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 30 RELIGIOUS, CIVIL RIGHTS, AND GRASSROOTS ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST[1]

Anti-discrimination laws have long played a crucial role in protecting the rights of religious minorities. This case asks whether a place of public accommodation can claim a "free speech" right to violate a state's anti-discrimination law by discriminating against a protected group when operating in the public marketplace. The answer to that question should be no.

As religious institutions, civil rights groups, and grassroots organizations committed to fighting discrimination, *amici* know from firsthand experience the tremendous success that public accommodation laws have had in ensuring that religious minorities and their adherents can freely practice their faith without the threat of being shut out of the public marketplace for doing so. Under the exemption that Petitioners seek, members of religious minorities would no longer be protected from discrimination as they go about their daily lives. Any business that hosts events or provides any degree of customized client services could simply choose not to serve religious minorities, could subject them to unequal treatment, or could mandate terms and conditions not mandated of others. This Court should avoid creating such a First Amendment "right-to-exclude card" for businesses who want to violate public accommodation laws.

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[1] No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than amici curiae, their members, or counsel made any monetary contribution intended to fund the preparation or submission of this brief. The parties have consented to the filing of this brief.

Such a speech-based exemption from compliance with anti-discrimination laws would open the floodgates to the very discrimination that these laws are intended to guard against. The consequences cannot be overstated: it would throw open the doors to discrimination against people who practice religion, with the strongest impact falling on people of faith from minority religious communities. While the exception that Petitioners seek risks devastating consequences for all historically marginalized groups, *amici* focus in particular here on the impact for members of minority religions.

Amici are organizations that are committed to supporting people of faith's full and equal participation in American life and to safeguarding the Constitution's guarantee of religious liberty, and include the following organizations:

- Muslim Advocates
- Columbia Law School's Law, Rights & Religion Project
- Americans United for Separation of Church and State
- Auburn Seminary
- Bayard Rustin Liberation Initiative
- Bend the Arc
- Central Conference of American Rabbis
- DignityUSA
- Hadassah, The Women's Zionist Organization of America, Inc.
- Interfaith Alliance Foundation
- Jewish Women International

- Men of Reform Judaism
- Methodist Federation for Social Action
- Metropolitan Community Church, Global Justice Institute
- Muslim Alliance for Sexual and Gender Diversity
- Muslim Girl
- Muslim Public Affairs Council
- National Council of Jewish Women, Inc.
- National LGBTQ+ Bar Association
- New Jersey Muslim Lawyers Association
- New Ways Ministry
- Sadhana: Coalition of Progressive Hindus
- Sakhi for South Asian Women
- Secular Student Alliance
- Sikh American Legal Defense and Education Fund
- The Sikh Coalition
- Soulforce, Inc.
- T'ruah: The Rabbinic Call for Human Rights
- Union for Reform Judaism
- Women of Reform Judaism

SUMMARY OF ARGUMENT

Public accommodation laws are essential to ensure that religious minorities are able to engage with society on equal terms in the open market. Through these protections, public accommodation laws support true religious freedom by enabling adherents of all religions to live a full social and economic life. These laws

ensure that all members of our society retain the same fundamental right to be treated fairly in the marketplace regardless of faith or belief; a business that opens itself to the public sphere may not divide customers into those it will serve and those it will turn away for being of the "wrong" religion. If businesses do not want to serve certain groups, then it is their prerogative to opt out of marketing their goods or services to the general public. But here, Petitioners ask this Court for constitutional protection to offer goods and services to only their favored members of the public marketplace. Petitioners seek an interpretation of free-speech rights that would endorse public businesses denying the dignity and equal treatment afforded to everyone under Colorado's anti-discrimination laws to those customers who do not conform to the business's preferences.

Carving out this broad exemption would allow public businesses to legally exclude customers based on their identities. Instead of safeguarding every citizen's right to buy goods and services from businesses open to the public, Petitioners' and their *amici*'s proposed exemption would further hurt the very people these civil rights laws were designed to protect.

