No. 21-476

In the Supreme Court of the United States

303 CREATIVE LLC, A LIMITED LIABILITY COMPANY; LORIE SMITH,

Petitioners,

v.

AUBREY ELENIS; CHARLES GARCIA; AJAY MENON; MIGUEL RENE ELIAS; RICHARD LEWIS; KENDRA ANDERSON; SERGIO CORDOVA; JESSICA POCOCK; PHIL WEISER,

Respondents.

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

BRIEF OF AMICUS CURIAE PROFESSOR CHRISTOPHER R. GREEN SUPPORTING PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT..... 2

ARGUMENT 4

I. The Fourteenth Amendment bans second-class citizenship. 4

II. The Fourteenth Amendment requires creedal and viewpoint equality 7

III. Excluding traditionalists from wedding professions resembles the anti-Catholic Test Acts..... 14

IV. Unique talents do not justify restrictions on civil rights. 19

A. The Tenth Circuit properly focused on tangible access to the market. 19

B. Reconstruction Republicans embraced English distinctions between the *ius privatum* and *ius publicum.* 22

C. Singer's account of public accommodations neglects the long history of scarcity-based justifications. 27

D. A professional's unique talents, without more, do not move her from the *ius privatum* to the *ius publicum.* 29

CONCLUSION 32

TABLE OF AUTHORITIES

Cases

303 Creative Ltd. Liab. Co. v. Elenis,
6 F.4th 1160 (10th Cir. 2021).....20, 22, 29

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104 Eng. Rep. 206 (K.B. 1810)..... ...23, 27

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179 U.S. 89 (1900)..... 12

Bartemeyer v. Iowa, 85 U.S. 129 (1874).....19

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Chas. Wolff Packing Co. v. Court of Ind. Relations, 262 U.S. 522 (1923).....3, 25, 26, 29

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Corfield v. Coryell,
6 F. Cas. 546 (C.C. E.D. Pa. 1825).....3, 7, 19

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Edwards v. California, 314 U.S. 160 (1941).....12

Elane Photography, LLC v. Willock,
309 P.3d 53 (N.M. 2013).....18

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494 U.S. 872 (1990)..... 13

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140 S.Ct. 2246 (2020)..... 13

Everson v. Board of Education,
330 U.S. 1 (1947)..... 12

Ex Parte Garland, 71 U.S. 333 (1867)..... 15

Heart of Atlanta Motel v. United States,
379 U.S. 241 (1964).....26, 29, 30

In re Klein, Nos. 44-14 & 45-14
(Ore. Bureau of Labor and Industries,
July 2, 2015).....18

*Live-Stock Dealers' & Butchers' Association
v. Crescent City Live-Stock Landing &
Slaughter-House Co.*,
15 F.Cas. 649 (D.La. 1870) 10

Lyng v. Northwest Indian Cemetery Protective Association, 485 U.S. 439 (1988).....13

McDonald v. Chicago, 561 U.S. 742 (2010) ... 2, 13, 24

Munn v. Illinois, 94 U.S. 113 (1877).....3, 23, 24, 25

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Speiser v. Randall, 357 U.S. 513 (1958)..... 16

State v. Arlene's Flowers, Inc., 389 P.3d 543 (Wash. 2017) 18

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United States v. Vaello Madero, 142 S.Ct. 1539 (2022)..... 1

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Young v. Harrison, 6 Ga. 130 (1849)..... 23

Statutes

42 U.S.C. § 2000a(b)(2) 26

An Act to Protect All Citizens in Their Civil and Legal Rights, 18 Stat. 335 (1875)..... 10

An Act to Protect All Persons in the United States in Their Civil Rights, and Furnish the Means of Their Vindication, 14 Stat. 27 (1866)..... 7

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Randy Barnett & Evan Bernick, THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT (2021) 6

4 WORKS OF EDMUND BURKE
(1852) (orig. 1782) 14

Steven G. Calabresi, et al., THE U.S.
CONSTITUTION AND COMPARATIVE
CONSTITUTIONAL LAW (2016) 19

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DE L'HOSPITAL, CHANCELLOR OF FRANCE (1814)…11

Chicago Tribune, Feb. 12, 1867 8

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SPEECHES OF THE CAMPAIGN OF 1866 (1866).....5, 6

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CONG. GLOBE, 42nd Cong. 2nd Sess. (1872)..... 15

110 CONG. REC. 6539 (1964) ..... …26, 27

3 CONG. REC. 1866 (1875) 10

Constitutional Amendment,
The Weekly Caucasian, June 20, 1866 15

1 Cor. 8:10, 10:25, 27-28 17

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Christopher Green, *Incorporation, Total Incorporation, and Nothing But Incorporation?*, 24 WM. & MARY BILL RTS. J. 93 (2015) 1

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(1670).....3, 23, 24, 27

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Afterword, SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS
(Douglas Laycock et al., eds., 2008) 14

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(12th ed. 1824) (orig. 1685) 11

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81 VA. L. REV. 947 (1995) 25

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Nov. 7, 1855,..... 10

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(1975)..... 6

REPORTS MADE TO THE GENERAL ASSEMBLY OF ILLINOIS 30 (1867) ..... …….6

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INTEREST OF AMICUS

Amicus[1] is a widely-published scholar of the Reconstruction Amendments, especially the Fourteenth Amendment's Privileges or Immunities Clause.

Professor Green has published EQUAL CITIZENSHIP, CIVIL RIGHTS, AND THE CONSTITUTION: THE ORIGINAL SENSE OF THE PRIVILEGES OR IMMUNITIES CLAUSE (2015) (hereafter Equal Citizenship); *The Original Sense of the (Equal) Protection Clause: Pre-Enactment History*, 19 GEO. MASON U. CIV. RTS. L.J. 1 (2008); *The Original Sense of the (Equal) Protection Clause: Subsequent Interpretation and Application*, 19 GEO. MASON U. CIV. RTS. L.J. 219 (2009); *Incorporation, Total Incorporation, and Nothing But Incorporation?*, 24 WM. & MARY BILL RTS. J. 93 (2015); *Duly Convicted: The Thirteenth Amendment as Procedural Due Process*, 15 GEO. J. L. & PUB. POL'Y 73 (2017); *Twelve Problems with Substantive Due Process*, 16 GEO. J. L. & PUB. POL'Y 398 (2018); *Seven Problems With Antidiscrimination Due Process*, 11 FAULKNER L. REV. 1 (2019); and *Our Bipartisan Due Process Clause*, 26 GEO. MASON L. REV. 1147 (2019). Justice Thomas cites Green's work on several issues in his concurrence in *United States v. Vaello Madero*, 142 S.Ct. 1539, 1546, 1550, 1551 n.4 (2022), and Justice Stevens cites Green's work on the

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[1] Pursuant to this Court's Rule 37.6, counsel for amicus curiae certify that this brief was not authored in whole or in part by counsel for any party and that no one other than amicus curiae or their counsel has made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief.

