No. 21-476

# In the Supreme Court of the United States

303 CREATIVE LLC et al.,

*Petitioners*,

v.

AUBREY ELENIS et al.,

*Respondents.*

**On a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit**

## BRIEF OF LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AND EIGHT ADDITIONAL CIVIL RIGHTS ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS


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## INTRODUCTION AND INTERESTS OF THE AMICI CURIAE*

We take for granted today that a musician cannot refuse to perform before an audience because it is racially mixed, and that a bakery cannot refuse to design a custom wedding cake for a couple because they are Black. But it has only been 58 years since white business owners could deny Black customers access to many goods and services, sometimes even with the blessing of a state's Jim Crow law. Public-accommodation laws continue to this day to help ensure that Black people and other people of color can live their day-to-day lives with basic dignity and respect and, when necessary, secure important remedies against discrimination. Yet the logical extension of petitioners' arguments would authorize any business arguably engaged in artistic pursuits to lawfully discriminate against racial and other historically disadvantaged groups by citing free speech.

Public-accommodation laws were hard-earned, the product of decades' worth of suffering and struggle by Black and other people of color seeking access to goods and services on the same terms as everyone else. Though Congress and the States have various laws that prohibit public discrimination by the government, so much of our everyday lives takes place in private. To guard against segregation in these daily activities, Congress and most States have enacted public-accommodation laws. See National Conference of State Legislators, *State Public Accommodation Laws* (June 25, 2021), perma.cc/NK2X-QBZS. These laws play an essential role in this nation's ongoing drive to ensure equality for every person, and

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* No counsel for a party has authored this brief in whole or in part, and no person other than *amici* or their counsel contributed financially to the preparation or submission of this brief. All parties have consented to the filing of this brief by blanket consent.

courts have consistently upheld them against constitutional attacks.

Petitioners now seek to establish a broad free-speech exemption from Colorado's public-accommodation law. But allowing free speech to override the government's compelling interest in combatting discrimination in public accommodations would undermine those laws' critical protections for people who have been subjected to a clear history of discrimination.

Amici know well the severe discrimination to which people of color, including those who identify as lesbian, gay, bisexual, transgender, and queer/questioning (LGBTQ+), have been subjected and the serious consequences that petitioners' position would inflict if free speech overrides public-accommodation laws. Amici are the Lawyers' Committee for Civil Rights Under Law joined by the Anti-Defamation League, the Center for Constitutional Rights, LatinoJustice PRLDEF, the National Association for the Advancement of Colored People (NAACP), the Mississippi Center for Justice, Public Counsel, the Southern Poverty Law Center, and the Washington Lawyers' Committee for Civil Rights and Urban Affairs. These organizations all have different missions, but each is committed to furthering the goal of eradicating discrimination in public accommodations.

Formed in 1963, the Lawyers' Committee is a nonpartisan, nonprofit organization that uses legal advocacy to achieve racial justice, fighting inside and outside the courts to ensure that Black people and other people of color have the voice, opportunity, and power to make the promises of our democracy real. To that end, the Lawyers' Committee has participated in hundreds of cases involving issues related to voting rights, housing, employment, education, and public accommodations. See, *e.g.*, *Students for Fair Admissions, Inc.* v. *University of North Carolina*, No. 21-707; *Masterpiece Cakeshop* v. *Colorado Civil*

*Rights Comm'n*, 138 S. Ct. 1719 (2018); *Shelby Cnty.* v. *Holder*, 570 U.S. 529 (2013); *Arizona* v. *Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1 (2013). As a leading national racial justice organization, the Lawyers' Committee has a vested interest in ensuring that people of color, including those who identify as LGBTQ+, have strong, enforceable protections from discrimination in places of public accommodation.

As amici can attest, despite the advances our country has made in eradicating segregation and other forms of invidious discrimination, people of color continue to suffer from structural and pervasive discrimination. Bigotry persists, and hate crimes have increased across the country in recent years. Today, people of color continue to receive worse treatment in the marketplace and experience disparate access to goods and services as a result of business owners' biased attitudes. Public-accommodation laws remain an essential tool for ensuring access to services, promoting equality, and providing relief when consumers experience discrimination.

