No. 21-476

In the Supreme Court of the United States

303 CREATIVE LLC, ET AL., PETITIONERS

v.

AUBREY ELENIS, ET AL.

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

BRIEF FOR SCHOLARS OF BEHAVIORAL SCIENCE AND ECONOMICS AS AMICI CURIAE SUPPORTING RESPONDENTS

JOSEPHINE K. PETRICK
Counsel of Record
ADAM W. HOFMANN
DAVID C. CASARRUBIAS
BREANA L. BURGOS
ASHLEY Y. NAKAI
Hanson Bridgett LLP
425 Market Street, 26th Fl.
San Francisco, CA 94105
(415) 777-3200
jpetrick@hansonbridgett.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF AMICI 1

SUMMARY OF ARGUMENT 2

ARGUMENT.. 5

I. Neoclassical economic theories provide no reliable basis for this Court to evaluate the lawfulness of Colorado's antidiscrimination law 5

II. Modern scholarship in behavioral economics has exposed flaws in neoclassical assumptions and undermines policy arguments premised on those assumptions 7

III. Markets do not operate on a purely rational basis, as behavioral economics reveals. Accordingly, they cannot be expected to eliminate the negative effects of discrimination.. 9

IV. The L&E Scholars' neoclassical assumptions provide no greater support for discrimination based on sexual orientation than they do for racial discrimination 14

CONCLUSION 19

APPENDIX

List of Amici.. App. 1

TABLE OF AUTHORITIES

Cases

Loving v. *Virginia*, 388 U.S. 1 (1967) 16

Masterpiece Cakeshop, Ltd. v. *Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018) 12, 13, 14

Other Authorities

Dan Ariely & Michael I. Norton, *How actions create – not just reveal – preferences*, 12 Trends in Cognitive Sciences 13 (2008) 14

Kenneth J. Arrow, *Some Models of Racial Discrimination in the Labor Market* 1 (Rand 1971).. 12

Kenneth J. Arrow, *What Has Economics to Say About Racial Discrimination?*, 12 J. Econ. Perspectives 91 (1998)... 10

Oren Bar−Gill, *Seduction by Contract: Law, Economics, and Psychology in Consumer Markets* (2012)... 10

Netta Barak−Corren, *A License to Discriminate? The Market Response to* Masterpiece Cakeshop, 56 Harv. C.R.-C.L. L. Rev. 315 (2021) 12, 13, 14

Netta Barak−Corren, *Religious Exemptions Increase Discrimination Toward Same-Sex Couples: Evidence from* Masterpiece Cakeshop, 50 J. Legal Stud. 75 (2021) 13, 14

Gary Becker's *The Economics of Discrimination* (2d ed. 1971)..*passim*

Thomas C. Berg, *Symposium: Religious Accommodation and the Welfare State*, 38 Harv. J.L. & Gender 103 (2015).............................7

Colin F. Camerer, *Do Biases in Probability Judgment Matter in Markets? Experimental Evidence*, 77 Am. Econ. Rev. 981 (1987)..............10

Colin Camerer *et al.*, *Labor Supply of New York City Cabdrivers: One Day at a Time*, 112 Q.J. Econ. 407 (1997) 10

Kerwin Kofi Charles & Jonathan Guryan, *Prejudice and Wages: An Empirical Assessment of Becker's The Economics of Discrimination*, 116 J. Polit. Econ. 773 (2008)...................10, 12, 13

Leora F. Eisenstadt, *Enemy and Ally: Religion in* Loving v. Virginia *and Beyond*, 86 Fordham L. Rev. 2659 (2018). 16

Richard A. Epstein, *Forbidden Grounds: The Case Against Employment Discrimination Laws* (1992)..18

Richard A. Epstein, *Public Accommodations Under the Civil Rights Act of 1964: Why Freedom of Association Counts as a Human Righ*t, 66 Stan. L. Rev. 1241 (2014).....................18

Victor Hugo Green, *The Negro Motorist Green Book: An International Travel Guide*, N.Y. Pub. Library, https://digitalcollections.nypl.org/collections/the-green-book#/ (last visited Aug. 18, 2022) . 15, 16

Christine Jolls, Cass R. Sunstein, & Richard H. Thaler, *A Behavioral Approach to Law and Economics*, 50 Stan. L. Rev. 1471 (1998)........... 6, 8

