NO. 21-476

IN THE

Supreme Court of the United States

303 CREATIVE, LLC, et al.,

Petitioners,

v.

AUBREY ELENIS, et al.,

Respondents.

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

BRIEF OF LEGAL SCHOLAR ADAM J. MACLEOD AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

JEFFREY A. SHAFER
Counsel of Record
LANGDON LAW LLC
8913 Cincinnati-Dayton Rd.
West Chester, Ohio 45069
(513) 577-7380
jshafer@langdonlaw.com

Counsel for *Amicus Curiae*

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Adam J. MacLeod is an expert in public accommodations law and the Anglo-American property law doctrines and concepts from which it is derived. He is Professor of Law at Faulkner University, Thomas Goode Jones School of Law, co-editor of Christie and Martin's *Jurisprudence* (4th ed., West Academic 2020), and the author of *Property and Practical Reason* (Cambridge University Press 2015) and many articles and essays. Professor MacLeod has written extensively about the interactions between private and public rights in property. He is interested in the ways in which American constitutions and law secure both public and private property rights and in how courts identify those rights by examining our Nation's history, traditions, and conscience.

SUMMARY OF THE ARGUMENT

In disputes between conscientious public accommodation owners and anti-discrimination claimants, there are time-tested, judicially impartial forms of resolution. They can be found in two legal institutions which avoid the zero-sum, one-size-fits-all conflicts that have characterized civil rights cases in recent years. They are old institutions, firmly grounded in our Nation's history and tradition, the immemorial rights and institutions of the common

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[1] All parties have filed blanket consents to the filing of amicus briefs in this case, as reflected on this Court's docket. No counsel for a party authored this brief in whole or in part or made any monetary contribution to fund the preparation or submission of this brief. The preparation and submission of this brief was partly funded by the Center for Religion, Culture & Democracy.

law. But they work just as well today as they did when Blackstone commended them in 1765, when jurists and legislators employed them to vindicate civil rights in the years after the Civil War, and when Congress codified them in the Civil Rights Act of 1964. The first institution is known to common-law jurists as the universal assumpsit or general license, and to contemporary lawyers as a civil action to enforce a public accommodation license. It holds owners liable when they exclude or refuse service with an unreasonable intention, and it leaves to the second ancient institution—the jury—the questions what the owner's intention was and whether it was a valid reason.

The district court below could have applied those venerable solutions to the present case and avoided constitutional conflict by giving a charitable construction to Colorado's public accommodation statute, as federal courts are required to do when interpreting state laws. Public accommodations statutes like Colorado's are declaratory of the common law terms governing public accommodations and are therefore most reasonably understood to codify the impartial solutions that the common law has long offered. Instead, the district court generated an avoidable infringement of the Petitioners' First Amendment rights. Faced with two possible legal interpretations of Colorado law, it chose a more burdensome interpretation over a less burdensome alternative that is more consistent with our Nation's history, traditions, and conscience. Asked to construe a state statute, which declares and secures fundamental, common-law rights, the Court interpreted the statute to *derogate* from fundamental

rights, disregarding the canons of charitable construction.

Having construed the statute to impose a substantial burden on speech and religious exercise contrary to immemorial customary law, the district court invoked a hypothetical act of discrimination to justify infringing the Petitioner's actual First Amendment rights. Rather than correcting those errors, the United States Court of the Appeals for the Tenth Circuit affirmed them. The circuit court also chose a novel and burdensome interpretation of Colorado public accommodations law over an interpretation that is more consistent with all Colorado law and the historic common-law doctrine of universal assumpsit, which public accommodation statutes declare and codify.

In reversing the courts below, this Court can take the opportunity to remind inferior federal tribunals of their constitutional obligation to interpret state laws to avoid constitutional conflicts where possible. This case presents just one of many recent conflicts between anti-discrimination claimants and religious liberty that could have been avoided by a charitable and historically-informed interpretation of state public accommodation laws. Several courts in recent years have departed from long-standing precedents, foisting on public accommodation statutes new constructions that impose improper burdens on conscientious religious schools, business owners, orders of nuns, and other Americans. By such faulty statutory constructions, these courts converted legal conduct into unlawful discrimination.

A court that instead reads public accommodation statutes in light of our Nation's history, traditions, and conscience will discover that such statutes do not burden free speech and free exercise because they prohibit only intentional discrimination—discrimination for the reason that a patron belongs to a protected class. Public accommodation statutes codify centuries-old legal doctrines developed in actions of assumpsit to enforce common-law property licenses. Because the scope of the license, and thus the central issue in the assumpsit action, turns on the intention of the property owner, the potential conflict of civil rights dissolves into a fact question, which juries may answer on a case-by-case basis according to the particular mores of the community and the evidence adduced at trial. Federal judges can thus remain neutral and impartial.