ARGUMENT

I. ANTI-DISCRIMINATION LAWS ENSURE THAT RELIGIOUS MINORITIES HAVE FULL AND EQUAL ACCESS TO THE PUBLIC MARKETPLACE.

Since this country's earliest days, individuals who would otherwise face exclusion from businesses in the public marketplace have been protected by American common law, and later by state public accommodation laws, requiring public businesses to offer their goods

and services to all customers. This deeply rooted protection traces its origins back to early English common law, which imposed on common carriers the duty to serve all persons. States began to codify this duty in the 19th century, and have since expanded is breadth to include prohibitions against discrimination on such bases as race, disability, national origin, religion, sex, marital status, gender identity, sexual orientation, military status and age. Nat'l Conference of State Legislatures, *State Pub. Accommodation Laws* (June 25, 2021).[2] Today, virtually all states prohibit discrimination in areas of public accommodation, regardless of the motivation for the discrimination. *Id.* The "fundamental object" of these laws is "to vindicate 'the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.'" *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 250 (1964) (citation omitted). And this Court has long recognized the government's "compelling interest" in preventing the "unique evils" caused by "acts of invidious discrimination in the distribution of publicly available goods, services, and other advantages." *Roberts* v. *U.S. Jaycees*, 468 U.S. 609, 628 (1984).

In enacting public accommodation laws, the legislatures of Colorado and other states sought to outlaw discrimination that blocked equal access to public businesses. These statutes include protections against discrimination that would deny full access to public spaces for many communities in this country.

Today, religious discrimination continues to exist in American society; with increased societal polarization

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[2] *Available at* http://www.ncsl.org/research/civil-and-criminal-justice/state-public-accommodation-laws.aspx.

in recent years, that discrimination is becoming increasingly overt. Indeed, the "thread of religious intolerance has woven its way into every aspect of life since colonial days." W. Melvin Adams, *An Overview of the Religious Discrimination Issue*, Religious Discrimination: A Neglected Issue, 174-175 (1980). The deeply depressing increase in religious-based discrimination over the past decade—not just in places of public accommodation but everywhere—has been notable. For example, criminal attacks borne of religious animosity have been steadily increasing. The rise in attacks on mosques in recent years correlates to a rise in anti-Muslim sentiment. *Nationwide Anti-Mosque Activity*, Am. Civil Liberties Union (last updated Jan. 2022).[3] A 2021 analysis determined that there was a 34% rise in anti-Semitic incidents nationwide from the year before, hitting a record high over a 40-year span, with more than seven anti-Semitic incidents per day on average. William Brangham & Rachel Wellford, *Antisemitic Incidents Hit a Record High In 2021. What's Behind the Rise in Hate?*, PBS News (Apr. 29, 2022).[4]

Colorado in particular has experienced an alarming amount of religious discrimination in the workplace. According to a 2019 study, Colorado ranked as the top state in the U.S. for religious-discrimination complaints per capita filed with the U.S. Equal Employment Opportunity Commission between 2009 and 2018. Marianne Goodland, *Colorado Leads US In*

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[3] *Available at* https://www.aclu.org/issues/national-security/discriminatory-profiling/nationwide-anti-mosque-activity.

[4] *Available at* https://www.pbs.org/newshour/show/antisemitic-incidents-hit-a-record-high-in-2021-whats-behind-the-rise-in-hate.

Complaints Based on Religious Discrimination, Study Finds, The Gazette (last updated May 15, 2021).[5] Against this backdrop of discrimination in other areas of public life, in Colorado and elsewhere, public accommodation laws are all the more vital to allowing religious minorities, like everyone else, to freely participate in the public marketplace.

II. CREATING A FIRST AMENDMENT RIGHT TO DENY "EXPRESSIVE" PRODUCTS AND SERVICES WOULD RADICALLY LIMIT MARKET ACCESS FOR THOSE PROTECTED BY PUBLIC ACCOMMODATION LAWS.