Privileges or Immunities Clause in his dissent in *McDonald v. Chicago*, 561 U.S. 742, 859 n.2 (2010).

SUMMARY OF ARGUMENT

This case involves a clash between two appealing claims to inclusion and equality that cannot both be satisfied. Both sides wish to participate in the market free from what they deem unfair, exclusionary discrimination. One side wants to celebrate their marriages in a market free from what they describe as private sexual-orientation discrimination; the other side wishes to engage in wedding-related professions free from governmental viewpoint or creedal discrimination. More specifically, same-sex couples claim that, as citizens, they have the right to celebrate on the same basis as other citizens, and to be denied wedding-related services by any provider, even if substitutes are available, would impose serious harm. Conversely, marriage traditionalists, like the petitioner here, simply desire, on a basis of equality with their fellow citizens, to work in wedding occupations in a manner consistent with their sincerely-held beliefs; to compel participation in same-sex weddings as a condition of participating in such professions constructively evicts marriage traditionalists from the market. Both sides agree that their claimed right to equality—their freedom from what they deem unfair discrimination—depends on whether or not the Constitution permits or prohibits Colorado from enforcing its antidiscrimination law to exclude petitioner from the marketplace.

The Court can resolve this dispute by looking at how the Republican authors of the Fourteenth

Amendment understood the principle of civic equality expressed in the Privileges or Immunities Clause. Because the First Amendment was adopted in 1791 to restrict only Congress, Fourteenth Amendment history from Reconstruction is what matters most when states are involved. Rather than combining textually-implausible views of due process with a controversial account of the First Amendment's meaning in 1791, the Court can rely directly on the much clearer history of how civil equality and the Privileges or Immunities Clause's hostility to creedal and racial discrimination were understood during Reconstruction itself.

Occupational liberties under the Fourteenth Amendment's Privileges or Immunities Clause, like rights under the Privileges and Immunities Clause of Article IV, are "subject … to such restraints as the government may justly prescribe for the general good of the whole." *Corfield v. Coryell*, 6 F. Cas. 546, 551-52 (C.C. E.D. Pa. 1825). Unless the "general good" justification for occupational limits is taken seriously and is carefully enforced, states will be given free rein to impose second-class citizenship on marriage traditionalists like that imposed on Roman Catholics in England and Ireland under the Test Acts.

The justification for *public* accommodation laws, as explained by Matthew Hale's 1670 treatise DE PORTIBUS MARIS, the Republican discussions preceding the Civil Rights Act of 1875, and cases from *Munn v. Illinois*, 94 U.S. 113 (1877), to *Chas. Wolff Packing Co. v. Court of Ind. Relations*, 262 U.S. 522 (1923), lies in the distinction between the *ius privatum* of purely private commercial activity and the

ius publicum of businesses "affected with a public interest" because of conditions like local monopoly. The Tenth Circuit's holding that individuals enter the *ius publicum* simply in virtue of possessing unique talents turns this well-reasoned tradition on its head. The scarcity of substitutes is an essential ingredient of any police-power justification for limiting the entrance of particular providers into useful professions. It would be truly bizarre to allow Colorado to push Lorie Smith *out* of the wedding market, and thereby deny marriage traditionalists the opportunity to purchase her services, in the name of guaranteeing citizens' equal *access to* the market.

ARGUMENT

I. The Fourteenth Amendment bans second-class citizenship.

Beginning most prominently with John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385 (1992), recent academic work has argued that the Privileges or Immunities Clause, not the Equal Protection Clause, was the vehicle by which the Fourteenth Amendment constitutionalized the Civil Rights Act of 1866. Just as Article IV guarantees American citizens civil rights equal to the rights of all similarly-situated citizens when visiting other states, free from the restrictions characteristic of alienage, the Privileges or Immunities Clause protects citizens of the United States more generally—against not only interstate but racial and several other forms of intrastate discrimination.

On March 27, 1866, in his veto of the Civil Rights Act, President Johnson asked regarding the freed-

men whether "it be reasonably supposed that they possess the requisite qualifications to entitle them to all the privileges and immunities of citizens of the United States?" CONG. GLOBE, 39th Cong. 1st Sess. 1679 (1866). The nation answered yes, beginning with the Republicans' override of Johnson's veto and in John Bingham's proposal of the Privileges or Immunities Clause[2] to the Joint Committee on Reconstruction.

When the Clause was unveiled, the press described the amendment as "intended to secure to all citizens of the United States, including the colored population, the same privileges and immunities." Raleigh, N.C., TRI-WEEKLY STANDARD, May 3, 1866, at 2. Representative Henry Raymond said that Section One "secures an equality of rights among all the citizens of the United States." CONG. GLOBE, 39th Cong. 1st Sess. 2502 (1866). Senator John Conness said that to be "treated as citizens of the United States" is to be "entitled to equal civil rights with other citizens of the United States." *Id.* at 2891. Speaker of the House Schuyler Colfax said that the Civil Rights Act's requirement of equality "specifically and directly declares what the rights of a citizen of the United States are." CINCINNATI COMMERCIAL, SPEECHES OF THE CAMPAIGN OF 1866, at 14 (1866). Benjamin Butler said that the Privileges or Immunities Clause would require "that every citizen of the United States should have equal rights with every other citizen of the United States, in every State." *Id.*

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2 "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

at 41. William Dennison summarized the Privileges or Immunities Clause: "[T]he colored man shall have all the personal rights, all the property rights, all the civil rights of any other citizen of the United States." *Id.* at 44.[3]