ARGUMENT

I. The history and traditions of universal assumpsit and jury trials provide a time-tested solution to civil rights conflicts in public accommodation cases.

A. Public accommodation statutes declare ancient legal doctrines.

Two venerable legal institutions offer solutions that preserve the neutrality of judges addressing disputes between conscientious public accommodation owners and anti-discrimination claimants. They are firmly grounded in our Nation's history and tradition, in the immemorial rights and institutions of the common law. Fortunately, state laws such as Colorado's public accommodation statute

declare and codify those solutions. Correctly interpreted, therefore, laws such as the Colorado public accommodations statutes are capable of avoiding the zero-sum, first-past-the-post conflict that keeps recurring between religious liberty and sexual minority claims around the Nation.

The first institution is known to common-law jurists as the general license or universal assumpsit, and to contemporary lawyers as a right against discrimination in places of public accommodation. It holds owners liable when they exclude or refuse service with an unreasonable intention, and it leaves to the second ancient institution—the jury—the questions of what the owner's intention was and whether it was a valid reason in light of the purposes for which the owner created the general license in the first place. Adam J. MacLeod, *Tempering Civil Rights Conflicts: Common Law for the Moral Marketplace*, 2016 Mich. State L. Rev. 643 (2016). Many states in the years preceding and following the United States Congress's Civil Rights Act of 1875 declared and codified these common-law norms and institutions, and the related doctrines governing common carriers and public utilities, in their early public accommodation statutes. Alfred Avins, *What Is a Place of "Public" Accommodation*, 52 Marq. L. Rev. 1, 14-73 (1968).

Neither Congress nor the states invented the universal assumpsit nor the concept of a general license, nor the action for its enforcement. When William Blackstone explained the doctrines in 1765, 3 William Blackstone, Commentaries on the Laws of England 129 (1765) at *164-65, *212, he was describing ancient customary rights—property

licenses—and common-law causes of action—assumpsit and action on the case.[2] Those rights and remedies existed long before the first non-discrimination statute. *Odom v. East Ave. Corp.*, 34 N.Y.S.2d 312, 317 (N.Y. Sup. Ct. 1942) (ruling that the right of a guest to the services of an innkeeper is a "common law right" which pre-existed its declaration by statute, and recognizing an existing "common law right of action for its violation"), aff'd 37 N.Y.S.2d 491 (N.Y. Sup. Ct. App. Div. 1942).

The universal assumpsit is similar to, but distinct from, the more famous duties of common carriers and other monopoly facilities, which are obligated at common law to serve all comers. Unlike common carriers, public accommodations owners do not have a standing, general obligation to serve all comers. *Markham* v. *Brown*, 8 N.H. 523, 528 (N.H. 1837) (an innkeeper "is not obliged to make his house a common receptacle for all comers, whatever may be their character or condition"); Avins, *Public Accommodation*, 52 Marq. L. Rev.at 5-7. Instead, the premises owner who throws open the doors of her business to the public has a more limited obligation to justify any refusal of service with reference to the purposes for which she granted to the public a general license to enter her premises. *State v. Sprague*, 200 A.2d 206, 208 (N.H. 1964); 3 Bl. Comm. at *164-65, *212; MacLeod, *Tempering Civil Rights Conflicts*, 2016 Mich. State L. Rev. at 692-711.

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[2] Blackstone cited The Reports of Sir Peyton Ventris, published first in 1696 and again in 1726, though the cases reported at the volume and page number cited do not obviously explain the concept of a universal assumpsit.

The law does not recognize a universal right to be served in any place of business. Rather, the common law recognizes a variety of customer licenses. Note and Comment, *Revocability of Licenses: The Rule of Wood v. Leadbitter*, 13 Mich. L. Rev. 401 (1915). At one end of the spectrum, a license created by *contractual* license, such as an entrance ticket to a sporting event or theater presentation, is determined according to the terms of the contract and can be terminated without reason unless the contract provides otherwise. *Wood* v. *Leadbitter*, 13 M. & W. 838 (1845); *Marrone* v. *Washington Jockey Club*, 227 U.S. 633 (1913); *Bailey v. Washington Theatre Co.*, 34 N.E.2d 17 (Ind. 1941); *Garfine v. Monmouth Park Jockey Club*, 148 A.2d 1, 5 (N.J. 1959); *Flores v. Los Angeles Turf Club, Inc.*, 361 P.2d 921 (Cal. 1961). Because the business is not conferring on the general public a universal license to enter, but is instead controlling the terms on which it engages each individual potential patron, absent a statutory prohibition "the owner or operator of a private amusement park or place of entertainment may arbitrarily and capriciously refuse admittance to whomsoever he pleases." *Fletcher v. Coney Island, Inc.*, 134 N.E.2d 371 (Ohio 1956).

