NO. 21-476

In the
# Supreme Court of the United States

303 CREATIVE LLC; LORIE SMITH,
*Petitioners*,
v.
AUBREY ELENIS; SERGIO RAUDEL CORDOVA; CHARLES GARCIA; RICHARD LEE LEWIS, JR.; MAYUKO FIEWEGER; CHERYLIN PENISTON; JEREMY ROSS; DANIEL WARD; PHIL WEISER,
*Respondents*.

ON WRIT OF CERTIORARI TO THE
U.S. COURT OF APPEALS FOR THE TENTH CIRCUIT

## BRIEF ON THE MERITS FOR RESPONDENTS


PHILIP J. WEISER
Attorney General

ERIC R. OLSON
Solicitor General
*Counsel of Record*

Office of the Colorado
Attorney General
1300 Broadway, 10th Floor
Denver, Colorado 80203
Eric.Olson@coag.gov
(720) 508-6000

ISABEL J. BROER
MELODY JOY FIELDS
ABIGAIL M. HINCHCLIFF
DANIEL R. MAGALOTTI
BIANCA E. MIYATA
VINCENT E. MORSCHER
HELEN NORTON
JACK D. PATTEN, III
DANNY RHEINER
BILLY LEE SEIBER
SKIPPERE S. SPEAR

*Counsel for Respondents*

## QUESTION PRESENTED

Does a public accommodations law violate the Free Speech Clause when it requires a business to offer all customers its goods and services—including customized goods and services—regardless of those customers' protected characteristics?

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Cases

**Statutes**



**Other Authorities**

## INTRODUCTION

Every day, Coloradans buy the goods and services they need from businesses that open their doors to the public. Many of these goods and services have deep meaning for their buyers: flowers for a spouse's funeral, family photographs to celebrate a baby's arrival, a custom suit to start a new job. These customers do not look, love, or worship the same way. But they all expect to participate in the public marketplace as equals. A business that rejects these customers because of who they are harms them as they seek to express their grief, mark their joy, and improve their lives.

Public accommodations laws ensure all customers can participate in these everyday commercial exchanges. Following a common-law tradition that predates the Founding, these laws protect customers' ability to buy goods and services regardless of their religion, race, disability, or other protected characteristic. Allowing a business to refuse service because of who these customers are would break from this tradition and deny them full participation in the marketplace.

Colorado's Anti-Discrimination Act protects these customers' equal access and equal dignity. The Act's Accommodations Clause requires businesses open to the public to sell their goods and services to all customers regardless of protected characteristics. The Act regulates ordinary commercial conduct—sales discrimination—which this Court has never found the First Amendment to embrace. But 303 Creative LLC and its owner, Lorie Smith (collectively, "the Company"), seek permission to refuse service to same-sex

couples in the future sale of wedding-website design services. The Company claims preemptively that serving these potential customers could send a message that it does not want to convey.

The Company's message, however, is not the target of the Act. The Accommodations Clause does not aim to suppress any message the Company might express. The Company is free to decide what design services to offer and whether to communicate its vision of marriage through biblical quotes on its wedding websites. The Act requires only that the Company sell whatever product or service it offers to all regardless of its customers' protected characteristics. The Act does not, as the Company claims, compel a Hindu calligrapher to "write flyers proclaiming, 'Jesus is Lord.'" Pet. Br. 27. It requires only that if the calligrapher chooses to write such a flyer, they sell it to Christian and Hindu customers alike.

Over many decades, and against many challenges, this Court has repeatedly affirmed the state's ability to prevent ordinary sales discrimination. It should not abandon this important and longstanding principle now.

## STATEMENT OF THE CASE

### I. Legal and historical background.

#### A. The nation has long required businesses open to the public to serve all customers.

At the Founding, American common law required businesses open to the public to provide their services to all customers. Many states later codified this common-law duty in the first public accommodations statutes. These statutes have covered different accommodations and different protected classes over time. But the common thread is the state's authority to require a business that sells its goods or services to the public to serve all comers.

Both English and American common-law sources agreed: businesses that held themselves out to the public must offer the services advertised to all who sought them. As Lord Holt explained, "where-ever any subject takes upon himself a public trust for the benefit of the rest of his fellow-subjects, he is *eo ipso* bound to serve the subject in all the things that are within the reach and comprehension of such an office." *Lane v. Cotton*, 88 Eng. Rep. 1458, 1464 (K.B. 1701). This requirement covered all those engaged in a "profession of a trade which is for the public good." *Id.* Similarly, Blackstone wrote that "if an inn-keeper, or other victualler" "opens his house for travellers, it is an implied engagement to entertain all persons who travel that way[.]" WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 139 (Edward Christian et al. eds., Collins & Hannay, Vol. 2 1830). And Justice Story summarized that common callings (such as inns and carriers) that "set[] themselves up" "for a common public employment on hire" are not "at liberty to refuse a

passenger." JOSEPH STORY, COMMENTARIES ON THE LAW OF BAILMENTS §§ 590-95, at 589-95 (Schouler, 9th ed., 1878). As Justice Oliver Wendell Holmes describes, this common-law duty imposed a "general obligation of those exercising a public or 'common' business to practise their art on demand." Oliver Wendell Holmes, Jr., *Common Carriers and the Common Law*, 13 AM. L. REV. 609, 615 (1879).

States began to codify this common law-duty in the mid-to-late 1800s. Such statutes codified "[t]he common law as it existed," which provided "a remedy against any unjust discrimination to the citizen in all public places." *Ferguson v. Gies*, 46 N.W. 718, 720 (Mich. 1890); *Donnell v. State*, 48 Miss. 661, 680-81 (1873) (similar). Though these statutes were not uniform, they based the duty to serve on a business holding itself out to the public, rather than on the type of business or the monopolistic features of certain industries. *See*, *e.g.*, *Messenger v. State*, 41 N.W. 638, 639 (Neb. 1889) (barber); *Ferguson*, 46 N.W. at 719 (restaurant); *Donnell*, 48 Miss. at 682 (ticket seller); *People v. King*, 18 N.E. 245, 248-49 (N.Y. 1888) (skating rink); *Sauvinet v. Walker*, 27 La. Ann. 14, 14-15, *aff'd*, 92 U.S. 90 (1875) (coffee house). These statutes were never understood to implicate the First Amendment or its state equivalents by preventing discrimination in sales to the public.

### B. Colorado has protected equal access to goods and services for over a century.

Exercising this longstanding authority, Colorado first enacted a public accommodations statute in 1885. This law required public accommodations to provide all "citizens" the "full and equal enjoyment" of their

services "regardless of race, color or previous condition of servitude." An Act to Protect All Citizens in Their Civil Rights, 1885 Colo. Sess. Laws 132-33 (repealed 1895). Ten years later, Colorado updated the law, removing "churches" from its scope and expanding it to include "all other places of public accommodation." An Act to Protect All Citizens in Their Civil and Legal Rights, 1895 Colo. Sess. Laws, ch. 61, 139 (1895).

Beginning in the 1970s, several local governments in Colorado amended their public accommodations ordinances to prevent discrimination based on sexual orientation. *Romer v. Evans*, 517 U.S. 620, 623-24 (1996). In response, voters approved an amendment to the Colorado Constitution nullifying such ordinances and prohibiting any state or local action that protected against discrimination based on sexual orientation. *Id.* at 624. This Court held that amendment violated the Equal Protection Clause because it lacked a rational basis, made it "more difficult for one group of citizens than for all others to seek aid from the government," and inflicted on "gays and lesbians" "immediate, continuing, and real injuries." *Id.* at 633-35.