Colorado prohibits discrimination "because of disability, race, creed, color, sex, sexual orientation, gender identity, gender expression, marital status, national origin, or ancestry" in a place of public accommodation. Colo. Rev. Stat. § 24-34-601(2)(a). The underlying premise of this anti-discrimination law is that public businesses are open to all customers regardless of what the business owner thinks about their personal characteristics. In fact, commercial conduct is subject to a wide range of public regulations that protect the safety, health, and economic well-being of everyone, including anti-discrimination laws like the one at issue here, and laws relating to everything from sanitation to fire safety, signage to noise levels, and intellectual property protection to sales tax collection. When a business offers goods or services

[5] *Available at* https://gazette.com/news/government/colorado-leads-us-in-complaints-based-on-religious-discrimination-study-finds/article_f63e38ba-4905-5d27-8260-bafa78265cda.html.

for sale to the public, this statute requires that *all* customers be served regardless of their disability, race, creed, color, sex, sexual orientation, gender identity, gender expression, marital status, national origin, ancestry, or other protected characteristics—including customers who wear kippahs, crosses, or hijabs, are atheist or engage in prayer, are gender non-conforming, and are in interfaith, interracial, or same-sex relationships.

Petitioners contend that application of this law to 303 Creative violates the First Amendment's free speech protections. The implications of accepting this argument are staggering and would result in the functional invalidation of countless civil rights laws across the nation. To clarify the predictable impact of a decision in Petitioners' favor, the Court should engage with the consequences of the proposed exemption.

Petitioners make two speech-based arguments. First, they submit that Colorado's requirement that they serve all-comers is impermissible because developing a website is inherently expressive and service to customers in protected categories amounts to compelled speech in favor of a position with which they disagree. Second, they argue that Colorado has imposed a content-based speech restriction by prohibiting 303 Creative from having a disclaimer announcing that it will not serve same-sex couples. If accepted, these arguments would recognize a speech exception to anti-discrimination laws so broad that it would swallow the rule.

Petitioners are correct to point out that laws prohibiting discrimination by business owners mandate that customers not be turned away based on their religion, race, sex (including sexual orientation), marital or

family status, among other statutorily protected categories. That is, in fact, the purpose of these laws. Petitioners are incorrect, however, in arguing that the Constitution somehow prohibits a state from protecting such access to the marketplace for all its citizens.

Indeed, this Court has consistently rejected arguments that businesses open to the public have a constitutional right to provide less than the full and equal services required by public accommodation laws. More than four decades ago, this Court held that, in a marketplace "open to the public to come and go as they please," the state enjoys broad authority to create rights of public access on behalf of its citizens. *PruneYard Shopping Ctr.* v. *Robins*, 447 U.S. 74, 87 (1980). A few years later, it reiterated that the First Amendment did not bar a state from prohibiting sex discrimination by a nonprofit organization that offered "various commercial programs and benefits" to its unselective membership. *Roberts*, 468 U.S. at 626.

Those holdings were consistent with long-standing precedent ensuring that public places like schools, and commercial establishments like restaurants, must be available to all. *Runyon* v. *McCrary*, 427 U.S. 160, 168, 172 (1976) (holding that "commercially operated, nonsectarian schools" that "advertised and offered [educational services] to members of the general public" could not deny admission to prospective students on the basis of race); *see also Bell* v. *Maryland*, 378 U.S. 226, 314 (1964) (Goldberg, J., concurring) ("The broad acceptance of the public in this and in other restaurants clearly demonstrates that the proprietor's interest in private or unrestricted association is slight."). Equal access for all in the commercial sphere of our Nation is a well-established tenet of law.

Cf. Hurley v. *Irish-Am. Gay, Lesbian, and Bisexual Grp. of Bos.*, 515 U.S. 557 (1995) (organizers were entitled to control the expressive elements of a parade, in part because it was purely expressive and non-commercial in nature).

Petitioners seek to gut these principles of law. There is no reasoned way to limit their proposed exception to expressive activity based in religious belief, but even if there were, the Court should not begin down this path. Free and equal access to the marketplace is important to respecting the equal dignity of all people. Because Petitioners' proposed exception is spun from general free speech considerations, it is not limited to "expressive" commercial conduct motivated by religious belief. It will equally apply to a caterer who, for philosophical reasons, opposes marriages of same-sex couples, and a family photographer who, for cultural reasons, opposes cross-race adoption. Simply put, the logic of the proposed exception, if accepted, would mean that states cannot protect their residents by ensuring them equal access to the same array of goods and services that others in the state freely enjoy.

