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 THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Petitioners operate a commercial business designing websites and wish to offer wedding-website services to the public while denying those services to same-sex couples. The question presented in this pre-enforcement challenge is whether the Free Speech Clause entitles petitioners to a categorical exemption from a state law prohibiting discrimination by places of public accommodation.

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INTEREST OF THE UNITED STATES

This case presents the question whether the First Amendment's Free Speech Clause entitles a business to a categorical exemption from a law prohibiting discrimination by places of public accommodation. The United States enforces federal public accommodations laws, including Title II of the Civil Rights Act of 1964, 42 U.S.C. 2000a *et seq.*, and Title III of the Americans with Disabilities Act of 1990, 42 U.S.C. 12181 *et seq.* And the United States has a substantial interest in preventing discrimination and preserving First Amendment rights.

STATEMENT

1. Public accommodations laws guarantee equal access to the Nation's commercial life by ensuring that all Americans can acquire "whatever products and services they choose on the same terms and conditions as are offered to other members of the public." *Masterpiece*

Cakeshop, Ltd. v. *Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1728 (2018). Those laws have a "venerable history." *Hurley* v. *Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston, Inc.*, 515 U.S. 557, 571 (1995). "At common law, innkeepers, smiths, and others who 'made profession of a public employment,' were prohibited from refusing, without good reason, to serve a customer." *Ibid.* (citation omitted). Shortly after the Civil War, many States enacted statutes "codify[ing] this principle to ensure access to public accommodations regardless of race." *Ibid.* Over time, States have "continued to broaden the scope" of those laws to bar discrimination based on other protected characteristics, including sex, religion, disability, and sexual orientation. *Id.* at 571-572. Congress, too, has enacted laws against "discriminatory denials of access to facilities ostensibly open to the general public." *Daniel* v. *Paul*, 395 U.S. 298, 307-308 (1969) (citation omitted); see p. 1, *supra*.

Such laws are deeply rooted in Colorado's history. The State adopted its first public accommodations law in 1885, "less than a decade after [it] achieved statehood." *Masterpiece*, 138 S. Ct. at 1725. "Today, the Colorado Anti-Discrimination Act" (CADA), Colo. Rev. Stat. §§ 24-34-301 *et seq.* (2021), "carries forward the state's tradition of prohibiting discrimination in places of public accommodation." *Masterpiece*, 138 S. Ct. at 1725.

CADA's centerpiece is the Accommodation Clause, which makes it unlawful "to refuse, withhold from, or deny" the "full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation" because of "disability, race, creed, color, sex, sexual orientation, gender identity, gender expression, marital status, national origin, or ancestry." Colo. Rev. Stat. § 24-34-

601(2)(a). CADA's Communication Clause reinforces that prohibition by making it unlawful for a public accommodation to advertise that its services "will be refused, withheld from, or denied" based on the same protected characteristics. *Ibid.* CADA defines a covered public accommodation as "any place of business engaged in any sales to the public" and "any place offering services, facilities, privileges, advantages, or accommodations to the public." *Id.* § 24-34-601(1).

The Colorado Civil Rights Commission enforces CADA through administrative proceedings. Colo. Rev. Stat. § 24-34-306(1). If the Commission finds a violation, it may issue a cease-and-desist order and require remedial action. *Id.* § 24-34-306(9); see *id.* § 24-34-605. A party aggrieved by the Commission's decision may appeal to the Colorado Court of Appeals. *Id.* § 24-34-307. A victim of discrimination may also sue directly in state court, where the only available remedy is a penalty of $50 to $500 per violation. *Id.* § 24-34-602(1)(a).

2. In 2016, petitioners Lorie Smith and 303 Creative LLC, Smith's website-design company, brought a pre-enforcement challenge to CADA. J.A. 237, 306. As relevant here, petitioners alleged that the Accommodation Clause violates the Free Speech Clause because it would require them to provide wedding-website design services to same-sex couples if they began providing those services to opposite-sex couples. J.A. 272-275. Petitioners also alleged that the Communication Clause violates the Free Speech Clause because it would prohibit them from posting a notice on their website advertising that they offer wedding-website services only to opposite-sex couples. *Ibid.* Petitioners sought an injunction against any application of CADA that would prevent

them from posting that notice or require them to create "websites for same-sex weddings." J.A. 303-304.

Although petitioners have never provided wedding-website services of any kind, the parties stipulated to "the type of wedding website that [petitioners] desire to design" and the notice they wish to post on their own website. Pet. App. 187a; see *id.* at 188a-189a. The parties also stipulated that "303 Creative is a 'place of public accommodation'" covered by CADA because it is a "place of business engaged in sales to the public and offering services to the public." *Id.* at 189a (citation omitted).

The district court dismissed petitioners' complaint in part, finding that they lacked standing to challenge the Accommodation Clause. Pet. App. 154a-170a. The court later granted respondents' motion for summary judgment on petitioners' challenge to the Communication Clause. *Id.* at 104a-113a; see *id.* at 130a-138a.

3. The court of appeals affirmed. Pet. App. 1a-103a. Although the court held that petitioners have standing to challenge the Accommodation Clause, *id.* at 9a-19a, it rejected their challenge on the merits, *id.* at 20a-32a. The court held that the Clause is subject to strict scrutiny because it would require petitioners "to create websites—and thus, speech—that they would otherwise refuse," and because the court regarded the Clause as a content-based regulation. *Id.* at 22a-24a. But the court concluded that the Clause is narrowly tailored to promote Colorado's compelling interest in "ensuring equal access to the commercial marketplace." *Id.* at 32a. And the court held that the Communication Clause is constitutional because it simply forbids businesses from

advertising discriminatory practices that the Accommodation Clause validly prohibits. *Id.* at 32a-34a.

Judge Tymkovich dissented. Pet. App. 51a-103a. He agreed that the Accommodation Clause is subject to strict scrutiny, but would have held that it is not narrowly tailored to serve a compelling interest. *Id.* at 55a-80a.