Daniel Kahneman, *A Psychological Perspective on Economics*, 93 Am. Econ. Rev. 162 (2003).......... 6, 8

Daniel Kahneman, Jack L. Knetsch, & Richard H. Thaler, *Anomalies: The Endowment Effect, Loss Aversion and Status Quo Bias*, 5 J. Econ. Perspectives 193 (1991)... 10

Daniel Kahneman, Jack L. Knetsch & Richard H. Thaler, *Experimental Tests of the Endowment Effect and the Coase Theorem*, 98 J. Pol. Econ. 1325 (1990) 10

Daniel Kahneman, Jack L. Knetsch & Richard H. Thaler, *Fairness and the Assumptions of Economics*, 59 J. of Bus. S285 (1986) 17

Daniel Kahneman, *Thinking, Fast and Slow* (2011) 9, 10

Andrew Koppelman, *Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law*, 88 S. Cal. L. Rev. 619 (2015) 7

Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 Cal. L. Rev. 1051 (2000) 8

Anne O. Krueger, *The Economics of Discrimination*, 71 J. Polit. Econ. 481 (1963) 12

L&E Amicus Br., *Masterpiece Cakeshop, Ltd.* v. *Colo. C.R. Comm'n*, 138 S. Ct. 1719 (2018) (No. 16-111), 2017 WL 4118065 (Sept. 6, 2017) 15

Michael Lewis, *The Undoing Project: A Friendship That Changed Our Minds* (2016) 9

John A. List, *The Nature and Extent of Discrimination in the Marketplace: Evidence from the Field*, 119 Q. J. Econ. 49 (2004) 12

Celia McGee, *The Open Road Wasn't Quite Open to All*, N.Y. Times, Aug. 22, 2010, www.nytimes.com/2010/08/23/books/23green.html (last visited Aug. 18, 2022) 15

Nathan B. Oman, *Doux Commerce, Religion, and the Limits of Antidiscrimination Law*, 92 Ind. L.J. 693 (2017) 6

Joseph E. Stiglitz, *Approaches to the Economics of Discrimination*, 63 Am. Econ. Rev. 287 (1973) 10, 11, 12

Cass R. Sunstein, *Free Markets and Social Justice* (1997) 14

Cass R. Sunstein, *Why Markets Don't Stop Discrimination*, 8 Social Phil. & Pol'y 22 (1991) 10

Richard H. Thaler & Cass R. Sunstein, *Market Efficiency and Rationality: The Peculiar Case of Baseball*, 102 Mich. L. Rev. 1390 (2004) 10, 11

Richard H. Thaler, *Misbehaving: The Making of Behavioral Economics* (2015) 6, 8

Richard Thaler & Cass Sunstein, *Nudge: Improving Decisions About Health, Wealth, and Happiness* (2008) 9, 10

Amos Tversky & Daniel Kahneman, *Judgment under Uncertainty: Heuristics and Biases*, 185 Science 1124 (1974) 8

INTEREST OF AMICI[1]

Amici curiae are professors in the fields of economics, sociology, psychology, law, and public policy who engage in significant research and teaching on behavioral science and behavioral economics (the "Behavioral Economics Scholars"). See Appendix (listing individual *amici*). This brief addresses issues that are within the Behavioral Economics Scholars' particular areas of scholarly expertise.

Behavioral economics applies psychological and sociological insights into human behavior to explain economic decision-making. This field has shown that consumer behavior in many situations systematically departs from that predicted by traditional, neoclassical economic theory, which assumes more purely rational, mathematical decision-making.

The Behavioral Economics Scholars' *amicus* brief respond to the brief of another set of *amici curiae*, the Law and Economics Scholars (L&E Scholars), who ask the Court to hold Colorado's antidiscrimination law invalid because, they say, the law is unnecessary and counterproductive when considered in light of neoclassical economic principles. But the research of behavioral economics scholars and others working in related disciplines has shown that those neoclassical principles often provide an incomplete or artificially

---

[1] No counsel for any party authored this brief in whole or in part, and no person other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief. See Sup. Ct. R. 37.6. All parties have consented to the filing of this brief. See Fed. R. App. P. 29(a)(2) & (4)(D); Sup. Ct. R. 37.2(a).

constrained view of the real world, with corresponding limits on their predictive abilities. The mix of purely theoretical and anecdotal citations relied upon by the L&E Scholars fail to support their thesis that economic factors will adequately protect the LGBT community from discrimination. In this way, the Behavioral Economics Scholars can help the Court better evaluate the L&E Scholars' arguments.