Colorado's law and state public-accommodation laws like it are designed to ensure that, when choosing to do business in the state, covered businesses treat everyone equally. These laws strengthen our country by ensuring our economy is an inclusive one where all people regardless of background, identity, or belief can participate free of discrimination. Petitioners seek a ruling that would give a custom wedding website designer the right to refuse service to members of an historically disadvantaged population because of their identity, and to advertise that it will not serve them, on the basis of free speech. Carving out such a gaping exception to public-accommodation laws for businesses that deliver custom goods and services cannot be limited for long, no matter how petitioners attempt to downplay the scope of their arguments.

This Court has long affirmed that free-speech interests must be balanced against, and yield to, the government's exceptionally compelling interest in ensuring that members of historically disadvantaged populations are not denied access to publicly available goods and services because they belong to a particular race, religion, gender, or sexual orientation. Free-speech objections have not been enough to exempt a business from laws mandating equal access to publicly available goods and services. Any retreat from these well-settled principles threatens to frustrate these hard-fought civil rights protections and to amplify the discrimination that people of color, including LGBTQ+ people of color, continue to experience in the marketplace to this day.

## ARGUMENT

## UPHOLDING PUBLIC-ACCOMMODATION LAWS IS ESSENTIAL TO ENSURE BLACK PEOPLE AND OTHER PEOPLE OF COLOR CAN ACCESS PUBLICLY AVAILABLE GOODS AND SERVICES.

### A. Civil rights laws have played an integral role in rooting out discrimination in public accommodations.

Public-accommodation laws were borne out of necessity. Since this country's founding, Black communities and other communities of color have faced discriminatory laws and practices that excluded them from businesses that serve the general public. In the post-Reconstruction United States, states ushered in the Jim Crow era by systematically relegating Black people to second-class citizenship. They did so by enacting laws, ordinances, and customs that separated white and Black people in every conceivable area of life. C. Vann Woodward, *The Strange Career of Jim Crow* 7 (1955). This code of segregation "lent the sanction of law to a racial ostracism that extended to churches and schools, to housing and jobs, to eating and drinking," and "that ostracism extended to

virtually all forms of public transportation, to sports and recreations, to hospitals, orphanages, prisons, and asylums, and ultimately to funeral homes, morgues, and cemeteries." *Ibid.* Racial segregation was not limited to the postbellum South. To the contrary, some northern states maintained separate schools for Black children and had laws against intermarriage. See John Hope Franklin, *History of Racial Segregation in the United States*, 304 The Annals of the American Academy of Political and Social Science 1, 1-9 (1956).

Congress first attempted to prohibit discrimination on the basis of race in places of public accommodation through the passage of the Civil Rights Act of 1875. Franklin, *supra*, at 6-9. This Court, however, held the Act exceeded Congress's power under the Thirteenth and Fourteenth Amendments. See *The Civil Rights Cases*, 109 U.S. 3 (1883). Southern states responded with a steady onslaught of legislation to ensure that Black people remained segregated in nearly every aspect of society. Franklin, *supra*, at 6-9. "The supply of ideas for new ways to segregate seemed inexhaustible," and "[n]umerous devices were employed to perpetuate segregation in housing, education, and places of public accommodation," including "[s]eparate Bibles for oath taking in courts of law, separate doors … separate elevators and stairways, [and] separate drinking fountains." *Id.* at 8. And, where laws left gaps, informal codes filled them. So eager were states to divide people based on race that "separate toilets existed even where the law did not require them." *Ibid.*

Given the painful brutality of segregation, and despite the very real threat of arrest and severe physical harm, Black people and others opposed to segregation staged protests and boycotts throughout the early and mid-twentieth century. See generally David Benjamin Oppenheimer, *Kennedy, King, Shuttlesworth and Walker: The Events Leading to the Introduction of the Civil Rights*

*Act of 1964*, 29 U.S.F. L. Rev. 645 (1995). Those efforts eventually brought national attention to the inhumanity of segregation and resulted in successful legal challenges to discrimination in access to voting (*Smith* v. *Allwright*, 321 U.S. 649 (1944)), interstate buses (*Morgan* v. *Virginia*, 328 U.S. 373 (1946)), graduate school facilities (*McLaurin* v. *Oklahoma State Regents for Higher Educ.*, 339 U.S. 637 (1950)), law school admissions (*Sweatt* v. *Painter*, 339 U.S. 629 (1950)), and, of course, public school education (*Brown* v. *Board of Educ.*, 347 U.S. 483 (1954)). These victories slowly but steadily chipped away at segregation's reach.

