No. 21-476

In the Supreme Court of the United States

303 CREATIVE LLC, *ET AL.*,

Petitioners,

v.

AUBREY ELENIS, *ET AL.*,

Respondents.

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

BRIEF OF PUBLIC ACCOMMODATIONS LAW SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici are legal scholars with expertise in the history and modern application of public accommodations law. By virtue of their scholarship, pedagogy, and public writings, they have a strong professional interest in the proper development of the law. *Amici* include Elizabeth Sepper, Professor of Law, The University of Texas at Austin School of Law; James Oleske, Professor of Law, Lewis & Clark Law School; and Joseph William Singer, Bussey Professor of Law, Harvard Law School. *Amici* file this brief in their individual capacities.

INTRODUCTION & SUMMARY OF ARGUMENT

I. The application of the Colorado Anti-Discrimination Act (the "Act") in this case does not burden Petitioners' free speech rights. Public accommodations laws regulate conduct, not speech. So long as they are content neutral, any incidental impact on speech generally does not raise First Amendment concerns.

In some cases, however, a public accommodations law may burden speech—namely, when it interferes

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[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund its preparation or submission. No person other than *amici* or *amici*'s counsel made a monetary contribution to the preparation or submission of this brief.

with activity both subjectively intended and objectively understood as expressing the regulated party's own message. The objective prong of this test requires a fact-intensive analysis that looks to whether a regulated party is highly selective, engages in standard commercial transactions, and engages in an endeavor that is customarily associated with expressing a message of its own.

Here, no reasonable third party would view the application of the Act as interfering with any message of Petitioners' own. Put differently, third parties can appreciate the difference between Petitioners expressing their own message and their rendering of services to all customers pursuant to the equal access requirement of the Act. And there is no merit to Petitioners' suggestion, and that of their *amici*, that the "expressive" nature of their services requires that their business be wholly exempted from antidiscrimination law.

II. Even if Petitioners could show a burden on protected speech, Colorado has compelling interests in assuring full and equal access to the market and protecting dignity in commercial transactions. Petitioners argue that the full and equal access interest is not implicated because (a) they will provide some services to gays and lesbians and (b) there is allegedly no market access issue. These arguments are foreclosed by history, tradition, and precedent, and raise a nasty swarm of practical problems to which Petitioners offer no serious answers. As to protecting dignity in the market, Petitioners do not deny Colorado's interest, but instead claim that their dignity is burdened by a law that prohibits them from discrim-

inating. This argument misdescribes Colorado law, and rests on flawed historical and legal foundations. The Court should reject Petitioners' position, which would inflict broad and irreparable damage upon the very architecture of antidiscrimination law.

ARGUMENT

I. THE ACT DOES NOT BURDEN PETITIONERS' FIRST AMENDMENT RIGHTS

A. Public Accommodations Laws Do Not Generally Burden First Amendment Rights

Public accommodations laws have a "venerable history," with roots in the common law and post-Civil War enactments. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 571 (1995). This history confirms that "a State enjoys broad authority to create rights of public access on behalf of its citizens." *Roberts v. Jaycees*, 468 U.S. 609, 625 (1984) (citing *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 81-88 (1980)). A State can thus assure full and equal access in the provision of goods and services. *See infra* at Part II.A. And it can extend those protections to gays and lesbians, including in the context of civil marriage. *See Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1727 (2018).

Petitioners assert that public accommodations laws like Colorado's are content- and viewpoint-discriminatory because "[t]he *content* of a message determines whether CADA applies, and the *viewpoint* of the speaker determines the legality of the message." Pet'rs Br. 31. On this view, nearly all pub-

lic accommodations laws would trigger strict scrutiny because they forbid signs inviting "White Customers Only" and permit signs declaring "All Races Welcome."

Petitioners' theory is not—and never has been—the law. To the contrary, public accommodations requirements "are well within the State's usual power to enact . . . and they do not, as a general matter, violate the First or Fourteenth Amendments." *Hurley*, 515 U.S. at 572 (collecting cases). That is because they regulate *conduct*, not *speech*—specifically, they regulate the act of discriminating in the sale of goods and services. *Jaycees* thus held that a ban on sex discrimination in public accommodations "does not aim at the suppression of speech" and "does not distinguish between prohibited and permitted activity on the basis of viewpoint." 468 U.S. at 623. Similarly, *Hurley* reasoned that a law did not "target speech or discriminate on the basis of its content" where the law concerned "the act of discriminating against individuals in the provision of publicly available goods, privileges, and services on the proscribed grounds." 515 U.S. at 572. Most recently, *Masterpiece Cakeshop* confirmed the "general rule" that "business owners and other actors in the economy" have no warrant to "deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law." 138 S. Ct. at 1727.

Simply put, where a State seeks to end discrimination in the marketplace and assure its citizens "equal access to publicly available goods and services," its goals are wholly "unrelated to the suppression of expression." *Jaycees*, 468 U.S. at 624.

