U. L. Rev. 1283, 1448 (1996) ("current settled values" recognize that "[m]embers of the public have legitimate interests in not being excluded from access to the marketplace solely on the basis of group membership or immutable individual characteristics").

Public accommodations laws protect that expectation by making concrete the promise of equal marketplace access for all people. Creating exceptions to public accommodations laws on the theory of going elsewhere strikes at the heart of that promise, and permits market stratification and social hostility. For customers in minority or disfavored groups, living in such a regime creates an ever-present vulnerability and anxiety. "What does it mean never to know, when one enters a store, whether one is welcome? How does it affect us if we cannot count on being able to buy food, or clothing, or a computer? How will our life chances and worldview change if our ability to obtain the thing we need depended on how much prejudice there was against us?" *Singer*, 95 B.U. L. Rev. at 946.

Worse, sanctioning the denial of goods and services to marginalized groups by commercial enterprises opens the door to more such discrimination. There is

no reason to believe that businesses that currently offer goods or services for marginalized customers, as required by law, will continue to do so if places of public accommodation are permitted to discriminate. That is, the rule Petitioners request will lead to fewer of the alternative options that its argument posits.

Further, even if the Court were to accept the concept that the availability of alternative services rendered a business owner's discrimination harmless, how would it determine what level of availability suffices in other cases? How long of a drive is acceptable? 50 miles? There is no logical limiting principle to determine what constitutes an "available enough" alternative given the immense social and geographic diversity of the United States, and the immense regional variations, and variations over time, on willingness to serve all comers.

The track record in places still lacking in public accommodations laws illustrates these points.

B. Frequently, Especially in Rural Settings, There is Nowhere Else to Go.

Arguing that marginalized customers should simply go elsewhere for a public accommodation also ignores the stark reality that often—especially in rural counties—there is nowhere else to go. *Amici* receive help requests frequently concerning such situations.[21]

---

[21] *See, e.g.*, *supra* n.15, Brief for Lambda Legal Defense and Education Fund, Inc., Family Equity Council, et al., as Amici Curiae Supporting Respondents, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (2018) (No. 16-111).

For example, consider Bob Huskey and his husband Jack Zawadski, who spent over 50 years of their lives together, and 20 of those years in the small town of Picayune, Mississippi. Compl. ¶¶ 10–11, *Zawadski v. Brewer Funeral Servs. Inc.*, Case No. 55CI1:17-cv-00019-CM (Miss. Cir. Ct. Mar. 7, 2017). Soon after their marriage in 2015, Bob's health started to fail and they made arrangements with the county's *only* crematorium, Picayune Funeral Home, to cremate Bob's body after his death. *Id.* ¶¶ 12, 14–21. After Bob died, the funeral home's staff learned that Bob had been Jack's husband, and shortly thereafter refused to pick up Bob's body from the nursing home and perform the cremation. *Id.* ¶¶ 25–29. The nursing home could not keep Bob's body onsite, and Jack ended up in a frantic scramble trying to find another crematorium who would accept Bob's body. *Id.* ¶ 31. He was finally able to locate one in Hattiesburg, Mississippi, some 90 miles away. *Id.*

This is just one example to illustrate that in a small town or sparsely populated area, exclusion from the service provider is a total exclusion, and requires leaving one's community, if one is able to arrange the necessary time, substitutes for care, transportation, and so on. One may have to drive hundreds of miles, take time off work, or find child or elder care, and even then, leaving town may not suffice to find a willing public accommodation.

In such a world, members of marginalized groups who are able to Google can do so, but they often still need to "call ahead" to see if the restaurant, club, or hotel will serve "people like them" before venturing out into the public square. For this reason, the LGBT

community had its own version of the Green Book in past years.[22] Having to navigate such a landscape tells people that they may face hostility and rejection wherever they go and because of who they are.

C. The Free Market Cannot Fix the Harms of Discriminatory Exclusion from Public Accommodations.

There is also no credible basis to conclude that free markets will eliminate discrimination. Singer, 95 B.U. L. Rev. at 937 (explaining faulty premise of market argument that "[n]orms have changed and it is simply bad business to treat customers with disdain" and "even if a few bad apples hold onto such appalling treatment, customers can still boycott and shop elsewhere."). This hypothesis is "demonstrably false" because the market responds to attitudes of customers and discrimination remains prevalent in our society. *Id.*

This exact phenomenon occurred in the Jim Crow South. In a survey of businesses' discriminatory