While courtroom constitutional challenges helped stymie public discrimination, the Constitution offered little refuge against private discrimination. Private businesses could continue refusing to provide publicly available goods and services to people of color. So ubiquitous was this private discrimination that Black people traveling within the United States turned to guides like *The Green Book* to learn where they could safely access hotels, restaurants, gas stations, and other types of businesses.[2] The introduction to the 1948 edition offered a poignant observation about the state of private discrimination in the era:

> 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 have equal opportunities and privileges in the United States. It will be a great day for us to suspend this publication when we can come and go as we please, and without embarrassment. But until that time comes we

[2] The New York Public Library has digitized many years' worth of *The Green Book*. They are available at digitalcollections.nypl.org/collections/the-green-book.

> shall continue to publish this information for your convenience each year.

*The Green Book* (Victor H. Green ed., 1948).

To fill the gap, states began to combat discriminatory business practices by enacting or increasing enforcement of public-accommodation statutes. See *Roberts* v. *United States Jaycees*, 468 U.S. 609, 624 (1984). Such state laws "provided the primary means for protecting the civil rights of historically disadvantaged groups until the Federal Government reentered the field" with the Civil Rights Act of 1957. *Ibid.*; see also *The Green Book* 2-4 (Victor H. Green ed., 1963) (summarizing state public-accommodation laws and where to lodge complaints).

After numerous legal challenges and non-violent resistance to racial segregation in places of public accommodation, the federal government followed suit with the Civil Rights Act of 1964. Title II of that act prohibited discrimination by entitling everyone in this country to "the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin." 42 U.S.C. § 2000a(a). A watershed enactment, Title II aimed to eliminate the loss of "personal dignity that surely accompanies denials of equal access to public establishments." S. Rep. No. 88-872 (1964), *reprinted in* 1964 U.S.C.C.A.N. 2355, 2370. The Senate Committee on Commerce's report stressed that "[d]iscrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public because of his race or color." *Ibid.* In a 1964 challenge to the Civil Rights Act, this Court finally distinguished *The Civil Rights Cases* and affirmed Congress's Commerce Clause authority to

establish federal public-accommodation laws affecting interstate commerce. See *Heart of Atlanta Motel* v. *United States*, 379 U.S. 241, 250-262 (1964).

Colorado is no exception to this odious history of discrimination against Black people that underlies the need for a strong public-accommodation law. Despite an 1895 state public accommodation law, segregation was custom in Colorado with "white politicians and business owners routinely ignor[ing] the equal access statute." See Dani Newsum, *Lincoln Hills and Civil Rights in Colorado* 12 (2015), perma.cc/5R22-V3HA. And, during the early 20th century, Colorado had one of the largest Ku Klux Klan organizations in the United States, with a membership that included a U.S. senator, a governor, state legislators, and a Denver mayor and police chief. *Id*. at 4.

Other communities of color likewise experienced invidious discrimination in Colorado. In the 1880s, anti-Chinese sentiment in Denver prompted a riot that attacked Chinese residents and burned their businesses and homes. See Mark R. Ellis, *Denver's Anti-Chinese Riot*, *in Encyclopedia of the Great Plains* (2011), perma.cc/Y4WB-ZAGW. Mexican American families were subjected to an Alamosa school district's policy of sending all Mexican American children to a separate school, despite the Colorado Constitution's prohibition on such segregation. See Sylvia Lobato, *School Lawsuit from 1914 Remembered*, Valley Courier (May 12, 2018), perma.cc/NN9J-T7ZK. And in the 1940s, Japanese Americans were forced into internment camps, including the Amache Camp in southeastern Colorado. See Nathan Heffel, *Amache: Japanese-American Internee Remembers His Years Without Freedom*, Colorado Public Radio (May 18, 2018), perma.cc/6LJZ-2R5L.

For LGBTQ+ individuals, it was only 30 years ago that a Colorado statewide referendum resulted in a state constitutional amendment effectively repealing any local

efforts to prevent discrimination on the basis of sexual orientation. *Romer* v. *Evans*, 517 U.S. 620, 623-624 (1996). The Colorado constitutional amendment, later struck down by this Court, followed decades of efforts by anti-LGBTQ+ activists to limit the rights of LGBTQ+ people to be free from police profiling, targeted criminalization, and discrimination in housing, employment, and public accommodations. See Br. for *Amicus Curiae* National Bar Ass'n in Support of Resps. 5-7, *Masterpiece Cakeshop, Ltd.* v. *Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018) (No. 16-111).

