No. 21-476

IN THE
# Supreme Court of the United States

303 CREATIVE LLC AND LORIE SMITH,

*Petitioners*,

v.

AUBREY ELENIS, ET AL.,

*Respondents*.

**On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit**

## BRIEF FOR FIRST AMENDMENT SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS


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## INTEREST OF *AMICI CURIAE*[1]

*Amici* are scholars of the First Amendment. They have an interest in promoting the sound interpretation of the First Amendment in harmony with its purpose, precedent, and the societal values that are served by the protection of free expression. At the same time, they recognize that overextension of the First Amendment to license discriminatory conduct can infringe the expressive freedom of other persons and their ability to participate fully in the marketplace. They submit this brief in order to provide an analytical framework for striking the proper balance in this area.

*Amici*'s names and professional affiliations are set forth in the Appendix.

## SUMMARY OF THE ARGUMENT

The First Amendment protects the communication of ideas through recognized mediums of expression. Choosing one's customers for a commercial activity has never been understood to entail expression covered by the First Amendment. Accordingly, for more than a century, governments have applied public accommodations laws to protect individuals against discrimination without any intrinsic offense to First Amendment freedoms.

Still, even in the commercial context, First Amendment expressive interests can limit the valid reach of public accommodations requirements. The

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

government may require a painter to sell the paintings in her gallery to any customer, but it cannot command her to paint specific images selected by the state. This reflects the general First Amendment distinction between the regulation of conduct and the regulation of expression. Newspapers, for example, cannot reject people who seek to place ads based on their race, but the First Amendment protects the editorial content newspapers publish. Public accommodations laws ensure that people can participate in the marketplace without facing discrimination. Those laws cannot be used to coerce expression protected by the First Amendment.

When a vendor is commissioned to perform a service with communicative qualities for a customer, determining whether the service implicates the vendor's own protected expressive interests requires a nuanced, fact-intensive inquiry. Some cases may be difficult, but this Court's cases provide the framework for the inquiry. Three questions are central: Does the service involve a recognized medium of expression? Is the regulated activity predominantly a commercial service or the artist's own protected expression? Would an objective observer conclude that the activity reflects the artist's own expression of a message in public discourse?

Not every transaction involving expressive content involves protected interests. For example, when a public accommodations law requires a commercial sign maker to print a poster for a Sunday Mass, no expressive interest protected by the First Amendment is infringed, even if the sign maker is sincerely opposed to Catholic traditions. That is because the activity of printing a poster is not inherently the

printer's expression. It is a predominantly commercial transaction that an objective observer would understand as such.

The same conclusion follows when a website designer is required to include same-sex couples in her clientele. A website has expressive elements, and one can imagine a website commission that would implicate the artist's own expression. But merely communicating information about the happy couple's ceremony to their friends and family does not conscript the designer in the delivery of a message of approval for the union that would be attributed to her. And this remains true even if she customizes esthetic details on the website for the client. What the law requires her to do—provide that service to same-sex couples as well as opposite-sex couples—does not regulate, require, or restrict any constitutionally protected expressive qualities of the service.

A holding that the First Amendment protects a refusal to serve certain customers would require the Court to jettison established constitutional doctrine at the expense of longstanding and vital antidiscrimination laws, and it should be avoided for that reason. Extending the Constitution's reach to expression beyond the First Amendment's traditional purview would also invite others to claim "expressive" exemptions from laws of general application. That result would damage the evenhanded administration of the law.

An expansive expression-based exceptionalism also risks unsettling established legal regimes in ways that do not advance, and may impede, First Amendment values. The extravagant extension of

traditional freedoms invites dilution of First Amendment standards of review to avoid untenable consequences. Alternatively, a ruling that a constitutionally protected expressive interest allows an artist to avoid dealing with certain groups (like same-sex couples) even while the artist can be required to deal with others (like interfaith or interracial couples) would be doctrinally incoherent, and wrong. *Amici* urge the Court to consider these broader consequences before endorsing the use of the First Amendment as a shield for discrimination.