Indeed, recognition of a First Amendment *speech* right for commercial business to refuse to serve customers based on the owner's beliefs would immunize denials of service to any group that a business owner disfavored, whether because of the owner's religious beliefs, philosophical or political ideals, acceptance of mis- or dis-information, or bare personal preference. Under Petitioners' proposed rule, the only question is whether a business can describe its product or service as somehow "expressive"; if the answer is yes, provid-

ing the product or service would be a compelled statement of support. And Petitioners' *amici* make clear how broadly such an exception would apply. There is a "creative" aspect to "wedding photography, tattoo artistry, cake design, [and] *a hundred other forms*" of commercial conduct. Br. of Creative Professionals et al. as *Amici Curiae* 11 (emphasis added). As a result, even if it were desirable to cleave access to the market along these lines—and it is not—such a standard would be enormously difficult, if not impossible, to implement.[6] *See, e.g.*, *Masterpiece Cakeshop, Ltd.* v. *Colo. Civ. Rights Comm'n*, 138 S. Ct. 1719, 1723 (2018) (recognizing the difficulty of determining when such activities as cake design would qualify as protected speech).

More troubling still are the implications of Petitioners' argument that by not allowing them to post a disclaimer stating they will not serve same-sex couples, Colorado has imposed an impermissible content-based restriction on their speech. This argument, if accepted, would apply with equal force even if Petitioners' product or service were not expressive. Petitioners' position requires the view that the disclaimer is entitled to full speech protection independent of the

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[6] For example, are salon hair stylists engaged in expressive activity but not barbers? Are companies that print custom party invitations engaged in expressive activity but not local copy centers? Are landscape designers sufficiently expressive, or only if they do more than trim the bushes? On which side of the line do dance class teachers, computer coding instructors, or custom framers fall? The list—and lack of clarity—goes on and on. *Cf. Dallas* v. *Stanglin*, 490 U.S. 19, 24-25 (1989) (noting that dance-hall dancing is not expressive conduct although "it is possible to find some kernel of expression in almost every activity a person undertakes").

underlying nature of the product or service. Thus, the expressive nature of the underlying product or service would be irrelevant to the analysis of a free speech challenge to a prohibition on such disclaimers. Any business could assert the same principle. After all, a "straights only" sign remains speech whether it is posted on the window of an artist's shop or a local supermarket. It is obvious that a prohibition on such signs is formally a content-based speech prohibition—since the end of Jim Crow it has simply not mattered because an unsegregated market cannot functionally exist with exclusionary signs on every window. *See* Joseph William Singer, *Subprime: Why A Free and Democratic Society Needs Law*, 47 Harv. C.R.-C.L. L. Rev. 141, 155 (2012) ("Allowing restaurants to proclaim their disinclination to serve customers because of race would perpetuate segregated eating establishments and allow racial segregation in the marketplace to persist."); Christopher M. Schultz, *Content-Based Restrictions on Free Expression: Reevaluating the High Versus Low Value Speech Distinction*, 41 Ariz. L. Rev. 573, 595 (1999) ("[A] 'Whites Only' sign is * * * legally seen 'as the act of segregation that it is.'") (internal citations omitted); *see also Rumsfeld* v. *F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 62 (2006) (noting that just because a law prohibits a sign reading "White Applicants Only" does not mean that the law should be analyzed as a speech regulation).

To invalidate a state's prohibition of such disclaimers as content-based restrictions would re-open the door to a segregated market, whether based on sexuality, gender-identity, religion, race, or another currently protected characteristic. Signs that say, "straights only," "Christians only," or "whites only" are all speech, after all. If one discriminatory sign

cannot be prohibited without violating the First Amendment rights of the business owner, then none can. In such a world, even if a state could compel a non-expressive business to serve all-comers, the owner could simply announce their bias to their customers and allow the market to segregate itself; the guardrails that are in place to prevent the recreation of this segregated world would crumble. The consequences would fall heavily on religious minorities by eliminating many of the protections that public accommodation laws have historically afforded—protections that allow religious minorities to freely practice their faith.