Governors throughout the Union characterized the Privileges or Immunities Clause, or all of Section 1, as a guaranty of equal civil rights: "equal rights and impartial liberty" (Vermont), "equality of right" between the freedmen and white citizens (New York), "equal liberty of all [the Union's] citizens in every State in the Union" (Illinois), for "all citizens of the United States equal civil rights" (Minnesota); "equality before the law" (Wisconsin), "civil equality before the law" (Massachusetts with specific reference to the Privileges or Immunities Clause), and "'equality before the law' for all citizens" (California). Pennsylvania's governor explained that Section 1 would secure "to all classes the benefit of American civilization" such that "all persons, of whatever class, condition, or color should be equal in civil rights before the law." Bernard D. Reams & Paul E. Wilson, SEGREGATION AND THE FOURTEENTH AMENDMENT IN THE STATES 35, 273, 409, 677, 715 (1975); REPORTS MADE TO THE GENERAL ASSEMBLY OF ILLINOIS 30 (1867); AMERICAN ANNUAL CYCLOPEDIA 518 (1866); William H. Egle, LIFE AND TIMES OF ANDREW GREGG CURTIN 194 (1896).

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[3] For much, much more, see generally Green, Equal Citizenship; Ilan Wurman, THE SECOND FOUNDING: AN INTRODUCTION TO THE FOURTEENTH AMENDMENT 93-103 (2021); Randy Barnett & Evan Bernick, THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT 117-155 (2021).

Chief among these civil rights were economic liberties such as the right to "to pass through or to reside in any other State, for purposes of trade, agriculture, professional pursuits, or otherwise," "to make and enforce contracts" and "to inherit, purchase, lease, sell, hold, and convey real and personal property," and immunity from discriminatory taxation ("exemption from higher taxes or impositions than are paid by the other citizens of the State").[4] Or as Senator John Henderson elaborated, the rights of citizens include "the right to acquire property, to enter the courts for its protection, to follow the professions, [and] to accumulate wealth." CONG. GLOBE, 39th Cong. 1st Sess. 3035 (1866). Hence a central purpose of Section 1, and the Privileges or Immunities Clause in particular, was to secure to all Americans the equal enjoyment of these economic rights.

II. The Fourteenth Amendment requires creedal and viewpoint equality.

Since the framing of the Amendment, racial disparities in the rights of citizens of the United States have taken center stage. Still, the Fourteenth Amendment—according to its original meaning and purpose, the way in which religious liberty had long been described in terms of equal citizenship, and according to the repeated dicta of this Court—

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[4] These rights are listed in either the Civil Rights Act or *Corfield v. Coryell,* 6 F.Cas. 546 (C.C.E.D. Pa. 1825), as quoted by Senator Howard and many others. See An Act to Protect All Persons in the United States in Their Civil Rights, and Furnish the Means of Their Vindication, 14 STAT. 27 (1866); CONG. GLOBE, 39th Cong. 1st Sess. 474-75, 1117-18, 1835, 2765 (1866).

protects equal citizenship against not only racial discrimination, but also viewpoint or creedal discrimination.

Republicans understood distinctions based on religion or belief to be clear instances of the sort of second-class citizenship against which the Privileges or Immunities Clause was aimed. Roscoe Conkling, while a member of the Joint Committee that was drafting the Amendment, insisted that any reconstruction plan must include "[t]he assurance of human rights to all persons within their borders, regardless of race, creed, or color." *Id.* at 252. Wisconsin's governor advocated an amendment that would protect "the sacred natural rights of the humblest citizen, whatever may be that citizens' creed or color," including the freedom to make and enforce contracts, and "to pursue any and all avocations for which he is qualified." CIVIL WAR MESSAGES AND PROCLAMATIONS OF WISCONSIN WAR GOVERNORS 266 (Reuben Gold Thwaites, ed., 1912). And in the state's legislature during ratification debates, a leading proponent said it secured "equal rights of all, regardless of color, race, or creed." Chicago Tribune, Feb. 12, 1867, at 2.

During the debates over the Civil Rights Act, participants saw that the principle of equal civil rights implicated creedal as well as racial discrimination. Senator Edgar Cowan protested against the application of civil rights laws in the North, where, he said, people already stood on the "same footing," "no matter what may be his color, his complexion, or his creed." CONG. GLOBE, 39th Cong. 1st Sess. 335 (1866). William Lawrence, responding to the Civil Rights Act veto, said that the bill was "not made for any

class or creed, or race or color," but would "protect every citizen, including the millions of people of foreign birth who will flock to our shores to become citizens and to find here a land of liberty and law." *Id.* at 1833. Democrat Garrett Davis, opposing federally-enforced *racial* civil equality, recognized that *religious* civil equality stood on the same basis. *Id.* at 419, 1415. Representative Koontz declared Republican hostility to all "systems built upon caste and creed for the oppression of man." CONG. GLOBE, 39th Cong. 2nd Sess. 596 (1867).

Indeed, to explain the civil equality mandated by the Amendment, proponents frequently relied upon a Jeffersonian principle that had originally dictated creedal equality. In his First Inaugural Address, Jefferson had listed, as first among the "essential principles of our Government," "[e]qual and exact justice to all men, of whatever state or persuasion, religious or political." CONG. GLOBE, 39th Cong. 1st Sess. 120 (1866) (quoting Jefferson). The preamble to the 1875 Civil Rights Act treated race and creed as similarly illegitimate bases for discrimination:

> Whereas it is essential to just government we recognize the equality of all men before the law, and hold that it is the duty of government in its dealings with the people to mete out equal and exact justice to all, of whatever nativity, race, color, or persuasion, religious or political; and it being the appropriate object of legislation to enact great fundamental principles into law.

An Act to Protect All Citizens in Their Civil and Legal Rights, 18 STAT. 335 (1875); see *also* 3 CONG.

REC. 1866, 1867, 1870 (1875) (Senator Edmunds and Bayard elaborating on similarity).