SUMMARY OF ARGUMENT

CADA aims to ensure that all of Colorado's citizens have equal access to goods and services offered to the public at large. Petitioners seek a categorical exemption allowing them to refuse to provide *any* website for a same-sex wedding. The Free Speech Clause does not justify that sweeping relief. On its face, CADA imposes only a permissible incidental burden on petitioners' speech. And although some potential applications of the law might raise novel and difficult First Amendment questions, those questions are not presented here—and, given Colorado's interpretation of the law, may never be presented. This Court should thus reject petitioners' broad pre-enforcement challenge, which is inconsistent with the nuanced approach to these issues contemplated in *Masterpiece Cakeshop, Ltd.* v. *Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018).

A. Public accommodations laws do not "target speech or discriminate on the basis of its content"; instead, they prohibit "the *act* of discriminating" in the provision of publicly available goods and services. *Hurley* v. *Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston, Inc.*, 515 U.S. 557, 572 (1995) (emphasis added). Many goods and services consist of or are accompanied by speech, so laws prohibiting that discriminatory conduct often require businesses to engage in speech they might prefer to avoid. But such incidental burdens on speech are subject at most to the deferential standard set forth in

United States v. *O'Brien*, 391 U.S. 367, 377 (1968). And traditional public accommodations laws like CADA easily pass muster under *O'Brien* because they burden no more speech than necessary to further substantial government interests—indeed, compelling interests of the highest order.

B. In *Hurley* and *Boy Scouts of America* v. *Dale*, 530 U.S. 640 (2000), this Court held that particular applications of public accommodations laws violated the Free Speech Clause. But those cases involved unusual applications of the laws that directly and substantially burdened speech by forcing private expressive associations to convey unwanted ideological messages. The Court's subsequent decision in *Rumsfeld* v. *Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006) (*FAIR*), confirms the narrow scope of the exception recognized in *Hurley* and *Dale*. Under *FAIR*, a neutral equal-access requirement imposes an incidental burden if it does not compel such an unwanted message and instead requires a regulated entity to create speech for members of a protected class only "if, and to the extent," it would create "such speech" for others—even if, as in *FAIR*, the entity deeply objects to creating equivalent speech for the protected class. *Id.* at 62.

C. This Court's precedents do not support petitioners' broad pre-enforcement challenge to the Accommodation Clause. The Clause does not target petitioners' speech or require them to create speech endorsing or conveying any government-prescribed message. Instead, it is a content-neutral regulation of conduct that, on its face, requires petitioners to create speech for a same-sex couple only "if, and to the extent," *FAIR*, 547 U.S. at 62, they would create equivalent speech for an opposite-sex couple. As in *FAIR*, that requirement

generally imposes only an incidental burden on speech. And petitioners do not dispute that the Accommodation Clause satisfies the *O'Brien* standard.

A law like the Accommodation Clause could in theory be applied to petitioners in a way that would raise concerns like those present in *Hurley* and *Dale*—if, for example, it were construed to require petitioners to design a website stating that same-sex marriage is consistent with Christian teachings, even though they would not design such a website for any customer. But there is no indication that the Colorado Civil Rights Commission or the State's courts would adopt such an interpretation, which the State has disclaimed. And in any event, the possibility that some applications of the law might violate the First Amendment does not justify the broad pre-enforcement relief petitioners seek.

D. Petitioners' remaining challenges to the Accommodation Clause lack merit. Petitioners err in asserting that the Clause's incidental impact on their speech transforms it into a content-based regulation. And although the Clause is not subject to strict scrutiny, petitioners are also wrong to contend that it is not narrowly tailored to serve the State's compelling interest in ensuring equal access to the public marketplace. Finally, there is no basis for petitioners' assertion (Br. 28) that a decision rejecting the categorical exemption they seek would open the door to laws "banning or compelling large swaths of speech."

E. Because petitioners are not entitled to a categorical exemption from the Accommodation Clause, they also are not entitled to an exemption from the Communication Clause. Just as a ban on "discriminating in hiring on the basis of race" may "require an employer to take down a sign reading 'White Applicants Only,'"

FAIR, 547 U.S. at 62, a valid prohibition on discrimination in public accommodations may bar a business from advertising its intent to violate the law.

ARGUMENT

THE FREE SPEECH CLAUSE DOES NOT ENTITLE A COMMERCIAL WEDDING-WEBSITE SERVICE TO CATEGORICALLY REFUSE TO SERVE SAME-SEX COUPLES

In *Masterpiece Cakeshop, Ltd.* v. *Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), this Court discussed but did not resolve the question whether and under what circumstances the Free Speech Clause entitles a business to an exemption from a law prohibiting public accommodations from refusing to serve customers based on race, sex, sexual orientation, and other protected characteristics. This case presents a variation on that question, and like *Masterpiece* it involves a business that objects to providing services for same-sex weddings because of its owner's beliefs about marriage.

In *Masterpiece*, the Court recognized that such "religious and philosophical objections to gay marriage are protected views and in some instances protected forms of expression." 138 S. Ct. at 1727. But the Court also emphasized the "general rule" that "such objections do not allow business owners" to deny same-sex couples "equal access to goods and services under a neutral and generally applicable public accommodations law." *Ibid.* The Court has long held that public accommodations laws are content-neutral regulations of conduct that serve compelling government interests. See *Roberts* v. *United States Jaycees*, 468 U.S. 609, 628-629 (1984). And *Masterpiece* reiterated that Colorado "can protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they

choose on the same terms and conditions as are offered to other members of the public." 138 S. Ct. at 1728.

Masterpiece also recognized that a business's entitlement to a First Amendment exception from a public accommodations law like CADA may depend on the "details" of its "refusal to provide service." 138 S. Ct. at 1723. But those details are absent here because this case does not arise from any concrete application of the Accommodation Clause. Indeed, petitioners have never provided wedding-website services to any customer; the record includes only stipulations describing hypothetical services they hope to provide. And petitioners have brought a broad pre-enforcement challenge asserting a categorical entitlement to refuse to provide *any* "websites for same-sex weddings." J.A. 303-304.