To illustrate Petitioners' illusory limitations on their proposed exception, consider the impact that granting expansive free-speech protections for discriminatory treatment would have on the following cases that protected religious minorities who sought to swim in a public hotel pool, eat at a public restaurant, and attend a public gun range. In California, for instance, the state's public accommodation law protected Jewish customers after a hotelier ordered her staff to kick the "f[---ing] Jews" out of the hotel pool. *Paletz* v. *Adaya*, No. B247184, 2014 WL 7402324, at *2, *4 (Cal. Ct. App. Dec. 29, 2014) (alteration in original). In Connecticut, both federal and state public accommodation laws protected a Muslim family's right to eat at a restaurant on equal terms with others after the restaurant's manager saw the mother wearing a hijab and instructed his staff, in front of the woman's 12-year-old child, "not to serve 'these people' any food." *Khedr* v. *IHOP Rests., LLC*, 197 F. Supp. 3d 384, 385-386, 388 (D. Conn. 2016). And in Oklahoma, the court held that Muslim patrons were protected by Title II of the Civil Rights Act, 42 U.S.C. § 2000a *et*

seq.—the principal federal public accommodation statute—after the owner of a gun range posted a sign declaring the facility a "MUSLIM FREE ESTABLISHMENT" and refused to allow Muslims to enter or use the range or gun shop. Order at 1-2, 6-11, *Fatihah* v. *Neal*, No. 6:16-cv-00058-RAW (E.D. Okla. Dec. 19, 2018), ECF No. 97.

The exception to public accommodation laws that Petitioners demand would, if granted, threaten the outcome in these and similar cases. Because there is no bright line around what constitute "expressive" goods and services, tableside conversations with diners, *see Khedr*, 197 F. Supp. 3d at 385-386, and the teaching of gun-safety lessons, *cf.* Order at 1-2, *Fatihah*, ECF No. 97, might well be called expressive. These businesses could therefore refuse service to religious minorities in their diners and gun ranges. Indeed, it is hard to imagine *any* business open to the public that does not include at least some (and likely many) expressive elements. Nor does Petitioners' attempt to segregate marriages or weddings of same-sex couples from the couples' status as couples or as members of the LGBTQIA+ community, *see* Pet. Br. 22, 37, provide any reassurance for religious minorities.

Accepting Petitioners' asserted distinction would also mean that while public accommodation laws could prevent the IHOP manager in *Khedr* from refusing to serve Muslim families, the law could not prevent that same restauranteur from turning away the same families if they came for an Eid dinner; and the hotel owner in *Paletz* could not order Jews out of her pool but could refuse rentals of the pool area for bar mitzvahs, while allowing rentals for other celebra-

tions, be they religious or nonreligious. For good reason, this Court has long recognized these supposed distinctions as nonsensical, holding that "[a] tax on wearing yarmulkes is a tax on Jews," *Bray* v. *Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993). Whatever illusory limitations Petitioners or their *amici* posit, to recognize a constitutional right for public accommodations to refuse service for disfavored religious groups' *events* is to recognize a constitional right to bar those disfavored religious groups altogether.

Finally, though Petitioners insist that other businesses would be willing to build wedding websites for same-sex couples, *see* Pet. Br. 45, surely there were also other hotel pools, other family restaurants, and other gun ranges that might have been willing to serve the plaintiffs in *Paletz*, *Khedr*, and *Fatihah*. Must religious minorities—and LGBTQIA+ people, and racial minorities, and everyone else protected by public accommodation laws—carry around a guide of establishments that will serve customers of their particular demographic? *Cf.* Brent Staples, *Traveling While Black: The Green Book's Black History*, N.Y. Times (Jan. 25, 2019).[7] And must Colorado allow businesses to force them to do so, at so great a cost to the dignity and well-being of its citizens? The answer has long been no. Nothing about free speech requires a state to sanction a business's imposing indignities and deprivations on citizens who seek to engage like anyone else in the state's marketplace.