Both earlier and later history supply similar evidence for the rough equivalence of racial and creedal discrimination in provisions guaranteeing the rights of citizens. An 1840 joint committee of the Massachusetts legislature compared interracial-marriage bans to interreligious-marriage bans, noting that the latter had been widely understood by Protestants to have "deprived them of the rights of citizens." David Upham, *Interracial Marriage and the Original Understanding of the Privileges or Immunities Clause*, 42 HASTINGS CONST. L. Q. 213, 240-41 (2015). John Bright argued in 1855 that the "rights, advantages, and immunities of citizens of the United States" (promised in 1803 to those in Louisiana), the "privileges, rights, and immunities of the citizens of the United States" (promised in 1819 to those in Florida), and the "the rights of citizens of the United States" (promised in 1848 to those in the Southwest) each represented an "assurance of entire equality" to Roman Catholics. Nashville Daily Union and American, Nov. 7, 1855, at 2. Sitting as a circuit justice in 1870, Justice Bradley said the Privileges or Immunities Clause enforced the "entire equality of all creeds and religions before the law." *Live-Stock Dealers' & Butchers' Ass'n v. Crescent City Live-Stock Landing & Slaughter-House Co.*, 15 F.Cas. 649, 653 (D.La. 1870).

Many classic arguments for religious freedom, including those of Locke, Madison, and Washington, rest squarely on equal citizenship. In the midst of seventeenth-century French disputes between Huguenots and Roman Catholics, Michel de L'Hospital

put the case for religious freedom in terms of equal citizenship: "All citizens who obey the laws and perform their duties to their country and their neighbor have an equal right to the advantages which civil society confers." Charles Butler, AN ESSAY ON THE LIFE OF MICHEL DE L'HOSPITAL, CHANCELLOR OF FRANCE 28-29 (1814). In his Essay on Toleration, John Locke analogized religiously-based second-class citizenship—that is, the failure to allow religious minorities "the same privileges as other citizens"—to its racially-based cousin:

> Suppose this business of religion were let alone, and that there were some other distinction made between men and men, upon account of their different complexions, shapes and features, so that those who have black hair, for example, or grey eyes, should not enjoy the same privileges as other citizens; that they should not be permitted either to buy or sell, or live by their callings; that parents should not have the government and education of their own children; that they should either be excluded from the benefit of the laws, or meet with partial judges: can be it doubted but these persons, thus distinguished from others by the colour of their hair and eyes, and united together by one common persecution, would be as dangerous to the magistrate, as any others that had associated themselves merely upon the account of religion?

5 WORKS OF JOHN LOCKE 49-50 (12th ed. 1824) (orig. 1685).

Early American statements on religious liberty frequently appealed to equal citizenship. James Madison's 1785 Memorial and Remonstrance, which this Court has invoked countless times, claimed that a proposed religious assessment "degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority." *Everson v. Board of Education*, 330 U.S. 1, 69 (1947) (quoting Madison). While the First Amendment was awaiting ratification, George Washington characterized American religious freedom in terms prefiguring the Privileges or Immunities Clause: "All possess alike liberty of conscience and immunities of citizenship." 6 PAPERS OF GEORGE WASHINGTON 284-86 (1996) (orig. August 18, 1790) (parroting Moses Seixas's letter of the previous day).

This Court has repeatedly affirmed, albeit in dicta, that the Fourteenth Amendment prohibits creedal as well as racial discrimination. *American Sugar Refining Co. v. Louisiana*, 179 U.S. 89, 92 (1900), condemned taxes turning on "color, race, nativity, religious opinions, political affiliations or other considerations having no possible connection with the duties of citizens as taxpayers." Justice Roberts's concurrence in *Edwards v. California*, 314 U.S. 160, 185 (1941), contended that indigence was "constitutionally an irrelevance, like race, creed, or color." Justice Harlan's dissent in *Plessy v. Ferguson*, 163 U.S. 537, 558 (1896), analogized compulsory racial segregation to compulsory religious or national-origin segregation. This Court's religion-clause cases

have likewise long been shot through with notions of equal citizenship.[5]

Whatever dangers of destabilization might be thought possible from the resurrection of the Privileges or Immunities Clause in other contexts,[6] rooting the idea of equal citizenship for adherents of all religions from this Court's precedents in the original public meaning of the Privileges or Immunities Clause would instead be profoundly stabilizing. The equal-citizenship principle already appears in this Court's doctrine; history can give it both a secure anchor and a guide for its precise reach.

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[5] In addition to the many quotations of Madison's 1785 Memorial and Remonstrance, see, for example, *Espinoza v. Montana Department of Revenue*, 140 S.Ct. 2246, 2255 (2020) ("an equal share of the rights, benefits, and privileges enjoyed by other citizens") (quoting *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439, 449 (1988)); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S.Ct. 2012, 2024 (2017) (quoting H.M. Brackenridge in 1818) ("odious exclusion from any of the benefits common to the rest of my fellow-citizens"); *Town of Greece v. Galloway*, 134 S.Ct. 1811, 1834 (2014) (Alito, J., concurring) ("the equal benefits of citizenship"); *id.* at 1841 (Kagan, J., dissenting) ("full and equal American citizens"; "[W]hen each person performs the duties or seeks the benefits of citizenship, she does so not as an adherent to one or another religion, but simply as an American."); *Employment Division v. Smith*, 494 U.S. 872, 897 (1990) (O'Connor, J., concurring) ("equal place in the civil community").

[6] See, for example, *McDonald v. Chicago*, 561 U.S. 742, 859-60 (2010) (Stevens, J., dissenting) ("the original meaning of the [Privileges or Immunities] Clause is … not nearly as clear as it would need to be to dislodge 137 years of precedent").

III. Excluding traditionalists from wedding professions resembles the anti-Catholic Test Acts.

For about 150 years—from the 1670s to the 1820s—Roman Catholics in England and Ireland were statutorily excluded from a range of professions, including the law, education, and any field requiring more than two apprentices. Edmund Burke described the disabilities on Roman Catholics in terms of second-class citizenship, referring to "that equality, without which you never can be FELLOW-CITIZENS," 4 WORKS OF EDMUND BURKE 494 (1852) (orig. 1782), and in terms of "a lower and degraded state of citizenship," *id.* at 513 (orig. 1792). As Douglas Laycock has noted,

> [O]ccupational exclusions have an odious history. The English Test Acts and penal laws long excluded Catholics from a range of occupations, including positions of responsibility in the civil and military service, solicitors, barristers, notaries, school teachers, and most businesses with more than two apprentices. These occupational exclusions are one of the core historical violations of religious liberty, and of course this history was familiar to the American Founders.

Afterword, SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 201, 296 (Douglas Laycock, et al., eds., 2008). Burke's view of Catholic second-class citizenship was, moreover, well-known to Reconstruction Republicans. Thomas Williams, for instance, analogized Burke's description of Roman Catholic disabilities and "lower and degraded …

citizenship" to the plight of the freedmen. CONG. GLOBE, 39th Cong. 1st Sess. 791 (1866).