In 2008, the General Assembly amended Colorado's public accommodations law—now known as the Colorado Anti-Discrimination Act—to prevent businesses open "to the public" from denying customers "the full and equal enjoyment" of "goods [or] services" "because of" "sexual orientation." Colo. Rev. Stat. § 24-34-601(1), (2)(a).

Two provisions of the Act are at issue. The Accommodations Clause ensures that businesses selling "to the public" do not discriminate based on "disability,

race, creed, color, sex, sexual orientation, gender identity, gender expression, marital status, national origin, or ancestry." Colo. Rev. Stat. § 24-34-601(2)(a). The Act limits public accommodations to "place[s] of business" selling "to the public" and "place[s] offering services … to the public." Colo. Rev. Stat. § 24-34-601(1). It does not cover freelance writers, artisans, and others who do not choose to offer their services "to the public." The Act also excludes all places "principally used for religious purposes." *Id.*

The second provision, the Communications Clause, makes sure that businesses do not evade the law by turning customers away through discriminatory advertising. The Communications Clause prohibits businesses from "display[ing]" a "notice" that "indicates that the full and equal enjoyment of the goods [or] services … will be refused, withheld from, or denied an individual or that an individual's patronage or presence at a place of public accommodation is unwelcome, objectionable, unacceptable, or undesirable" based on a protected characteristic. *Id.* at (2)(a).

These protections do not interfere with a business's control over the goods or services it will offer to the public. Rather, the Act prevents businesses from refusing to sell those same goods or services based on a customer's protected characteristic.

## II. Proceedings below.

### A. The Company filed suit before offering wedding website services.

The Company is a Limited Liability Company and it receives substantial benefits under Colorado law, including limited liability for its owners, the ability to

sue in its own name, and tax advantages. Colo. Rev. Stat. § 7-80-101, et seq.

While the Company provides design services, no customer has requested the Company to design any specific wedding website. *Id.* at 166a. The record contains only a mock-up website the Company made without any customer input. Pet. 5. This mock-up does not show how the Company would design a future customer's website; what messages the website might contain; who would create those messages; or to whom those messages might be attributed. Pet. App. 187a.

The Company claims that, after it sued, it received a "request for a same-sex-wedding website." Pet. 5. But the "request" referred to by the Company was not a request for a website at all, just a response to an online form asking about "invites" and "place-names," with a statement that the person "might also stretch to a website." Pet. App. 166a.

The Company did not respond to that online form. Nor did the Company take any steps to verify that a genuine prospective customer submitted the form.

### B. The District Court and the Court of Appeals found the Act constitutional.

The District Court granted summary judgment to Colorado. Because no customers had sought any services from the Company, the court held that the Company had not shown an injury-in-fact sufficient for standing to challenge the Accommodations Clause. Pet. App. 165a-67a. It found the Communications Clause constitutional because it regulated speech that proposed illegal discrimination. *Id.* at 132a-34a.

A divided panel of the Tenth Circuit affirmed on a theory not advanced by Colorado. The court reasoned that the Accommodations Clause was a content-based restriction on speech as applied to the Company's proposed wedding-website design services, and therefore triggered strict scrutiny. *Id.* at 23a-24a. It concluded that the Act satisfied strict scrutiny, because it is narrowly tailored to Colorado's compelling interest in ensuring equal access to publicly available goods and services. *Id.* at 26a-27a.

The Tenth Circuit also applied *Fulton v. City of Philadelphia* and *Employment Division v. Smith* to conclude that the Act is a neutral law of general applicability. *Id.* at 34a-46a; *Fulton*, 141 S. Ct. 1868 (2021); *Smith*, 494 U.S. 872 (1990). The court held that the Company provided no evidence that Colorado would enforce the Act in a non-neutral fashion after *Masterpiece*. Pet. App. at 36a-37a.

## SUMMARY OF THE ARGUMENT

The Accommodations Clause prohibits sales discrimination by businesses that choose to sell their goods and services to the public.

The Act's application does not turn on what a business chooses to sell. It simply requires that, once a business offers a product or service to the public, the business sells it to all without regard to a customer's protected characteristic. What a business chooses to sell remains entirely up to the business. The Company can define its service however it wants—including offering only websites that include biblical quotes describing marriage as the union of one man and one woman.

But the Company must sell whatever it offers to customers regardless of their race, religion, sexual orientation, or other protected characteristic. The Company cannot refuse to sell its services, however limited, to a customer just because of who they are. Both believers and atheists can choose to buy its websites with biblical quotes. Because the Act regulates sales, and not the products or services sold, it does not prohibit or compel the speech of any business.

Nor does the Accommodations Clause regulate expressive conduct. The mere act of selling something—even something that may contain expressive elements—is not itself expressive conduct. Routine commercial transactions do not become expressive conduct just because the business believes a sale would convey approval of the buyer.

If this Court needs to consider the content of the Company's websites to determine whether the Company will deny equal access to its services, then this

dispute is not ripe. The constitutional questions before this Court are too significant to decide without an adequate record.

Even if this Court were to find that the Accommodations Clause's regulation of conduct burdens the Company's expression, any such burden is incidental to the regulation. And because the State's regulatory interest is unrelated to the suppression of ideas, this Court should analyze its requirements under, at most, an intermediate level of scrutiny. The Company's and its *amici*'s proposed exemptions would upend antidiscrimination law—and other laws too. Each of their proposed exemptions departs from this Court's doctrine and creates an enforcement regime riddled with uncertainty and inconsistency. The Company does not suggest limiting its proposed exemptions to certain objections, customers, or laws. Nor do the Company's proposed exemptions offer workable standards for determining who qualifies as an "artist," what a custom product is, or when a business's message is "affected" by a law. Its proposed exemptions would leave customers unsure about which businesses will serve them in the public marketplace.

The Accommodations Clause satisfies any level of scrutiny. Colorado has a compelling interest in ensuring equal access to publicly available goods and services. This interest is rooted in this nation's history and traditions, which have long recognized both the material and dignitary harms of the denial of service.

The Accommodations Clause is also tailored to this compelling interest. It targets only specific commercial conduct: the discriminatory sale of products and services by businesses open to the public. Under

the Act, customers do not have a right to whatever goods and services they want—instead, they have a right to whatever goods and services are sold to other customers. The Act is thus drawn to avoid any burden on expression that does not precisely correspond with the refusal to provide equal access. The exemptions proposed by the Company would disregard the State's interest or fail to attain it. Even if this Court were to apply strict scrutiny, Colorado's compelling interest cannot be achieved through less restrictive means.

Nor does the Communications Clause violate the First Amendment. It prohibits only commercial speech that facilitates illegal conduct—expression that receives no free speech protection. It does not prohibit the Company from expressing its views on marriage or any other issue. And the Company's proposed advertisements expressly deny service on an equal basis when they state that it will not create wedding websites for same-sex couples.