Thus, contrary to Petitioners' account, it is usually irrelevant that public accommodations laws sometimes incidentally impact speech. "Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy." *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 390 (1992). That rule governs here. The fact that antidiscrimination laws "will require an employer to take down a sign reading 'White Applicants Only' hardly means that the law should be analyzed as one regulating the employer's speech rather than conduct." *Rumsfeld v. FAIR*, 547 U.S. 47, 62 (2006). By the same token, nondiscriminatory service often requires a vendor to speak—and to do so in a manner that is neither discriminatory nor unwelcoming (e.g., a family restaurant that sings "Happy Anniversary" for all married couples cannot refuse to do so for interracial couples). The speech *required* by civil rights laws, like the speech they *prohibit*, is merely incidental to regulated conduct. *See, e.g.*, *id.* (rejecting claim that "recruiting assistance" was itself unlawfully compelled speech).

B. In Rare Cases, Public Accommodations Laws May Improperly Burden First Amendment Rights

1. Interference with a person's "own message"

Although public accommodations laws usually do not burden First Amendment rights, they can do so when applied in "peculiar" ways that go beyond securing equal access to goods and services. *Hurley*, 515 U.S. at 572. Specifically, public accommodations

laws may impose First Amendment burdens when they interfere with activity that is both subjectively intended and objectively understood as expressing the regulated party's "own message." *Id.* at 573. This test is familiar from the Court's expressive conduct jurisprudence and properly identifies the universe of peculiar circumstances where prohibiting discrimination in commerce may raise free speech concerns. *See, e.g.*, *Texas v. Johnson*, 491 U.S. 397, 404 (1989); *Spence v. State of Wash.*, 418 U.S. 405, 410-11 (1974).

In evaluating First Amendment burdens alleged to arise from content-neutral access regulations, the Court has frequently asked whether third-party observers would objectively perceive the complaining party to be expressing its own message when providing access under those regulations. In two cases involving peculiar applications of antidiscrimination law, the Court emphasized the risk that third parties would be misled as to the complaining party's own message. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640, 653 (2000) (requiring Boy Scouts to accept gay scout master would "send a message" to "the world"); *Hurley*, 515 U.S. at 572-73 (requiring parade to include unwanted group would affect "the message conveyed by the private organizers" and "alter the expressive content of [the] parade"). In many more cases, the Court rejected claims that access requirements alter the regulated party's own speech so as to raise First Amendment concerns. *See FAIR*, 547 U.S. at 64-65 ("[S]tudents can appreciate the difference between speech a school sponsors and speech the school permits because legally required to do so, pursuant to an equal access policy."); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 655 (1994) (*Turner I*) (finding "lit-

tle risk that cable viewers would assume that the broadcast stations carried on a cable system convey ideas or messages endorsed by the cable operator"); *PruneYard*, 447 U.S. at 87 (finding that the views expressed by members of the public in a mall "will not likely be identified with those of the [mall] owner").

Although this rule has deep roots, Petitioners resist it, warning that "if third-party (mis)perceptions were all that mattered, there would be few limits to government-compelled speech." Pet'rs Br. 30. But Petitioners conflate the analysis that governs in a case like this one (involving content-neutral laws that incidentally impact speech) with the analysis from very different cases (where a law was either content based or facially aimed at speech). *See, e.g.*, *Wooley v. Maynard*, 430 U. S. 705 (1977); *W. Va. Bd. of Educ. v. Barnette*, 319 U. S. 624 (1943).

That distinction is crucial. *See FAIR*, 547 U.S. at 62 (warning that it "trivializes the freedom protected in *Barnette* and *Wooley*" to claim that the First Amendment forbids a content-neutral access regulation at law schools). When laws are aimed at speech, they lie at the core of what the First Amendment aims to prohibit. *See Turner I*, 512 U.S. at 641. Given that such action is so dangerous and so clearly targeted at speech, the Court has not looked to third-party perception. There is no need. In contrast, when a law regulates only conduct, the risk to First Amendment values is much lower. *See Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 213 (1997) (*Turner II*). Moreover, there are many cases where neutral regulation of conduct—even if it causes inci-

dental impacts on speech—does not have any actual effect on the regulated party's own expression. So in assessing a claim that the government has burdened speech, it makes sense to start by asking whether a regulation has altered (and thus burdened) a person's *own* message in a manner recognized by third parties. And that is exactly what this Court has long done.

2. The structure of the objective inquiry

The essential inquiry is whether the application of the public accommodations law interferes with activity that is subjectively intended and objectively understood as expressing the regulated party's *own message*. Here, the parties agree that Petitioners subjectively intend to speak. The key question is the objective one: would third parties reasonably understand Petitioners to be expressing their own message if Petitioners were to comply with the Act and serve a gay couple?

That inquiry is fact intensive. But this Court has identified three factors as useful in assessing whether providing service would be perceived as sending the business's own message.