---

[22] *See, e.g.*, Randy Stern, *Our Own "Green Book"*, Gaywheels (Feb. 27, 2019), https://gaywheels.com/2019/02/our-own-green-book/ (describing the Damron and Spartacus guides as maintaining "a list of places that are friendly to [LGBT people] in communities that are not entirely welcoming to LGBT visitors"); Ian Philips & Gina M. Gatta, *The Damron Address Book*, Damron Co. (Sept. 1, 1996) (gay men's travel guide in continuous publication since the early 1960s); *Lesbian Connection*, Elsie Publishing (in continuous publication since 1974, providing information about places of accommodation that welcome lesbian travelers), https://www.lconline.org/about/welcome; Lindsay Van Gelder, *Are You Two… Together? A Gay and Lesbian Travel Guide to Europe*, Random House (1991).

practices, "findings support[ed] an interpretation that among the industries captured in the Green Books, local retail and service markets were responsive to changes in the racial composition and discriminatory preferences of local consumers . . . provid[ing] empirical evidence . . . that profit-maximizing firms practiced segregation on the basis of White consumer discrimination." Cook et al., *The Evolution of Access to Public Accommodations in the United States*, Q. J. Econ., at 50. Far from penalizing segregated businesses, time and time again the market *rewarded* segregationists. It created an incentive for businesses to market primarily or exclusively to majorities or dominant groups. These market forces severely impacted the ability of many Black Americans to simply "go elsewhere" if turned away from a business. The primary factor that corrected this rampant discrimination was not the free market, but the Civil Rights Act of 1964.[23] Any presumption that the market alone will ensure access for disfavored groups has no footing in reality.

IV. A FREE SPEECH EXEMPTION FROM PUBLIC ACCOMODATIONS LAWS WOULD RECREATE SEGREGATED MARKETPLACES.

Petitioners' requested exemption would permit the resegregation of our marketplaces, with widespread discrimination inevitably resulting. While LGBT

---

[23] *See* Cook et al., *The Evolution of Access to Public Accommodations in the United States*, Q. J. Econ., at 50 (full access to services required legal intervention, not only market forces).

people are the subject here, ostracism can affect any group because patterns of discrimination shift. If public accommodations laws are weakened, it will expose whatever group is the current target of animosity, disapproval, or even misunderstanding to amplified risks of exclusion. Our history shows that most minorities can be vulnerable this way. Catholic and Irish communities experienced systemic rejection.[24] Antisemitism has persisted and recently increased.[25] After the September 11 attacks, Muslim communities experienced surging discrimination.[26] Then, with the COVID-19 pandemic, Anti-Asian hate

---

[24] *See* Roy Carroll, *America's dark and not-very-distant history of hating Catholics*, The Guardian (Sept. 12, 2015), https://www.theguardian.com/world/2015/sep/12/america-history-of-hating-catholics (describing rampant anti-Catholicism before John F. Kennedy was president); Rebecca A. Fried, *No Irish Need Deny: Evidence for the Historicity of NINA Restrictions in Advertisements and Signs*, 49 J. Soc. Hist. 829 (2016) (explaining anti-Irish discrimination); *see also Nappi*, No. 11-cv-2832, 2015 WL 5023007.

[25] According to the Anti-Defamation League, 2,717 anti-Semitic incidents were reported in 2021, a 34% increase compared to the 2,026 incidents in 2020. Nicole Chavez, *Assaults, Vandalism and Harassment Targeting Jewish Communities and People are Higher than Ever, Audit Shows*, CNN (Apr. 26, 2022), https://edition.cnn.com/2022/04/26/us/antisemitic-incidents-2021-report/index.html.

[26] *See Confronting Discrimination in the Post-9/11 Era: Challenges and Opportunities Ten Years Later*, *A Report on the Civil Rights Division's Post-9/11 Civil Rights Summit*, Dep't of Just. 4–13 (2011), https://www.justice.gov/sites/default/files/crt/legacy/2012/04/16/post911summit_report_2012-04.pdf.

swelled.[27] If the Court changes long-settled doctrine to allow this new exemption, it would create grounds for excluding any of these groups moving forward.