At the other end of the spectrum, *common carriers* and *public utilities*, who enjoy a monopoly position or state-conferred advantage, have always borne a general duty to serve all comers whom they can accommodate. *Jackson v. Rogers* (1683) 2 Show 327, 89 Eng. Rep. 968 (verdict in action on the case against a common carrier who refused to carry a package). The common law treats the common carrier's general offer to carry or serve as an offer to the entire public,

which any member of the public may accept and thus create a binding obligation. *Denton v. Great Northern Ry. Co.* (1856) 5 El. & Bl. 860, 119 Eng. Rep. 701.

Public accommodations created by a universal assumpsit fall between those two extremes, conferring upon the public a qualified privilege to enter the premises or inquire about service, though not an absolute right to be served. Summarizing the doctrine, Blackstone explained that the property owner, in opening a public accommodation, extends a limited property license to the public. "[A] man may justify entering into an inn or public house, without the leave of the owner first specially asked; because, when a man professes the keeping of such inn or public house, he thereby gives a general license to any person to enter his doors." 3 Bl. Comm. at *212. The license is in rem, rather than in personam, and is thus a "universal assumpsit" rather than a personal contract. 3 Bl. Comm. at *164. But the license is not property in the strong sense of an immunized, irrevocable right. It is a right of a certain, limited kind.

The general license is a concession of privilege that the property owner confers on potential patrons for the purpose of offering particular goods or services. It is strong enough to be protected by a common-law cause of action. But it is limited to the purposes of the owner's business. It does not entail a duty to provide any particular services. *Fell* v. *Spokane Transit Authority*, 128 Wash. 2d 618, 638-39 (1996). A patron does not have a right to walk into a barbershop and demand to be served a hamburger. Nor does a patron have a right to disrupt the business nor demand that the owner act contrary to her moral convictions.

B. The owner's reason for exclusion controls.

The universal assumpsit license is a privilege rather than a property right for another reason. It is revocable. *Raider v. Dixie Inn*, 248 S.W. 229, 230 (Ky. 1923) (affirming sustained demurrer to claim for removal from hotel, reasoning, "The innkeeper need not accept any one as a guest who is calculated to and will injure his business.") So, though the owner of a public accommodation does not have an absolute right to exclude anyone she wants, neither does she relinquish her rights of dominion and exclusive possession entirely when she throws her doors open for business.[3]

Blackstone taught that the universal assumpsit can be refused to any particular person or terminated for a "good reason." 3 Bl. Comm. at *164. What counts

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[3] Legal scholars who think of the right to exclude in reified, dichotomous terms have missed this nuance, leading them to conclude either that only common carriers and public utilities have duties in assumpsit or that all business owners relinquish their right to exclude when they open a place of public accommodation. Contrast Richard A. Epstein, *Public Accommodations Under the Civil Rights Act of 1964: Why Freedom of Association Counts as a Human Right*, 66 Stan. L. Rev. 1241 (2014) with Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 Nw. U. L. Rev. 1283 (1996). Neither view is quite right, as a detailed reading of the cases reveals. Avins, *Public Accommodation*, 52 Marq. L.Rev. at 17-73. The property right of exclusive possession is not an either-or, all-or-nothing right but instead is capable of sorting out valid and invalid reasons for exclusion by owners and unconsented entry by non-owners. Adam J. MacLeod, Property and Practical Reason 173-96 (2015); Eric R. Claeys, *Labor, Exclusion, and Flourishing in Property Law*, 95 North Carolina L. Rev. 413, 421-55 (2017).

as a good reason is determined first by the purposes for which the owner holds open to licensees. *State* v. *DeCoster*, 653 A.2d 891, 893–94 (Me. 1995). Also relevant are the values and moral commitments of the property owner.

Racists did not confer the right of exclusive possession upon property owners in the aftermath of Reconstruction, as some property scholars mistakenly assert.[4] The right of exclusion possession is a fundamental incident of property ownership and a necessary security for the owner's control over the res. Essential to property ownership is the right to decide for what purposes property will be used. *Cf. Christian Legal Society Chapter of the University of California, Hastings College of the Law* v. *Martinez*, 561 U.S. 661, [pin cite] (2011) (citing authorities explaining, as to limited public forums, that the State property owner may reserve forums use for certain purposes and exclude speakers outside the class for whose benefit the forum was created).