At least some opponents and supporters of the Amendment affirmed that it would prohibit the retroactive occupational limits imposed in some states against the former secessionists. Just after Congress approved the Amendment, one newspaper taunted that "it is a nice question for Missouri and Tennessee radicals to decide, how, under this amendment, they could make their test oath work with [the Privileges or Immunities Clause]." *Constitutional Amendment*, The Weekly Caucasian, June 20, 1866, at 2. The Supreme Court struck down such limits in *Cummings v. Missouri*, 71 U.S. 277 (1867), and *Ex Parte Garland*, 71 U.S. 333 (1867), while states were ratifying the Fourteenth Amendment. Senator Matthew Carpenter appealed at length to *Cummings* and *Garland* in explaining the Privileges or Immunities Clause in February 1872, calling *Cummings* the "best definition I know" for the privileges of citizens of the United States. While *Cummings* merely described such rights in explaining the baseline for punishment, Senator Carpenter applied *Cummings*'s statement that in America, "all avocations, all honors, all positions are alike open to everyone," 71 U.S. at 321, directly to the Privileges or Immunities Clause. CONG. GLOBE, 42nd Cong. 2nd Sess. 762 (1872). The Privileges or Immunities Clause, said Carpenter, "offers all the pursuits and avocations of life to the colored man, in all the States of the Union." *Id.* Further, *Cummings* cited religiously-based occupational restrictions in support of its view that such restrictions are the sort of punishment covered by the bill-of-attainder and ex-post-

facto-law prohibitions. 71 U.S. at 320-21. More recently, the Court has recognized that imposing conditions on benefits can "reduce[] [an] individual … to second-class citizenship" just as effectively as a direct penalty. *Speiser v. Randall*, 357 U.S. 513, 536 (1958) (Douglas, J., concurring). Of course, the Court need not hold that the right to enter an occupation is an exceptionless right guaranteed in *all* circumstances; it need merely hold that *religious* occupational exclusions are, prima facie, abridgements of the privileges or immunities of citizens of the United States.

The stakes here are high. Those seeking to make an example of traditionally-minded wedding professionals can use today's information technology to find those professionals *precisely in order to be denied service* and thereby force such professionals out of public life. A loss by 303 Creative here will inevitably allow the weaponization of public-accommodations law.

Like Colorado's law, the Test Acts excluded by compelling the disfavored group to do something irreconcilable with their beliefs. Anti-Roman-Catholic legislation generally required citizens to endorse some proposition, usually the oath against transubstantiation, in order to participate in a particular profession: "I, N, do declare that I do believe that there is not any transubstantiation in the sacrament of the Lord's Supper, or in the elements of the bread and wine, at or after the consecration thereof by any person whatsoever." Test Act, 25 Car. 2, c. 2, § 8 (1673). This is not strictly a religious statement—an atheist would have no problem agreeing to it—but rather a secular statement to

which Roman Catholics would have religious objections. Requiring wedding professionals to affirm the propriety of same-sex marriage—a secular statement to which many would object on religious grounds—would be directly analogous to the Test Acts.

Religious market participants who take rituals, customs, and ceremonies seriously have long faced the need to guard against participating in the message that such traditions express. Religious believers' assessment of endorsement—their evaluation of what *God* believes about the message conveyed—raises critical concerns for the believer. Paul told the Corinthians, for instance, that it was not wrong to eat, outside of a temple, meat that *might* have been sacrificed to idols; members of the Corinthian church buying their dinners were not required to pry into sellers' religious practices to assess how animals had been killed. Eating idolatrously-sacrificed meat, *explicitly presented as such*, however, or eating it in a temple, was an improper endorsement, according to Paul: "Eat whatever is sold in the meat market without raising any question on the ground of conscience. … If one of the unbelievers invites you to dinner and you are disposed to go, eat whatever is set before you without raising any question on the ground of conscience. But *if someone says to you*, 'This has been offered in sacrifice,' then do not eat it." 1 Cor. 10:25, 27-28 (emphasis added); 1 Cor. 8:10 ("[I]f anyone sees you who have knowledge eating in an idol's temple, will he not be encouraged, if his conscience is weak, to eat food offered to idols?"). Careful attention to the role of locations and customs is of course required to apply such principles today.

Whatever the medium, compelling expression to which citizens object on religious grounds clearly has the potential to impose second-class citizenship on those who cannot comply. Roman Catholics were asked to comply with oaths, Corinthians with meat, Barronelle Stutzman with flowers, Elane Photography with photos, Jack Phillips with wedding cakes, and Lorie Smith with website design. But the legitimacy of occupational qualifications should not turn on endorsement of messages.

Indeed, those who worry about "disrespect" from marriage traditionalists make clear that the rationale of applying public-accommodation laws is precisely to require professionals to send a particular message, not merely to allow access to goods and services. See *State v. Arlene's Flowers, Inc.*, 389 P.3d 543, 851 (Wash. 2017) ("[P]ublic accommodations laws do not simply guarantee access to goods or services"); *Elane Photography, LLC v. Willock*, 309 P.3d 53, 80 (N.M. 2013) (Bosson, J., concurring) (requirement to convey a "sense of respect" is the "price of citizenship"); *In re Klein*, Nos. 44-14 & 45-14 (Ore. Bureau of Labor and Industries, July 2, 2015),[7] at 32, 33 ("This case is not about a wedding cake or a marriage," but about cakeshop's "clear and direct statement"); USA Today, *Gay Marriage: Siding with Religious Baker is Problematic*, June 26, 2017, ("[T]he right of same-sex couples to marry is the law of the land. As Justice Anthony Kennedy wrote in his 2015 majority opinion, 'The Constitution

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[7] Available at https://web.archive.org/web/20200516050251/https://www.oregon.gov/boli/SiteAssets/pages/press/Sweet%20Cakes%20FO.pdf.

promises liberty to all within its reach, a liberty that includes specific rights that allow persons, within a lawful realm, to define and express identity.' *Why would the court now want to countenance people who object to that?*") (emphasis added). The entire *point* of applying public-accommodations laws to professionals like Smith, under rationales like these, is to compel them either to express a more positive attitude toward same-sex marriage or leave public life.