Recent race relations debates signal the divides likely to deepen if Petitioners prevail. As recent surveys indicate, long-hushed calls for businesses to refuse to serve Black Americans on religious grounds have risen again.[28] Fifty-five years after *Loving v. Virginia*, 388 U.S. 1 (1967), some wedding venues are still refusing on religious grounds to rent to interracial couples.[29]

Because the requested exemption has no feasible limiting principle, it likely would both invite the reemergence of long-forbidden practices and expand refusals across a range of businesses. While denials of cakes, catered meals, or floral arrangements may seem insignificant to some, they are conceptually indistinguishable from a potentially wide array of analogous denials. For example, bakers who disagree

---

[27] Sarah Ngu, *The Pandemic Released a Wave of Anti-Asian Hate - Now They're Fighting Bias in Their Own Pews*, NBC News (Sept. 8, 2021), https://www.nbcnews.com/news/asian-america/pandemic-released-wave-anti-asian-hate-now-fighting-bias-pews-rcna1762.

[28] *See*, *e.g.*, FM Editors, *More White Christians Say Businesses Should Refuse Serving Black Americans Based on Religious Grounds*, Faithfully (June 30, 2019), https://faithfully magazine.com/white-christians-anti-black-service/.

[29] P.R. Lockhart, *A Venue Turned Down An Interracial Wedding, Citing "Christian Belief." It's Far From the First to Do So*, Vox (Sept. 3, 2019), https://www.vox.com/identities/2019/9/3/20847943/mississippi-event-hall-interracial-couple-wedding-religious-exemption.

with same-sex couples marrying also may disagree with them raising children. Would these businesses similarly refuse to make cakes to celebrate the adoption or birth of a child, or an LGBT child's birthday? And how could similar exemptions not be available to vendors who object to selling goods or services for the celebrations of particular cultures or religions, such as aqiqahs or bar and bat mitzvahs? Likewise, could a commercial photographer hired to take prom photos for a high school class refuse same-sex couples, interracial couples, or students wearing clothing signifying a minority religious faith? Indeed, were the law to switch focus from the business owner's decision to sell to the general public, and instead use subjective notions of art and whether one's business conduct might convey an idea, it would seem to invite refusals of any skilled crafts and creative services offered for hire—from architects to interior designers, from nail salons to barbershops,[30] to chocolatiers and "sandwich artists,"[31] and more. The prospect is even more alarming because validation of discrimination against a disfavored group in one realm tends to exacerbate discrimination in others, usually landing most heavily on those least able to meet their needs elsewhere.[32]

---

[30] *See*, *e.g.*, *Oliver v. The Barbershop*, Complaint, No. CIVDS1608233 (Cal. San Bernardino Cty. Super. Ct. filed May 25, 2016).

[31] Subway, *Sandwich Artist* (last visited Aug. 10, 2022), https://apply.mysubwaycareer.com/us/en/career-path/.

[32] *See, e.g.*, *Smith v. Avanti*, 249 F. Supp. 3d 1194 (D. Colo. 2017) (addressing rental housing discrimination against a same-sex

CONCLUSION

No one can think that, were this Court to approve the proposed exemption, refusals of service would be limited to the matters litigated to date. Instead, such a rule change would open the door to countless other denials of service, by and to any number of groups. All this only fragments society, rendering it less stable, functional, and fair. The civil rights settlement in public accommodations that this Court has protected for decades should be maintained as it is, without a new exception for "creative" commercial activity.

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

---

couple) and The Trevor Project, *Homelessness and Housing Instability Among LGBTQ Youth*, (Feb. 3, 2022), https://tinyurl.com/4tf9drez and Justin Stabley, *For Transgender People, Finding Housing has Become Even Harder During the Pandemic,* PBS (Mar. 12, 2021), https://tinyurl.com/ysy9mhzz.

Respectfully submitted,

MARY L. BONAUTO
Counsel of Record
GARY D. BUSECK
CHRIS ERCHULL
GLBTQ LEGAL ADVOCATES
& DEFENDERS
18 Tremont Street
Suite 950
Boston, MA 02108
(617) 426-1350
mbonauto@glad.org

CLAUDINE COLUMBRES
KIMBERLY A. HAVLIN
WHITE & CASE LLP
1221 Avenue of the
Americas
New York, NY 10020
(212) 819-8200
ccolumbres@whitecase.com
kim.havlin@whitecase.com

JENNIFER C. PIZER
LAMBDA LEGAL DEFENSE
AND EDUCATION FUND, INC.
4221 Wilshire Blvd.
Suite 280
Los Angeles, CA 90010
(213) 382-7600
jpizer@lambdalegal.org

SHANNON MINTER
CHRISTOPHER F. STOLL
NATIONAL CENTER FOR
LESBIAN RIGHTS
870 Market Street
Suite 370
San Francisco, CA 94102
415-392-6257
sminter@nclrights.org
cstoll@nclrights.org

C*ounsel for Amici Curiae*

August 19, 2022