## ARGUMENT

### I. PUBLIC ACCOMMODATIONS LAWS ENSURE THAT EVERYONE CAN PARTICIPATE IN THE COMMERCIAL SPHERE

Public accommodations laws have a "venerable history." *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp. of Boston*, 515 U.S. 557, 571 (1995). At common law, those who "made profession of a public employment"—like innkeepers and smiths—"were prohibited from refusing, without good reason, to serve a customer." *Id.* (quotations omitted). That reflected the prevailing "rule" that those who served the public had "no right to say to one, you shall come into my [business], and to another you shall not, as every one coming and conducting himself in a proper manner has a right to be received." *Id.* (quoting *Rex v. Ivens*, 7 Car. & P. 213, 219 (N.P. 1835)); M. Konivitz & T. Leskes, A Century of Civil Rights 160 (1961). "[T]he traditional understanding of public-accommodations laws" was "that they provide rights for customers." *See PGA Tour, Inc. v. Martin*, 532 U.S. 661, 692 (2001) (Scalia, J., dissenting).

Building on that tradition, modern public accommodations laws seek to ensure customers' access to the commercial sphere on a non-discriminatory basis. They "prevent discrimination in traditional places of public accommodation—like inns and trains"—as well as "restaurants, bars," "hotels," and even less tangible places, like "membership organizations." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 656-57 (2000); *see, e.g.*, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1725 (2018) ("Today, the Colorado Anti-Discrimination Act (CADA) carries forward the state's tradition of prohibiting discrimination in places of public accommodation."). It is thus "unexceptional that Colorado law can protect" individuals against sexual-orientation discrimination "just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public." *Masterpiece Cakeshop,* 138 S. Ct. at 1728.

Public accommodations laws "do not, as a general matter, violate the First or Fourteenth Amendments." *Hurley*, 515 U.S. at 572. They regulate commercial transactions. A law designed to prohibit discrimination does not attract the additional scrutiny reserved for laws that serve a suspect governmental purpose of suppressing certain messages. *Texas v. Johnson*, 491 U.S. 397, 406 (1989) ("The government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word. It may not, however, proscribe particular conduct *because* it has expressive elements." (citations omitted)); *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011) ("[T]he

First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech."). The Constitution "does not guarantee a right to choose employees, customers, suppliers, or those with whom one engages in simple commercial transactions, without restraint from the State." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 634 (1984) (O'Connor, J., concurring in part and concurring in the judgment). Thus, a vendor "has no constitutional right to deal only with persons of one sex," *id.*, and "it is a general rule" that "objections to [same-sex] marriage" "do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services." *Masterpiece Cakeshop, Ltd.*, 138 S. Ct. at 1727. The same has long been true of race discrimination: As this Court held in *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968) (per curiam), the First Amendment does not exempt a restaurant from public accommodations laws that require it to serve Black customers—even where the restaurant's stated basis for race discrimination is to serve "the will of God." *Id.* at 402 n.5. Public accommodations laws serve a worthy governmental purpose and do not inherently intrude on the interests—including expressive interests—protected by the First Amendment.

## II. CREATORS MAY BE ENTITLED TO FIRST AMENDMENT PROTECTION FOR THEIR EXPRESSIVE ACTS EVEN WHEN THEY ENTER THE COMMERCIAL SPHERE

While the First Amendment does not protect discrimination against customers, the First Amendment does protect certain kinds of expression even when creators enter the marketplace. "It is well settled that

a speaker's rights are not lost merely because compensation is received; a speaker is no less a speaker because he or she is paid to speak." *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 801 (1988); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 494 (1995) (Stevens, J., concurring) ("[E]conomic motivation or impact alone cannot make speech less deserving of constitutional protection, or else all authors and artists who sell their works would be correspondingly disadvantaged."); *see, e.g.*, *Miami Herald Publ'g. Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (holding that a newspaper has a First Amendment right to choose what articles to write and publish). The First Amendment protects artists' freedom to create the messages they will disseminate in the marketplace as their own.

In economic contexts, then, some speech that is predominantly non-commercial and the speaker's own message—like a newspaper editorial or the text of a book that is sold—will receive the stringent protections of speech in public discourse. *Rumsfeld v. Forum for Acad. & Inst. Rts.*, 547 U.S. 47, 61 (2006) ("*FAIR*") (the First Amendment "prohibits the government from telling people what they must say."); *see, e.g.*, *Hurley*, 515 U.S. at 573 ("[A] speaker has the autonomy to choose the content of h[er] message."); *Bigelow v. Virginia*, 421 U.S. 809, 818 (1975) (embracing First Amendment protection for a newspaper advertisement despite the advertiser's commercial interest); *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964) (protected statements "do not forfeit th[e] protection [of the First Amendment] because they were published in the form of a paid advertisement"). Even when creative expression is offered for sale, cre-

ators—from artists, to journalists, to authors, to website designers—retain important protections, which vary according to context, for their speech. *See generally* Robert Post & Jennifer Rothman, *The First Amendment and the Right(s) of Publicity*, 130 Yale L.J. 86 (2020) (providing a framework for sorting cultural products such as commercial posters treated as art, with full First Amendment protections, from commodities for purposes of a right of publicity claim).