The first factor is *selectivity*: whether a business offers goods, services, or accommodations widely to the public (thus suggesting that it serves all comers and that service to any particular customer does not convey its own views), or whether it instead acts with a sustained degree of selectivity indicating approval or association. In *Hurley*, the Court saw this factor as supporting a First Amendment claim, since the parade organizers had picked who could march "rather

like a composer" to comport with their own view of "what merits celebration." 515 U.S. at 574. In contrast, in *Jaycees*, decisions about who could join a civic group did not strike the Court as protected, because "the local chapters of the Jaycees are large and basically unselective groups." 468 U.S. at 621. For similar reasons, the *PruneYard* Court did not see any burden on a mall owner's message where a law allowed members of the public to solicit, since the mall was "open to the public to come and go as they please." 447 U.S. at 87. The question here is whether a business's full set of decisions reveals its own message—namely, that serving someone reflects its approval or endorsement of that person or their relationships. When a business serves just about everybody, the provision of service does not send any particular message, and so being required to serve a particular person (or group) would not interfere with that business's own message, since a third party would not see any message in the business's provision of service.[2]

The second factor is *commerce*: when a business enters into a commercial transaction—receiving money in exchange for its offerings—third parties are

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[2] Because the expectations are that all are served in places open to the public, refusing service only to people of a particular race or religion would send a message. But that discriminatory message remains incidental to the core regulated conduct. If it were protected in its own right, then expressive freedom claims would logically extend to all businesses that seek to discriminate, eviscerating antidiscrimination laws altogether.

unlikely to see the business as expressing a message of its own from that transaction (apart from a message about its willingness to accept money in exchange for goods and services). *See PruneYard*, 447 U.S. at 87; *Jaycees*, 468 U.S. at 620; *Runyon v. McCrary*, 427 U.S. 160, 168, 176 (1976). Only in a very narrow set of cases could commercial ventures claim that when they are required to accept profitable commercial transactions with protected groups, their own message is being burdened in a manner understood by third parties. *See, e.g.*, *Dale*, 530 U.S. at 657 (distinguishing membership organizations from "clearly commercial entities"); *Hurley*, 515 U.S. at 572-73, 576, 579-80 (distinguishing the application of civil rights laws to commercial entities from cases of "noncommercial speech restriction").

The final factor is *custom*: whether the endeavor is one that—in our history and tradition—is usually associated with a business communicating a message of its own. Put differently, is the business engaged in activity that has traditionally been seen as involving its own expressive quality? This factor carried major weight in *Hurley*, where "the expressive nature of a parade was central to [the Court's] holding." *FAIR*, 547 U.S. at 63. *FAIR* also drew upon custom in contrasting the "expressive quality" of "a law school's recruiting services" with "a parade, a newsletter, or the editorial page of a newspaper." *Id.* at 64. And many other cases have looked to custom while addressing whether conduct is sufficiently expressive as to convey a message. *See, e.g.*, *Texas*, 491 U.S. at 404-05.

Together, these three factors—*selectivity*, *commerce*, and *custom*—provide a powerful guide to as-

sessing whether a public accommodations law interferes with activity that is objectively understood as expressing the regulated party's own message.

Within this inquiry, no one factor is dispositive, and no profession is wholly exempted from the application of public accommodations laws. Consider the classically expressive crafts of writing, poetry, and painting. They are all associated with communicating a creator's own message and with an intensely selective approach to potential consumers or purchasers—and so would generally evoke First Amendment protection. But not every writer, poet, or painter could lay claim to that principle. Imagine a baker who routinely writes "Happy Anniversary!" on cakes, a poet who sells birthday cards in a local bookstore, or a boardwalk caricature artist who draws stylized portraits of any couple that strolls past. No objective observer would perceive them to be expressing their own personal message of approval in every sale, no matter how creative their artwork. *See Telescope Media Grp. v. Lucero*, 936 F.3d 740, 776 (8th Cir. 2019) (Kelly, J., dissenting) (explaining that a "boardwalk cartoonist who offers his services to any passing beachgoer" does not have a right to "refuse[] to paint the portrait of an interracial couple or a woman in a hijab").

Pulling this all together: When a public accommodations law is content neutral—like the Act here at issue—its incidental impacts on speech are usually permissible. But when the application of such a law requires a business to render service in circumstances that subjectively and objectively burden its own message, then the First Amendment is implicated.

And those rare circumstances occur only when a business is highly selective, is not engaged in commercial activity, and/or is engaged in an endeavor where businesses are customarily understood to be expressing their own message. This test is sensible, administrable, and consistent with how public accommodations laws have historically been applied in our Nation.

C. The Act Does Not Burden Petitioners' First Amendment Rights on This Sparse Record

There is no merit to Petitioners' claim that being required to serve same-sex couples under the Act would violate their First Amendment rights. As Respondents explain, the Act does not require Petitioners to change the services or products they offer, but rather requires only that Petitioners not discriminate in their provision of those services and products. *See* Resp'ts Br. 15-20. This is a content-neutral requirement that does not aim at expression. Although it incidentally impacts Petitioners' speech, that poses no First Amendment difficulty because the Act does not interfere with activity that is subjectively intended and objectively understood to express Petitioners' own message. There is no basis here to conclude that the objective part of this standard is met: no reasonable third party would think that Petitioners express their own message—rather than standard messages of profit-seeking and legal compliance—when they render services to customers.

1. No reasonable observer would see the Act as interfering with Petitioners' own message

Here, Petitioners do not satisfy any of the three factors identified by this Court for assessing whether providing service under the Act would be perceived as sending the Petitioners' own message. For starters, Petitioners are not selective. This is apparent from the public record, which makes clear that Petitioners' provision of website services would hardly be perceived as a "coherent speech product" indicating their own views of "what merits celebration." Eugene Volokh, *Treating Social Media Platforms Like Common Carriers?*, 1 J. Free Speech L. 377, 423-25 (2021).