The L&E Scholars also respond (at 6–14) to the Tenth Circuit's discursive comment that, due to the unique nature of petitioners' services, they can be said to have something similar to a "monopoly" on the relevant market (Pet. App. 29a). The Behavioral Economics Scholars do not address this issue other than to note that it is not necessary to resolve, because discrimination in the market has been shown to persist in both monopoly and nonmonopoly conditions, and the market does not always self-correct when it does. See Parts III, IV, *infra*.

Rather, the Behavioral Economics Scholars write to dispel the notion that any contemporary consensus regarding economic principles supports discrimination as a societal good.

SUMMARY OF ARGUMENT

Petitioners and the L&E Scholars attack Colorado's antidiscrimination law as unjustified by economic necessity. They argue that market forces alone will ensure access to goods and services to same-sex couples, obviating any need for regulation by the state. L&E Amicus Br. 16–17. In support, they rely

upon neoclassical economic theories, which assume that all economic actors make purely rational choices designed to maximize their economic self-interest and are often used to predict macroeconomic decision-making. To advance the efficient allocation of resources under these assumptions, they suggest, constitutes a kind of scientific justification for their belief that business ought to be permitted to discriminate.

But decades of behavioral-economic research reveal that those neoclassical assumptions are often incorrect. As common sense would suggest, modern scholarship has shown conclusively that human beings are not perfectly rational. Study after study has shown that individuals engage in various forms of discrimination in the marketplace, despite their own financial detriment; and that consequently, the market is affected by a range of biases, including cognitive, statistical, and invidious forms of bias. Whatever traditional models would predict in theory, the actual market does not reliably self-correct and produce welfare-maximizing outcomes when this occurs. Part III, *infra*. The Court's consideration of policy implications of constitutional claims should accordingly not rest on the incomplete and often inaccurate assumptions of neoclassical economics. The L&E Scholars' arguments reflect policy preferences, rather than scientific certitude.

Tacitly recognizing that their prediction of a self-correcting free market has proven inaccurate in the context of racial discrimination, the L&E Scholars argue (at 4, 14, 17) that economic conditions in the Jim Crow South involved a "monopoly" of discriminatory

businesses, which interfered with the proper functioning of the market. They contend (at 16) that no similar distortion is present in today's market that would inhibit LGBT individuals from participating in the marketplace. L&E Scholars overlook that their own cited authority, Gary Becker's *The Economics of Discrimination* (2d ed. 1971) (Becker), documented that discrimination occurs in both monopolistic and non-monopolistic industries. *Id.* at 48–50, 158. In other words, that a monopoly may be a sufficient but not necessary condition for invidious discrimination to flourish in the free market.

The L&E Scholars appear to have backed away from their earlier claim that same-sex couples can fare perfectly well in the marketplace because the Internet offers lists of "gay-friendly" businesses, *e.g.*, L&E C.A. Amicus Br. 12 & n.2—perhaps because of the obvious parallel to the "Green Book" that guided African-Americans to "Black-friendly" businesses until Congress enacted the Civil Rights Act of 1964, Part IV, *infra*. However, the L&E Scholars continue to make essentially the same argument when they insist (at 1, 7–8, 10) that, so long as petitioners' business is "reasonably interchangeable" with that of other vendors, the LGBT community has access to services, and the state may not intervene to protect same-sex couples from discrimination when businesses like petitioners' refuse to serve them. The L&E Scholars' arguments reveal no principled reason to distinguish between the expected economic impacts of discrimination based on sexual orientation and the impacts of racial discrimination. Neoclassical assumptions fall short in both scenarios.

ARGUMENT

I. Neoclassical economic theories provide no reliable basis for this Court to evaluate the lawfulness of Colorado's antidiscrimination law.

Petitioners' opening brief seeks primarily to establish a constitutional right to discriminate. Pet. Br. *passim*. Among other things, petitioners argue that Colorado has no legitimate interest in prohibiting discriminatory, commercial statements because, they say, existing discrimination has not rendered goods and services completely unavailable to the LGBT community. *Id.* at 36–38.