## III. WHEN PUBLIC ACCOMMODATIONS LAWS INTERSECT WITH CLAIMED EXPRESSIVE INTERESTS, COURTS MUST CONFIRM THE APPLICATION OF THE FIRST AMENDMENT THROUGH A NUANCED, FACT-SENSITIVE INQUIRY

Although the First Amendment extends into the commercial sphere, commercial activity is not insulated from regulation merely because it has expressive qualities. To evaluate whether an artist who enters the marketplace may claim a First Amendment right not to accommodate certain business, it is necessary to inquire whether the activity subject to regulation is predominantly a commercial service or protected expression. Applying that analysis to this case, Colorado's application of its public accommodations law to the website design petitioner proposes to offer does not intrude on her protected expression.

### A. Established Doctrinal Principles Guide The Analysis Of Whether Activity Is Protected Expression.

Assessing whether a public accommodations law affects protected expression can be fact-intensive. The easiest case is the off-the-shelf sale of a product with expressive qualities. As petitioner acknowl-

edges, an artist has no right under the First Amendment to refuse service "based on the status of the requester." Pet. 21; *see Hurley*, 515 U.S. at 572-73. Refusal to deal is not a protected form of expression, even if the vendor sincerely considers the refusal expressive. *See FAIR*, 547 U.S. at 65-66 ("[W]e [have] rejected the view that conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."); *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984) (rights of expression or association in selecting law firm partners do not permit discrimination in violation of Title VII); *Associated Press v. United States*, 326 U.S. 1, 20 & n.18 (1945) (distinguishing refusal to sell product from refusal to create); *cf. Piggie Park Enters.*, 390 U.S. at 402 n.5 (declining to afford First Amendment protection to restaurant's desire to discriminate racially to serve "the will of God").[2]

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[2] *See also, e.g.*, Robert Post, *Recuperating First Amendment Doctrine*, 47 Stan. L. Rev. 1249, 1255 (1995) ("First Amendment analysis is relevant only when the values served by the First Amendment are implicated. These values do not attach to abstract acts of communication as such, but rather to the social contexts that envelop and give constitutional significance to acts of communication."); Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 Harv. L. Rev. 1765, 1769 (2004) ("The acts, behaviors, and restrictions not encompassed by the First Amendment at all … are the ones that are simply not *covered* by the First Amendment. It is not that the speech is not *protected*. Rather, the entire event—an event that often involves 'speech' in the ordinary language sense of the word—does not present a First Amendment issue at all, and the government's action is consequently measured against no First Amendment standard whatsoever." (emphasis added)).

Other cases are more difficult because they involve more than a simple refusal to deal. Yet the First Amendment does not automatically shelter all discriminatory conduct simply because a person claims that it has expressive content. The Court's doctrine provides three questions that frame that analysis: (i) Does the service involve a recognized medium of expression? (ii) Is the regulated activity predominantly a commercial service or the artist's own protected expression? And (iii) Would an objective observer conclude that the activity reflects the artist's own expression of a message in public discourse?

***1. Recognized mediums of expression.*** At the threshold, courts must determine whether the good or service involves a recognized medium of expression. A vendor's assertion that they are selling expression does not automatically make it so. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 294 (1984) (conduct is expressive where it is "intended to be communicative" *and* "would reasonably be understood by the viewer to be communicative"); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952) (holding that motion pictures had come within the ambit of the First Amendment's coverage as "a significant medium for the communication of ideas"). Gourmet chefs cannot invoke First Amendment protection merely because they perceive their craft to be expressive; the same goes for florists, jewelers, carpenters, clothing designers, auto detailers, architects, and hair stylists. *Cf. 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 . . . but such a kernel is not sufficient to bring the activity within the protection of the First Amendment.").