How the owner exercises that right determines in large part whether any particular exercise of the right to exclude is done for a "good reason." *See Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557, 571 (1995), citing *Lane* v. *Cotton*, 12 Mod. 472, 484–485, 88 Eng. Rep. 1458, 1464–1465 (K.B.1701) (Holt, C.J.); *Markham* v. *Brown*, 8 N.H. 523, 529-30, 531 (N.H. 1837). Many owners exercise this right to form and build together

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[4] See, for example Brief of Amici Curiae Public Accommodation Law Scholars in Support of Respondents, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, Supreme Court of the United States, No. 16-111 (October 30, 2017), at 12-14.

their own life plans, not only in the privacy of the home, but also in religious assemblies, charitable works, businesses, and civic groups. Adam J. MacLeod, Property and Practical Reason 74-87, 114-21 (2015). Those plans are often predicated on unique moral visions. Indeed, property rights have stood guard around many of the most prominent social reform movements in American history. The civil rights protests that were planned in Southern black churches and the LGBT activism of more recent decades were enabled in part by property owners' rights both to include others in their use of property and to tell others to keep out. MacLeod, Property and Practical Reason, at 33-34; John D. Inazu, *A Confident Pluralism*, 88 So. Cal. L. Rev. 587, 590 & n.17 (2015); Lawrence A. Wilson & Raphael Shannon, *Homosexual Organizations and the Right of Association*, 30 Hastings L.J. 1029, 1043, 1046-49, 1054-55 (1979).

Even innkeepers are allowed to have and enforce policies that exclude persons who might adversely affect other guests or jeopardize their basic values and commitments. See generally, Note, *Innkeepers—Duties to Travelers and Guests—Whether Bad Reputation is an Excuse for Refusing Entertainment*, 24 Harv. L. Rev. 234 (1911). "Where one seeks accommodations to engage in an act illegal or *contra bonos mores*, it is of course the innkeeper's duty to refuse him admission." *Id.* at 239.

A few reasons for exclusion or refusal to serve are per se unreasonable at common law. The most obvious of these is race. *Odom*, 34 N.Y.S.2d at 314; *Shepard v. Milwaukee Gas Light Co.*, 6 Wis. 539 (1858); *Coger v. Northwestern Union Packet Co.*, 37 Iowa 145 (1873);

Donnell v. State, 48 Miss. 661, 682 (1873); *Messenger v. State*, 41 N.W. 638 (Neb. 1889); *Ferguson v. Gies*, 46 N.W. 718 (Mich. 1890); Avins, *Public Accommodation*, 52 Marq. L.Rev. at 4-5. And of course, most public accommodation statutes add additional categories of per se reasons, such as ethnicity, religion, and sexual orientation. Still, the touchstone is the reasonableness of the owner's asserted justification, not the status or identity of the person excluded. Racial motivations are unreasonable, and therefore not a valid justification for exclusion. *Id.* at 4-5. In legal terms, race is not a "good reason." 3 Bl. Comm. at *164; *Hurley*, 515 U.S. at 571. As one jurist expressed the point, "An individual is not responsible, and ought not to be made responsible, for his ancestry." Avins, *Public Accommodation*, 52 Marq. L.Rev. at 4, quoting *Rothfield v. North British Ry. Co.*, [1920] Sess. Cas. 805, 820 (Scotland Ct. of Sess.).

In an exemplary decision, the Supreme Court of Michigan explained that to refuse service to a person "for no other reason than" that person's race is contrary to "absolute, unconditional equality of white and colored men before the law." *Ferguson* v. *Gies*, 46 N.W. 718, 719, 720 (Mich. 1890). Discrimination on the basis of race is "not only not humane, but unreasonable." *Id.* at 721. That is why racial discrimination in public accommodations is contrary to the common law and nondiscrimination statutes that prohibit racial discrimination in public accommodations are not novel innovations but are "only declaratory of the common law." *Id.* at 720.

In every case, the law prohibits only exclusions and service refusals that are unreasonable. This is

why the Planned Parenthood clinic, the state university, and the Christian artist all have the right to decline to associate with or to provide services that contravene their fundamental commitments. Adam J. MacLeod, *Equal Property Rights for All, Including Christian Wedding Cake Bakers*, PUBLIC DISCOURSE (November 30, 2017) (https://www.thepublicdiscourse.com/2017/11/20584/) ; Adam J. MacLeod, *Universities as Constitutional Lawmakers*, 17 U. PA. J. CON. L. ONLINE 1 (2014). They are prohibited only from discriminating for inherently wrongful reasons: reasons that are morally arbitrary from the perspective of their plan of business, such as race and ethnicity.