The L&E Scholars focus and expand on this narrow point. They argue (at 14–16) that the State need not regulate in this area because economic forces will prevent widespread discrimination. Briefly stated, they note that discrimination carries negative economic impacts for the discriminator. Consequently, say the L&E Scholars, only businesses with sincerely held religious motivations will be willing to incur the consequences of discriminating against potential customers, while the market will provide alternative sources of goods and services to the LGBT community, so long as there is no monopoly to impede consumer choice. *Ibid.* Thus, for example, the problem with Jim Crow laws in the South was not discrimination; it was that white people had a monopoly on Southern lunch counters. *Id.* at 4, 14, 17.

The L&E Scholars' position rests on neoclassical economic theories, which assume that people make decisions based strictly on rational considerations, maximizing their self-interest based on stable preferences. See, *e.g.*, Richard H. Thaler, *Misbehaving: The Making of Behavioral Economics* 4–5 (2015) (*Misbehaving*) (explaining that these assumptions are not supported by empirical evidence); Daniel Kahneman, *A Psychological Perspective on Economics*, 93 Am. Econ. Rev. 162, 162 (2003) (*Psychological Perspective*) (same); Christine Jolls, Cass R. Sunstein, & Richard H. Thaler, *A Behavioral Approach to Law and Economics*, 50 Stan. L. Rev. 1471, 1476 (1998) (*Behavioral Law and Economics*) (same). For example, the L&E Scholars claim (at 4) that the ordinary give-and-take of the market and merchants' self-interest in maximizing revenues will eventually overcome systemic prejudice in the market.

In support, the L&E Scholars cite (at 16–17, 19) articles by law professors Andrew Koppelman, Thomas Berg, and Nathan Oman. But their work relies, implicitly or explicitly, on neoclassical assumptions about human behavior, and offers theoretical suppositions that are not supported by empirical evidence. Nathan Oman invokes the 18th-century *doux commerce* theory, which proposes that, in a market setting, gentle manners and cordiality will be favored because individuals all act rationally and with maximum self-interest—an idea that "harks back to eighteenth-century theorists of the market[.]" Nathan B. Oman, *Doux Commerce, Religion, and the Limits of Antidiscrimination Law*, 92 Ind. L.J. 693, 719 (2017).

Andrew Koppelman supposes without supporting evidence that, so long as people are largely protected from discrimination, allowing "a few outliers" to refuse to serve for discriminatory reasons "won't make any difference." Andrew Koppelman, *Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law*, 88 S. Cal. L. Rev. 619, 627–628 (2015); accord L&E Amicus Br. 16. Likewise, Thomas Berg assumes that "only a very small number of deeply committed business owners would be likely" to discriminate because of market pressures to compete and maximize profits. Thomas C. Berg, *Symposium: Religious Accommodation and the Welfare State*, 38 Harv. J.L. & Gender 103, 138 (2015).

Understanding this theoretical background for the L&E Scholars' arguments is critical because, as discussed below, the ability of those theories to predict individuals' behavior has been significantly called into doubt.

II. Modern scholarship in behavioral economics has exposed flaws in neoclassical assumptions and undermines policy arguments premised on those assumptions.

Neoclassical theory remains a viable basis for predicting macroeconomic impacts in contexts where its underlying assumptions of rational, informed action can be shown to be accurate. But more recent work in "behavioral economics"—which stands at the intersection of traditional economics and other social sciences, especially psychology—reveals the ways in

which rational decision-making is not the norm. Rather, decisions in the real world are systematically impacted by cognitive limitations, biases, and mental shortcuts. See *Misbehaving* 5–6; see also, *e.g.*, *Psychological Perspective, supra*; Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 Cal. L. Rev. 1051 (2000); *Behavioral Law and Economics* 1471; Amos Tversky & Daniel Kahneman, *Judgment under Uncertainty: Heuristics and Biases*, 185 Science 1124 (1974).

The field of behavioral economics explores these very human—and typically unseen—cognitive and emotional predispositions, which so heavily influence the decisions we make. Among other benefits, that exploration allows the public to better understand the practical effects of laws and policies.

At over forty years of study, behavioral economics is still a relatively new field, but in that short time it has won wide—and ever-growing—academic consensus regarding the accuracy of its conclusions. *E.g.*, *Misbehaving* 9–10. In fact, the Nobel Prize in Economics has been awarded multiple times in recent years for pioneering work in behavioral economics, to George Akerlof in 2001 (and to *Amicus* Joseph Stiglitz and A. Michael Spence in the same year for their related work in the economics of information); Daniel Kahneman in 2002; Robert Shiller in 2013; and Richard Thaler in 2017.