The Court's decisions in *Hurley* and *FAIR* sit on either side of the line. In *Hurley*, the First Amendment's protection extended to a parade because parades are "mediums of expression," and not simply "group[s] of people . . . march[ing] from here to there": "we use the word 'parade' to indicate marchers who are making some sort of collective point, not just to each other but to bystanders along the way," and indeed "depend[] on watchers." 515 U.S. at 568. In *FAIR*, in contrast, the regulated activity—accommodating military recruiters on campus—lacked the expressive qualities necessary for the First Amendment to extend its protection. *FAIR*, 547 U.S. at 66-67. Painting a picture is considered expressive, but painting a *house* generally is not.[3]

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[3] *See* Post, *supra*, at 1254 ("[S]ocial conventions, to serve the values protected by the First Amendment, must do more than merely facilitate the communication of particularized messages. They must at a minimum also presuppose and embody a certain kind of relationship between speaker and audience."); *e.g., id.* ("Navigation charts for airplanes, for instance, are clearly media in which speakers successfully communicate particularized messages. And yet when inaccurate charts cause accidents, courts do not conceptualize suits against the charts' authors as raising First Amendment questions. They instead regard the charts as 'products' for the purpose of products liability law.'" (citation omitted)); Schauer, *supra*, at 1765 ("[I]f we include the speech by which we make wills, enter into contracts, render verdicts, create conspiracies, consecrate marriages, admit to our crimes, post warnings, and do much else—it becomes still clearer that the speech with which the First Amendment is even slightly concerned is but a small subset of the speech that pervades every part of our lives."); Leslie Kendrick, *First Amendment Expansionism*, 56 Wm. & Mary L. Rev. 1199, 1212 (2015) ("[C]ountless activities involve 'speech.' These include professional advice from doctors and lawyers, legal documents and testimony, instruction manuals from product manufacturers, labels on food

***2. Effect on protected expression.*** A law that compels an artist to provide a good or service with expressive qualities but that does not affect protected expression itself also does not implicate the First Amendment. A law cannot declare "speech itself to be the public accommodation." *Hurley*, 515 U.S. at 573. But as all apparently agree in this case, public accommodations laws may require artists who enter the marketplace to sell their creations without discrimination among purchasers; the First Amendment does not shield discriminatory customer selection. *Supra* at 9. A public accommodations law could not require a baker to offer particular messages on their cakes—it could not require a baker to prepare a "Black Lives Matter" cake for any customer, for example. But once a baker enters the marketplace to provide messages of congratulation, they may not refuse to write "Mazel Tov, Jim" on a cake on the ground that Jim is Jewish. *See Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993) ("A tax on wearing yarmulkes is a tax on Jews."). Similarly, the First Amendment does not protect a newspaper's "decision to accept a commercial advertisement which the advertiser directs to be placed in a sex-designated column or the actual placement there," which combination "conveys essentially the same message as an overtly discriminatory want ad." *Pittsburgh Press Co. v. Pittsburgh Comm'n on Hum. Rels.*, 413 U.S. 376, 388 (1973).

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products, campaign spending, flag burning, tattoos, the production and distribution of pornography, work produced by machines such as Internet search results, work produced by people now dead, activities undertaken by infants and minors, and so on. 'Freedom of speech' is a term of art that does not refer to all speech activities, but rather designates some area of activity that society takes, for some reason, to have special importance.").

When the customer's identity forms the basis for refusing to furnish content the vendor already provides to others, the refusal is outside the reach of the First Amendment.

A vendor cannot avoid this principle by defining the expressive quality of the service to exclude a particular clientele. A calligrapher today could not invoke the First Amendment to create kanji only for Asian Americans—any more than Ollie, six decades ago, could claim constitutional protection for serving "Bar-B-Que for White People." *See Katzenbach v. McClung*, 379 U.S. 294, 304 (1964).

***3. Objective understanding of the act as the artist's independent expression of ideas in public discourse.*** Last—and most context-specific—is whether reasonable people would perceive the service or product provided by the vendor as the artist's independent expression. Compelling expression that would be received as the artists' own invades a core interest protected by the First Amendment.