C. Except in per se cases, the reasonableness of exclusion is a jury question.

Unless the owner's asserted justification for refusing service is an enumerated per se unreasonable motivation, the question of reasonableness is a jury question. *Haddad v. Wal-Mart Stores, Inc. (No. 1)*, 914 N.E.2d 59, 72 (Mass. 2015); *Noble v. Higgins*, 158 N.Y.S. 867 (N.Y. Sup. Ct. 1916) (judgment ordered for defendant where undisputed evidence showed refusal to serve was "on purely personal grounds" and not because of race, creed, or color); *Fell* v. *Spokane Transit Authority*, 128 Wash. 2d 618, 642-43 (1996). Thus, "the ultimate issue of discrimination is to be treated by courts in the same manner as any other issue of fact." *Lewis* v. *Doll*, 53 Wash. App. 203, 206-07 (1989).

So it was in a noteworthy case in which a known prize fighter was refused lodging in an inn. *Nelson v. Boldt*, 180 F. 779, 780-81 (C.C.E.D. Pa. 1910). The

sport was illegal in the state at the time. *Id*. The trial judge left to the jury the question whether the innkeeper's decision to exclude the prize fighter was reasonable, and on motion the judge refused a new trial. *Id*. at 781-82. The judge had charged the jury,

> Where objection to admitting a guest is based on the fact that the guest is committing a breach of the peace, or is intoxicated, the innkeeper's justification may be determined by the court as a matter of law, but when the question is as to the guest's character or reputation, and his standing as a reputable person, the question is for the jury; that if the jury believed that plaintiff was not a law-abiding citizen, but at the time was engaged in a business which was in violation of the laws of the various states of the United States, then the jury would be authorized in finding that he was not such a proper person as was entitled to enforce a legal right to be admitted to a hotel in the state of Pennsylvania, and defendants would be justified in refusing to give him such accommodations as he demanded at that time, it being no answer that other hotels would accommodate him.

Id. at 779.

D. The owner's intent in excluding is also a fact question for the jury.

When the parties dispute what the property owner's motivation actually is, that too is a question for the jury. The reasoning of the property owner is the dispositive consideration. Therefore, in an assumpsit action for unlawful termination of a public

accommodation license, discrimination is a question of the owner's intent.

Justice Gorsuch has explained the critical point in the intent analysis.

> The distinction between intended and knowingly accepted effects is familiar in life and law. Often the purposeful pursuit of worthy commitments requires us to accept unwanted but entirely foreseeable side effects: so, for example, choosing to spend time with family means the foreseeable loss of time for charitable work, just as opting for more time in the office means knowingly forgoing time at home with loved ones. The law, too, sometimes distinguishes between intended and foreseeable effects. Other times, of course, the law proceeds differently, either conflating intent and knowledge or presuming intent as a matter of law from a showing of knowledge.

Masterpiece Cakeshop v. Colorado Civil Rights Commission, 584 U.S. __, 138 S. Ct. 1719, 1736 (2018) (Gorsuch, J. concurring).

The common law follows the first approach, distinguishing between intended ends and unintended side effects, and requiring evidence of an unlawful intention. The owner's reasons govern the question of liability. So, in overturning the conviction of a barber under a state accommodations statute, who refused to shave a patron, the Iowa Supreme Court explained,

> For aught that appears in the indictment, there may have been good reasons for the refusal.

> The law cannot be construed so as to compel a barber to shave every one who presents himself for that purpose. The proposed customer may be drunk, disorderly, profane, or filthy, or he may have some contagious disease, such as barber's itch, or the like, and it would be no violation of the law if the barber should refuse to shave all such persons. Or, for anything that appears in this indictment, the defendant may have desired to go to his meal at the time Bennett demanded to be shaved. ... There may have been many good reasons for the refusal.

State v. Hall, 34 N.W. 315 (Iowa 1887).

Intent is, of course, a fact question. Where the question of intent is not disputed, a court is bound to accept the stipulations of the parties. Where intent is disputed it is a question for a jury. In no case is intent a question of law, nor a universal absolute to be declared by state commissars and adventurous federal trial judges. Even though racial discrimination is unlawful as a matter of law, the question whether the owner acted for the reason that the claimant was of a certain race is a fact question.