These findings have even migrated from the academy into mainstream consciousness and policymaking circles. Such works as Daniel Kahneman's *Thinking, Fast and Slow* (2011) (*Thinking, Fast and Slow*), Richard Thaler and Cass Sunstein's *Nudge: Improving Decisions About Health, Wealth, and Happiness* (2008) (*Nudge*), and Michael Lewis's *The Undoing Project: A Friendship That Changed Our Minds* (2016) have all helped to bring the key insights of behavioral economics into popular awareness.

As relevant here, this modern body of economic scholarship has demonstrated that markets cannot always be counted on to "self-correct" and produce a welfare-maximizing outcome because individuals in the market are not uniformly and reliably rational in a way that would support petitioners and the L&E Scholars' arguments, as the Behavioral Economics *amici* discuss in Part III, *infra*.

III. Markets do not operate on a purely rational basis, as behavioral economics reveals. Accordingly, they cannot be expected to eliminate the negative effects of discrimination.

The L&E Scholars assert (at 16–17), contrary to the great weight of research, their belief that the market self-corrects for discrimination, pushing out businesses that engage in invidious discrimination. But markets do not operate on a purely rational basis. Research consistently demonstrates that individuals labor under a range of biases that affect their behavior in the market, even when it is not in their rational,

economic self-interest. See, *e.g.*, Daniel Kahneman, Jack L. Knetsch & Richard H. Thaler, *Experimental Tests of the Endowment Effect and the Coase Theorem*, 98 J. Pol. Econ. 1325 (1990); Daniel Kahneman, Jack L. Knetsch, & Richard H. Thaler, *Anomalies: The Endowment Effect, Loss Aversion and Status Quo Bias*, 5 J. Econ. Perspectives 193 (1991); Colin F. Camerer, *Do Biases in Probability Judgment Matter in Markets? Experimental Evidence*, 77 Am. Econ. Rev. 981 (1987) (*Biases in Probability Judgment*); Colin Camerer *et al.*, *Labor Supply of New York City Cabdrivers: One Day at a Time*, 112 Q.J. Econ. 407 (1997) (*Labor Supply*); *Thinking, Fast and Slow, supra*; *Nudge, supra*; Oren Bar–Gill, *Seduction by Contract: Law, Economics, and Psychology in Consumer Markets* (2012); Richard H. Thaler & Cass R. Sunstein, *Market Efficiency and Rationality: The Peculiar Case of Baseball*, 102 Mich. L. Rev. 1390 (2004) (*Market Efficiency and Rationality*).

The market does not reliably self-correct and produce welfare-maximizing outcomes when this occurs. See, *e.g.*, Cass R. Sunstein, *Why Markets Don't Stop Discrimination*, 8 Social Phil. & Pol'y 22, 28, 36 (1991); Kerwin Kofi Charles & Jonathan Guryan, *Prejudice and Wages: An Empirical Assessment of Becker's The Economics of Discrimination*, 116 J. Polit. Econ. 773, 774–775, 781 (2008) (Charles & Guryan) (collecting authorities); *Labor Supply, supra*; *Biases in Probability Judgment, supra*; Kenneth J. Arrow, *What Has Economics to Say About Racial Discrimination?*, 12 J. Econ. Perspectives 91 (1998); Joseph E. Stiglitz, *Approaches to the Economics of Discrimination*, 63 Am.

Econ. Rev. 287 (1973) (Stiglitz); *Market Efficiency and Rationality, supra.*

Despite this body of research, the L&E Scholars claim (at 4) that market pressures will eliminate nearly all instances of discrimination without the need for legal prohibitions. As support—aside from the theoretical suppositions of Koppelman, Berg, and Oman discussed above (at pp. 6–7, *supra*)—the L&E Scholars cite (at 4, 14) Gary Becker's work on the economics of racial discrimination from his 1971 book, *The Economics of Discrimination*, *supra.* A closer examination of Becker's research reveals that the L&E Scholars' reliance on his work is misplaced.

While Becker is generally regarded as an economist in the neoclassical tradition, his work does not support the inferences L&E Scholars would have this Court draw. He concluded that while a "White" market may have experienced a net gain in income from discriminatory practices—at the expense of the segregated, African-American sector—discrimination had a distorting effect on the economy, and the free market did not "self-correct" or produce the welfare-maximizing outcome neoclassical economic models would have predicted. See Becker 2–3, 22–23.