The First Amendment does not entitle petitioners to that categorical exemption because the application of the Accommodation Clause to the provision of wedding-website services would ordinarily impose only a permissible incidental burden on petitioners' speech. And although some potential applications of the Clause could raise more difficult questions, those questions are not presented here—and the State's interpretation of the law suggests that they may never be presented at all.[*]

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[*] The United States filed an amicus brief in *Masterpiece* urging a broader view of the circumstances where the Free Speech Clause requires an exemption from a content-neutral public accommodations law. Following the Court's grant of certiorari in this case, the government reexamined the issue and determined that the conclusions in the *Masterpiece* brief do not reflect the best understanding of the First Amendment principles articulated in this Court's precedents. To the extent the views expressed in that brief are inconsistent with the views expressed here, they no longer represent the position of the United States.

A. Public Accommodations Laws Comply With The First Amendment Even When They Incidentally Burden Speech

1. When a law burdens speech, the applicable level of First Amendment scrutiny depends on the nature of the law and of the burden it imposes. "Content-based regulations 'target speech based on its communicative content.'" *National Inst. of Family & Life Advocates* v. *Becerra*, 138 S. Ct. 2361, 2371 (2018) (citation omitted). "As a general matter, such laws 'are presumptively unconstitutional and 'may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.'" *Ibid.* (citation omitted).

In contrast, content-neutral laws targeting conduct rather than speech generally pose no First Amendment problem even when they impose "incidental" burdens on expression. *Rumsfeld* v. *Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006) (*FAIR*). "[I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Ibid.* (citation omitted). Instead, the question is whether the challenged law is "*directed at* the communicative nature of conduct" or "at speech itself"; if not, any burden ordinarily qualifies as incidental. *Texas* v. *Johnson*, 491 U.S. 397, 406 (1989) (citation omitted).

This Court has subjected content-neutral laws that incidentally burden speech or expressive conduct to no more than intermediate scrutiny under the standard set forth in *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968). See, *e.g.*, *United States* v. *Albertini*, 472 U.S. 675, 689 (1985). A law satisfies *O'Brien* if it "promotes a substantial government interest" that is unrelated to

the suppression of speech and that "would be achieved less effectively absent the regulation." *Ibid.*; see *FAIR*, 547 U.S. at 67. Under that "relatively lenient standard," *Johnson*, 491 U.S. at 407, the Court will uphold the law so long as it does not "burden substantially more speech than is necessary to further the government's legitimate interests." *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 662 (1994) (citation omitted).

2. Public accommodations laws like CADA easily pass muster under that framework. They impose no more than an incidental burden on speech because they do not "target speech or discriminate on the basis of its content." *Hurley* v. *Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston, Inc.*, 515 U.S. 557, 572 (1995). Instead, public accommodations laws target "the *act* of discriminating" by requiring businesses to provide goods and services to members of a protected class on the same terms extended to other customers. *Ibid.* (emphasis added).

Public accommodations laws thus generally raise no First Amendment concern even when they incidentally compel businesses to engage in speech or expressive conduct. Such incidental compulsion is routine, even for seemingly non-expressive businesses. Restaurants and motels, for example, engage in speech when they greet customers, take their orders, or direct them to their rooms. Some restauranteurs or innkeepers may deeply object to the speech associated with welcoming guests of a particular race, religion, or sexual orientation—but such objections are not grounds for a valid First Amendment challenge. Cf. *Newman* v. *Piggie Park Enters., Inc.*, 390 U.S. 400, 402 n.5 (1968) (per curiam); *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 258-262 (1964).

Even when the relevant goods and services consist of speech or expressive conduct, public accommodations laws readily survive scrutiny under *O'Brien*. As this Court explained in upholding the application of such a law to require the United States Jaycees to admit women, laws aimed at "eliminating discrimination" and assuring "equal access to publicly available goods and services" "plainly" serve "compelling state interests of the highest order." *Roberts*, 468 U.S. at 624. And a public accommodations law "'responds precisely to the substantive problem which legitimately concerns' the State and abridges no more speech or associational freedom than is necessary to accomplish that purpose." *Id.* at 629 (citation omitted).

3. Petitioners correctly recognize (Br. 21) that businesses that sell expressive goods and services to the public have no general license to violate public accommodations laws. Petitioners concede (*ibid.*) that the Free Speech Clause provides no shield for "an artist" who offers services to the public but "declines to speak based on the status of the requester"—even if the result is to compel the artist to create speech she would strongly prefer not to create for a particular customer. And petitioners likewise acknowledge (*ibid.*) that a speaker who offers expressive goods to the public cannot refuse "to sell an off-the-shelf product to a protected class"—even if that means that a speaker who opposes same-sex marriage must sell an expressive product knowing it will be used in a same-sex wedding.

Public accommodations laws thus sometimes incidentally require owners of expressive businesses to act in a manner inconsistent with their deeply held beliefs. But under this Court's precedents, those incidental burdens are a permissible—indeed, uncontroversial—result

of a decision to offer expressive goods or services to the public. See *Masterpiece*, 138 S. Ct. at 1727-1728.

B. This Court Has Invalidated Public Accommodations Laws Only In Unusual Cases Where They Were Applied To Directly Burden Speech By Forcing A Speaker To Convey An Unwanted Ideological Message

In *Hurley* and *Boy Scouts of America* v. *Dale*, 530 U.S. 640 (2000), this Court held that unusual applications of public accommodations laws imposed direct rather than incidental burdens on First Amendment rights by compelling private expressive associations to convey unwanted ideological messages. But the Court's reasoning in those cases reinforces the general rule that public accommodations laws ordinarily impose only incidental burdens. And the Court's subsequent decision in *FAIR* confirms the narrow scope of the exception recognized in *Hurley* and *Dale*.

1. In *Hurley*, the Massachusetts courts held that the Boston St. Patrick's Day Parade—an expressive event organized by a private association—was subject to the State's public accommodations law. 515 U.S. at 561-562, 564. The state courts further held that the parade's sponsors violated the law by excluding the Irish-American Gay, Lesbian and Bisexual Group of Boston (GLIB) from the parade. *Id.* at 572.