IV. Unique talents do not justify restrictions on civil rights.

A. The Tenth Circuit properly focused on tangible access to the market.

Even robust interpretations of the Privileges or Immunities Clause make a tacit exception for the promotion of health, safety, and morals. See *Bartemeyer v. Iowa*, 85 U.S. 129, 138 (1874) (Field, J., concurring); *Corfield,* 6 F. Cas. 551-52 ("such restraints as the government may justly prescribe for the general good of the whole"); Steven G. Calabresi, et al., THE U.S. CONSTITUTION AND COMPARATIVE CONSTITUTIONAL LAW 711 (2016) (*Corfield* "general good of the whole" language "is the basis for the balancing test that the Supreme Court engages in, even in the First Amendment case law area, where rights are said to be fairly absolute."). Republican adoption of the Civil Rights Act of 1875 makes plain that the Fourteenth Amendment does not embody an unqualified, unlimited right of all businesses to deny service to customers for any reason. The Fourteenth Amendment clearly continues an English common-law tradition allowing many sorts of market inter-

vention. Those interventions, however, are themselves not unlimited. The interests at stake here clearly lie outside the police power as the English and American common-carrier traditions and Reconstruction Republicans construed those limits.

The Tenth Circuit properly held that dignitary interests standing alone could not justify exclusion of Ms. Smith from the wedding-services industry. "As compelling as Colorado's interest in protecting the dignitary rights of LGBT people may be, Colorado may not enforce that interest by limiting offensive speech." *303 Creative Ltd. Liab. Co. v. Elenis*, 6 F.4th 1160, 1179 (10th Cir. 2021). The court was right that any attempt to prevent offense through a commercially-limited ban on offensive speech would be woefully underinclusive, because "the First Amendment protects a wide range of arguably greater offenses to the dignitary interests of LGBT people." *Id.* This fits with how Reconstruction Republicans distinguished civil rights from purely-private social interactions. Green, Equal Citizenship, at 106-07, 207-211 (explanations preceding Civil Rights Act of 1875 from Senators James Alcorn, Henry Anthony, Matthew Carpenter, James Flanagan, Frederick Frelinghuysen, John Sherman, and Charles Sumner, and Representatives Alonzo Ransier and William H.H. Stowell); *Bell v. Maryland*, 378 U.S. 226, 294 (1964) (Goldberg, J., concurring) (same distinction repeatedly made in 1866).[8]

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[8] Independent of the underinclusiveness of commercial regulations in fostering the dignitary interests of the gay and lesbian community, there is of course also a critical distinction between not serving members of a protected class due to animus against the class and what is at stake here, a desire not

The Tenth Circuit instead justified Colorado's regulations on the uniqueness of Ms. Smith's talents:

> Excepting Appellants from the Accommodation Clause would necessarily relegate LGBT consumers to an inferior market because Appellants' *unique* services are, by definition, unavailable elsewhere. … Appellants' custom and unique services are … inherently not fungible. To be sure, LGBT consumers may be able to obtain wedding-website design services from other businesses; yet, LGBT consumers will never be able to obtain wedding-related services of the same quality and nature as those that Appellants offer. Thus, there are no less intrusive means of providing equal access to those types of services. … This case does not present a competitive market. Rather, due to the unique nature of Appellants' services, this case is more similar to a monopoly. The product at issue is not merely "custom-made wedding websites," but rather "custom-made wedding websites of the same quality and nature as those made by Appellants." In that market, only Appellants exist… It is not difficult to imagine the problems created where a wide range of custom-made services are available to a favored group of people, and a disfavored group is relegated to a narrower selec-

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to use creative talents to promotion and event or idea. Petitioner would serve all people, but not promote all events or ideas. Thus, the characterization as a dignitary harm aimed at the gay and lesbian community is misplaced. The risk of harm through a wooden application of laws like this validates our historic limitations on such laws.

> tion of generic services. Thus, unique goods and services are where public accommodation laws are most necessary to ensuring equal access.

303 Creative, 6 F.4th 1180-81. As Justice Tymkovich noted in his dissent, the court did not "cite any case law to support this unconventional characterization of a compelling interest." *Id.* at 1203.

B. Reconstruction Republicans embraced English distinctions between the "*ius privatum*" and "*ius publicum*."

Led by Charles Sumner, Republicans understood the Fourteenth Amendment to embody a common-law tradition that justified market interventions to promote freedom of competition or supply a remedy when such competition is impossible, as with local natural monopolies. Prior to their enactment of the Civil Rights Act of 1875, Republicans gave a great deal of attention to the nature of common-carrier-style rights and their relationship to the Privileges or Immunities Clause. The Congressional Globe and Congressional Record display a great deal of consensus among Republicans and continuity between the Fourteenth Amendment and the English common-law tradition. Republicans consistently justified market interventions the same way as had traditional English law.

By the time of Reconstruction, the English and American law of public accommodations had long made a threefold division of rights first marked crisply by Chief Justice Matthew Hale's 1670 trea-

tise DE PORTIBUS MARIS (Concerning the Gates of the Sea):

- a purely private/social *ius privatum* outside governmental power,
- a purely governmental *ius regium* consisting of the government's own responsibilities, such as the protection of life and property and the operation of a system of criminal and civil justice, and
- the *ius publicum*, the overlapping civic/social realm in which common carriers and other businesses "affected with a public interest" operate.

A COLLECTION OF TRACTS RELATIVE TO THE LAW OF ENGLAND 45-113, 78 (Francis Hargrave, ed., 1787). Hale's three-fold distinction was explicitly acknowledged in English law in *Allnutt v. Inglis*, 104 Eng. Rep. 206 (K.B. 1810), and became part of American substantive-due-process law in *Munn v. Illinois*, 94 U.S. 113, 125-29 (1877), which reviewed both Hale and *Allnutt* in great detail. Hale's views had been amply received into American law well before *Munn*; one court noted of DE JURE MARIS, a companion essay to DE PORTIBUS MARIS, citing five earlier cases, that "its authority has been repeatedly recognized in this country." *Young v. Harrison*, 6 Ga. 130, 142 (1849).

Allnutt and *Munn* both quote Hale's rationale for imposing special duties on a wharf owner not to charge excessive rates: "because they are the wharfs only licensed by the Queen, or because there is no other wharf in that port." *Allnutt*, 104 Eng. Rep. at 211; *Munn*, 94 U.S. at 127 (both quoting Hale at 77).