## ARGUMENT

### I. The Accommodations Clause regulates discriminatory sales practices, not speech.

The Act's objective is simple: to prevent sales discrimination by businesses that choose to sell their goods and services to the public. It focuses on ordinary commercial conduct and applies in the same way regardless of the goods or services sold. Once a company chooses to sell to the public, the Act ensures it sells to everyone regardless of protected characteristics.

What a business chooses to sell to the public—including the design of its goods or services—remains entirely up to the business. The Act does not interfere with the Company's choice to offer only websites of its own design, including those with biblical passages stating that marriage is a union of one man and one woman.

The Act just requires that the Company allow potential customers to decide for themselves whether to buy such a website, rather than restrict sales based on a buyer's protected characteristic. If the Company turns down a customer because of who they are, that violates the Act.

The Company claims that the Act allows Colorado to "compel commissioned speakers to speak any message." Pet. Br. 27. The Act does no such thing. Three of the Company's examples do not involve discrimination because of a protected characteristic under Colorado law. And all of the examples misunderstand how the Act works, as the fourth example shows. The Act does not compel a Hindu calligrapher to "write flyers proclaiming, 'Jesus is Lord.'" Pet. Br. 27. It requires only that if the calligrapher chooses to write such a

flyer, they sell it to Christian and Hindu customers alike. Because the Act regulates sales, and not the products or services sold, it does not prohibit or compel the speech of any business.

The mere act of selling something—even something that may contain expressive elements—is not itself expressive conduct. And routine commercial transactions do not become expressive just because the business believes a sale would convey its approval of the buyer. A book is expressive; selling a book to the public is not. Designing a home is expressive; selling that design service to the public is not. By regulating routine commercial conduct, the Act addresses what a business does and not what it says. Any burden the Act might impose on a business's expression therefore does not violate the First Amendment.

### A. The Accommodations Clause regulates conduct, not speech.

The Act applies to businesses that sell goods and services "to the public," and makes it unlawful for such businesses to deny equal access to offered goods or services based on protected characteristics. Colo. Rev. Stat. § 24-34-601(1), (2)(a). By ensuring all customers enjoy equal access to a business's goods and services, the Act regulates the conduct of discriminatory sales. *See Wisconsin v. Mitchell*, 508 U.S. 476, 487 (1993) (describing antidiscrimination laws as the "content-neutral regulation of conduct").

As an unbroken line of this Court's decisions makes clear, public accommodations laws permissibly regulate conduct when they require equal access to goods and services, even where the businesses engage in activities protected by the First Amendment. *See,*

*e.g., N.Y. State Club Ass'n, Inc. v. New York*, 487 U.S. 1, 6-7, 13-14 (1988) (holding antidiscrimination law governing businesses consistent with First Amendment); *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 542, 548-49 (1987) (same); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622-28 (1984) (same); *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 n.5 (1968) (similar); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 260 (1964) ("[I]n a long line of cases this Court has rejected the claim that the prohibition of racial discrimination in public accommodations interferes with personal liberty.")

Requiring businesses to provide equal access to the services they offer does not burden their expression even when those businesses offer custom or expressive services. *Runyon v. McCrary* illustrates this principle. 427 U.S. 160, 176 (1976). There, the Court held that a "commercially operated" school's refusal to admit Black students violated federal law prohibiting race discrimination in contracting. *Id.* at 173. In so doing, the Court found that the law's regulation of non-expressive conduct—offering "educational services" for sale "to members of the general public"—did not interfere with the business's ability to control the expressive content of those services. *Id.* at 175-76. Similarly, requiring a law firm to treat its female and male attorneys equally did not interfere with the expressive "activities of [its] lawyers." *Hishon v. King & Spalding,* 467 U.S. 69, 78 (1984).

The Act's regulation of conduct operates like the antidiscrimination law upheld in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.* (*FAIR)*,

547 U.S. 47, 60 (2006). "As a general matter, the Solomon Amendment regulates conduct, not speech. It affects what law schools must *do*—afford equal access to military recruiters—not what they may or may not *say*." *Id.* (emphasis in original). Though "[t]he law schools object to having to treat military recruiters like other recruiters," the Court held "that regulation of conduct does not violate the First Amendment." *Id.* at 70.

### B. The Accommodations Clause does not address what a business chooses to sell—only who can buy what it sells.

Businesses pick the goods and services they sell to the public without any interference from the Act. A bookseller may sell only Christian books. A photographer may take only pet photos. And an architect may design only hotels. Similarly, businesses need not provide goods and services they do not want to. The Act does not make the bookstore sell secular literature, the photographer take family portraits, or the architect design a house. It leaves the content of goods and services unregulated.

Here, the Company is free to design custom wedding websites that feature whatever biblical passages it wants. *See* Pet. Br. 6. And the Company may use the websites it sells to express its view that marriage is "a life-long union between one man and one woman." *Id.* at 7, 23. All the Act requires is that the Company sell its website-design services to the public regardless of the customer's sexual orientation, religion, or other protected characteristic. If a customer wanted a different website, one that the Company did not offer, the Company need not provide it. The Act is concerned

only with whether the Company offers its services regardless of a customer's protected characteristic.

The Company suggests that designing a website for a same-sex couple is a different service than designing a website for an opposite-sex couple because "context matters." Pet. Br. 23 n.2. On this sparse record with no actual customer, the only possible "context" is the protected characteristic of the customer, not the service the Company says it will offer.

Just as it violates Title VII to fire someone "if changing the employee's sex would have yielded a different choice by the employer," so too does it violate the Act if changing the customer's sexual orientation, or any other protected characteristic, would yield a different choice by the Company. *Bostock v. Clayton Cnty., Ga.*, 140 S. Ct. 1731, 1741 (2020). And refusing to sell based on an attribute inextricable from a customer's protected characteristic is discriminatory. *See, e.g.*, *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (denying employment to women with young children is gender discrimination); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 151 (1970) (refusing to serve a white customer because she was in the company of Black patrons is racial discrimination). In these cases, the business discriminated based on an attribute that was "inextricably bound up with" the person's protected characteristic. *Bostock*, 140 S. Ct. at 1742. The Company's proposed conduct of refusing to provide services for same-sex weddings is similarly inextricable from refusing to serve a couple based on sexual orientation.

The Company claims that the expressive character of its services exempts it from these well-settled

laws. It relies on *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston* to assert that the Act impermissibly requires it to alter the message its services send to the public. 515 U.S. 557, 568 (1995).

But *Hurley* supports the Act's application here. *Hurley* did not involve sales (much less sales discrimination) and cast no doubt on the constitutionality of public accommodations laws applied to ensure equal access to the goods or services businesses sell. Instead, *Hurley* involved the "peculiar" application of public accommodations law to "require private citizens" to include a group they objected to in their parade. *Id.* at 559. The law in *Hurley* was applied not to a business's sales but to private parade organizers' decisions about who to include in their parade. So the law altered the message that the parade organizers sought to deliver; the "apparent object" of the law was the message itself. *Id.* at 578.

Here, in contrast, the Company remains free to choose what services it sells to the public. The Act's object is only the nondiscriminatory sale of those services—an objective that the *Hurley* Court expressly recognized as "well within the State's usual power to enact." *Id.* at 572-73 (observing that public accommodations laws are not "unusual" when their "focal point" is the "act of discriminating against individuals in the provision of publicly available goods, privileges, and services").