In considering whether that result was consistent with the First Amendment, this Court reiterated that public accommodations laws "are well within the State's usual power to enact" and "do not, as a general matter, violate the First or Fourteenth Amendments." *Hurley*, 515 U.S. at 572. And the Court recognized that the Massachusetts law did not "on its face, target speech or discriminate on the basis of content." *Ibid.* But the Court emphasized that the law had been "applied in a peculiar

way": The parade sponsors had refused to allow GLIB to participate not because of its members' sexual orientation, but rather "to exclude a message [the sponsors] did not like from the communication [they] chose to make." *Id.* at 572, 574; see *Dale*, 530 U.S. at 653 ("[T]he parade organizers did not wish to exclude GLIB members because of their sexual orientations, but because they wanted to march behind a GLIB banner.").

Because the Massachusetts courts applied the State's law to a private parade that excluded a group based on its message rather than to a business that excluded customers based on their protected characteristics, the resulting burden on speech was not incidental to a prohibition on discriminatory denials of service. Instead, the courts' "peculiar" application of the law directly burdened speech by effectively "declaring the sponsors' speech itself to be the public accommodation." *Hurley*, 515 U.S. at 572-573.

In reaching that conclusion, the Court emphasized that GLIB's compelled participation would have altered the parade's "overall message" in a manner that would have been attributed to the sponsors, because the public would have viewed GLIB's inclusion as reflecting the sponsors' determination "that [GLIB's] message was worthy of presentation and quite possibly of support." *Hurley*, 515 U.S. at 575, 577. The Court explained that a "speaker's right to autonomy over [its] message is compromised" when "dissemination of a view contrary to one's own is forced upon a speaker intimately connected with the communication advanced." *Id.* at 576.

Finally, the Court found that the application of the Massachusetts law did not survive "any review under the Speech Clause" because it did not serve a government interest "going beyond abridgment of speech

itself." *Hurley*, 515 U.S. at 577. In particular, the Court emphasized that because GLIB had been excluded due to its message rather than its members' sexual orientation, the challenged application of the law did not serve the traditional function of preventing "denial of access to (or discriminatory treatment in) public accommodations on proscribed grounds." *Id.* at 578.

2. Like *Hurley*, *Dale* involved the application of a public accommodations law to a private expressive organization rather than a commercial business. The New Jersey courts held that the Boy Scouts were covered by the State's public accommodations law and had violated the law by excluding an assistant scoutmaster who was also a "gay rights activist." *Dale*, 530 U.S. at 644. Relying on *Hurley*, this Court concluded that this application of the law violated the Boy Scouts' right to expressive association. *Id.* at 653.

As in *Hurley*, the Court emphasized that the New Jersey courts had extended the State's public accommodations law beyond "traditional places of public accommodation" or "clearly commercial entities" to an expressive association dedicated to promoting particular values. *Dale*, 530 U.S. at 656-657. The Court also emphasized that the Boy Scouts had not asserted that "mere acceptance of a member from a particular group would impair [the organization's] message." *Id.* at 653. The Boy Scouts had instead refused to retain a leader who was "a gay rights activist" because his continued participation would have "force[d] the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior." *Ibid.*

The Court held that applying New Jersey's law in that way "directly and immediately affect[ed] associa-

tional rights," and it therefore declined to apply *O'Brien*. *Dale*, 530 U.S. at 659. Applying heightened scrutiny, the Court concluded that the State's interest in requiring the inclusion of the assistant scoutmaster did not "justify [the] severe intrusion on the Boy Scouts' rights to freedom of expressive association." *Ibid.*

3. *Hurley* and *Dale* thus involved unusual applications of public accommodations laws that strayed from the laws' traditional function of ensuring equal access to commercial goods and services. The resulting burdens on speech could not be justified as incidental to a prohibition on status-based discrimination; instead, the laws directly and substantially burdened speech by forcing private expressive associations to convey ideological messages that would naturally be attributed to the associations themselves. This Court's subsequent decision in *FAIR* reinforces the limits of those holdings.

Although *FAIR* did not involve a public accommodations law, it addressed another type of equal-access requirement raising similar First Amendment issues. In the 1990s and early 2000s, law schools that objected to the military's then-existing limits on service by gays and lesbians restricted military recruiters' access to the schools' campuses. *FAIR*, 547 U.S. at 52-53. In response, Congress enacted the Solomon Amendment, which denied federal funding to a school unless it provided military recruiters with "the same access to its campus and students that it provides to the nonmilitary recruiter receiving the most favorable access." *Id.* at 55. A coalition of law schools sued, relying on *Hurley* and *Dale* and alleging that this requirement violated the First Amendment. *Id.* at 53. This Court rejected those arguments, and two aspects of its reasoning are particularly instructive here.

First, the Court acknowledged that the Solomon Amendment compelled schools to engage in speech they found objectionable, but upheld that compulsion because it was incidental to a valid regulation of conduct. The Court explained that the "recruiting assistance provided by the schools often includes elements of speech." *FAIR*, 547 U.S. at 61. For example, the schools would "send e-mails," "post notices on bulletin boards," and "distribut[e] flyers" on "an employer's behalf." *Id.* at 60-61. The Court observed that those services "clearly involve speech" protected by the First Amendment. *Id.* at 60. And the Court thus recognized that the Solomon Amendment "compelled speech" because "schools offering such services to other recruiters must also send e-mails and post notices on behalf of the military." *Id.* at 61.

But the Court explained that the Solomon Amendment was nothing like the laws at issue in *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 (1943), and *Wooley* v. *Maynard*, 430 U.S. 705 (1977), which directly burdened speech by compelling citizens to "endorse" a "Government-mandated pledge or motto." *FAIR*, 547 U.S. at 62. The Solomon Amendment did not "dictate the content of the speech at all" because a school's speech was "only 'compelled' if, and to the extent, the school provides such speech for other recruiters." *Ibid.* The Court therefore held that the "compelled speech" at issue in *FAIR* was "plainly incidental to the Solomon Amendment's regulation of conduct" and rejected the law schools' First Amendment challenge. *Ibid.*

FAIR thus establishes that a content-neutral regulation of conduct imposes an incidental burden if it compels speech only "if, and to the extent" a regulated

entity would "provide[] such speech for other[s]." 547 U.S. at 62. Under *Hurley*, *Wooley*, and *Barnette*, Congress plainly could not have required the law schools to expressly endorse the military's policies or encourage students to enlist. But Congress could, as a valid incident of the Solomon Amendment's equal-access requirement, compel the schools to create and distribute speech facilitating the military's recruiting efforts—even though the schools found those efforts deeply objectionable.