[7] *Available at* https://nyti.ms/3aaPiAB.

III. PETITIONERS' PROPOSED FREE SPEECH EXCEPTION THREATENS THE CIVIL RIGHTS OF RELIGIOUS MINORITIES IN THE PUBLIC ACCOMMODATION ARENA AND BEYOND.

A. Creating a Speech Right for Businesses to Exclude Would Disproportionately Affect Religious Minorities.

Accepting Petitioners' free-speech rationale for discriminating would invalidate substantial portions of the Colorado Anti-Discrimination Act. By allowing such unfair, unequal treatment, it would protect those who seek to discriminate while abandoning those who are targeted. This would have disastrous consequences for all civil rights laws, including those protecting religious liberty. The first to bear the cost of such a rule would be same-sex couples in the market for wedding products and services—the class of people targeted in this lawsuit—including same-sex couples for whom marriage is a religious act. *See, e.g.*, Kirsten Ott Palladino, *Peter and Roland's Jewish Christian Wedding*, Equally Wed.[8]

But if, as Petitioners argue, a state cannot ensure that businesses in the marriage market equally serve all couples who seek to marry, then Petitioners could also deny services to couples, whether same- or different-sex, because they are religious, interfaith, interracial, or formerly divorced. It is no objection that such couples have nothing to fear because their marriages are becoming more socially acceptable. Indeed,

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[8] *Available at* https://equallywed.com/peter-roland-jewish-christian-gay-wedding/ (last visited Aug. 17, 2022).

it is in part due to the protection of anti-discrimination laws that such acceptance has come about. Regardless, this acceptance has never been universal,[9] and sanctioning a First Amendment right to exclude, once out of the bottle, cannot be contained. Opening the door to market discrimination against same-sex couples will invite evermore creative attempts to exclude. *See* Netta Barak-Corren, *Religious Exemptions Increase Discrimination Toward Same-Sex Couples: Evidence from Masterpiece Cakeshop*, 50 J. Legal Stud. 75, 78 (2021) (finding that willingness to serve same-sex couples significantly decreased after the decision in *Masterpiece Cakeshop*).

Colorado's anti-discrimination law does not just prohibit businesses from refusing to serve customers on the basis of their sexual orientation—it also prohibits such refusals on the basis of religious identity. These categories are not mutually exclusive. A business owner could therefore turn away a same-sex, interfaith couple either because the business's owner disagrees with same-sex marriage, disapproves of a Christian marrying a Muslim, or both. Civil rights protections are even more critical for those members of our society who are vulnerable to discrimination on multiple bases. It is those individuals who will suffer the most harm under Petitioners' proposed rule.

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[9] As recently as 2019, a wedding venue's owner told an interracial couple they would not host their wedding, asserting, "First of all, we don't do gay weddings or mixed race * * * because of our Christian race, I mean, our Christian belief." P.R. Lockhart, *A Venue Turned Down an Interracial Wedding, Citing "Christian Belief." It's Far from the First to Do So*, VOX (Sept. 3, 2019), *available at* https://www.vox.com/identities/2019/9/3/20847943/mississippi-event-hall-interracial-couple-wedding-religious-exemption.

It is not just the marriage market that would see an increase in discrimination by proprietors of "expressive" enterprises. Petitioners' argument would sweep in a vast array of goods traditionally not understood to be "speech" protected by the First Amendment—such as the blueprint for a new home or a program for a bar mitzvah.[10] Countless markets would see increases in claims of "speech exemptions" from antidiscrimination laws, a development which, ironically given that Petitioners' speech is religiously motivated, would jeopardize the rights of members of minority faiths. It is not difficult to imagine the havoc such a state of affairs would wreak on the full participation of religious minorities in American society.