Specifically, Becker's model showed that discrimination led to a decrease in trade and an increase in economic segregation, which closed off access to less expensive labor that would otherwise maximize net capital. *Id.* at 20–22. With respect to discrimination against African-Americans, there was no market "self-correction" in favor of maximizing capital. See *id.* at

20–22, 45, 156; see also Anne O. Krueger, *The Economics of Discrimination*, 71 J. Polit. Econ. 481, 483–486 (1963) (Krueger) (discussing Becker's work); Charles & Guryan 775, 780–781 (validating Becker's predictions that racial discrimination would have lasting negative effect on African-American wages); cf. Kenneth J. Arrow, *Some Models of Racial Discrimination in the Labor Market* 1, 6 (Rand 1971) (identifying deficiencies in neoclassical economics in analyzing racial discrimination).

Contemporary data confirm that the market does not reliably "self-correct" to end discrimination. See, *e.g.*, Charles & Guryan 775–776, 782–791 & fig. 1, tbl. 1 (analyzing data from the General Social Survey from 1972 through 2004 regarding racial prejudice, and finding that discrimination persists in the market); see also Becker 2–3, 155–156, 161 (market discrimination against the best educated and trained non-whites increased since 1957); Krueger 483–486 (positing why racial discrimination persists despite its inefficiency); Stiglitz, *supra* (market imperfections and discriminatory preferences contribute to existing wage gaps in the labor market); John A. List, *The Nature and Extent of Discrimination in the Marketplace: Evidence from the Field*, 119 Q. J. Econ. 49 (2004); Netta Barak–Corren, *A License to Discriminate? The Market Response to* Masterpiece Cakeshop, 56 Harv. C.R.-C.L. L. Rev. 315, 320, 347 (2021) (Barak–Corren) (finding that on average, wedding-industry businesses, including formerly "gay-friendly" ones, are 8.4% less likely to serve same-sex couples compared to heterosexual couples than they were before the *Masterpiece Cakeshop* decision, raising the aggregate risk

that a same-sex couple will experience discrimination to between 61% and 85% as they plan their wedding); accord Netta Barak–Corren, *Religious Exemptions Increase Discrimination Toward Same-Sex Couples: Evidence from* Masterpiece Cakeshop, 50 J. Legal Stud. 75 (2021).

Thus, while the L&E Scholars are not the first to argue that market forces will eliminate or minimize discrimination, and prejudiced businesses will be "driven out of the market," modern economic research has demonstrated otherwise. *E.g.*, Charles & Guryan 774–775, 781 (collecting authorities); pp. 10–12, *supra*.

The L&E Scholars contend that the impact of their proposal will be modest, and assert (at 2) that "market forces will ensure that only those few artists with substantial conscience objections will seek an exception from antidiscrimination laws." But again, the empirical evidence points otherwise. Research has revealed that after *Masterpiece Cakeshop, Ltd.* v. *Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), same-sex couples experienced a "substantial reduction" in businesses' willingness to provide them wedding services. Barak–Corren 348.

Contrary to the L&E Scholars' assumption, the author of the *Masterpiece Cakeshop* study concluded that denials of service increased based on the "seeming availability" of an exemption. Barak–Corren 365. And while market alternatives do exist—there are vendors who will provide services to same-sex cou-

ples—"granting a religious exemption encourages discrimination towards same-sex couples nevertheless, across a wide range of social and legal categories." *Id.* at 361. "[T]he results of the *Masterpiece Cakeshop* experiment discredit the argument that the effect of religious exemptions is negligible and that exemptions will not promote discrimination. Instead, what . . . [it] shows is that even an intentionally narrow and case-specific exemption can have a substantial impact on an industry and its customers." *Id.* at 320. This finding is consistent with the behavioral science literature, which documents that consumer preferences are not stable and that the law—like other situational factors—will influence them. See, *e.g.*, Cass R. Sunstein, *Free Markets and Social Justice* 4–7, 14–17 (1997); Dan Ariely & Michael I. Norton, *How actions create – not just reveal – preferences*, 12 Trends in Cognitive Sciences 13 (2008). In other words, discrimination actually increases in the absence—or even narrowing—of direct regulation, notwithstanding the hypothetical economic disincentives highlighted by the L&E Scholars.