Second, *FAIR* rejected the law schools' argument that requiring them to host military recruiters would compel them to "send[] the message that they see nothing wrong with the military's policies." 547 U.S. at 64-65. The Court explained that "the schools are not speaking" or engaging in expressive conduct "when they host interviews and recruiting receptions." *Id.* at 64; see *id.* at 65-66. The Court distinguished *Hurley*, explaining that "[u]nlike a parade organizer's choice of parade contingents, a law school's decision to allow recruiters on campus is not inherently expressive." *Id.* at 64. The Court noted that "[n]othing about recruiting suggests that law schools agree with any speech by recruiters," and it added that the law schools' previous exclusion of recruiters was expressive "only because the law schools accompanied their conduct with speech explaining it"—which was "strong evidence that the conduct" itself was "not so inherently expressive that it warrant[ed] protection under *O'Brien*." *Id.* at 65-66.

C. Petitioners Are Not Entitled To A Categorical Exemption From the Accommodation Clause

This Court's precedents do not support petitioners' broad pre-enforcement challenge to the Accommodation Clause. Petitioners assert, as they have throughout

this litigation, that they are entitled to a categorical exemption allowing them to refuse to provide *any* services for a same-sex wedding. Pet. Br. 22-23 & n.2; see, *e.g.*, J.A. 303-304. But the Accommodation Clause is a content-neutral regulation of conduct that, on its face, requires petitioners to provide speech for a same-sex couple only "if, and to the extent," *FAIR*, 547 U.S. at 62, they would provide equivalent speech for an opposite-sex couple. As in *FAIR*, that incidental burden is ordinarily permissible even though petitioners object to creating speech they view as promoting events they sincerely oppose.

The Accommodation Clause could conceivably be applied in a way that would raise constitutional concerns—if, for example, Colorado construed it to require petitioners to design a website stating that same-sex marriage is consistent with Christian teachings or expressing another ideological message they would not create or convey for any client. But there is no reason to think that Colorado would apply the law that way. And in any event, the possibility that some applications of the law may violate the First Amendment does not justify the broad pre-enforcement relief petitioners seek.

1. The Accommodation Clause ordinarily imposes only an incidental burden on petitioners' speech

a. The Accommodation Clause is a content-neutral regulation of a form of conduct—a business's discriminatory denial of service. Like the equivalent Minnesota law the Court considered in *Roberts*, the Clause "does not aim at the suppression of speech, does not distinguish between prohibited and permitted activity on the basis of viewpoint, and does not license enforcement authorities to administer the statute on the basis of such constitutionally impermissible criteria." 468 U.S. at 623.

This case, moreover, does not involve any "peculiar" application of a public accommodations law. *Hurley*, 515 U.S. at 572. Petitioners operate a commercial business, not a private expressive association. They do not resemble artists or writers who are highly selective in choosing their clients or patrons; instead, they "offer[] services to the public" at large, Pet. App. 189a. And unlike the parade sponsors in *Hurley* and the expressive association in *Dale*, petitioners wish to exclude customers based on a protected characteristic: Petitioners would design a wedding website for Jane if she were marrying Steve, but would refuse to design an otherwise-identical site if she were marrying Sue. That is the sort of status-based denial of service that public accommodations laws have traditionally prohibited in their core applications.

Petitioners dispute that characterization, observing (Br. 21-22) that they would serve gays and lesbians in other contexts and that their unwillingness to provide wedding-website services for same-sex couples is grounded in their sincere religious beliefs rather than animus. But denying a service that would be provided but for a customer's sexual orientation (or race, sex, or religion) constitutes discrimination under the public accommodations laws regardless of the business's motive or willingness to provide other services. Cf. *Bostock* v. *Clayton County*, 140 S. Ct. 1731, 1741-1742 (2020). And in *Masterpiece*, the Court specifically recognized that a vendor's refusal to provide goods and services for same-sex weddings squarely implicates a State's interest in ensuring that gays and lesbians can acquire goods and services "on the same terms and conditions as are offered to other members of the public." 138 S. Ct. at 1728.

b. Petitioners emphasize that, by requiring them to provide wedding-website design services to same-sex couples, the Accommodation Clause compels them to create speech promoting events they oppose. But that does not distinguish petitioners from the law schools in *FAIR*, which had to create speech facilitating military recruitment they found deeply objectionable. At least on its face, CADA simply requires covered businesses to provide their services "on the same terms and conditions as are offered to other members of the public." *Masterpiece*, 138 S. Ct. at 1728. Much like the Solomon Amendment, therefore, the Accommodation Clause would ordinarily impose an incidental burden on speech because it would require petitioners to create speech for a same-sex couple only "if, and to the extent," they would create equivalent speech for an opposite-sex couple. *FAIR*, 547 U.S. at 62.

A same-sex couple might, for example, ask petitioners to provide them with a website using a design petitioners had already created for other clients and merely substituting the couple's names and the logistical details of their wedding. A refusal to provide that service would closely resemble a "refus[al] to sell an off-the-shelf product"—something even petitioners acknowledge (Br. 21) the First Amendment does not protect.

Alternatively, a same-sex couple could ask petitioners to create a simple website providing their friends and family with logistical information about the ceremony, the reception, lodging, and a gift registry. Designing a functional and attractive website containing that information would not require petitioners to create speech conveying messages they would not convey for an opposite-sex couple. In fact, if "Jane Smith" asked petitioners to create such a website for her wedding to

"Taylor Jones" and did not supply any additional identifying information, petitioners might not even know whether the wedding was a same-sex or opposite-sex ceremony unless they asked about Taylor's sex.