Imagine a young Muslim girl who wears hijab and loves to dance. Her mother signs her up for ballet classes at the local dance studio in their small town, which puts on a choreographed dance show at the end of class. When they arrive, the dance instructor notices the girl's hijab and says she is sorry, but she believes only girls who are oppressed would wear headcoverings, and she does not want to be seen as endorsing that oppression by the other parents. The girl's parents complain to their state's civil rights enforcement body, which opens an investigation. The dance instructor argues that enforcement of the public accommodation law would compel her speech because she believes including a girl wearing hijab in the instructor's choreographed dance performance endorses

[10] This is particularly true here where Colorado's antidiscrimination law does not restrict what goods and services businesses are allowed to sell; it only requires that the business make its goods or services available to all customers once it decides to offer them to the public.

a religious practice to which she objects. Under Petitioners' rule, she wins, and the young girl is unable to participate in dance classes.

Imagine a school that is hosting a fundraising dinner for the families of its students. The organizers order certain vegetarian options from the menu of a local caterer to accommodate the religious dietary requirements of various Jains on the guest list. The caterer refuses on the grounds that providing vegetarian meals to Jains would express his endorsement of Jainism. The school complains to the state's civil rights enforcement body, which opens an investigation. The caterer argues that enforcement of the public accommodation law would compel his speech because he believes preparing vegetarian food for Jains endorses a religious practice to which he objects. Under Petitioners' rule, he wins, and the school cannot obtain meals for certain attendees of the event.

Imagine a baptism for a Catholic family's baby. The family contacts a local florist to request floral arrangements for the baptism. The florist explains to the family that she is Baptist and objects to the baptism of infants. The family complains to the state's civil rights enforcement body that they have been refused service on the basis of their religion, and the body opens an investigation. The florist argues that enforcement of the public accommodation law would compel her speech because she believes that creating floral arrangements for an infant's baptism expresses endorsement of a religious practice to which she objects. Under Petitioners' rule, she wins, and the family is unable to secure flowers for their baby's baptism.

Imagine an Orthodox Jewish family spending the day at an amusement park. They come across a caricature artist and wait in line to have their portrait done. When their turn comes, the artist takes note of the men's yarmulkes and the women's modest clothing. He informs the family that he cannot draw their portrait because he does not approve of their faith practice and does not want to endorse it with his art. The family complains to the state's civil rights enforcement body, which opens an investigation. The artist acknowledges that his services fall within the purview of the state's definition of public accommodations, but argues that enforcement of the public accommodation law would compel his speech because he believes that representing Orthodox Jewish practices in his art would express endorsement of a religious practice to which he objects. Under Petitioners' rule, he wins, and the family is effectively banned from having their portrait drawn at their local amusement park.

It is also not difficult to imagine scenarios in which business owners refuse to serve customers based on an incorrect assumption about their identity. For example, perhaps the ballerina from the example above does not wear hijab and is, in fact, Christian, with a name of Arabic origin. Assuming her to be Muslim, the ballet instructor refuses to include her in class because she does not want to be perceived as endorsing Islam. In a pluralistic society like ours, identities overlap considerably, and assumptions are made about one's religion, race, sexual orientation, or gender all the time. Petitioners' proposed exemption would permit those assumptions to be acted upon in

the market such that, even if formally limited to denials of service to one group, customers outside of that group will still feel its effects.

B. A Speech Exemption from Civil Rights Laws Will Not Be Limited to the Public-Accommodations Context.

An exemption as far-reaching as the one urged by Petitioners would not necessarily be limited to public accommodations. Employers, too, could argue that they are engaged in expression protected by the First Amendment when they make hiring decisions. Title VII of the Civil Rights Act (Title VII) prohibits discrimination by non-religious organizations against applicants and employees because of their religion. *See* 42 U.S.C. § 2000e-2(a)(1). In *E.E.O.C.* v. *Abercrombie & Fitch Stores, Inc.*, this Court recognized that Title VII's religious protections "affirmatively obligat[e]" employers to accommodate an applicant or employee's religion. 575 U.S. 768, 775 (2015). Under Petitioners' compelled-speech logic, a clothing store's owner could prevail by asserting that its employee uniforms are an expression of the owner's religious beliefs and therefore that fulfilling the legal duty to accommodate an employee's wearing of religious garb, such as a crucifix, would impermissibly compel the employer to endorse the employee's faith—thus undermining the important protections for religious freedom that *Abercrombie* and Title VII recognize.