Colorado's public-accommodation law, like its federal and sister-state counterparts, is a crucial safeguard against the deprivation of personal dignity that accompanies a discriminatory refusal to serve. It is only because of laws like Colorado's that people of color and members of other historically disadvantaged groups are ensured access to publicly available goods and services on equal terms.

### B. This Court has repeatedly upheld public-accommodation laws over constitutional challenges.

Just like the Colorado public-accommodation statute at issue here—and similar state statutes throughout the country—Title II also faced strong opposition from recalcitrant business owners who sought to maintain the codified racial discrimination of Jim Crow. For decades, business owners have been seeking exceptions to public-accommodation laws that would allow them to intentionally discriminate against customers, and this Court has rejected those challenges time and again.

As the Court explained more than 50 years ago, in a "long line of cases," the Court "has rejected the claim that the prohibition of racial discrimination in public accommodations interferes with personal liberty." *Heart of*

*Atlanta Motel*, 379 U.S. at 260; see also *Jaycees*, 468 U.S. at 625.

In *Heart of Atlanta Motel*, the petitioner specifically framed "the fundamental issue" as "whether or not Congress has the power to take away the personal liberty of an individual to run his business as he sees fit with respect to the selection and service of his customers" and contended that Black peoples' loss of rights was "purely incidental." Pet. Br. 32, *Heart of Atlanta Motel* v. *United States*, 379 U.S. 241 (1964) (No. 515). The petitioner analogized this "basic right to pursue his calling" as "a right just as fundamental to his life and liberty as such other high priority freedoms, to wit, freedom of speech and freedom of religion" and contended that an obligation to "furnish[] labor or services for certain individuals for whom he does not desire to work is obviously coercion if not outright punishment." *Id.* at 57. This Court, of course, squarely "rejected the claim" that Title II violated the liberty or property rights of business owners. 379 U.S. at 260.

This Court has also repeatedly confirmed that state public-accommodation laws do not generally infringe on free speech or other liberty interests. That is because States enjoy "broad authority to create rights of public access on behalf of [their] citizens." *Jaycees*, 468 U.S. at 625. And measured against this broad authority, the right to discriminate receives little weight. Indeed, this Court has rejected the idea that "every setting in which individuals exercise some discrimination in choosing associates, their selective process of inclusion and exclusion is protected by the Constitution." *New York State Club Ass'n* v. *City of Colorado*, 487 U.S. 1, 13-14 (1988); see also *Hishon* v. *King & Spalding*, 467 U.S. 69 (1984) (rejecting First Amendment defenses against Title VII enforcement).

Given these overwhelmingly strong state interests, public-accommodation laws withstand any level of constitutional scrutiny. These laws evince states' "strong historical commitment to eliminating discrimination and assuring its citizens equal access to publicly available goods and services"—a goal that "is unrelated to the suppression of expression" and that "plainly serves compelling state interests of the highest order." *Jaycees*, 468 U.S. at 624. Thus, even if these laws impose some infringement on First Amendment rights, "that infringement is justified because it serves the State's compelling interest in eliminating discrimination." *Board of Dirs. of Rotary Int'l* v. *Rotary Club of Duarte*, 481 U.S. 537, 549 (1987).

Many states now have public-accommodation statutes that prohibit discrimination against certain characteristics that Title II did not initially cover. And this Court has upheld the states' authority to broaden the scope of these public-accommodation laws. These laws, the Court has explained, are an extension of the common-law principle that "innkeepers, smiths, and others who 'made profession of a public employment' were prohibited from refusing, without good reason, to serve a customer." *Hurley* v. *Irish-American Gay, Lesbian and Bisexual Grp. of Boston*, 515 U.S. 557, 571 (1995). Because that general common-law duty "proved insufficient in many instances," modern statutes codified and built on these common-law protections by "enumerating the groups or persons within their ambit of protection." *Romer*, 517 U.S. at 627-628. That "[e]numeration is the essential device [states] used to make the duty not to discriminate concrete and to provide guidance for those who must comply" (*id.* at 628), and this Court has expressly affirmed states' power to determine which groups suffer from discrimination and warrant protection (*Hurley*, 515 U.S. at 572). Prohibiting discrimination on the basis of "race, color, religious creed,

national origin, sex, [and] sexual orientation" are "well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination." *Hurley*, 515 U.S. at 572; see also *Romer*, 517 U.S. at 629.