Similar analysis would apply to many more elaborate designs. A same-sex couple might, for example, ask petitioners to design a website with a floral theme, to convey that theirs is a spring wedding. Or a couple might request a website showcasing their love of travel, a shared hobby, their favorite sports teams, or their joint alma mater. So long as petitioners would create those designs for an opposite-sex couple, requiring them to create the same designs for a same-sex couple would impose only an incidental burden on their speech.

c. Petitioners emphasize (Br. 23 n.2) that they regard any website for a same-sex couple as distinct from an otherwise-identical website for an opposite-sex couple because, in petitioners' view, such websites "convey very different messages." But the law schools in *FAIR* could have said the same thing: They objected to being compelled to create and distribute recruiting-related speech "on behalf of the military," 547 U.S. at 61, precisely because they regarded that speech as conveying a message they did not want to convey and implicitly supporting policies they strongly opposed. The Court nonetheless held that the compulsion of that speech was "plainly incidental to the Solomon Amendment's regulation of conduct." *Id.* at 62.

Petitioners also state that they believe creating a website for a same-sex wedding would convey a particular message to which they object—one "celebrating and promoting a concept of marriage that [they] believe[] is contrary to God's design." Pet. Br. 22 (citation omitted). To the extent petitioners invoke free-exercise

concerns based on their sincere religious beliefs, that argument is not properly presented here because the Court did not grant certiorari on their free-exercise claim. And the Free Speech Clause demands an objective rather than subjective assessment of the impact of the challenged law on a plaintiff's expression. In *Roberts*, for example, the Court rejected the Jaycees' assertion that admitting women would impair its ability to "disseminate its preferred views" in service of its goal of "promoting the interests of young men." 468 U.S. at 627. And in *Dale*, the Court reiterated that even "an expressive association" cannot "erect a shield against antidiscrimination laws simply by asserting that mere acceptance of a member from a particular group would impair its message." 530 U.S. at 653.

The question is thus whether, as an objective matter, requiring petitioners to provide a same-sex couple the same services they would provide for an opposite-sex couple would inevitably require them to convey an unwanted message like the ones at issue in *Hurley* and *Dale*. It would not. Any wedding website will, of course, communicate the fact that the couple is getting married and provide information about a celebratory event. But creating a website conveying that sort of information would not require petitioners themselves to "celebrat[e] and promot[e]" a particular "concept[] of marriage," Pet. Br. 22 (citation omitted)—any more than creating speech on behalf of military recruiters required the law schools in *FAIR* to celebrate and promote the military's policies. As the Court emphasized in *FAIR*, an equal-access requirement that incidentally requires such speech is "simply not the same" as a law that compels citizens to endorse or convey a government-prescribed message. 547 U.S. at 62.

Petitioners object (Br. 29) that if they created a website for a same-sex couple, viewers would assume that they endorsed the couple's marriage. But unlike the parade organizers in *Hurley* and the expressive association in *Dale*, petitioners are not "intimately connected with the communication advanced" by their clients' weddings. *Hurley*, 515 U.S. at 576. Viewers of a wedding website would naturally attribute the messages it expresses to *the couple*; there is "little likelihood" that those views "would be identified" with the website's designer. *FAIR*, 547 U.S. at 65. Those who visit wedding websites will generally be wedding guests who may not even think about the designer. And to the extent guests consider the matter at all, it is implausible to assert that they would presume that the designer "agree[d] with any speech" by the couple, *ibid.*—still less that the designer shared the couple's view of marriage or endorsed their union.

Petitioners assert that this Court must reject that commonsense understanding because the parties stipulated that viewers "'will know that [petitioners'] websites are [their] original artwork'" and "understand [petitioners'] 'intended message of celebration.'" Pet. Br. 29 (quoting Pet. App. 187a-188a). But such stipulations are not controlling on what is ultimately a legal question about the proper characterization of petitioners' speech. "[B]ecause the reaches of the First Amendment are ultimately defined by the facts it is held to embrace," this Court must "decide for [itself] whether a given course of conduct falls on the near or far side of the line of constitutional protection." *Hurley*, 515 U.S. at 567.

In any event, petitioners omit a crucial part of the stipulations on which they rely. The stipulations state that viewers will know petitioners' websites are their

"original artwork *because all of the wedding websites will say 'Designed by 303Creative.com*,'" and that viewers will understand petitioners' "intended message of celebration" only "*after viewing the addition to 303 Creative's webpage*," which explains the message about marriage that petitioners are trying to express. Pet. App. 187a-188a (emphases added). The "fact that such explanatory speech is necessary is strong evidence" that the mere act of producing a website for a couple does not itself express approval of their marriage. *FAIR*, 547 U.S. at 66.

Indeed, petitioners' concern that providing services for a same-sex wedding could be construed as endorsing the couple's marriage—and petitioners' corresponding desire to avoid contributing to events they oppose—does not distinguish them from any of the rest of the "long list of persons who provide goods and services for marriages and weddings." *Masterpiece*, 138 S. Ct. at 1727. Caterers, hoteliers, restauranteurs, bartenders, tailors, florists, stationers, car services, and event spaces could likewise object to facilitating—and being seen to facilitate—same-sex weddings. Concern about being complicit in an event one opposes is familiar to many religious and moral traditions. But as those examples illustrate, it is not a concern protected by the Free Speech Clause because it is not tied to the *expressive* character of the goods and services at issue. And the Court in *Masterpiece* emphatically rejected the suggestion that "all purveyors of goods and services who object to gay marriages for moral and religious reasons" should be entitled to deny their goods and services on that ground. *Id.* at 1728-1729.

2. The Accommodation Clause easily satisfies the O'Brien *standard*

Because the application of the Accommodation Clause to petitioners' wedding-website services would ordinarily impose only an incidental burden on their speech, it is at most subject to intermediate scrutiny under *O'Brien*. Petitioners do not dispute that the Accommodation Clause passes muster under that standard, and for good reason: This Court has repeatedly upheld similar public accommodations laws against First Amendment challenges. See *New York State Club Ass'n* v. *City of New York*, 487 U.S. 1, 11-12 (1988); *Board of Dirs. of Rotary Int'l* v. *Rotary Club of Duarte*, 481 U.S. 537, 549 (1987); *Roberts*, 468 U.S. at 628-629.