With other wharves available, competition will of course prevent an owner from being able to charge extortionate prices. The extent of legal and natural monopolies—i.e., the lack of a readily-available substitute goods and services—mark the furthest extent of a police-power justification for imposing common-carrier-style rights on private parties. Private rate-setting in a genuinely competitive market is beyond state power. Richard Epstein's work canvasses the economic background and later history at length. *Public Accommodations Under the Civil Rights Act of 1964: Why Freedom of Association Counts as a Human Right*, 66 STAN. L. REV. 1241, 1249-53, 1261-63 (2014) (hereafter Epstein, Public Accommodations); *The History of Public Utility Rate Regulation in the United States Supreme Court: Of Reasonable and Nondiscriminatory Rates*, 38 J. SUP. CT. HIST. 345, 346-50 (2013); PRINCIPLES FOR A FREE SOCIETY: RECONCILING INDIVIDUAL LIBERTY WITH THE COMMON GOOD 279-318 (2002).

Munn's explanation of Hale and cases like *Allnutt* fits perfectly with Republican explanations of the Privileges or Immunities Clause; the Court repeatedly refers to "citizens" and other language from the Clause. See, for example, 94 U.S. at 124 (referring to the "rights or privileges" with which "citizens" part when they enter society); *id.* at 125 ("the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good'); *id.* at 129 ("the right of the citizen to pursue his lawful trade or calling"). As in *Allgeyer v. Louisiana*, 165 U.S. 578, 589-90 (1897),

McDonald, 561 U.S. 762 n.9, and the many religion-clause equal-citizenship cases cited earlier, the stream of historical evidence relevant to the original meaning of the Privileges or Immunities Clause feeds into the substantive due process river in *Munn*.

Many observers have noted the similarity between the approach to regulation in *Munn* and that explained by Reconstruction Republicans like Charles Sumner in 1872. See *Bell*, 378 U.S. 298 n.17 (Goldberg, J., concurring); Civil Rights Cases, 109 U.S. 3, 42 (1883) (Harlan, J., dissenting); Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 1029 n.388 (1995) ("It is no coincidence that *Munn* … shares the world view of the Congress of 1871-85.").

Cases after *Munn* reaffirmed and amplified its approach to the *ius privatum*/*ius publicum* distinction. Harvard Law Professor Bruce Wyman's 1517-page treatise, THE SPECIAL LAW GOVERNING PUBLIC SERVICE CORPORATIONS (1911) (hereafter Wyman, Public Service), explained the history of the distinction and its monopoly/scarcity rationale. The Court unanimously explained the distinction again in *Chas. Wolff Packing Co. v. Court of Ind. Relations*, 262 U.S. 522 (1923). Chief Justice Taft recapitulated three general categories of businesses clothed with a public interest: express grants of privileges from the government, certain "exceptional occupations" like "keepers of inns, cabs, or gristmills," and a broad third category of businesses with a "peculiar relation to the public." *Id.* at 535. Taft explained, "In nearly all the businesses included under the third head above, the thing which gave the public interest was the indispensable nature of the service and the

exorbitant charges and arbitrary control to which the public might be subjected without regulation." *Id.* at 538. Food was not scarce in the 1920s, and Taft's explanation of the market could easily be applied to website design services today: "There is no monopoly in the preparation of foods. … . Food is now produced in greater volume and variety than ever before. Given uninterrupted interstate commerce, the sources of the food supply in Kansas are country-wide, a short supply is not likely, and the danger from local monopolistic control less than ever." *Id.*

Title II of the Civil Rights Act of 1964 continues this tradition as well. In rebutting individual-rights objections to the public-accommodations rules in Title VII, this Court relied heavily on history. See *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 261 (1964) (noting that Title II and state public-accommodations statutes "but codify the common-law innkeeper rule"); 110 CONG. REC. 6539 (1964) (Senator Humphrey: "The legal theory supporting enactment of title II is firmly rooted in our common law heritage. … Title II is in the tradition of Anglo-Saxon common law."). Title II focuses on situations in which local physical scarcity gives particular vendors special market power. As Epstein notes, "The paradigmatic case of Title II's application in 1964 was against monopolists who used their powers of exclusion to limit the options of politically vulnerable persons." Epstein, Public Accommodations at 1243 (citing *Heart of Atlanta*). The sale of food for on-site consumption at lunch counters, for instance, is covered, but not the sale of food at ordinary grocery stores to be eaten elsewhere. 42 U.S.C. §

2000a(b)(2). Because the radius of potential competitors is so much larger, retail sales for off-site consumption involve far less local scarcity. As Senator Hubert Humphrey explained in the discussions leading to the Civil Rights Act, "Discrimination in retail establishments generally is not as troublesome a problem as is discrimination in the places of public accommodation enumerated in the bill." 110 CONG. REC. 6533 (1964).

C. Singer's account of public accommodations neglects the long history of scarcity-based justifications.

Joseph Singer's reboot of the public-accommodations origin story, *No Right to Exclude: Public Accommodations and Private Property*, 90 Nw. U. L. Rev. 1283, 1292 (1996), claims that a natural-monopoly justification for, and limit on, common-carrier law was "the invention of" Wyman, though he cites only Wyman's earlier articles and not his 1911 treatise. A glance at Wyman's discussion of history makes Singer's error plain: Wyman was clearly no innovator. Singer himself does not even mention Hale's DE PORTIBUS MARIS or *Allnutt*, the classic English monopoly-based explanations of the law of common carriers. Appearing in 1670 and 1810, they decisively cut the legs from under Singer's claim that such justifications arose only after the Civil War. Singer asks, "Specifically, did the idea of monopoly or the idea of a government license have anything to do with it, as suggested by later scholars?" He answers "no," *id.* at 1303, but this is just wrong. So is Singer's emphatic claim of a complete absence of monopoly justification in antebellum cases, *id.* at 1319 ("it is important to note that *none*

of the antebellum cases bases the duty to serve on the fact of monopoly," emphasis in original). A list of twenty counterexamples to Singer's claim—twenty American antebellum "representative cases about the monopoly characteristics of common carriers and their franchises and licenses"—appears in Alfred Avins, *The Civil Rights Act of 1875: Some Reflected Light on the Fourteenth Amendment and Public Accommodations*, 66 COLUM. L. REV. 873, 888 n.80 (1966). The cases that Avins cites in this footnote repeatedly explain the duty to serve the public in the context of scarcity.[9]