The Company's reliance on *Boy Scouts of America v. Dale* is similarly misplaced, as *Dale* did not involve the application of a public accommodations law to ordinary commercial conduct. 530 U.S. 640, 657-58 (2000). *Dale* instead involved a freedom of association

challenge (not, as here, a Free Speech Clause claim) to a public accommodations law that forced an expressive association to accept members it did not want. *Id.* at 648; *see FAIR*, 547 U.S. at 68-69 (distinguishing *Dale* from a law requiring universities to provide military recruiters with equal access to university facilities).

In contrast, the Act's objective is to ensure customers' equal access to whatever goods or services a business chooses to sell to the public. Because the Act's requirement of equal treatment targets commercial conduct, the Tenth Circuit erred when it described the Act's purpose as "eliminating … ideas." Pet. App. 24a. This Court has never found that prohibiting sales discrimination imposes a burden on a business's expression. But if enforcement of the Act imposes any burden, it is incidental to the Act's regulation of conduct.

### C. The Accommodations Clause does not compel any business's speech in violation of the First Amendment.

The government compels speech in violation of the First Amendment when it forces a speaker to convey the government's ideological message or when it targets a speaker's message for change or suppression. The Accommodations Clause does neither when it ensures equal access to commercially available goods and services.

The Tenth Circuit erred in holding that the Accommodations Clause compels the Company's speech by requiring it to provide the same wedding website to a same-sex couple that it would provide to an opposite-sex couple. Pet. App. 21a-23a. The Act does not require

the Company to offer particular services. Instead, it ensures that those services actually offered are available to customers regardless of their protected characteristics.

Relying on cases from other contexts, the Company trades on the lower court's error to claim the Act compels it to speak. Pet. Br. 12. That is wrong. By ensuring equal access to commercially available goods and services, the Accommodations Clause does not require the Company to display or parrot state-sponsored ideologies. *Wooley v. Maynard*, 430 U.S. 705, 715 (1977) (First Amendment prohibits a state from requiring a motorist to display the state's motto on his vehicle's license plate); *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 640-42 (1943) (First Amendment prohibits the government from requiring public school students to salute the flag). Rather than requiring businesses to recite or display the State's own message, the Act instead requires businesses to offer their goods and services for sale on an equal basis.

Nor, in ensuring customers' equal access to commercially available goods and services, does the Act seek to alter or compel the Company's speech. *Hurley*, 515 U.S. at 579-80 (distinguishing the regulation of commercial transactions from the regulation of "a speaker who takes to the street corner to express his views"); *see also Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (state cannot require newspaper to print rebuttals to its editorials); *Pac. Gas and Elec. Co. v. Pub. Utils. Comm'n of Cal. (PG&E)*, 475 U.S. 1, 20-21 (1986) (state cannot require company to include other parties' statements in its customer mailings). Just as a newspaper remains free to control the

content of its pages and a business may control the content of its mailings, the Company retains control over the products and services it chooses to sell to the public. It must simply sell the same service to a same-sex couple that it would to an opposite-sex couple.

The Company also relies on *Tornillo* and *PG&E* to claim that the Act impermissibly uses the Company's speech (in the form of wedding websites featuring opposite-sex couples) as a trigger to compel the Company to speak about same-sex weddings. Pet. Br. 32-33. This too is inaccurate. The Act's application is instead triggered by the Company's commercial conduct of offering the same services to some but not to others, not by the expressive content of its services.

Again, the Company can sell—or not sell—whatever it wants to the public, including only websites that feature biblical passages describing marriage as a union between a man and a woman. The Act requires only that the Company sell its services without unlawful discrimination.

### D. The Act does not regulate expressive conduct.

Selling goods and services to the public is not expressive conduct. Yet the Company argues that providing the same wedding-website service to a same-sex couple that it would provide to an opposite-sex couple would communicate that it supports same-sex marriage. Pet. Br. 22-23. This Court has rejected that argument before, and it should do so again here. *See FAIR*, 547 U.S. at 65.

Distinguishing between expressive and non-expressive conduct ensures that ordinary regulations are not subject to heightened scrutiny simply because

a regulated actor wishes to communicate a message. *United States v. O'Brien,* 391 U.S. 367, 376 (1967) (rejecting the view that "conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea"). For example, if an individual intends to express disagreement with government policy by refusing to pay income taxes, courts need not apply heightened scrutiny to determine whether the tax code violates the First Amendment. *FAIR*, 547 U.S. at 66. Refusing to pay income taxes is not expressive conduct for First Amendment purposes.

Conduct is expressive and its regulation receives intermediate scrutiny only if an actor views its conduct as conveying a message *and* onlookers would likely understand that message. *Texas v. Johnson*, 491 U.S. 397, 404 (1998) (citing *Spence v. Washington*, 418 U.S. 405, 410-11 (1974)). Under *Spence*, conduct like wearing a black arm band to protest the Vietnam War or burning an American flag as part of a political demonstration is expressive because the expressive nature of such conduct is "both intentional and overwhelmingly apparent." *Johnson*, 491 U.S. at 404-06.

In contrast, the bare act of selling a service to all on equal terms is not expressive conduct. *FAIR*, 547 U.S. at 65. When a restaurant serves a couple celebrating their anniversary dinner, or a bespoke tailor designs a custom wedding dress, no one believes that by doing so the business expresses any view about the customers or their marriages. There, as here, these businesses are just complying with laws requiring equal service. Treating the simple act of service as expressive conduct protected by the First Amendment

would transform ordinary commercial transactions into constitutionally protected activity.

The Company asserts that "Colorado agrees that Smith's websites 'are expressive in nature' and 'communicate a particular message' that 'celebrate[s] and promote[s]' God's design for marriage." Pet. Br. 19. But those stipulated facts say nothing about whether onlookers would understand the Company to be communicating a message by *selling* these website services on equal terms. And the Company acknowledges as much when it urges an exemption that "does not depend on what others may think." Pet. Br. 29.

The Company wrongly claims "Colorado concedes that viewers … understand Smith's 'intended message of celebration'" "in her websites." Pet. Br. 29 (citing Pet. App. 187a). That stipulated fact instead addresses the Company's own website, not the wedding websites it proposes to sell to the public. And in any event, the fact is immaterial. The issue is not whether a particular website is expressive but whether the conduct of selling the same service to all is itself expressive.

This Court has never treated the act of sale as expressive activity. That a good or service is celebratory (for a wedding), sympathetic (for a funeral), supportive (for an illness), or otherwise "expressive" does not transform the commercial conduct of selling it into expressive activity. As this Court has recognized, even when a law requires an entity to host the speech of others (an act arguably more expressive than sale of a service), observers "can appreciate the difference between speech [a regulated actor] sponsors and speech

[it] permits because legally required to do so, pursuant to an equal access policy." *FAIR,* 547 U.S. at 65.

In any event, as explained in Section II, *infra*, even if the Company's sale of its services were expressive, the Act easily satisfies the intermediate scrutiny that applies to regulations of expressive conduct unrelated to the suppression of ideas.

### E. This case is not ripe if its resolution depends on the nature of the products or services offered by the Company.

The Company argues that the Act has a much more sweeping reach than what is described above. *E.g.*, Pet. Br. 15. But this claim arises from predictions about what the future may bring. The Company has yet to build any custom wedding website, serve a customer, refuse work for a same-sex wedding, or have the Act enforced against it in any way. Instead, the Company seeks a preemptive exemption from the Act for any time it claims a customer's protected characteristic might "affect" the Company's "own message." Pet. Br. 18.