IV. The L&E Scholars' neoclassical assumptions provide no greater support for discrimination based on sexual orientation than they do for racial discrimination.

The L&E Scholars anticipate the point that their theories have proven false in the context of racial discrimination and attempt to distinguish petitioners' proposal for a constitutional right to discriminate against same-sex couples. They claim (at 10, 17) that a monopoly of discriminatory businesses in the Jim

Crow South distorted the free market in ways that "do not exist" today. But L&E Scholars overlook that Becker himself concluded that African-Americans in the United States suffer disproportionately from discrimination because "even without monopolies, trade unions, and government discrimination, substantial discrimination by whites . . . would greatly reduce the net income" of African-Americans. Becker 158; see also *id.* at 48–50 (documenting that discrimination occurs in both monopolistic and nonmonopolistic industries). A monopoly may be a sufficient but not necessary condition for invidious discrimination to flourish unchecked in the market. *Id.* at 48–50, 158; Part III, *supra*.

The L&E Scholars appear to have retreated from the claim they advanced in prior briefs that same-sex couples can fare perfectly well in the marketplace because the Internet offers lists of "gay-friendly" businesses. L&E C.A. Amicus Br. 12 & n.2; L&E Amicus Br. at 3, 12–13 & n.2, *Masterpiece Cakeshop, Ltd.* v. *Colo. C.R. Comm'n*, 138 S. Ct. 1719 (2018) (No. 16-111), 2017 WL 4118065, at *3, 12–13 & n.2 (Sept. 6, 2017). Perhaps the L&E Scholars have backed away from this argument because of its obvious parallel to the "Green Book" that guided African-Americans to "Black-friendly" businesses until Congress enacted the Civil Rights Act of 1964. See Victor Hugo Green, *The Negro Motorist Green Book: An International Travel Guide*, N.Y. Pub. Library, https://digitalcollections.nypl.org/collections/the-green-book#/ (*Green Book*); Celia McGee, *The Open Road Wasn't Quite Open to All*, N.Y. Times, Aug. 22, 2010, www.nytimes.com/2010/08/23/books/23green.html. Of course,

such lists are popular precisely because they help gay individuals and couples avoid humiliation, or worse, in the face of pervasive homophobia. Cf. *Green Book, supra* ("There will be a day sometime in the near future when this guide will not have to be published. That is when we as a race will have equal opportunities and privileges in the United States.").

However, the L&E Scholars continue to make essentially the same argument when they insist (at 1, 7–8, 10) that, so long as petitioners' business is "reasonably interchangeable" with that of other vendors, the state has no recourse to protect same-sex couples from discrimination when businesses like petitioners' refuse to serve them. Like the L&E Scholars' previous argument regarding the availability of lists of "gay-friendly" businesses, their argument regarding the availability of "reasonably interchangeable businesses" cannot in any principled way be limited to LGBT discrimination. The L&E Scholars' arguments would apply with equal force to any form of invidious discrimination. Cf. *Loving* v. *Virginia*, 388 U.S. 1, 3 (1967) (quoting *Loving* v. *Commonwealth* (Va. Cir. Ct. Caroline Cty. Jan. 22, 1965)); Leora F. Eisenstadt, *Enemy and Ally: Religion in* Loving v. Virginia *and Beyond*, 86 Fordham L. Rev. 2659 (2018).

Similarly, the L&E Scholars' argument (at 3) that market participants should be permitted to self-"match" based on their shared "preferences" for certain goods, like goods "Made in America," is evocative of the "taste for discrimination" that Gary Becker documented among Whites in 1957 and 1971. Becker 6, 153. (Technically, this would be an example of market

"segregation" in Becker's model—which Becker posited (at 22) would increase as discrimination in society increases.) Indeed, the L&E Scholars go on to acknowledge quite candidly (at 4) that their "matching" policy would extend to ethnic groups as well as religious, age, occupational, and economic groups. But, once again, the L&E Scholars' position is refuted by the very authority on whom they rely: Becker observed that when market participants act on their "taste for discrimination," overall trade is reduced, as is the net income for both the minority and majority groups. Becker 6, 19–21. And while the L&E Scholars argue (at 4) that fostering a diversity of businesses serving different clientele "is a social good because it expands opportunities for producers and consumers alike," they give little or no weight to the countervailing social and economic ills that invidious discrimination wreaks on individuals and society. Cf. Daniel Kahneman, Jack L. Knetsch & Richard H. Thaler, *Fairness and the Assumptions of Economics*, 59 J. of Bus. S285 (1986); see also Becker 24 ("[C]omplete segregation does not avoid the bad economic effects of discrimination but only multiples them.").