These expanded protections generally satisfy both the First and Fourteenth Amendments because they do not "on [their] face, target speech or discriminate on the basis of [their] content, the focal point of [their] prohibition being rather on the act of discriminating against individuals in the provision of publicly available goods, privileges, and services on the proscribed grounds." *Hurley*, 515 U.S. at 572. The Colorado public-accommodation law merely continues this "venerable history" of state efforts to weed out discriminatory treatment of its residents in the provision of goods and services. *Ibid.*

These principles remain regardless of whether a publicly available good or service qualifies as "custom." "[O]ne would expect" retail shops, including businesses that deliver custom goods and services, "to be places where the public is invited" because they are still "clearly commercial entities" properly subject to state nondiscrimination provisions. *Boy Scouts of Am.* v. *Dale*, 530 U.S. 640, 657 (2000); see also *Romer*, 517 U.S. at 628. Indeed, the "custom" label would seem to fit innumerable goods and virtually all services—serving a made-to-order meal, tailoring a suit, styling hair, printing invitations, or running a funeral service. Whether "custom" or not, the State's interest in ensuring that people of all races, religions, genders, and sexual orientations can access publicly available goods and services on equal terms is compelling. After all, retailers are not guaranteed "a right to choose … customers … or those with whom one engages in simple commercial transactions, without restraint from the State." *Jaycees*, 468 U.S. at 634 (O'Connor, J., concurring). Custom or not, there is no right to deal only with

persons of one background or identity by asking that free-speech rights override the state's compelling interest in eradicating discrimination.

### C. Allowing a public accommodation's speech interest to override the state's compelling interest in preventing discrimination would frustrate these essential protections.

Petitioners' attempt to establish an expansive free-speech exception to public-accommodation laws for allegedly expressive services threatens to undermine the protections afforded by public-accommodation laws.

As respondents persuasively explain (Resp. Br. 12-24), freedom of speech and expression are not implicated in this case at all. At bottom, 303 Creative is a business, not a personal hobby for its owner. If its owner wanted to spend her free time designing wedding websites that illustrate her beliefs regarding marriage for no charge, she could pick and choose her subjects without triggering Colorado's public-accommodation law. But 303 Creative's primary function is to sell goods and services to customers, and once a company "enters the marketplace of commerce in any substantial degree it loses the complete control over its membership that it would otherwise enjoy if it confined its affairs to the marketplace of ideas." *Jaycees*, 468 U.S. at 636 (O'Connor, J., concurring). As long as 303 Creative is open to the public, Colorado law simply requires that it provide its services to paying customers without regard to their sexual orientation, race, sex, creed, or other protected classifications under Colorado law.

Beyond that, public-accommodation laws and the First Amendment can and long have coexisted. When equal access to commercially available goods and services in the marketplace is at stake, businesses' free-speech rights must yield to ensure that people of color and all the

other protected classes can access those goods and services, free from discrimination.

To start, the First Amendment poses no bar to a state's regulation of speech incidental to illegal discrimination. Laws that forbid commercial actors from making statements that enable illegal discrimination—by communicating that certain goods or services are off limits to some because of their protected class status—satisfy the First Amendment. See *Sorrell* v. *IMS Health, Inc.*, 564 U.S. 552, 567 (2011) ("[T]he First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech. That is why a ban on race-based hiring may require employers to remove 'White Applicants Only' signs."); see also *Rumsfeld* v. *Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006) (offering "White Applicants Only" as an illustration of speech that is unprotected because of its relationship to illegal conduct); *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973) (forbidding newspapers from publishing job advertisements in sex-designated columns except where the employer was free to discriminate in hiring on the basis of sex survived First Amendment challenge). Refusing to serve certain customers on the basis of a protected characteristic is discrimination and thus not speech that is constitutionally protected at all. Petitioners are therefore wrong to suggest (at 34) that their statements are incidental to an *invalid* restriction on constitutionally protected speech. Instead, petitioners' refusal to provide services to individuals based on their sexual orientation facilitates illegal discrimination that is not protected under the First Amendment.