To the extent the Court would need to consider the content of the Company's websites or why it would refuse a particular customer to determine whether it would deny equal access to its goods and services, this case is not ripe. Or, given the significant dispute over how the Act would apply to the Company, a dismissal as improvidently granted may be appropriate.

The Company's assertion that its "opposite-sex wedding websites are not 'suitable for use' to celebrate a same-sex wedding" adds to the uncertainty about the content or scope of the services it intends to sell to the

public. Pet. Br. 23 n.2. The record does not include evidence about why the Company's websites would be unsuitable for a same-sex couple or why same-sex couples should not be able to decide for themselves whether the Company's websites are suitable for their purposes.

The one sample website in the record is made with no apparent customer input and reflects only what the Company "desire[s] to design for [its] prospective clients." Jt. App. 261, 51-72. This sample does not show how the Company would work with a customer or what messages that customer's website might contain. Nor does it allow the Court to make the sometimes-difficult determination of when a refusal to serve is based on who the customer is rather than whether the Company offers that service.

"A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998) (quotation omitted). And this Court has held similar Free Speech Clause claims to be nonjusticiable due to the claim's premature posture when "it is impossible to know whether access will be denied to places fitting appellees' constitutional claim." *Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 304 (1979).

The constitutional questions before this Court are too significant to decide without a sufficient record, particularly given the parties' disagreement about when and how the Act applies to the Company's actions. *See Pub. Affairs Assocs. v. Rickover*, 369 U.S. 111, 112-13 (1962) (declining to adjudicate a dispute

"of serious public concern" absent "an adequate and full-bodied record").

## II. At most, intermediate scrutiny applies because any burden on expression is incidental to the Accommodations Clause's regulation of conduct.

Finding that laws preventing sales discrimination are targeted at the suppression of ideas would be a profound departure from this Court's precedents. The closest constitutional scrutiny is reserved for content-based regulations that risk the state's deliberate suppression of ideas. If this Court finds that the Accommodations Clause imposes any burdens on the Company's expression (and it should not), any burden is incidental to the Act's regulation of conduct—and at most an intermediate level of scrutiny should apply.

When a regulation of conduct incidentally burdens expression, "[i]t is … the governmental interest at stake[] that helps to determine whether a restriction on that expression is valid." *Johnson*, 491 U.S. at 406-07. This Court has repeatedly analyzed regulations that have the effect—but not the intent—of burdening expression under an intermediate level of scrutiny. In *United States v. O'Brien*, for example, this Court upheld a law that prohibited the knowing destruction of draft cards. 391 U.S. at 375. The defendant's unlawful conduct was expressive: Mr. O'Brien publicly burned his draft card to protest the Vietnam War. *Id.* at 369. But that did not warrant strict scrutiny. Instead, because the purpose of the law was to promote efficient administration of the draft, not to suppress anti-war protest, this Court held that intermediate scrutiny was appropriate. *Id.* at 381. Under

that scrutiny, a law survives if it serves an important purpose and is no more restrictive than necessary to serve that purpose. *Id.* at 377-82.

Similarly, in *Clark v. Community for Creative Non-Violence*, this Court upheld a camping ban in Lafayette Park against a challenge by a group organizing a "sleep-in." All agreed that the sleep-in was expressive: the act was intended to protest the nation's failure to house homeless people. But the Court applied only intermediate scrutiny because the regulation sought to conserve park property and applied whether or not the group's camping expressed a message. 468 U.S. 288, 292-93 (1984).

*United States v. Albertini* reinforces this principle. There, the Court upheld a restriction prohibiting individuals from entering a military base after being excluded for destroying government property. 472 U.S. 675, 687 (1985). Even though Mr. Albertini wished to enter the military base for expressive purposes—to display a banner and distribute leaflets critical of the nuclear arms race—the Court upheld the restriction under intermediate scrutiny because the restriction's purpose was to secure military installations. *Id.* at 678-79, 689. Likewise, in *Ward v. Rock Against Racism*, the Court applied intermediate scrutiny and upheld a city regulation requiring groups to use the city's sound equipment and technician to avoid excessive sound levels at its park. 491 U.S. 781, 796-803 (1989).

In each of these cases, the challenged laws burdened expression. But in each, the government's interest in its law was unrelated to the suppression of that expression. The government sought to achieve the draft's efficient administration in *O'Brien*, public

parks' preservation in *Clark*, military installations' security in *Albertini*, and noise reduction in *Ward*. The application of these laws did not turn on any message communicated by destroying a draft card, sleeping in a park, entering a military base, or amplifying sound at park events. The laws' incidental burden on expression was therefore unrelated to the suppression of ideas, and they were all upheld under intermediate scrutiny.

By contrast, when a law aims at the suppression of expression, such as the flag burning prohibition in *Texas v. Johnson*, 491 U.S. at 400, 410, it must satisfy a higher standard of review. That law fell outside of *O'Brien* scrutiny altogether because it was "not aimed at protecting the physical integrity of the flag in all circumstances" but only at flag destruction "that would cause serious offense to others." *Id.* at 411. The Court concluded that the law was aimed at the suppression of ideas, and thus applied strict scrutiny. *Id.* at 411-12.

Applying intermediate scrutiny to laws that directly regulate conduct but impose incidental burdens on expression offers a "nuanced" approach to resolving "conflicts between generally applicable laws and [the] First Amendment right[]" of free speech. *Fulton*, 141 S. Ct. at 1882-83 (Barrett, J., concurring) (noting the Court's "nuanced" resolution of such First Amendment conflicts). States must regulate a wide range of commercial and market conduct. *See, e.g.*, *Nebbia v. People of New York*, 291 U.S. 502, 523 (1934). Such regulations are subject to strict scrutiny if the regulation aims at suppressing particular ideas. But an interme-

diate level of review allows states some leeway to prevent harmful conduct—including conduct that might also express a message—when it is the conduct rather than the message that is the target of the regulation.

If the Accommodations Clause burdens the Company's expression at all, it does so only as an incidental effect of its regulation of discriminatory sales. The Act aims to prevent discrimination in the public marketplace, regardless of whether (or how) that discrimination expresses a message. Any burden on expression imposed by such a law triggers only intermediate scrutiny under *O'Brien*, *Clark*, *Albertini*, and *Ward*. And because the Clause burdens no more expression than necessary to further this substantial interest, it easily satisfies intermediate scrutiny. *See infra* Section IV.

## III. The Company's proposed exemption from public accommodations laws is unworkable.

Rather than apply settled rules about regulations of conduct, the Company asserts that strict scrutiny should apply to laws that "affect[]" in any way the message of businesses that "involve[] a form of expression." Pet. Br. 17-18. In another version, an undefined category of "artists" would receive near-absolute protection to convey "messages consistent with their beliefs." *Id.* at 15. No version of this new exemption from antidiscrimination law, and the Company's brief has many, is faithful to the text of the First Amendment or workable as described.

### A. The Company's proposed exemption misstates this Court's holdings.

The Company claims to derive its exemption from *Hurley* and *FAIR*. Pet. Br. 17. Neither case supports the Company's claims. *Hurley* involved the application

of public accommodations law to change the composition of a parade; the "apparent object" of the law was to alter the parade's message. 515 U.S. at 578. This "peculiar" application of the law has no bearing on the application of such laws to ordinary commercial conduct like discriminatory sales. *Id.* at 572.