For example, in *Hurley*, a council was not required to include an LGBTQ+ group in its parade when the public would likely perceive its inclusion "as *having resulted from*" the council's belief that the group was "worthy of presentation and . . . support." 515 U.S. at 575 (emphasis added). And in *Walker v. Texas Division, Sons of Confederate Veterans*, 576 U.S. 200 (2015), Texas was not required to permit a specialty license plate design featuring a Confederate battle flag when "license plate designs are often closely identified in the public mind with the State" and, in fact, a "a person who displays a message on a Texas license plate"—rather than using a simple bumper sticker—

"likely intends to convey to the public that the State has endorsed that message." *Id.* at 212 (internal quotation marks and brackets omitted).

But misattribution concerns diminish when the public can easily differentiate between the artist and the expression. *See Shurtleff v. City of Boston*, 142 S. Ct. 1583, 1591 (2022) (raising a private group's flag at City Hall was "private, not government, speech" in part because the public would not "tend to view the speech at issue as the government's"); *Bd. of Educ. of Westside Cmty. Schs. (Dist. 66) v. Mergens*, 496 U.S. 226, 250 (1990) (plurality opinion) (high school students could differentiate between school-sponsored speech and speech the school was legally required to permit pursuant to an equal access policy); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 841 (1995) (university took "pains to disassociate itself from the private speech" at issue, and misattribution "not a plausible fear"). So where expression is "not likely [to] be identified with . . . the [speaker]," the fact that the service can be characterized as expressive is not sufficient to claim constitutional protection against commercial dealings with certain customers. *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 87-88 (1980).

Based on these principles, a wedding ring designer's disagreement with interracial marriage would not justify refusing to create wedding rings for an interracial couple. No matter how much effort and creativity the design entailed, the couple's family and friends would not reasonably perceive the ring as the jeweler's endorsement of interracial marriage. Requiring a jeweler to create a symbol they would not otherwise publish, in contrast, may intrude on the

jeweler's expressive interests: A jeweler could refuse a commission to create a swastika necklace, for example, if it would require the jeweler to give voice to a message the jeweler would otherwise renounce.

In this vein, the Court has "assumed that a member of the clergy who objects to [same-sex] marriage on moral and religious grounds could not be compelled to perform the ceremony without denial of his or her right to the free exercise of religion." *Masterpiece Cakeshop*, 138 S. Ct. at 1727. Wedding guests would reasonably perceive the clergy member's own words of blessing as an expression of approval for the couple's union. But the same is not true for the "long list of persons who provide goods and services for marriages and weddings." *Id.* A copy shop must print the couple's invitations. A florist must arrange their flowers. And a restaurant must serve their dinner. Reasonable people would not perceive those vendors to be endorsing same-sex marriage simply because they served those customers. This is true even if the service at issue—whether dress making, cake baking, makeup artistry, or website design—could be considered expressive, so long as an objective observer would not identify the expression as the vendor's own independent contribution to the world of ideas.

### B. 303 Creative Cannot Withhold Its Services From Same-Sex Couples.

Applying those principles to the limited record here,[4] the First Amendment does not protect 303 Creative's refusal to create wedding websites for same-

[4] As respondents explain, the record "contains only a mock-up website the Company made without any customer input." Respondents' Br. 7. So if the "Court needs to consider the content

sex couples (but not opposite-sex couples). Petitioner proposes to operate a business where the service provided has expressive qualities—we take as true that petitioner adapts the content for the client, and exercises creative liberties in the esthetic details. But Colorado's law does not affect those creative endeavors. It simply requires petitioner to undertake them for any couple, regardless of age, race, ethnicity, religion, or sexual orientation. The variations in content that come with customizing a webpage for a particular couple—date, location, wedding registry, names—are variations inherent in the business enterprise itself. The law operates on the commercial aspects of petitioner's business, not on its expressive features.

Moreover, reasonable people would not attribute to the website designer the content on the website, much less a message of approval of the partners' choice to marry each other. *See FAIR*, 547 U.S. at 63; *PruneYard Shopping Ctr.*, 447 U.S. at 87-88. A churchgoer does not understand the copy shop that prints the church bulletin to endorse the church's religious message. A child does not believe that the baker of a custom birthday cake is wishing her a "Happy Birthday." And a person who opens a hand-calligraphed wedding invitation does not attribute the communication to the company that provided its custom script or the mail carrier who delivered it. The invitation designer is a conduit for the couple's communication, just as a wedding website is a conduit for the couple to distribute information about their wed-

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of the Company's websites" to answer the question presented, "this dispute is not ripe." *Id.* at 10.

ding. The audience for the website would be the couple's friends and family, who are likely unaware petitioner even exists.