Even if Colorado's public-accommodation law does burden petitioners' speech rights, the law would pass any level of scrutiny for the basic reason that the government has a well-established, compelling interest in

"eradicating discrimination." *Jaycees*, 468 U.S. at 623. Black people suffered from invidious discrimination for more than 150 years before finally securing an efficacious federal prohibition on discrimination in many public accommodations. Securing similarly efficacious state anti-discrimination laws was likewise a monumental effort ongoing since 1865. See Lisa Lerman & Annette Sanderson, *Discrimination in Access to Public Places: A Survey of State and Federal Public Accommodations Laws*, N.Y.U. Rev. L. & Soc. Change 215, 238 (1978). These laws today evince broad legislative consensus that access to publicly available goods and services should not be denied on the basis of race, sex, religion, or another protected class and that, when a business places its goods and services into the marketplace, the state has a compelling interest in ensuring that all people can access those goods and services on equal terms.

This "compelling interest" in "prevent[ing]" these "acts of invidious discrimination in the distribution of publicly available goods, services, and other advantages" (*Jaycees*, 468 U.S. at 628) overcomes any alleged speech interests. That is why in *Jaycees*, this Court held that even if a public-accommodation statute "causes some incidental abridgement of the Jaycees' protected speech" by requiring inclusion of women, "that effect is no greater than necessary to accomplish the State's legitimate purposes." *Ibid.* This is true for public accommodations. See *Heart of Atlanta Motel*, 379 U.S. at 260; *Duarte*, 481 U.S. at 549 ("Even if the [public accommodations statute] does work some slight infringement on [the] right of expressive association, that infringement is justified because it serves the State's compelling interest in eliminating discrimination[.]"). And it is true in other important contexts. See *Bob Jones Univ.* v. *United States*, 461 U.S. 574, 604 (1983) ("[T]he Government has a fundamental, overriding interest in eradicating racial discrimination in

education."); *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682, 733 (2014) ("[T]he Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal.").

At every turn, 303 Creative repeats or reinvents arguments levied against civil rights laws for decades. But these arguments fail for the same reasons that their predecessors did. States have a compelling interest in eradicating discrimination in the marketplace and ensuring that all people have equal access to publicly available goods and services on equal terms. As such, under any degree of scrutiny, Colorado's law passes constitutional muster.

### D. Historically marginalized groups, including Black people, people of color, LGBTQ+ individuals, and other groups continue to experience discrimination and need strong public-accommodation laws.

Opening the door to broad free speech exemptions to civil rights statutes will harm not only LGBTQ+ members of society but people of all races, sexes, creeds, national origins, and more. If businesses may intentionally discriminate against LGBTQ+ people, for reasons allegedly rooted in speech interests, they will inevitably seek to discriminate against other groups too on free-speech grounds. Although this country has made great strides in combatting racial prejudice, this societal blight persists today. Just as in 1968, public-accommodation statutes remain a vital prophylactic that allow people of color to participate fully and freely in the market.

Because petitioners insist that their free speech rights preclude designing wedding websites for same-sex weddings, rest assured that another business owner will insist that those same rights preclude them from creating a

website for an interracial ceremony. And a free-speech exception to public-accommodation laws would almost certainly sweep more broadly than that.

### *1. Discrimination persists today, even with strong public-accommodation laws.*

**a.** LGBTQ+ people rely on the continued protection of anti-discrimination laws that have started to disrupt an ongoing legacy of discrimination. Yet LGBTQ+ individuals—especially those who are Black—continue to face severe discrimination. In Colorado, hate crimes increased by 138% from 2018 to 2019 and another 23% in 2020, with the most common crime involving racial bias and the second most common involving bias against gay people. See U.S. Dep't of Justice, *Colorado Hate Crimes Incidents in 2020* (as of Aug. 10, 2022), perma.cc/FV43-FNSL; Alayna Alvarez & John Frank, *Hate Crimes in Colorado Rise to Record Levels*, Axios (Aug. 31, 2021), perma.cc/BBX6-GG2D.

People who experience discrimination doubly on the basis of race or ethnicity and sexual orientation are even more susceptible to hate and bias incidents,[3] to workplace

[3] National Coalition of Anti-Violence Programs, *Lesbian, Gay, Bisexual, Transgender, Queer, and HIV-Affected Hate Violence in 2016* 30 (2017), perma.cc/6Q92-TB3K

discrimination and harassment,[4] to discrimination by healthcare providers and receiving substandard medical care,[5] and to being disproportionately more likely to be housing-insecure and living at or near the poverty level,[6] and more likely to have fewer opportunities for and worse access to education.[7]