Singer's argument against a monopoly rationale for common-carrier law hinges on illicitly pitting two aspects of the Anglo-American law of common carriers against each other: the existence of a local monopoly and the offer to serve the public. Properly understood, these two phenomena work together. Common carriers who invite the public at large to rely on them by abandoning substitute goods and services—using a particular railroad, bridge, or grain elevator—*thereby render* themselves the only source of the relevant good. Common-carrier regulations prevent those with such local reliance-induced monopolies from preying on vulnerable members of the public. That is why those businesses are "affected with a public interest." As Chief Justice Holt put the point in an early bailment case, common-carrier

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[9] For the exact language in these cases describing the duty to serve the public, see Christopher Green & David Upham, *The Fourteenth Amendment and Masterpiece Cakeshop: Equal Citizenship, our Inclusive Republic, and Anglo-American Common Law*, PUBLIC DISCOURSE, December 5, 2017, https://www.thepublicdiscourse.com/2017/12/20624/.

regulation is "contrived by the policy of the law, for the safety of all persons, the necessity of whose affairs oblige them to trust these sorts of persons." *Coggs v. Bernard*, 92 Eng. Rep. 107, 112 (1703).

D. A professional's unique talents, without more, do not move her from the *ius privatum* to the *ius publicum*.

The mere lack of perfect fungibility between one provider and another is obviously a far cry from what *Wolff* required to justify intervention to prevent monopolistic control, namely, "the indispensable nature of the service and the exorbitant charges and arbitrary control to which the public might be subjected without regulation." *Chas. Wolff Packing Co.*, 262 U.S. 538. No one will be subject to exorbitant charges simply because Ms. Smith is allowed to compete in the wedding-services market. Greater supply will obviously *reduce* prices. Further, marriage traditionalists who desire to promote their weddings in a way that only a fellow traditionalist like Smith would find appropriate will find themselves with additional options on the market. It is difficult to imagine a more directly counterproductive way to promote marketplace access than what Colorado has chosen.

The Tenth Circuit sought to bolster its unique-abilities argument by relying on *Heart of Atlanta*'s reference to "overwhelming evidence of the disruptive effect that racial discrimination has had on commercial intercourse." *303 Creative,* 6 F.4th at 1179. But this draws exactly the wrong lesson from the Court's careful defense of Title II in 1964. The Court did not assert categorically that because

discrimination *always* has disruptive marketplace effects, any public accommodation laws at all would always be justified. The Court instead explained how a particular law, Title II, could be justified based on the particular disruptions at the time. But in our world today, in which wedding professionals are standing by to meet the full complement of same-sex couples' celebratory needs and desires, an individual vendor's claims of conscience can have no disruptive effect on any buyer's access to the market. The *Heart of Atlanta* justification does not apply.

Finally, Professor Wyman's discussion of public-calling regulation of two fields that obviously involve non-fungible individual talents—surgeons and tailors—is instructive. No two individual surgeons will supply exactly the same services in exactly the same way; neither will any two individual tailors. But even though surgeons and tailors, like website designers, are obviously unique and non-fungible, the present-day relative abundance of such professionals has rendered earlier public-service restrictions obsolete.

Regarding surgeons, Wyman cites a case from the reign of Henry VI and comments,

> [I]t is plain that the curing of man or beast was considered a public calling. In the rude England of these unlettered times such professional men were comparatively few. Frequently only one surgeon would be at hand in any one district, so that if he should refuse his services, all might be lost. Such being the situation it is easy to understand why the law was so stern in the case of the common doctor,

> requiring him to cure all who came by reason of his general profession and giving the patient an action, although he had submitted himself to the operation, if the doctor was negligent, although no care had been promised in the particular case. It was the unusual situation which produced this extraordinary law. Today, however, there are so many physicians in most communities that the law apparently no longer deems it necessary to compel them to accept any patient who may call upon them.

Wyman, Public Service at 7. Regarding tailors, Wyman cites another fifteenth-century case, this time from the reign of Edward IV, and then comments similarly:

> It is rather difficult at present to imagine a state of society where there was not competition enough among tailors. Still, the time was when this most necessary calling was followed by so few comparatively, that for the protection of the public coercive law was deemed necessary. But in this calling there has been lively competition for so long that the tailor at a very early time dropped from the list of public callings, and is mentioned in the books no more as a member of this exceptional class of public servants.

Id. at 8. Later, Wyman summarizes the way in which the disappearance of scarcity has changed the proper contours of regulation:

> The common law persists from age to age, and though the instance of its rules may be seen to

> change as old conditions pass away and new conditions arise, its fundamental principles remain. The early cases which were just under discussion are illustrations of this course of events. Barber, surgeon, smith and tailor are no longer in common calling because the situation in the modern times does not require it; but innkeeper, carrier, ferryman and wharfinger are still in that classification, since even in modern business the conditions require them to be so treated.

Id. at 17.

CONCLUSION

The Tenth Circuit's story simply does not fit traditional justifications for limits on occupational freedom. An approach to public accommodations rooted in the original meaning of the Fourteenth Amendment and historic limits on police powers, by contrast, will maximize freedom, respect, and participation in the marketplace. Our Constitution is not consistent with pushing citizens like Ms. Smith out of the marketplace. This is not because her liberties trump the freedoms of those seeking same-sex-wedding services. Rather, subscribing to a creed that limits one's participation in certain sorts of events is miles removed from the refusal to serve a class of persons in order to undermine their equal citizenship. While we want to encourage a society that recognizes the dignity of all of its members, the drive to eradicate dissent from the majority's understanding of marriage is the sort of "officially disciplined uniformity for which history indicates a disappointing and disastrous end." *W. Va. Board of Education*

v. Barnette, 319 U.S. 624, 637 (1943). By contrast, our history has shown that public accommodations laws function best to prohibit public harms—those that result in difficulty in accessing service providers due to class-based discrimination, particularly in monopoly or near-monopoly settings. We can prohibit invidious class-based discrimination while continuing to protect the creedal and viewpoint-based diversities that have long enhanced the live-and-let-live marketplace of America's inclusive republic.

The judgment below should be reversed.

Respectfully submitted,

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