II. Discriminatory intent, not disparate effect, is the historic standard of public accommodation regulation.

A. Recent innovations in interpreting public accommodation statutes have departed from their historic standard.

From early in American history, public accommodation statutes have declared the centuries-old doctrines that grew out of the real property license

and the common-law writ of assumpsit. Avins, *Public Accommodation*, 52 Marq. L.Rev. at 14. Thus, under such statutes, as at common law, the validity of a licensor's reasons for exclusion is settled on a case-by-case basis by the common law's institutions of private ordering: first by the purpose for the license and, where necessary, by a civil jury. And an owner can be held liable only for intentional discrimination, *i.e.*, discrimination for an invalid reason.

Late in the twentieth century, a new interpretation of public accommodation statutes surfaced in some cases in a few states. Rather than leave property owners free to make their own decisions absent an intention to discriminate for a prohibited reason, some state courts have imposed liability on property owners where their decisions have disparate effects. So, an owner who chooses to serve person A rather than person B can be liable if person B belongs to a class of persons identified in a nondiscrimination statute, whether or not person B's status or identity as a member of that class motivated the owner's decision.

This shift can be seen most clearly in cases of alleged housing discrimination because of marital status. At common law, leaseholds are personal conveyances and thus treated like contractual licenses. The owner has no general duties to the public. Statutes prohibiting housing discrimination import the standard rules prohibiting discrimination in places of public accommodation into certain landlord-tenant relationships. A persistent question is whether to read those statutes as declaratory of common law nondiscrimination norms, incorporating

them into the existing framework of property licenses, or to interpret them in some wholly novel way.

Under a traditional, common-law interpretation of housing discrimination statutes, landlords who refuse to lease to unmarried, cohabitating couples are not discriminating against prospective tenants because of their marital status when the landlords' intention is simply to avoid being complicit in what they understood to be immoral conduct. *Mister v. A.R.K. P'ship*, 553 N.E.2d 1152, 1159 (Ill. App. Ct. 1990); *N.D. Fair Hous. Council, Inc. v. Peterson*, 625 N.W.2d 551 (N.D. 2001); *McFadden v. Elma Country Club*, 613 P.2d 146, 152 (Wash. Ct. App. 1980); *City of Dane v. Norman*, 497 N.W.2d 714, 715-18 (Wis. 1993).

The conscientious landlords in those cases followed traditional religious teachings that marital sexual intimacy and non-marital sexual intimacy are two different acts. Of course, marital status is derivatively relevant for discerning what kind of conduct a couple is engaged in. But the primary fact motivating the landlords' decisions was the conduct, not marital status. On their reasoning, they would have leased to an order of celibate, unmarried nuns, or to siblings, or to unmarried college roommates, or to other combinations of unmarried persons. Marital status was not the reason or motivation for the landlords' decisions.

In a typical case of this sort, a landlord refused to lease an apartment to a potential tenant after she disclosed that she intended to cohabitate with her fiancé. The landlord was not liable for discrimination "because of . . . marital status" within the meaning of a nondiscrimination statute; his reason for refusing

the lease was his belief that "having sexual relations outside of marriage is sinful," a conviction reinforced by state law rendering "fornication" unlawful. *State v. French*, 460 N.W.2d 2, 3-5 (Minn. 1990). The landlord did not refuse to lease to the potential tenant because she was unmarried, but because of the conduct in which she intended to engage. *Id.* at 6-7.

Other courts have employed the newer, effect-focused interpretation and ruled that a landlord who refuses to lease to cohabitating couples who are not married is discriminating because of marital status. *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274 (Alaska 1994), *cert. denied*, 513 U.S. 979, 979-83 (1994) (Thomas, J., dissenting); *Smith v. Fair Emp't & Hous. Comm'n*, 913 P.2d 909 (Cal. 1996); *Jasniowski v. Rushing*, 678 N.E.2d 743 (Ill. App. Ct. 1997), *rev'd*, 685 N.E.2d 622 (Ill. 1997); *Att'y Gen. v. Desilets*, 636 N.E.2d 233 (Mass. 1994); *McCready v. Hoffius*, 586 N.W.2d 723 (Mich. 1998), *vacated and remanded on other grounds*, 593 N.W.2d 545 (Mich. 1999). These courts reason that the *effect* of a landlord's refusal to lease to cohabitating couples is to deny housing to the unmarried where the married would be permitted to lease. The landlord's actual motivation is irrelevant.

B. Colorado law is best interpreted as declaratory of the common law rule prohibiting discriminatory intent rather than unintended disparate effects.