Indeed, the core applications of the Accommodation Clause would survive even strict scrutiny. Equal access to businesses that hold themselves out as serving the public is a key component of equal citizenship and equal participation in the Nation's economic life. As this Court has recognized, a public accommodations law aimed at preserving that equal access "plainly serves compelling state interests of the highest order." *Roberts*, 468 U.S. at 624. Those interests apply with full force when a State seeks to "protect gay persons." *Masterpiece*, 138 S. Ct. at 1728. And by "precisely" targeting the discriminatory denials of service that undermine those interests, a public accommodations law "abridges no more speech * * * than is necessary." *Roberts*, 468 U.S. at 629 (citation omitted).

3. Some potential applications of the Accommodation Clause could raise novel and difficult questions, but those questions are not presented here

Although petitioners are not entitled to a categorical exemption from the Accommodation Clause, some

potential applications of the Clause could violate the First Amendment or raise much harder questions. Colorado could not, for example, interpret the Clause to require petitioners to create content for a wedding website advocating marriage equality, stating that same-sex marriage is consistent with Christian teachings, or praising this Court's decision in *Obergefell* v. *Hodges*, 576 U.S. 644 (2015). Petitioners would not create websites conveying those messages for any customer. As in *Hurley*, therefore, requiring petitioners to create such speech for a same-sex couple would directly burden petitioners' expression without serving the traditional equal-access function of public accommodations laws, which forbid discrimination based on customers' protected characteristics—not their desired messages. See 515 U.S. at 577-578.

There is, however, no reason to think Colorado would interpret the Accommodation Clause to require such results. When the Court decided *Masterpiece*, the Colorado Civil Rights Commission had already interpreted the law to afford businesses "some latitude to decline to create specific messages." 138 S. Ct. at 1728. And the Commissioners, along with Colorado's Attorney General, have now represented (Resp. Br. 2, 9, 12-13, 15-16) that the Accommodation Clause would not require petitioners to create messages for a same-sex couple that they would not create for any customer.

To be sure, it may sometimes be "difficult to find a line where the customers' rights to goods and services" becomes "a demand for [a website designer] to exercise the right of [her] own personal expression" to create a message she opposes. *Masterpiece*, 138 S. Ct. at 1728. That is especially true in the context of wedding websites: The message conveyed by a wedding website may

sometimes be closely linked to the customers' protected characteristics, making it difficult to distinguish between denials of service based on status and those based on message. If, for example, petitioners declined a same-sex couple's request to design a website featuring their "unique love story," Pet. Br. 22 (quoting Pet. App. 187a), that might be understood as a refusal to provide a service petitioners would provide to an opposite-sex couple or a refusal to create speech conveying a message petitioners would not create for anyone.

If such a situation arose, the Commission and the Colorado courts would have to decide whether petitioners' refusal violated the Accommodation Clause at all. If they concluded that it did, courts would confront novel and difficult First Amendment questions, including whether compelling petitioners to design the requested website would impose a direct or a merely incidental burden on speech; whether there could ever be circumstances where a content-neutral law imposing only an incidental burden might nonetheless be subject to a standard more demanding than *O'Brien*; and whether the relevant application of the Accommodation Clause could survive heightened scrutiny. The answers to those questions would necessarily depend on the "details" of the request and petitioners' refusal. *Masterpiece*, 138 S. Ct. at 1723.

This Court should not attempt to decide those novel and potentially far-reaching questions in this case, which includes none of the necessary details—and, indeed, lacks any concrete application of the Accommodation Clause. Instead, the Court can fully resolve this pre-enforcement challenge by simply holding that the Free Speech Clause does not give petitioners a categorical right to refuse to create *any* wedding websites for

same-sex couples. As the Court has explained in rejecting analogous pre-enforcement challenges, "adjudication of the reach and constitutionality" of the Clause in specific circumstances "must await a concrete fact[ual] situation." *Holder* v. *Humanitarian Law Project*, 561 U.S. 1, 25 (2010) (citation omitted). And that disposition would leave petitioners ample room to protect their rights if Colorado ever sought to apply the Clause in a constitutionally problematic manner: "[U]pholding the law against a broad-based challenge does not foreclose a litigant's success in a narrower one." *Doe* v. *Reed*, 561 U.S. 186, 201 (2010).

D. Petitioners' Remaining Arguments Lack Merit

Petitioners make several other arguments against the Accommodation Clause. None justifies the categorical exemption they seek.

1. Petitioners first assert that the Accommodation Clause is not content- and viewpoint-neutral because its "very purpose" is to suppress expression opposing same-sex marriage. Br. 30 (citation omitted). That is wrong.

The Accommodation Clause targets the *act* of discriminating, not the ideas behind it. This Court has long recognized that "discrimination in the distribution of publicly available goods, services, and other advantages cause[s] unique evils that government has a compelling interest to prevent—wholly apart from the point of view such conduct may transmit." *Roberts*, 468 U.S. at 628. The Court has repeatedly held that laws like the Accommodation Clause do not "target speech or discriminate on the basis of its content." *Hurley*, 515 U.S. at 572; see *Roberts*, 468 U.S. at 628-629. And the Court has emphasized that when "the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a

discriminatory idea or philosophy." *R. A. V.* v. *City of St. Paul*, 505 U.S. 377, 390 (1992). Accordingly, just as Title VII's prohibition on sex discrimination does not impermissibly seek to suppress opposition to women's participation in the workplace, the Accommodation Clause does not impermissibly seek to suppress opposition to marriage equality.

Petitioners are similarly mistaken in asserting (Br. 32) that the Accommodation Clause's application is content-based because it compels them to produce wedding websites for same-sex couples only if they produce them for opposite-sex couples. The Clause does not single out wedding-related content for special treatment; it imposes an equal-access requirement no matter what goods, services, or speech a public accommodation provides. Nor does the Clause target those opposed to same-sex weddings: A business would equally violate the law if it refused to provide services for opposite-sex weddings.