On other facts, a First Amendment interest might preclude requiring an accommodation. If the website designer were to create commentary in her own voice, for example, the service she provided might be considered predominantly her own expression, akin to the parade in *Hurley*, and the public might attribute the content to her. The same might be true for the composition of a unique poem or musical performance. But on the undeveloped factual record here, the showing that the website designer is creating what is predominantly her own protected speech has not been made.

The First Amendment does not provide a blanket exemption from the non-discrimination rules that apply to all others in the marketplace. And because the First Amendment does not allow vendors to define what their services "express" based on the clientele they prefer to serve, 303 Creative cannot resolve to be a website designer for opposite-sex weddings only. On the stipulated facts here, Colorado's public accommodations law is constitutional.

## IV. THE FIRST AMENDMENT SHOULD NOT BECOME A SHIELD FOR DISCRIMINATION OR A WAY TO CIRCUMVENT IMPORTANT LAWS OF GENERAL APPLICATION

Crediting a vendor's expressive interest in refusing certain customers would wrongly strip governments of the power to protect individuals from discrimination in the marketplace. The resulting "community-wide stigma" of precluding same-sex cou-

ples—and, assuming analytical coherence, also interracial couples, interfaith couples, and others protected by public accommodations laws—from "equal access to goods, services, and public accommodations," *Masterpiece Cakeshop,* 138 S. Ct. at 1727, is alone cause for concern. But a decision in petitioner's favor would wreak even greater havoc: it would permit the First Amendment to supersede laws of general application that are important for our society to function, without advancing First Amendment goals. That, in turn, would risk diluting First Amendment protections when they are actually warranted.

Allowing 303 Creative to discriminate on the basis of the First Amendment's protections would necessarily open the door to conflicts between such "expressive" interests and other laws of general application, unsettling the law in multiple ways. If petitioner's claim is sustained, could a person claim an expressive interest in refusing to pay taxes to a government whose policies they consider unconscionable? Does the First Amendment insulate a protestor from trespassing prohibitions? The answers to those question have previously been straightforward. Yet petitioner's position would roil those waters.

In the past, the Court has recognized that claimed expressive interests like these are beyond the First Amendment's coverage. It has, for example, rejected the notion that "if an individual announces that he intends to express his disapproval of the Internal Revenue Service by refusing to pay his income taxes, we would have to apply [First Amendment principles] to determine whether the Tax Code violates the First Amendment." *FAIR*, 547 U.S. at 66. As the Court held, First Amendment law does not "support[] such

a result." *Id.* To throw courts to into those conflicts would invite subjective invalidation of basic legal regimes. The Court should not lose sight of the broad negative implications of ruling in petitioner's favor here.

Permitting businesses to avoid commercial regulation by claiming First Amendment protection of any business activity—like choosing customers, hanging exclusionary signs on the door, or rejecting employees of certain genders or races—may also "dilute free speech protection, and that dilution may spill over into traditional areas of First Amendment coverage in ways that are now difficult to anticipate." Amanda Shanor, *First Amendment Coverage*, 93 N.Y.U. L. Rev. 318, 324 (2018); *see* Frederick Schauer, *Commercial Speech and the Architecture of the First Amendment*, 56 Cin. L. Rev. 1181, 1194 (1988) ("'doctrinal dilution'" is a "possibility that some existing first amendment rule would lose some of its strength because of the number of unacceptable applications it would generate when its new applications were added"). And an alternative approach of carving out this case as different—purportedly resting on a principle that is inapplicable to a claimed expressive interest in not serving Black people, or Christians, or those with disabilities—would create intolerable doctrinal incoherence. Both distortions ultimately hinder the First Amendment's goal of furthering the free and robust exchange of ideas.

Here, affording First Amendment protection to activity that is predominantly commercial—and that would be understood as such by an objective observer—threatens to dilute and distort First Amendment protections in just those ways. The First

Amendment gives expressive activity a special status in our law, in part because of "the fundamental rule . . . that a speaker has the autonomy to choose the content of his own message." *Hurley*, 515 U.S. at 573. But claiming that a transaction implicates a kernel of expression does not afford a right to opt out of generally applicable laws on the grounds that the vendor would prefer not to engage with the customer because of her protected characteristics.

## CONCLUSION

For the above reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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# APPENDIX

# APPENDIX A
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