Contemporary public accommodation statutes employ the same language as earlier, nineteenth- and twentieth-century statutes, and therefore are most reasonably read as enacting the same legal standard.

Public accommodations statutes such as Colorado's are declaratory of common law terms governing public accommodations and are therefore most reasonably understood to codify the neutral solutions that the common law has long offered. *Bell v. Maryland*, 378 U.S. 226, 254 (1964) (Douglas, J, concurring); *Id.* at 293-97 (Goldberg, J., concurring); *Ferguson v. Gies*, 46 N.W. 718, 719-20 (Mich. 1890) (reasoning that a Michigan public accommodation statute was "only declaratory of the common law").

The United Kingdom Supreme Court re-affirmed the common law understanding of nondiscrimination laws in *Lee v. Ashers Baking Company Ltd.* [2018] UKSC 49. Writing for the Court, Lady Hale reversed a judgment against a Christian baker who could not in good conscience produce a cake bearing the message, "Support Gay Marriage." *Id.* at ¶ 12. She reasoned that this was not unlawful discrimination because the bakers objected "to the message, not the messenger." *Id.* at ¶ 22. She noted that "they would also have refused to supply a cake with the message requested to a hetero-sexual customer." *Id.* The reason for their decision was not the customer's "sexual orientation but the message he wanted to be iced on the cake. Anyone who wanted that message would have been treated in the same way." *Id.* at 23. That the effect on the customer was more acute because of his sexual orientation was regrettable—and the bakers took deliberate measures to spare him embarrassment, *id.* at 12—but that effect did not make their decision unlawful discrimination. *Id.* at 23.

Separately, Lady Hale observed that this Court in *Masterpiece Cakeshop* had affirmed the difference

between actions that communicate a message and a customer's status. After summarizing all of the separate opinions in *Masterpiece Cakeshop*, Lady Hale observed,

> The important message from the *Masterpiece Cakeshop* case is that there is a clear distinction between refusing to produce a cake conveying a particular message, for any customer who wants such a cake, and refusing to produce a cake for the particular customer who wants it because of that customer's characteristics.

Id. at ¶62. She concluded that refusal to produce a cake which communicates that a same-sex union is a marriage is "no discrimination on grounds of sexual orientation" where the baker would not make such a cake for anyone, regardless of how they identify. *Id*.

Like the common law and declaratory statutes in other states and common-law jurisdictions, Colorado law prohibits intentional discrimination. The State's public accommodation statute uses substantially the same terms as myriad other statutes and ordinances that declare the common-law doctrine, changing the law only by extending the list of per se unreasonable grounds for exclusion and expanding the category of establishments that come within the category of public accommodations. Colo. Rev. Stat. §24-34-601(2). And the unreasonableness of a refusal or service under the statute is determined by the accommodation owner's intention, a fact question. *Crosswaith v. Bergin*, 35 P.2d 848 (Colo. 1934) (reversing dismissal of a complaint because the trial court failed to assess the "credibility or weight of the

evidence" concerning alleged racial discrimination); *School District No. 11-J v. Howell*, 517 P.2d 422 (Colo. App. 1973) (no unlawful discrimination because no evidence that "purpose or effect" of generally-applicable regulation requiring haircuts "was to single out or classify Indian Americans").

Colorado's public accommodation statute makes this explicit in subsection (3), which states expressly that "it is not a discriminatory practice for a person to restrict admission to a place of public accommodation to individuals of one sex if such restriction has a bona fide relationship to the goods, services, facilities, privileges, advantages, or accommodations of such place of public accommodation." Colo. Rev. Stat. §24-34-601(3). This provision allows distinctions on the basis of sex where they are related to the purposes for which the owner holds the property open as a place of public accommodation, whether those purposes are provisions of goods or services or access to the facilities themselves. The requirement of a bona fide relationship highlights the importance of the owner's intentions. And the fact that the statute does not impose an absolute ban on sex discrimination illustrates the general declaratory nature of the statute, that sex discrimination is prohibited because and to the extent that it is without good reason, just as the common law has always prohibited discrimination done without good reason.