One of the websites in Petitioners' portfolio—on which the much-touted "Designed by 303creative.com" notice appears—is a website for a blues band promoting a song list featuring "Shake Your Money Maker." Another—which also bore a "Designed By 303Creative LLC" notice—was for a law firm prominently listing divorce and marijuana law services. Other 303 Creative projects include website design for real estate and mortgage companies, a roofing company, a sports apparel company, a jeweler, a DJ service, and a breeder of French bulldogs with puppies to spare.[3]

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[3] *See* https://303creative.com/portfolio/slydersband-com/; https://web.archive.org/web/20210623233429/https://www.slyder

Petitioners claim that Lorie Smith intends her "custom websites" to be "her message" and "her speech," Pet'rs Br. 12-13, 29, but no reasonable observer familiar with Petitioners' work and web design would draw that conclusion. The range and breadth of clients, causes, and messages represented here makes clear that Petitioners are exceptionally non-selective. Nobody would review Petitioners' work and infer that they approved, endorsed, or otherwise sent

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sband.com/;
https://web.archive.org/web/20150410080514/http://rpitlerlaw.com/;
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a message of their own concerning divorce, marijuana use, breeding French bulldogs, hiring a DJ from DanceTraxProductions, or shaking your money maker.

At bottom, Petitioners' commercial provision of website design services involves them in nothing more than a collection of "individual, unrelated segments" of third-party messages. *See Hurley*, 515 U.S. at 576. Petitioners' choice to serve a client does not send any objective message, even if they use a stamp on every site and insist in a legal brief that Ms. Smith promotes "causes closer to her heart." Pet'rs Br. 2. Because Petitioners are not selective, being required to serve more clients does not burden a message of their own apparent to any third-party observer.

This conclusion is confirmed by the commercial nature of Petitioners' work. They are not throwing a parade. *See Hurley*, 515 U.S. at 574. They are not running a civic membership organization. *See Dale*, 530 U.S. at 657. They do not enter into an expressive association with every prospective customer, and they do not impliedly adopt every customer's message as their own. *See, e.g.*, *FAIR*, 547 U.S. at 65 ("Nothing about recruiting suggests that law schools agree with any speech by recruiters."). Instead, Petitioners exchange website design services for money, a practice that further undermines any perception that they are engaged in a fundamentally and inherently expressive endeavor.

Finally, it is not customary in American life to presume that web designers approve, endorse, or otherwise personally associate themselves with every website they design. The nature of web design ser-

vices is usually transactional and arms-length. When designers include identifying information on a website, it is generally as part of an effort to solicit additional web design business, rather than to adopt the website as their own speech. That is one reason why most Americans have no idea (and don't care) who created most websites they visit. They customarily understand such websites to express the views of the customers who commissioned the web design.

For all these reasons, the application of the Act does not burden Petitioners' First Amendment rights. No reasonable third party would understand Petitioners to express a message of their own in rendering services under the Act, so there is no basis for concluding that the Act interferes with their expression.

Although Petitioners' case falls firmly within the general rule that public accommodations laws can be applied without issue under the First Amendment, some web design services may present closer calls. We offer one hypothetical here to illustrate how the approach described above may operate elsewhere.

Imagine a bible study group consisting of three like-minded Baptists who study graphic design and make a new website for their church. Word of their skill spreads within their religious community and they are asked to develop websites for three nearby churches. The trio goes into business as True Word Creative ("TWC"). TWC does not advertise to the general public. It accepts discounted rates and consistently works only with familiar groups within their local church community. For that reason, it turns down requests for design services from several

businesses, a Catholic high school, and a same-sex couple. In our view, applying public accommodations laws to a group like TWC would raise First Amendment concerns, since they are highly selective, not purely commercial, and operating in a way generally understood as endorsing or expressing approval of the Baptist clients to whom they provide services. But if TWC were eventually to change its business model—offering services to the general public at standard market rates and entering into contracts with people from all backgrounds—then there would no longer be any First Amendment basis for concluding that it could decline to serve groups shielded by antidiscrimination law.

2. Generally artistic endeavors are not wholly exempt from public accommodations laws

Petitioners separately suggest, and their *amici* contend, that application of the Act burdens their First Amendment rights because they are engaged in a generally expressive trade. *See* Pet'rs Br. 17, 19; *see also, e.g.*, Br. for Dale Carpenter *et al.* as *Amici Curiae* 19. This argument goes awry at every step. We identify five core errors.

First, Petitioners and their *amici* misdescribe the operation of the Act. As Respondents explain, the Act applies only to the act of selling. Resp'ts Br. 13. It does not require Petitioners to create anything they would not otherwise create, and so the artistry or lack thereof in their commercial venture is beside the point. The Act requires only that they sell their designs to all buyers.

Second, relatedly, Petitioners and their *amici* largely ignore the commercial context here. Many professions (including the law) involve at least some acts that would qualify as fully protected speech or art if done by a citizen while home alone or standing on a soapbox. But when a person enters "the marketplace of commerce," they lose the "complete control" they enjoy in "the marketplace of ideas." *Jaycees*, 468 U.S. at 636 (O'Connor, J., concurring in part and concurring in the judgment). Going into business marks a qualitative change in the nature of a person's activity.