Similarly, a ruling by the Court that accepts Petitioners' broad interpretation of the scope of expression rights under the First Amendment could apply in the context of housing as well. The Fair Housing Act includes protections against religious discrimination.

42 U.S.C. § 3604. But if that prohibition can be characterized as compulsion to speak, a condominium association could prohibit a Jewish family from affixing a mezuzah to their door, or a sukkah in their back yard. *Bloch* v. *Frischholz*, 587 F.3d 771, 772 (7th Cir. 2009) (en banc).

Petitioners invite this Court to upend our Nation's efforts to ensure that the public sphere, whether in the context of a store, a place of employment, or a condo building, is equally accessible to all religious adherents, and that religious pluralism should be fostered in civil society. This Court should decline that invitation.

IV. PROTECTING RELIGIOUS LIBERTY DEPENDS ON BALANCING RELIGIOUS, SPEECH, AND EQUALITY RIGHTS.

Petitioners' reading of the speech clause of the First Amendment would undermine protections for religious liberty, opening the door to discrimination against religious minorities exercising their faith. Furthermore, it leaves LGBTQIA+ people of faith vulnerable to dual discrimination. Petitioners wrongly posit that there is an unavoidable conflict between freedom of speech, religious liberty, and the equality rights of LGBTQIA+ individuals—and all Coloradans—and thus ask this Court to favor the religious-expression rights of a business's owner over the equality and religious-freedom rights of everyone else. This is a false dichotomy.

First Amendment rights should be interpreted in equality-enhancing, not equality-denying, ways. When courts aim to protect both religious liberty and equality, they must strike a balance that does not subjugate one right to the absolute claim of the other. *See*

United States v. *Lee*, 455 U.S. 252, 261 (1982) ("When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity."); *see also, e.g.*, *Anderson* v. *U.S.F. Logistics (IMC), Inc.*, 274 F.3d 470, 476 (7th Cir. 2001) (no absolute rights to say "Have a Blessed Day" to clients who voice an objection to the phrase); *Wilson* v. *U.S. W. Commc'ns*, 58 F.3d 1337, 1342 (8th Cir. 1995) (no absolute right to wear a graphic and religiously motivated anti-abortion button in an office where it upset coworkers).

Where Petitioners argue that speech rights entitle a business to refuse service to certain individuals based on their identity, Petitioners inherently argue that free-speech rights trump equality rights. But for many decades, this Court and the lower courts have recognized that people engaged in commercial activities open to the public cannot thwart anti-discrimination laws.[11] There is a basic reason to continue to adhere to that balancing: Protections for religious liberty, particularly for religious minorities, depend on

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[11] *See, e.g.*, *Lukaszewski* v. *Nazareth Hosp.*, 764 F. Supp. 57, 61 (E.D. Pa. 1991) (hospital's free exercise rights were "not implicated" by federal prohibitions on age discrimination); *U.S. Dep't of Labor* v. *Shenandoah Baptist Church*, 707 F. Supp. 1450, 1460 (W.D. Va. 1989) (religious school's Free Exercise rights did not excuse it from violating Fair Labor Standards Act when it discriminated against employees on basis of sex); *Gay Rights Coal. of Georgetown Univ. Law Ctr.* v. *Georgetown Univ.*, 536 A.2d 1, 37, 39 (D.C. 1987) (en banc) (Georgetown University's free exercise rights did not excuse it from violating the D.C. Human Rights Act when it denied tangible benefits to student groups on basis of sexual orientation).

the rigorous enforcement of non-discrimination policies.[12]

CONCLUSION

Amici curiae respectfully request that this Court affirm the judgment below.

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AUGUST 2022

[12] Stated another way: "Religious liberty was never intended to give one religion dominion over other religions, or a veto power over the civil rights and civil liberties of others." U.S. Comm'n on Civil Rights, *Peaceful Coexistence: Reconciling Nondiscrimination Principles with Civil Liberties* 29 (2016).