*FAIR,* in turn, rejected the law schools' claim that their message would be affected by a generally applicable nondiscrimination regulation. The law schools claimed that accommodating military recruiters "could be viewed as sending the message" that the schools agreed with the military's policies. 547 U.S. at 64-65. This Court disagreed. *Id.* at 65. The Company misstates *FAIR* to assert that the lawfulness of a public accommodations law turns on the "expressive quality" of that accommodation. Pet. Br. 17. *FAIR* held instead that requiring nondiscriminatory access to students does not regulate a school's expression. 547 U.S. at 66. Under that same approach, regulating sales discrimination—as the Act does here—likewise does not regulate the Company's expression. The Company's proposed exemption conflicts with *FAIR*.

### B. The Company fails to show how exemptions for "artists," "custom products," or where a "speaker's own message was affected" are workable.

The Company offers no limiting principle to implement its various dividing lines for what or who is shielded by its proposed exemption. The Company's exemption cannot be limited to religiously motivated objections, public accommodations laws, or concerns

about same-sex marriage. It offers no standard to determine who qualifies as an "artist," what a custom product is, or when a message is affected.

Without workable standards, companies would challenge regulations of all kinds, requiring rank and file workers in civil rights agencies, and then reviewing courts, to exercise significant discretion in determining whether an exemption was appropriate. The Company's standardless exemption would require governments and courts to make difficult determinations about what level of customization, expression, or curation would qualify for such an exemption. Such discretion would itself create constitutional concerns. *Fulton*, 141 S. Ct. at 1878-79; *Tandon v. Newsom*, 141 S. Ct. 1294, 1297 (2021).

Consider the Company's suggestion that "artists" should be exempt from laws like the Act. The Company offers no definition of an artist. Does this exemption apply to whoever calls themselves an "artist"? If so, that definition would cover Subway Sandwich Artists, https://apply.mysubwaycareer.com/us/en/careerpath/ (last visited Aug. 9, 2022); Minnesota's Artistic Plumbing, which explains that "a good plumbing job is a work of art," http://www.artisticplumbing.net/ (last visited Aug. 9, 2022); and Denver's own Artistic Tree Care, which claims that "A Chainsaw is Our Paintbrush," https://artistictreecaredenver.com (last visited Aug. 9, 2022).

Or is an "artist" any business that provides a service or product that involves a sort of artistic expression or curation? That definition would cover millions of businesses, including bartenders making artisanal drinks, hair stylists, corporate photography studios,

architects, and landscape designers. And if some sort of artistic expression or curation is required, what level of expression or curation qualifies? If a customer chooses from preexisting options, would the business's hand in designing the choices be expressive enough to warrant a right to discriminate? What if the company permits customization of its products, as in a monogrammed towel or a t-shirt bearing the customer's chosen logo?

The Company offers no meaningful standards for governments, courts, or companies to determine what qualifies as having a message "affected" or how much artistry "counts" as expression. And this, in turn, means that customers cannot predict which businesses will serve them. The breadth and uncertainty of these exemptions would leave many customers unsure about whether they will be served or rejected by companies that have invited the public's business.

### C. The Company's exemption has no limiting principle.

By the Company's own terms, to receive an exemption from a generally applicable law, a company need only claim that complying would send a message that is not "consistent with [its] beliefs" or would "affect[]" its "own message." Pet. Br. 15, 18. Because this exemption relies on subjective claims about a company's message and beliefs, the exemption is not limited to any particular type of law or to serving customers with any particular characteristics.

Nor could the Company's proposed exemption have an analogous requirement for a sincerely held religious belief that Free Exercise Clause or RFRA claims require. Though courts understandably do not

rigorously interrogate this requirement, it limits the types of claims that plaintiffs may bring. By contrast, the Company's proposed free speech exemption has no such limitation (nor could it, under the Free Speech Clause). It would encompass not only a business's objections to serving certain customers motivated by sincerely held religious beliefs, but also objections motivated by ignorance, whim, bigotry, caprice, and more—including pure expressions of racial, sexist, or anti-religious hatred. And that belief or message can differ from day to day and need not be consistent with the business's actions.

A business could, based on its claimed beliefs, refuse to bake for Catholic baptisms because it is pro-choice, photograph reunions of Black families because it opposes racial equality, or create floral arrangements for events celebrating women's business achievements because it believes only men should work outside the home. To receive the exemption, a business would just need to claim that serving those customers would affect its own message.

In *Fulton*, some members of this Court recognized the uncertainty that overruling *Smith* would create. 141 S. Ct. at 1882-83 (Barrett, J., concurring). Those concerns about the "number of issues to work through if *Smith* were overruled" arise even more forcefully here. *Id.* at 1883. As the *Fulton* concurrence recognized, the "resolution of conflicts between generally applicable laws" and free speech rights "has been much more nuanced" than imposing strict scrutiny whenever a neutral law burdens expression (or whenever an individual believes it does so). *Id.*

### D. Other tests offered by *amici* suffer from similar defects or misstate the law.

*Amici* supporting the Company offer many tests, but they all suffer from similar defects. They offer no clear standards, would require subjective determination by regulators and courts, and would disrupt a long list of generally applicable laws.

For example, the Senators and Representatives' brief argues that "message-based services" or those that "create artistic content about or for weddings" should not fall under public accommodations laws. Br. of *Amici Curiae* U.S. Sen. and Rep. Supporting Pet'rs 14. There is no textual basis for this claim. The First Amendment does not call out weddings or other ceremonies for special protection. And what is a "message-based service"? Could a newspaper refuse to sell subscriptions to immigrants? And, again, what standard governs "artistic"? Like the Company's exception, this would apply to far more than same-sex couples, website designers, or public accommodations laws.

Arizona and other states propose a similar exemption when "a business owner creates custom speech for her clients, a prospective client requests custom speech, and the owner declines because she objects to the message that the speech would express (and not the status of the customer being served)." Br. of Ariz., et al. as *Amici Curiae* in Support of Pet'rs 3. But what counts as "custom" speech? And would this exemption apply whenever a business objects to the message it believes an action would convey?

Professors Carpenter and Volokh argue that "'[u]nique' and [e]xpressive [g]oods and [s]ervices" should fall outside the ambit of regulation. Br. of

*Amici Curiae* Profs. Dale Carpenter and Eugene Volokh, et al. in Support of Pet'rs 12. But determining what is "unique and expressive" creates the same challenges as the Company's "artists" exemption. If a company makes a product for more than one customer, does that render it no longer unique? They would exclude tailors from this exemption, even though their work is both expressive and customized to unique customers. *Id.* at 19. Like the Company, they offer no way to assess what qualifies as expressive enough to fall within their exemption. And these same *amici* recognized that problem in *Masterpiece*, where they noted that a similar exemption could not be limited in any principled way and "would apply to a vast range of conduct." Br. of Amer. Unity Fund and Profs. Dale Carpenter and Eugene Volokh as *Amici Curiae* in Support of Resp't at 20, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018) (No. 16-111).