Third, whereas Petitioners and their *amici* plant their flag on *Hurley*, that case affirmed the constitutionality of public accommodations statutes in most applications. *See* 515 U.S. at 571-72. Moreover, in identifying the scope of the "peculiar" exception it recognized, *Hurley* pointed to the uniquely expressive nature of a parade. Because parades have long been perceived as an act of "inherent expressiveness," and because the groups that march in a parade are themselves a key part of its message, requiring a parade to include unwanted groups is necessarily to regulate the core content of the parade's message as grasped by the wider world. *See id.* at 572-73. But a store is not a parade. Stores do not by their nature exist to express messages. Even where a store aims to speak, requiring its offerings to be available to protected groups does not regulate the content of that message in a manner evoking the expressive association logic animating *Hurley*.

Fourth, the proposed artistic endeavor exemption is not only theoretically and historically unsound, but

also unworkable. Our legal tradition offers no resources or precedents for pronouncing certain professions too "expressive" to be subject to antidiscrimination law. Nor does our tradition offer any basis to intelligently decide what professions do and don't make the cut. *See Dallas v. Stanglin*, 490 U.S. 19, 25 (1989) ("It is possible to find some kernel of expression in almost every activity a person undertakes."). Even within a single field, there may be huge variation in how much artistry, speech, or expression are involved in particular tasks—which may, in turn, depend on the client, the context, the price, the locale, and more. To implement Petitioners' theory would require courts to pass judgment about an astonishingly wide range of activities in virtually every profession. This would quickly overwhelm the federal judiciary, while sowing discord about fundamental civil rights protections. *See Elane Photography, LLC v. Willock*, 309 P.3d 53, 71 (N.M. 2013).

Finally, the exemption would invite mischief beyond antidiscrimination law. For instance, many labor laws regulate strikes and may require workers to resume their work activities; would applying them to "expressive" professions raise First Amendment concerns on the theory that ending the strike forces the artists to speak or create their art? *See, e.g.*, *Seattle Opera v. NLRB*, 292 F.3d 757, 759 (D.C. Cir. 2002). Similarly, Petitioners' rule may call into doubt the regulation of educational institutions that describe their mission in expressive terms. *But see Runyon*, 427 U.S. at 168-72. And there would surely be many other settings—including health and safety—where businesses assert that legal requirements somehow

force them to speak or stay silent in a manner intruding upon their "expressive" aims.

Although Petitioners' and their *amici*'s focus on artistic endeavors is deeply mistaken, it starts from a reasonable intuition: that in some cases, it matters whether a business is engaged in activities that seek to express its own message. As explained above, the right way to account for this intuition is within the multi-factor, fact-intensive objective inquiry that asks whether a public accommodations law interferes with a business's own message. Such analysis properly considers whether the business is engaged in an endeavor customarily seen as expressing a message of its own. Petitioners' very different proposal—identifying whole fields or practices as "expressive" and declaring them exempt from civil rights law—is the wrong way to implement this concern and should be rejected.

II. THE ACT FURTHERS COMPELLING INTERESTS IN ASSURING FULL AND EQUAL ACCESS AND PROTECTING DIGNITY IN THE MARKET

Even if Petitioners could show that the Act burdens their own message, that burden would be justified by Colorado's compelling interests in assuring full and equal access and protecting dignity in the marketplace. Petitioners' insistence otherwise lacks merit. There is no legal or historical support for blessing partial access or limiting the application of public accommodations laws to monopolies, a test that in any event would be extraordinarily confusing and unworkable. Nor do Petitioners' own asserted dignitary interests in discriminating withstand scru-

tiny, let alone outweigh a state interest in protecting all market participants.

A. Full and Equal Access to the Market

This Court has long held that state laws assuring citizens "equal access to publicly available goods and services" further "compelling state interests of the highest order." *Jaycees*, 468 U.S. at 624; *accord Bd. Dirs. Rotary Club Int'l v. Rotary Club of Duarte,* 481 U.S. 537, 549 (1987). That principle is deeply rooted in our legal tradition, and springs from "old common law" duties that promised "to any member of the public . . . [that] they will not be turned away merely on the proprietor's exercise of personal preference." *Hurley*, 515 U.S. at 578. While States have gradually expanded the protected classes covered by their public accommodations laws, this Court has remained steadfast in affirming the State's interest in assuring full and equal access. *See Masterpiece Cakeshop*, 138 S. Ct. at 1727-28.

Petitioners assert that Colorado's interest in full and equal access is not implicated here—either because Petitioners will provide some web design services to gays and lesbians, or because gays and lesbians can seek web design services elsewhere in the market. On both accounts, Petitioners are mistaken.

1. This state interest is not achieved by the provision of partial and unequal access

Petitioners first contend that Colorado lacks a strong interest here because Ms. Smith "does not discriminate against anyone and will happily serve everyone, regardless of status." Pet'rs Br. 37. But

Ms. Smith will "happily serve" gay and lesbian clients *unless* they ask for particular services, in which case she will completely refuse them even as she renders the same services to everyone else. That is not full and equal access, and our antidiscrimination laws would be gutted if read to authorize such denials of service.