The Accommodation Clause thus bears no resemblance to the right-of-reply law in *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974). That law specifically targeted speech criticizing politicians by requiring newspapers that published such speech to print the politicians' replies. *Id.* at 244. By contrast, the Accommodation Clause draws no content-based distinctions—indeed, it does not single out expressive goods and services at all.

If petitioners mean to assert that the Accommodation Clause has a disproportionate *effect* on those who oppose same-sex marriage, that argument is likewise unavailing. "[A] facially neutral law does not become content based simply because it may disproportionately affect speech on certain topics." *McCullen* v. *Coakley*,

573 U.S. 464, 480 (2014). Instead, "a regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Ibid.* (brackets and citation omitted).

2. Petitioners also argue (Br. 35-50) that the Accommodation Clause fails strict scrutiny. But they do not deny that it survives review under *O'Brien*, which is all that is required. See p. 26, *supra*. And petitioners' arguments are unpersuasive in any event.

Petitioners first assert (Br. 37-39) that Colorado lacks a compelling interest in applying the Accommodation Clause to them because other website designers will serve same-sex couples. But the compelling interest furthered by public accommodations laws is not just ensuring that all consumers can find *some* supplier of goods and services; it is ensuring that Americans enjoy "*equal* access to public establishments" regardless of their race, sex, religion, disability, or sexual orientation. *Roberts*, 468 U.S. at 625 (emphasis added; citation omitted). Applying a public accommodations law furthers that compelling interest even if other businesses would serve a customer who was turned away—just as applying Title VII serves the "compelling interest in providing an equal opportunity to participate in the work force without regard to race," *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682, 733 (2014), even if other employers would hire a rejected applicant.

Petitioners also briefly assert (Br. 47-49) that Colorado has less-restrictive means of achieving its compelling interests. But this Court has repeatedly recognized that laws prohibiting discrimination are "precisely tailored" to the compelling interests they serve. *Hobby Lobby*, 573 U.S. at 733; see, *e.g.*, *Roberts*, 468 U.S. at

629. Petitioners' contrary arguments either rest on the incorrect premise that petitioners do not seek to deny service based on sexual orientation (Br. 47-48) or simply assert that the State must tolerate some degree of harm to the compelling interests furthered by guaranteeing equal access to commercial establishments that offer their services to the public (Br. 48-49).

3. Finally, petitioners insist (Br. 28) that any decision rejecting the categorical exemption they seek would greenlight laws "banning or compelling large swaths of speech." Petitioners posit, for example, laws requiring "Muslim filmmakers to promote Scientology" (Br. 26); compelling "lesbian artists to design church websites criticizing same-sex marriage" (*ibid*); or forcing "writers to write speeches that violate their most deeply held convictions" (Br. 30). Unlike this case, however, those hypotheticals involve *direct* burdens on speech because they contemplate speakers being forced to create and convey ideological messages they would not create for anyone. Those cases would be governed by *Hurley*, not *FAIR*, and the laws petitioners hypothesize will remain off-limits even if the Court rejects their claim to a far more sweeping exemption.

Petitioners' fears (Br. 26-30) about compulsion of authors, "painter[s]," "filmmakers," speechwriters, and "photographer[s]" are misplaced for another reason: Many speakers in those categories will not be covered by public accommodations laws to begin with. Many writers and artists may produce works on commission, but do not make their services "readily accessible to the public." *Fulton* v. *City of Philadelphia*, 141 S. Ct. 1868, 1880 (2021). Instead, they conduct a "customized and selective assessment" before taking on a client, and thus ordinarily are not subject to public accommodations

laws. *Ibid.*; see Resp. Br. 40 ("[CADA] does not affect vendors who solicit commissions only from limited sources"). And even if a different State sought to apply its public accommodations law to artists or writers who engaged in such a selective assessment, the relevant First Amendment analysis might be different. Such an application of the law would not, for example, serve the government's traditional interest in ensuring equal access to "facilities ostensibly open to the general public." *Daniel* v. *Paul*, 395 U.S. 298, 307-308 (1969) (citation omitted).

This case presents none of those issues. Petitioners have stipulated that they operate a commercial business that holds itself out as open to the public at large. Pet. App. 189a. And petitioners seek not merely the right to decline to create websites explicitly conveying messages they would not create for any customer, but an entitlement to refuse to create *any* wedding website for a same-sex couple. Granting that categorical exemption to petitioners—and, by necessary extension, to every other similarly situated business—would be "inconsistent with the history and dynamics of civil rights laws that ensure equal access to goods, services, and public accommodations." *Masterpiece*, 138 S. Ct. at 1727.

E. Petitioners Are Not Entitled To An Exemption From The Communication Clause

Because petitioners' challenge to the Accommodation Clause fails, their challenge to the Communication Clause necessarily fails as well. The Communication Clause makes it unlawful for a public accommodation to advertise that "the full and equal enjoyment" of its services "will be refused, withheld from, or denied" because of a protected characteristic. Colo. Rev. Stat. § 24-34-601(2)(a). Such prohibitions are a common

feature of antidiscrimination laws. See, *e.g.*, 42 U.S.C. 2000e-3(b), 3604(c). And this Court has long held that they are permissible so long as the underlying antidiscrimination law is valid: The First Amendment does not give a business a right to advertise its intent to engage in illegal conduct, so a ban on "discriminating in hiring on the basis of race" may "require an employer to take down a sign reading 'White Applicants Only.'" *FAIR*, 547 U.S. at 62; see *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 389 (1973).

Here, petitioners seek to violate the Communication Clause by posting a notice stating categorically that they will not "create websites for same-sex marriages." Pet. App. 189a. As petitioners appear to recognize (Br. 34-35), they would be entitled to an exemption from the Communication Clause only if they prevailed on their claim to a corresponding exemption from the Accommodation Clause. And because the First Amendment does not require that categorical exemption, it does not require an exemption from the Communication Clause either.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted.

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AUGUST 2022