LGBTQ+ individuals continue to experience discrimination in public accommodations too. LGBTQ+ individuals of color report high rates of avoiding public accommodations so that they do not experience discrimination: 36% report avoiding public spaces like stores or restaurants and 21% report avoiding getting necessary services for themselves or their families or avoiding travel to not experience discrimination. See Lindsay Mahowald, *LGBTQ People of Color Encounter Heightened Discrimination*, Center for American Progress (Jun. 24, 2021),

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[4] See NPR et al., *Discrimination in America: Experiences and Views of LGBTQ Americans* (Nov. 2017), perma.cc/RG7E-8M4G; Jaime M. Grant et al., *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* 51, 56 (2011), perma.cc/93TJ-6FMB; Human Rights Campaign Found., *The Impact of COVID-19 on LGBTQ Communities of Color* 2 (2020), perma.cc/PTQ2-FRY2; see also, *e.g.*, National Center for Transgender Equality, *Issues: Non-Discrimination Laws* (as of Aug. 10, 2022), perma.cc/KQP5-LKS5; M.V. Lee Badgett et al., *Bias in the Workplace: Consistent Evidence of Sexual Orientation and Gender Identity Discrimination*, Williams Inst. 3 (June 2007), perma.cc/NS2A-9K73 (reporting similar evidence of pronounced discrimination against LGBTQ+ employees of color); M.V. Lee Badgett et al., *Evidence from the Frontlines on Sexual Orientation and Gender Identity Discrimination*, Center for Employment Equity (July 2018), perma.cc/4EK8-5PMF (same).

[5] Center for American Progress & Movement Advancement Project, *Paying an Unfair Price: The Financial Penalty for LGBT People of Color in America* 10, 14 (June 2015), perma.cc/9H5V-P3KZ.

[6] Lourdes A. Hunter et al., *Intersecting Injustice: A National Call to Action* 11 (Mar. 2018), perma.cc/3JVE-PUCN.

[7] Center for American Progress, *supra*, at 24-28.

perma.cc/A6UM-SXX7. These responses are consistent with the real-world examples of LGBTQ+ individuals experiencing discriminatory refusals to serve in public accommodations. A gay couple from Glasgow, Kentucky, for example, attempted to do business in the city of Radcliff with a local tax preparer and saw a sign on the door stating "[h]omosexual marriage not recognized." In refusing to serve clients in a "homosexual marriage," the Kentucky accountant stated that there are other tax preparers that could do same-sex couples' taxes and that his stance was "protected by federal law." See Chelsea Stahl, *A 'Troubling Rise' In Business Owners Refusing Gay Couples Advocates Say*, NBC News (Apr. 21, 2021), perma.cc/4QBY-HWZF.

Given the disproportionate rates of discrimination faced by LGBTQ+ people in every aspect of their lives, preventing further discrimination against LGBTQ+ people, including LGBTQ+ people of color, is essential and the government has an especially compelling interest in doing so.

**b.** Despite the existence of public accommodation laws, race discrimination and other forms of discrimination have not yet been eradicated from the marketplace. For example, in 2019, a wedding venue refused to host a wedding for an interracial couple, telling the couple "[w]e don't do" "mixed race" weddings. Karen Zraick, *Mississippi Event Hall Refuses to Host Interracial Wedding, Then Apologizes*, N.Y. Times (Sept. 3, 2019), perma.cc/LN94-FEQF. And, in 2021, a food-court restaurant refused to serve two Black women, telling them that he thought they would not pay because of their race. Bryan Ke, *Japanese Restaurant in Illinois under Fire for Refusing Service to Two Black Customers*, Yahoo (Dec. 30, 2021), perma.cc/ZH98-MHB6.

Within the last decade, the owners of a gun range in Oklahoma posted a sign at the entrance of their business

stating: "This privately owned business is a Muslim free establishment!!! We reserve the right to refuse service to anyone!!!" Compl. ¶ 24, *Fatihah* v. *Neal*, No. 16-cv-00058 (E.D. Okla. Feb. 17, 2016), ECF No. 3 (all-capitalization omitted). After the range denied service to a Black Muslim U.S. Army reserve member, the owners invoked a First Amendment free-speech defense, arguing that the "Muslim Free" sign is "political and public issue speech such that any cause of action based on this speech is barred by the First and Fourteenth Amendments." Answer ¶ 24, *Fatihah*, No. 16-cv-00058 (E.D. Okla. Apr. 14, 2016), ECF No. 23. The district court correctly rejected that defense for the simple reason that "[t]he First Amendment is not a defense to a discrimination claim." Order at 10, *Fatihah*, No. 16-cv-00058 (E.D. Okla. Dec. 19, 2018), ECF No. 97 (citing *Rumsfeld*, 547 U.S. at 62).