Throughout our history, a State's interest in assuring full and equal access has always been understood to apply to every aspect of a covered business. Statutes enacted after the Civil War thus forbade a business from withholding "full and equal enjoyment" of *any* goods or services offered to the public. Elizabeth Sepper, *The Original Meaning of "Full and Equal Enjoyment" of Public Accommodations*, 11 Calif. L. Rev. Online 572, 580 (2021). Courts repeatedly reinforced this view. For instance, in 1890, the Michigan Supreme Court held that an eating house had discriminated by requiring a Black man to move to a table on the saloon side, six feet from the restaurant—rejecting the defendant's argument that it did not refuse equal service because it would "serve him in precisely the same manner in which he would be served at the table at which plaintiff had seated himself." *Ferguson v. Gies*, 82 Mich. 358, 362 (1890). Citing a line of cases dating to the 1920s, the California Supreme Court likewise held that the textual guarantee of "full and equal . . . services" demanded equality in "*all aspects* of the business." *Koire v. Metro Car Wash*, 40 Cal. 3d 24, 29-30 (1985) (emphasis added). *See also Dir., Div. on Civil Rights v. Slumber, Inc.*, 82 N.J. 412, 413-16 (1980) (upholding discrimination case where hotel assigned Black patrons to rooms on one floor of hotel); *Johnson v. Auburn & Sy-*

racuse Elec. R. Co., 222 N.Y. 443, 448-49 (1918) (holding that an amusement park could not exclude Black visitors from the dance pavilion).

Petitioners' argument is thus at odds with history. It also defies this Court's precedent, which has twice rejected arguments that civic groups can exclude women from full membership even where those groups allow women *some* rights of attendance or engagement. *See Duarte*, 481 U.S. at 541; *Jaycees*, 468 U.S. at 613.

In sum, Colorado retains a compelling interest in assuring *full* and *equal* access, even if Petitioners allow gay and lesbian customers partial access to the business.

2. There is no basis for limiting this state interest to businesses with monopoly power

Petitioners attempt to introduce a second carveout to the full and equal enjoyment interest: they assert that Colorado has no real interest in enforcing its antidiscrimination requirements because "Coloradoans have no 'actual problem' accessing the website-design market," and others can provide the goods and services that petitioners refuse to provide. *See* Pet'rs Br. 37-38; *see also, e.g.*, Br. for Law and Economics Scholars as *Amici Curiae* 14-17; Br. for Christopher R. Green as *Amicus Curiae* ("Green Br.") 22-28. Petitioners' position is that in the absence of monopoly or uncompetitive markets, States have little interest in ensuring equal treatment.

This argument has no credible basis in history or common law; Petitioners' insistence otherwise plainly

mischaracterizes the historical record. Moreover, this Court's precedent—as well as twentieth-century practice—are firmly at odds with Petitioners' theory. Finally, operationalizing a "monopoly" theory of anti-discrimination law would be virtually impossible.

a. History

History offers no support for the notion that a State's interest in public accommodations law is limited to businesses with monopoly power. At common law, the duty to serve was imposed on a wide range of public accommodations, including those that lacked any monopoly power. And this duty was based solely on a *holding-out* rationale. To be clear, this is not a case of dueling commentators or competing theories: there is *no* serious evidence supporting a monopoly reading of the cases, and the few scattered quotes that Petitioners' *amici* rely upon are taken totally out of context.

The common law rule requiring innkeepers, common carriers, and other tradespeople to provide their services without discrimination rested squarely on the view that "[t]hose who hold themselves out as ready to serve the public thereby make themselves public servants and have a duty to serve." Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 Nw. U. L. Rev. 1283, 1321 (1996) (collecting leading cases and authorities supporting this point). That same holding-out rationale was widely accepted not only by commentators, but also by early American courts. *See*, *e.g.*, *Markham v. Brown*, 8 N.H. 523, 528 (1837); *Jencks v. Coleman*, 13 F. Cas. 442, 443 (C.C.D.R.I. 1835) (Story, J.).

Petitioners' *amici* attempt to convert Sir Matthew Hale's discussion of excessive wharf rates in 1670—which was first published in 1787 (long after the duty to serve was established at common law)—into a controlling "scarcity of substitutes" requirement for public accommodations laws. *See* Green Br. 3-4, 22-24. But this argument gets Hale wrong. Hale elsewhere addressed the duties of "common carrier[s]" and other such "tradesmen"—and, in so doing, said their duties were based on "implied contract," not monopoly. *See* Matthew Hale, *An Analysis of the Civil Part of the Law* 76-77 (6th ed. 1820).

Regardless, this discussion of Hale is a sideshow: not a single American case discussing the duties of common carriers and innkeepers between 1787 and 1868 relied on Hale's view of wharf rates. Instead, these cases looked to Blackstone, Story, or James Kent—none of whom articulated any monopoly rationale and all of whom espoused the holding-out rationale. *See*, *e.g.*, *Chevallier v. Straham*, 2 Tex. 115, 116-18 (1847); *Fish v. Chapman & Ross*, 2 Ga. 349, 353 (1847); *State v. Moore*, 12 N.H. 42, 45-46 (1841); *Dwight v. Brewster*, 18 Mass. 50, 55 n.1 (1822).