The Jewish Coalition for Religious Liberty misunderstands Colorado law. Its exemption—applying only to a "close-knit" company where "the artists who actually perform the creative work share the same religious beliefs, and object to creating a specific wedding-related product"—reflects Colorado law. Br. for the Jewish Coalition for Religious Liberty as *Amicus Curiae* in Support of Pet'rs 17-18. A company need not create any "specific wedding-related product" if it does not want to. The Act just requires the company to sell to all comers whatever wedding-related products it chooses to sell "to the public" in the first place.

The cacophony of different tests illustrates the fundamental flaw in the Company's arguments. They

offer no workable method to exempt some businesses from generally applicable public accommodations laws on Free Speech Clause grounds. And many of the concerns identified by *amici* are not present here because Colorado does not require any company to offer any product or service that it does not want to.

## IV. The Accommodations Clause satisfies any level of scrutiny.

The appropriate level of scrutiny for a public accommodations statute turns on the target of the regulation itself. As a straightforward regulation of conduct, the Accommodations Clause is subject, at most, to intermediate scrutiny. *See supra* Section II. It easily survives such scrutiny. The law does not target expression and effectively furthers the State's important—indeed, compelling—interest in preventing discriminatory sales. But even were this Court to find that the Clause targets the Company's expression, the State's interests cannot be achieved through less restrictive means. While the Act need not satisfy strict scrutiny, it does so.

### A. Colorado has a compelling interest in ensuring equal access to publicly available goods and services.

Public accommodations laws serve a compelling state interest by protecting the equal access and equal dignity of customers. These laws preserve a common law tradition of equal service that predates the Founding. And they are the basis for one of the great achievements of the last century: expanding the marketplace to include customers excluded based on characteristics such as gender, race, religion, and sexual orientation.

### 1. The State's interest in equal access is rooted in history and tradition.

Colorado's interest in equal access has a historic pedigree. Authoritative treatises of English and American common law describe a duty of those who undertook a "common"—that is, public—business to perform the services they advertised for all comers. *See supra* Statement of the Case. This history highlights the strength of the State's interest and the need for the State's regulation here. *See Burson v. Freeman*, 504 U.S. 191, 200 (1992) (surveying historical precedents that "demonstrate[] the necessity of" the regulation of speech at issue).

The common law duty to serve has always included the sale of custom and expressive goods and services. At the Founding, virtually all goods and services were custom-made. And the early public accommodations statutes that codified the common law included a wide range of businesses without regard for whether those businesses could be seen as expressive. *See supra* Statement of the Case.

Nor was this common law duty limited to necessities or to businesses with monopoly power. At the Founding, customers often had many inns or restaurants to choose from, but that did not mean those establishments were free to discriminate. As one court put it, "there is a power in the public of increasing the number of public houses or of carriers indefinitely." *Allnutt v. Inglis,* 104 Eng. Rep. 206, 209 (K.B. 1810) (Ellenborough, C.J.).

Finally, the common law interest was not limited to the economic harm stemming from a denial of service. Instead, the common law long recognized that the

injuries caused by denial of access include the dignitary harms that stem from such denial. *See, e.g.*, *Chicago, St. L. & P. R. Co. v. Holdridge*, 20 N.E. 837, 839 (Ind. 1889) (collecting cases authorizing recovery for "humiliation and degradation" for wrongful denial of carriage).

This history illustrates the state's established interest in ensuring equal access to goods and services that are offered to the public. The Court's inquiry here may be guided by "the long accepted practices of the American people," when reviewing "what the Constitution forbids, with regard to a text as indeterminate as the First Amendment's preservation of the freedom of speech." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 517 (1996) (Scalia, J., concurring) (quotation omitted).

**2. This Court's decisions confirm that Colorado's interests are compelling.**

This Court has "recognized [] the State's compelling interest in assuring equal access" to "goods and services." *Bd. of Dir. of Rotary Int'l*, 481 U.S. at 549. Protecting equal access is an interest "of the highest order." *U.S. Jaycees*, 468 U.S. at 623-24 (quotation omitted).

Discrimination "denies society the benefits of wide participation in political, economic, and cultural life." *Id.* at 625. The material harms from discrimination are well-documented. Studies consistently show strong correlation between increased protection against discrimination and the economic success of

historically disfavored groups.[1] When discrimination prevents a person's equal participation in the economy, that person suffers in quantifiable ways. This harm is wide-ranging—from the deprivation of equal educational opportunities to the difficulties of finding a hotel while traveling. *See, e.g.*, *Runyon*, 427 U.S. at 173; *Heart of Atlanta Motel*, 379 U.S. at 251-52. For this reason, this Court has long affirmed the state's compelling interest in combatting discrimination across industry, occupation, and activity. *See, e.g.*, *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 733 (2014) (employment); *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983) (education).

The state has an equally compelling interest in protecting the dignity of its citizens. "Discrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel" when denied service. *Heart of Atlanta Motel*, 379 U.S. at 292 (Goldberg, J., concurring) (quotation omitted). The government has an interest in protecting its citizens from the "political, social, and moral damage of discrimination." *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 609 (1982). The "fundamental object" of public accommodations laws is to "vindicate the deprivation of personal dignity that surely accompanies denials of equal access to public establishments." *Heart of Atlanta Motel*, 379 U.S. at 250 (quotation omitted). And these noneconomic harms

---

[1] *See* Lauren Box, *It's Not Personal, It's Just Business: The Economic Impact of LGBT Legislation*, 48 IND. L. REV. 995, 999 (2015); Gavin Wright et al., *The Regional Economic Impact of the Civil Rights Act of 1964*, 95 B.U. L. REV. 759, 759, 778 (2015).

are well-documented, including the serious damage to physical and mental health caused by sales discrimination. *See, e.g.*, Br. for Thirty-Seven Businesses and Organizations as *Amici Curiae* at 17-18 (citing studies), *Masterpiece Cakeshop* (No. 16-111).

The harm caused by conduct in the form of a denial of service is distinct from any harm caused by offensive or hurtful speech. The denial of service because of who one is unjustly relegates people to "second-class citizenship," creating both economic and dignitary harms different from the harms inflicted by insulting speech alone. *Bell v. Maryland*, 378 U.S. 226, 271 app. I (1964) (J. Douglas, concurring in part).

### B. The Accommodations Clause effectively furthers Colorado's compelling interest.

Under intermediate scrutiny, the State need not elect the least burdensome option to promote its interests, "so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Albertini*, 472 U.S. at 688-89. The Act easily satisfies that test.

First, the Act targets only specific commercial conduct: the discriminatory sale of products and services by businesses open "to the public." The Act allows businesses open to the public to choose whatever products or services they want to offer. It merely requires that they not deny goods or services based on a customer's protected characteristic. The Act is therefore drawn to avoid any burden on speech or expressive conduct that does not precisely correspond with a business's refusal to provide equal access. Businesses can decline commissions for products they would not offer to anyone. The Act prohibits only discriminatory

sales, where a company refuses to offer a service (such as a website narrative) or a product (like a cake) because of the customer's protected characteristic.

Next, the Act exempts any "place that is principally used for religious purposes." Colo. Rev. Stat. § 24-34-601(1). This exemption respects the religious freedom of places of worship and cabins state regulation to an area of maximal state interest: a business's sale to the public. *See, e.g.*, *Nebbia*, 291 U.S. at 523-24 (citing cases). Any more pliable exemptions would threaten the state's interest in ensuring publicly offered goods and services are available regardless of a customer's protected characteristic. *See Masterpiece*, 138 S. Ct. at 1727 (recognizing the harm to the state's interest if an "exception [for religious clergy] were not confined").