Declaratory statutes are to be construed broadly while statutes that might abrogate or weaken the immemorial and fundamental rights and duties of the common law are to be construed strictly. *Miller v. Dawson*, 1775 Ariz. 610, 613 (1993); *Potter v. Washington State Patrol*, 165 Wash. 2d 67, 76-77

(2008). In Colorado, as in the law of other states, a statute must be read not to abrogate common law rights and duties absent a clear expression of legislative intent to do so. *People v. Johnson*, 499 P.3d 1045, 1047 (Colo. 2021). "Although the [Colorado] General Assembly possesses the authority to abrogate common law remedies, statutes may not be interpreted to abrogate the common law absent a clear expression of intent." *Beach v. Beach*, 74 P.3d 1, 4 (Colo. 2003). "Statutes in derogation of the common law, particularly those abrogating prior existing property rights, are to be strictly construed." *Clay, Robinson & Co. v. Atencio*, 218 P. 906 (Colo. 1923). Thus, courts have a duty to read state law to declare and codify the common-law property and contractual rights of licensors and licensees, rather than to abrogate them, where the text does not expressly foreclose that reading. *Phillips v. Pembroke Real Estate, Inc.*, 819 N.E.2d 579, 584-85 & n. 12 (Mass. 2004).

Interpreted in that light, Colorado law prohibits intentional discrimination, discrimination "because of"—as Blackstone and the *Hurley* Court expressed it, for the "reason" of—a person's race, ethnicity, sexual orientation or gender identity. Whether the Petitioners have any intention to discriminate against anyone for those reasons is a fact question.

III. The lower courts invented both a legal standard and its violation.

To generate the illusion that Colorado law forbids Lorie Smith and 303 Creative to exercise their property rights consistent with the purposes of their business, the lower courts asserted that Smith

intends to discriminate in violation of Colorado's public accommodations law. That assertion is a necessary predicate of the holdings of both the district and circuit court. The Court of Appeals reasoned that "although Appellants' 'ultimate goal' might be to only discriminate against same-sex marriage, to do so Appellants might also discriminate against same-sex couples. As a result, Appellants' refusal may be 'because of' the customers' sexual orientation." *303 Creative LLC v. Elenis*, 6 F.4th 1160, 1173 (10th Cir. 2021). The court flatly asserted that 303 Creative's proposed public statement that Lorie Smith "will not be able to create websites for same-sex marriages or any other marriage that is not between one man and one woman" amounted to an expression of "intent to deny service based on sexual orientation." *Id*. at 1183. This assertion was the basis for the court's holding that the communication prohibition in Colorado's law would not violate the Petitioner's free speech rights, because "Colorado may prohibit speech that promotes unlawful activity, including unlawful discrimination." *Id*. at 1182.

The district court found that "the *content* of Ms. Smith's speech is unlawful because it proposes an action made unlawful by an entirely *different* statute – the Accommodation Clause." *303 Creative LLC v. Elenis*, 405 F. Supp. 3d 907, 909 (D. Colo. 2019). This assertion rests on an avoidable, uncharitable interpretation of a statute which introduces an implausible contradiction into Colorado public accommodations law. The courts below mistakenly assumed that Colorado public accommodations law would render the Petitioners' proposed service decisions discriminatory because the potential *effects*

of 303 Creative's proposed published services policy would fall differently on same-sex couples than on male-female couples. *303 Creative LLC*, 6 F.4th at 1173; *303 Creative LLC v. Elenis*, 385 F.Supp.3d 1147, 1153 (D. Colo. 2019). As the district court explained, Smith's expression of belief that marriage is a man-woman union, and her avowed refusal to endorse other views of marriage, would lead to the result "that same-sex couples could not hire 303 to design a website for their wedding, even though opposite-sex couples could." *Id*.

Colorado courts have interpreted Colorado's public accommodations to prohibit discriminatory *intent*, consistent with the common law that the statute declares. At common law, differential *effects* are not sufficient to render conscientious business judgments unlawful where the conscientious owner has no intention to discriminate against anyone because of a prohibited reason, such as race or ethnicity. Colorado law would require a finding of intentional discrimination in any context other than an allegation of sexual orientation or gender identity discrimination, and the lower courts did not identity a reason to treat those classifications differently than common-law classifications such as race.

CONCLUSION

The most reasonable interpretation of Colorado law, the interpretation that is most consistent with other provisions of Colorado's statutes, court precedents, and our Nation's history and traditions, leaves Smith free to conduct her business in peace and with her religious conscience intact. While recalling the district and circuit courts to their duty to interpret Colorado law charitably, this Court can articulate the most sensible and historically grounded interpretation of Colorado's law and public accommodation laws generally. That might lower the stakes in the culture war, avoid future controversies and constitutional conflicts, and restore security to those fundamental rights that are grounded in our Nation's history, traditions, and conscience.

Respectfully submitted,

JEFFREY A. SHAFER
Counsel of Record
LANGDON LAW LLC
8913 Cincinnati-Dayton Rd.
West Chester, Ohio 45069
(513) 577-7380
jshafer@langdonlaw.com

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