In *Munn v. Illinois*, 94 U.S. 113, 126-29 (1876), this Court mentioned Hale's teachings about controlling excessive fees charged by virtual monopolies. *See also Allnutt v. Inglis* (1810), 104 Eng. Rep. 206, 210-11 (similar). But *Munn* did not adopt a monopoly rationale as a limitation on legislatures' power to regulate and create access requirements, and it certainly did not redefine (or reject) the duty to serve that long had been applied to all manner of businesses that lacked monopoly power. *See* Breck P. McAllister,

Lord Hale and Business Affected with A Public Interest, 43 Harv. L. Rev. 759, 769 (1930) (a monopoly test could not "have been readily reconciled with the cited instances of fixing the fees of chimney sweeps, the rates of hauling by cartmen, the commissions of auctioneers, and the like"); Edward A. Adler, *Business Jurisprudence*, 28 Harv. L. Rev. 135, 156 (1914) ("Nowhere [in common carrier cases] is monopoly suggested as the distinguishing characteristic.").

As a fallback, an *amicus* points to Alfred Avins' collection of twenty allegedly "representative cases about the monopoly characteristics of common carriers." Green Br. 28. But not a single one of the quotations highlighted from these cases—the vast majority of which concern bridges, turnpikes, ferries, and canals operating as public franchises—purports to declare that a common carrier *only* had a duty to serve if it was operating as a monopoly. And, critically, none of these cases says or even implies that legislatures *lack* the power to regulate non-monopoly businesses under public accommodations statutes. *Cf.* John B. Cheadle, *Government Control of Business*, 20 Colum. L. Rev. 550, 580 (1920). In the end, the effort to read into the Avins cases a constitutional limit on the duty to serve suffers from the same flaws Justice Brandeis identified with efforts to do likewise with Hale's remarks on wharf rates: "Lord Hale was speaking of the particulars, wharves and cranes in ports; and did not purport to generalize the obligation to serve all persons at reasonable rates in other circumstances. He was speaking of duties arising at common law, and not of limitations upon the legislative power of Parliament." *New State Ice Co. v. Lieb-*

mann, 285 U.S. 262, 302 n.43 (1932) (Brandeis, J., dissenting).

There is thus overwhelming evidence that the duty to serve arose at common law from a holding-out rationale—that applied to a wide range of public accommodations, including those that lacked monopoly power. *See Messenger v. State*, 41 N.W. 638, 639 (Neb. 1889) ("A barber, by opening a shop, and putting out his sign, thereby invites every orderly and well-behaved person who may desire his services to enter this shop during business hours."); *Joseph v. Bidwell*, 28 La. Ann. 382, 382-83 (1876) (upholding enforcement of nondiscrimination requirement that applied to "all places of business, or of public resort"). State public accommodations laws were understood to codify this duty to serve. *Donnell v. State*, 48 Miss. 661, 681 (1873).

And on this basis, this Court upheld the application of a public accommodations statute over a century ago. *See W. Turf Ass'n v. Greenberg*, 204 U.S. 359, 364 (1907). That case did not involve a business with monopoly power, nor did the Court reference any such concerns. Instead, consistent with a long line of authority, the Court based its analysis on the holding-out principle. *See id.* ("The race course in question, being held out as a place of public entertainment and amusement, is, by the act of the defendant, so far affected with a public interest that the state may, in the interest of good order and fair dealing, require defendant to perform its engagement to the public.").

Attempts to redescribe this vast body of law and commentary as articulating a monopoly theory are

based on a mistaken view of just a handful of sources, none of which limit a State's interest in public accommodations law to addressing discrimination by monopoly businesses.

b. Precedent and American Practice

Any doubt on that score is confirmed by more modern practice and precedent. Throughout our history, disfavored minorities typically had access to a market niche, while being denied full and equal enjoyment of the entire market. Before the Civil Rights Era, for example, Mexican, Asian, and Sikh farm laborers in California might frequent the one market willing to serve them, while otherwise encountering signs reading "Just-White-Trade-Only." Nat'l Park Serv., *Civil Rights in America: Racial Desegregation of Public Accommodations* 92-93 (2009). Black Americans in the South could buy a wide array of goods from the Sears catalogue. *See* Louis Hyman, *How Sears Helped Oppose Jim Crow*, N.Y. Times, Oct. 20, 2018. In the 1950s, roughly half of the resorts in Maine, Vermont, and New Hampshire allowed Jews as guests. *See* Charles Abrams, *". . . Only the Very Best Christian Clientele,"* Commentary, Jan. 1955, at 13. And in the 1960s, women had robust dining options, but were excluded from businessmen's lunches and "men's grills." Elizabeth Sepper & Deborah Dinner, *Sex in Public*, 129 Yale L.J. 78, 86-87 (2019).

Public accommodations laws were enacted to eradicate precisely such discrimination—even if minorities could ultimately obtain service from another business within any given market. These laws did not aim to ensure "access to *some* places of public accommodation," but rather to "guarantee equal access

to *all* goods and services otherwise available to the public." *Telescope Media Grp.*, 936 F.3d at 777 (Kelly, J., dissenting).

This is clear from the Court's leading case of the era, *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964). The same year that case was decided, "[f]ourteen major Atlanta hotels and motels [] publicly pledged to accept reservations regardless of race 'in accordance with usual hotel practices.'" *Atlanta Hotels Drop Color Line*, N.Y. Times, Jan. 12, 1964, at 1. But this Court did not hesitate to uphold the application of the public accommodations provisions of the Civil Rights Act of 1964 to an Atlanta hotel. And the Court offered no suggestion whatsoever that the existence of alternative lodging undermined the government's interests in full and equal access. *See* 379 U.S. at 253 (referring to "the obvious impairment of the Negro traveler's pleasure and convenience that resulted when he continually was uncertain of finding lodging").