Finally, the Act applies only to the sale of a good or services "to the public." Colo. Rev. Stat. § 24-34-601(1). The Act does not affect vendors who solicit commissions only from limited sources, such as many freelance artists and writers. If a business would prefer to serve only a limited preselected clientele, it may do so. The Act applies only when that business chooses to offer goods or services to the public.

The Accommodations Clause is targeted at specific conduct—discriminatory sales by businesses open to the public—and, at most, incidentally burdens only expression wholly corresponding with that conduct.

### C. No alternative means would ensure equal access to publicly available goods and services.

Even if this Court applied strict scrutiny, Colorado's compelling interest cannot be achieved through

less restrictive means. Any burden on the Company's expression is therefore "actually necessary" to eliminate sales discrimination and curtails no more expression than it must to achieve that goal. *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 799 (2011). The Company's and its *amici*'s proposed exemptions either disregard the State's interest or would fail to achieve it.

The Company first asserts that Colorado's interests could be achieved while allowing businesses to "decline specific projects based on their message." Pet. Br. 47. But the only time a company must sell a good or service to a specific customer is when it offers that same thing to the public. The Act already allows the Company to decline requests for goods or services it will not offer to anyone. The Act's rule, with no discretionary exemptions, is as narrow as possible to achieve Colorado's interest in equal access to publicly available goods and services. An exemption that would give businesses the option to refuse equal service would swallow that interest whole.

The other rules proposed by the Company and its *amici* would invite discretionary exemptions and replace the Act's clear guarantee of equal treatment with uncertain lines vulnerable to subjective preferences. The Company's proposed exemptions would "contain[] myriad exceptions and accommodations for comparable activities"—just the sort of Swiss-cheese enforcement that would itself "require[] the application of strict scrutiny." *Tandon*, 141 S. Ct. at 1298.

The Company also suggests that Colorado could achieve its interests by limiting the Act's definition of public accommodations to "physical spaces" or "essential goods." Pet Br. 48-49. But this revision would

achieve Colorado's interest only by changing it. Colorado has an interest in combatting all sales discrimination by public businesses, not simply discrimination in physical places, particularly when so much commercial activity occurs virtually. And race, sex, and other forms of discrimination are invidious not only for "essential" goods or services—however that might be defined. After all, "a law cannot be regarded as protecting an interest of the highest order" where "it leaves appreciable damage to that supposedly vital interest unprohibited." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993) (quotation omitted).

Finally, the Company asserts that the market will provide alternative vendors to rejected customers, so the Act is not the narrowest way to achieve the State's interest. Similarly, the Company's *amici* states assert—without evidence—that same-sex couples can access goods and services in their states despite narrower statutes. Arizona Br. 4-5. This "market alternatives" argument represents a profound departure from this Court's prior precedents and a deep misunderstanding of the second-class status that discrimination creates.

The Company's argument implies that a state must analyze the availability of each good or service for each protected characteristic before it can prevent sales discrimination to those groups. The Court has never conducted such an analysis, nor condoned the Balkanized enforcement that would result. For example, the Company's argument would allow the State to

enforce the Act against companies in rural communities (where alternatives might be limited or nonexistent) but not in a big city.

The Company's market alternatives exemption also rests on unsound assumptions. The existence of alternatives in a market where companies cannot discriminate does not foretell whether such alternatives would remain if companies could discriminate. *See* Br. for Scholars of Behavioral Science and Economics as *Amici Curiae* Supporting Respondents at 11, *303 Creative LLC v. Elenis*, 6 F.4th 1160 (10th Cir. 2021) (No. 19-1413). Discrimination based on race, religion, gender, and sexual orientation, among other characteristics, is not a figment of the distant past.

By regulating only businesses open to the public, where those businesses are free to choose what goods or services they sell, the Act interferes with the Company's expression as little as possible while advancing Colorado's interest in equal access. *U.S. Jaycees*, 468 U.S. at 628-29. A rule that would shunt customers with certain protected characteristics to a list of vendors willing to serve them frustrates the public's expectations of a competitive market. The same limitation brands the customer as a second-class citizen, who cannot expect the same treatment as the public.

Customers do not have a right to whatever goods and services they want, but the Act ensures that they have a right to whatever goods and services are sold to others. In this way, the Act ensures that "a dollar in the hands" of one customer will "purchase the same thing as a dollar in the hands" of another customer,

regardless of protected characteristic. *See Jones v. Alfred H. Mayer Co.,* 392 U.S. 409, 443 (1968).

## V. The Communications Clause does not violate the First Amendment because it prohibits only speech facilitating illegal conduct.

The Act's Communications Clause prohibits only commercial speech that facilitates illegal discrimination. Here, the Company wishes to post a statement that it will deny equal service to same-sex couples. *See* Jt. App. 73. The Company concedes that this statement is unlawful if the Accommodations Clause satisfies this Court's scrutiny. Pet. Br. 34. The Company does not argue the Communications Clause is overbroad—only that its underlying discrimination is constitutionally protected and so its announcement of that discrimination must be protected too.

The First Amendment does not protect commercial speech that facilitates illegal conduct. *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 388-89 (1973); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 563-64 (1980). For that reason, the First Amendment does not protect an employer's "white applicants only" notice, or any other statement that announces an intent to illegally discriminate. *FAIR,* 547 U.S. at 62; *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949).

The Communications Clause fits snugly in that safe harbor. It does not prevent the Company from stating that it opposes marriage for same-sex couples. *See FAIR*, 547 U.S. at 60. Reasonable observers can understand that the Company might express negative views about such marriages while complying with its

legal obligation to serve such customers. *Id.* at 65. Instead, the Communications Clause regulates only speech that seeks to deny equal service based on a customer's protected characteristic. The Accommodations Clause declares such denial of equal service illegal. And so, the Communications Clause's restriction on speech "is incidental to a valid limitation on economic activity" and receives no First Amendment protection. *Pittsburgh Press Co.*, 413 U.S. at 389.

The Company's proposed statement about its services includes its announcement that it will not create wedding websites for same-sex couples. Jt. App. 73 ("I will not be able to create websites for same-sex marriages or any other marriage that is not between one man and one woman."). This amounts to an announcement of illegal discrimination similar to a "white applicants only" sign. Because this speech is incidental to the Company's unlawful conduct, Colorado can regulate it without conflicting with the First Amendment. *Pittsburgh Press Co.*, 413 U.S. at 389.

## CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

PHILIP J. WEISER
Attorney General

ERIC R. OLSON
Solicitor General
*Counsel of Record*

Office of the Colorado
Attorney General
1300 Broadway
10th Floor
Denver, Colorado 80203
Eric.Olson@coag.gov
(720) 508-6000

ISABEL J. BROER
MELODY JOY FIELDS
ABIGAIL M. HINCHCLIFF
DANIEL R. MAGALOTTI
BIANCA E. MIYATA
VINCENT E. MORSCHER
HELEN NORTON
JACK D. PATTEN, III
DANNY RHEINER
BILLY LEE SEIBER
SKIPPERE S. SPEAR

*Counsel for Respondents*

August 12, 2022.