It is noteworthy that the L&E Scholars claim (at 17) that there is no anti-LGBT monopoly akin to the Jim Crow South because "public institutions stand foursquare against discrimination[.]" In so claiming, the L&E Scholars tacitly acknowledge that state regulation is the reason LGBT persons do not presently face discrimination akin to that historically experienced by African-Americans. That is, the very antidiscrimination laws that the L&E Scholars claim are un-

necessary are, in their account, shown to be responsible for the comparatively favorable social conditions they claim render those laws unnecessary. This internal tension in the L&E Scholars' arguments reveals an implicit recognition that economic incentives are inadequate to the task of preventing discrimination, just as they always have been.

The L&E Scholars' attempt to distinguish between discrimination based on race and sexual orientation rings particularly hollow in light of the fact that their own Richard Epstein has used the same arguments he presents here to advocate for the total repeal of the Civil Rights Act of 1964, some of which they even cite (at 4, 17) in their brief before this Court. See Richard A. Epstein, *Public Accommodations Under the Civil Rights Act of 1964: Why Freedom of Association Counts as a Human Righ*t, 66 Stan. L. Rev. 1241, 1291 (2014); Richard A. Epstein, *Forbidden Grounds: The Case Against Employment Discrimination Laws* (1992).

Epstein's writings only bolster the conclusion that the L&E Scholars present no principled reason to distinguish the predicted economic consequences of discrimination based on sexual orientation from those based on racial discrimination. Rather than advance an argument supported by empirical evidence, closer inspection of the L&E Scholars' brief reveals that their position is a normative one cloaked in the guise of science.

CONCLUSION

No contemporary consensus regarding economic principles supports discrimination—or exceptions to antidiscrimination laws—as a societal good. The modern corpus of economic research undermines the inferences the L&E Scholars ask this Court to draw. Rather, their argument that antidiscrimination laws should be held to be unnecessary and the market should have the opportunity to self-correct is a normative position, nothing more. Their appeal to economic principles is unscientific and should not be credited.

Respectfully submitted,

JOSEPHINE K. PETRICK
Counsel of Record
ADAM W. HOFMANN
DAVID C. CASARRUBIAS
BREANA L. BURGOS
ASHLEY Y. NAKAI
Hanson Bridgett LLP
425 Market Street, 26th Fl.
San Francisco, CA 94105
(415) 777-3200
jpetrick@hansonbridgett.com

APPENDIX OF AMICI[1]

Ian Ayres
Oscar M. Ruebhausen Professor
Yale Law School
New Haven, CT

Max H. Bazerman
Jesse Isidor Straus Professor of Business Administration
Harvard Business School, Harvard University
Boston, MA

Monica C. Bell
Professor of Law and Associate Professor of Sociology
Yale Law School, Yale University
New Haven, CT

Colin F. Camerer
Robert Kirby Prof. of Behavioral Economics
Caltech
Dir., T&C Chen Center for Social and Decision Neuroscience
Pasadena, CA

Issa Kohler–Hausmann
Professor of Law and Associate Professor of Sociology
Yale Law School, Yale University
New Haven, CT

---

[1] Titles and institutional affiliations are provided for identification purposes; the views expressed are the authors' and *amici*'s own, and do not necessarily represent the views of their respective institutions.

Peter H. Huang, J.D., Ph.D.
Professor (Ret. 2022)
University of Colorado Law School
Boulder, CO

David Laibson
Robert I. Goldman Professor of Economics
Harvard University
Cambridge, MA

Mary-Hunter McDonnell, JD, PhD
The Wharton School
The University of Pennsylvania
Philadelphia, PA

Neeru Paharia
Associate Professor
McDonough School of Business
Georgetown University
Washington, D.C.

Joseph E. Stiglitz
University Professor, Columbia University
Co-recipient of the 2001 Nobel Memorial Prize in Economics
New York, NY

Maurice E. Stucke
Douglas A. Blaze Distinguished Professor of Law
University of Tennessee College of Law
Knoxville, TN

Lauren E. Willis
Associate Dean for Research, Professor of Law &
William M. Rains Fellow
Loyola Law School, Loyola Marymount University
Los Angeles, CA