That same logic forecloses Petitioners' suggestion that Colorado's interest is diminished by the possibility that gay and lesbian couples could potentially obtain comparable web design services elsewhere.

c. Practicalities

There is also a good practical reason why Petitioners' monopoly theory has never been accepted: it is extraordinarily unworkable.

For starters, ascertaining the existence of a monopoly—and defining the relevant market—is itself complex, often involving burdensome expert testimony and judicial factfinding. *See Telecor Commc'ns,*

Inc. v. Sw. Bell Tel. Co., 305 F.3d 1124, 1131 (10th Cir. 2002) ("There is no subject in antitrust law more confusing than market definition."). Even for sophisticated and well-resourced firms engaged in high stakes transactions, mapping potential antitrust concerns is a costly and uncertain endeavor. Transforming every application of antidiscrimination law into an antitrust question, both at the point of sale and in any ensuing lawsuit, would invite a logistical nightmare.

Nor do ad hoc, shoot-from-the-hip theories of monopoly power answer the very real, practical questions courts, businesses, and consumers would confront if Petitioners' theory were adopted:

- What other businesses are in the same market? Does the existence of web-based services matter?
- Do customers' home addresses set the parameters of the market they are in and thus control whether discrimination is unlawful?
- Are regular surveys required to assess whether other businesses will actually serve each protected group?
- Will customers—when touring Main Street or Google—be forced to rely on listings of which businesses will serve people of their religion, sex, national origin, or sexual orientation?

Petitioners and their *amici* offer no serious answers to these questions. That's because there are none. To hold that Colorado has only a compelling interest in enforcing the Act in noncompetitive mar-

kets—as Petitioners and their *amici* invite the Court to do—would be ahistorical, legally unjustified, and (in practice) downright irresponsible.

B. Dignity in the Market

When Jackie Robinson hit the road, he faced more hardships than merely finding "*some hotel* that would have him." He also faced "the indignity of not being able stay in the *same hotel* as his white teammates." *See* James M. Oleske, Jr., *The Evolution of Accommodation: Comparing the Unequal Treatment of Religious Objections to Interracial and Same-Sex Marriages*, 50 Harv. C.R.-C.L. L. Rev. 99, 138 (2015). This speaks to yet another "fundamental object" of public accommodations laws: thwarting "the deprivation of personal dignity that surely accompanies denials of equal access to public establishments." *Heart of Atlanta*, 379 U.S. at 250; *see also Masterpiece Cakeshop*, 138 S. Ct. at 1723; *Bob Jones Univ. v. United States*, 461 U.S. 574, 603-04 (1983).

Rather than acknowledge the dignitary harms that would result from their position, Petitioners assert that by prohibiting them from discriminating, the Act fails to respect their own dignity. Pet'rs Br. 39. That argument is mistaken.

To start, Colorado's Act does not prioritize the interests of gays and lesbians over the interests of religious people. It ensures that *everyone*—people of all races, genders, religions, sexual orientations, and abilities—is afforded full and equal access to the open marketplace. No group is unfairly benefitted, and no group is unfairly burdened. Ms. Smith enjoys the very same legal protections that same-sex couples do

when she goes about her day and seeks to participate fully and equally in commercial life.

Nor is there merit to Petitioners' claim that serving all Coloradoans injures their dignity. As the owner of a business, Ms. Smith accepted the benefits and the responsibilities that come with offering services to the public in commerce. *Nebbia v. New York*, 291 U.S. 502, 538-39 (1934) ("The Constitution does not secure to any one liberty to conduct his business in such fashion as to inflict injury upon the public at large, or upon any substantial group of the people."). This Court has of course recognized that there are sincere "religious and philosophical objections to gay marriage," *Masterpiece Cakeshop*, 138 S. Ct. at 1727, but has never found that dignitary interest to give license to *businesses* to engage in discrimination in the commercial marketplace. Accepting Petitioners' claim would open the door to businesses to seek exemptions because they cannot tell customers of a different race, religion, or sex: "We do not serve your kind here."

Under Colorado's Act, the Petitioners retain extraordinary latitude to express their own messages. Because "no specific message is dictated by the State," Petitioners remain able to engage in protected activities and disseminate their preferred views. *PruneYard*, 447 U.S. at 87; *see also Brush & Nib Studio, LC v. City of Phoenix*, 247 Ariz. 269, 317 (2019) (Timmer, V.C.J., dissenting) ("Plaintiffs retain control over the type of products they sell, their style and design, and the specific messages written . . . . They can freely publish views opposing same-sex marriages or say nothing at all about marriages.").

Here, Ms. Smith can design her own website to express her views on marriage. She can devote substantial time and attention—as well as business resources—to advocating against same-sex marriage or in favor of her own vision of marriage. She can even include text on her business website that disclaims "any sponsorship of the message" conveyed by websites she works on. *PruneYard*, 447 U.S. at 87. But she may not refuse to serve would-be customers based on their sexual orientation.

That rule does not invade Ms. Smith's mind or deny her dignity. It simply requires a modicum of civility and equality in operating her public-facing business.

CONCLUSION

For the reasons given above, the judgment below should be affirmed.

Respectfully submitted,

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