Beyond the filed lawsuits lies an ocean of non-litigated instances of discrimination. In 2015, a Harvard Law professor recounted an instance where a Korean student and friends were excluded from a club because they "are Korean and that apparently bugged the bouncer"; when the group spoke with the manager, "the manager backed up the bouncer": "[n]ot only did he not let them in, he used a racial epithet to express his animus toward Asians." Joseph William Singer, *We Don't Serve Your Kind Here: Public Accommodations and The Mark Of Sodom*, 95 B.U. L. Rev. 929, 930 (2015). In March 2022, a hotel in Rapid City, South Dakota made a social media post announcing its new discriminatory guest policy: "[w]e will no long[er] allow any Native American on property" because they could not tell "who is a bad Native or a good Native." See Andrea Salcedo, *A Hotel Banned Native Americans. The Sioux Served a Trespassing Order.* The Wash. Post (Mar. 30, 2022), perma.cc/272Z-ZWXB.

These examples only scratch the surface of the pervasive discrimination that still exists in businesses and

private life. Permitting free speech interests to override the state's compelling interest in public-accommodation laws is certain to open the door to intensified discrimination against Black people and other historically disadvantaged groups. Members of other races, religious groups, and women have all experienced severe discrimination for much of our nation's history. Fortunately, laws have stepped in to protect them. See, *e.g.*, 42 U.S.C. §§ 1981, 1985(3); *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886) (as to Chinese nationals, "[t]he fact of this discrimination is admitted. No reason for it is shown, and the conclusion cannot be resisted that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which, in the eye of the law, is not justified."); *Frontiero* v. *Richardson*, 411 U.S. 677, 683-691 (1973) ("There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. … Congress itself has concluded that classifications based upon sex are inherently invidious … ."). Without the protections of strong public-accommodation laws, these groups will inevitably experience even more pervasive discrimination than they already do, without legal redress.

***2. Giving businesses a right to discriminate by invoking free speech would open the door for discrimination against people of color and every other protected class.***

If speech interests can override the state's compelling interest in preventing discrimination in public accommodations in this case, there would be innumerable ways in which businesses could effectively discriminate based on race, gender, religion, or any other basis. By simply posting signs warning people away from their establishments—conduct that is actively occurring today even without a free-speech exception to public-accommodation laws—businesses could engage in the very types of discrimination public-accommodation laws have long sought

to prevent. A wedding venue could conceivably tell customers it won't serve interracial couples, restaurant staff could lawfully tell Black customers it will not serve them, or businesses could simply post a sign to that effect.

Indeed, that is what petitioners propose to do. Petitioners want to publish the following statement:

- So I will not be able to create websites for same-sex marriages or any other marriage that is not between one man and one woman. Pet. App. 7a.

If that is free speech that overrides the government's compelling interest in preventing discriminatory refusals to serve, the statement need only be tailored slightly to reflect the logical extension of the argument:

- So I will not be able to create websites for interracial marriages or any other marriage that is not between people of the same race.

Or even:

- So I will not be able to create websites for Black peoples' marriages or any other marriage that is not between two white people.

If petitioners' view of free speech were to prevail, there is no discernable limit for its end. Petitioners envision a world where much of our lives could be permissibly segregated. Businesses could pick and choose customers based on race, sex, religious faith, national origin, age, and beyond. Even if those exclusions were limited to expressive activities, that may leave a world in which potentially restaurants, fashion boutiques, interior design shops, architecture firms, musicians, barbershops, theaters, and more could limit access to their goods and services based on free speech. Some businesses would seek to avoid complying with public-accommodation laws by asserting that the contents of their goods and services are

imbued with subjective expressions that depend on the identity of their customers.

Public-accommodation laws are not a necessity of the past but remain vital to ensuring equal access to the marketplace by people from historically disadvantaged backgrounds. It is precisely because of public-accommodation laws that Black people, people of color, women, members of religious groups, and LGBTQ+ individuals are guaranteed the right to access commercially available goods and services on the same terms as everyone else.

Public-accommodation laws have united us in private life while protecting individuals' dignity. This Court should reject petitioners' request for an exception that is inconsistent with both this Court's precedent and the principle that states may protect equal access to publicly available goods and services for all people.

## CONCLUSION

The Court should affirm.

Respectfully submitted.

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