No. 21-476

IN THE
Supreme Court of the United States

303 CREATIVE LLC; LORIE SMITH,

Petitioners,

v.

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

Respondents.

On Writ of Certiorari to the
U.S. Court of Appeals for the Tenth Circuit

BRIEF OF THE NATIONAL WOMEN'S LAW CENTER AND 35 ADDITIONAL ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

The National Women's Law Center ("NWLC") is a non-profit legal advocacy organization that fights for gender justice—in the courts, in public policy, and in our society—working across the issues that are central to the lives of women and girls—especially women of color, LGBTQ people, and low-income women and families. Since its founding in 1972, NWLC has worked to advance workplace justice, income security, educational opportunities, and health and reproductive rights. NWLC has participated in a range of cases before this Court to advocate for equality and civil rights protections for women and LGBTQ individuals.

This brief is also submitted on behalf of 35 additional organizations committed to civil rights protections for women and LGBTQ people.[2] *Amici* have a particular interest in this case because we work to address discrimination, including sex discrimination, and to advance LGBTQ rights, and because the arguments advanced by Petitioners are similar to the ones asserted in defense of discrimination against women in the public marketplace. *Amici* respectfully submit that their perspectives and experiences in addressing sex discrimination and advocating for LGBTQ equality may assist the Court in resolving this case.

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[1] No counsel for a party authored this brief in whole or in part, and no person other than *amici curiae* and their counsel made a monetary contribution to fund the preparation or submission of this brief. All parties have consented to the filing of this brief. NWLC also recognizes the contributions of NWLC consulting attorney Harper Jean Tobin and NWLC attorney Auden Perino to the preparation of this brief.

[2] For a complete list of these organizations, see App. 1a–2a.

SUMMARY OF ARGUMENT

Public accommodations laws prohibit commercial businesses that choose to sell goods or services to the public from turning away customers based on their race, sex, national origin, or other protected characteristic. By barring discrimination in the public sale of goods and services, public accommodations laws are fundamental to promoting equal access to the marketplace for all people, including women, people of color, and LGBTQ people.

This pre-enforcement challenge to a Colorado public accommodations law arises because the for-profit company, Petitioner 303 Creative LLC, through its owner Petitioner Lorie Smith (together, the "Company"), seeks to expand its business to offer wedding websites, but only if the Company can deny this service to LGBTQ couples. Brief for Petitioners ("Pet. Br.") 2, 6–7. The Company also wishes to include a statement on its website advertising the denial of service to LGBTQ couples. Pet. Br. 7. Both of these actions are illegal under the Colorado Anti-Discrimination Act ("CADA"), which seeks to ensure equality in the marketplace by prohibiting discrimination based on protected characteristics. This case implicates two primary provisions of CADA: (1) the "Public Accommodations Clause," which prohibits businesses from refusing to provide offered goods or services based on a person's protected characteristics; and (2) the "Communications Clause," which prohibits businesses from advertising that they will refuse to provide offered goods or services based on a person's protected characteristics. *See* Colo. Rev. Stat. § 24-34-601(2)(a).

The robust and continued enforcement of public accommodations laws is an important component of preventing discrimination and thereby ensuring greater equality. Through this brief, *amici* highlight the importance of upholding public accommodations laws in the face of free speech objections, so that such laws continue to facilitate the full participation of women and LGBTQ people in the marketplace and society. If the Court creates an exemption to Colorado's public accommodations law and permits the Company to refuse service to LGBTQ couples on free speech grounds, this could establish a dangerous and far-reaching precedent for undermining legal protections that were enacted to ensure that all people are welcome and treated equally in the public marketplaces across our nation.

I. Public accommodations laws across the country, including CADA, have proven fundamental to combatting the profound economic and dignitary harms associated with unequal access to publicly available goods and services.[3] *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 628 (1984). Women, especially LGBTQ women and women of color, have faced a long history of discrimination and exclusion from public places and the marketplace. Recognizing the significant harms

[3] Many states have included explicit protections against discrimination based on sexual orientation and gender identity in their state and local laws, and more courts are following *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020), to confirm that protections against sex discrimination include protections for LGBTQ people. *See, e.g.*, *Rouch World, LLC v. Dep't of Civ. Rights*, No. 162482, 2022 WL 3007805, at *11 (Mich. July 28, 2022) (relying on *Bostock*'s definition of "sex" to find that public accommodations law's prohibition on sex discrimination necessarily included discrimination based on sexual orientation and gender identity).

caused by such discrimination, this Court has stressed the need for legal protections, including through public accommodations laws, to ensure equal access and participation for all.

II. This Court and other courts have repeatedly upheld public accommodations laws in the face of First Amendment challenges, including the free speech objections the Company presents here. Nothing in the First Amendment's Free Speech Clause allows businesses to engage in discriminatory conduct in violation of public accommodations laws. When businesses voluntarily enter into commercial activity, whether by selling goods or providing services, they accept certain limits on their conduct that have been put into place to further important government interests. *See Jaycees*, 468 U.S. at 634 (O'Connor, J., concurring) ("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."). One such important—indeed "compelling"—government interest is "equal access to publicly available goods and services" for all. *Id.* at 624.

CADA's Public Accommodations Clause does not violate the Company's free speech rights because the law regulates commercial conduct, not speech. Under this Court's well-established precedents, the denial of services to certain customers based on protected characteristics constitutes discriminatory commercial conduct that may be prohibited by states without infringing on free speech rights. *See, e.g.*, *Pittsburgh Press Co. v. Pittsburgh Comm'n on Hum. Rels.*, 413 U.S. 376, 388–89 (1973).

CADA's Communications Clause also does not violate the Free Speech Clause because it regulates only commercial speech that facilitates illegal conduct. Speech like the Company's proposed statement, which advertises an intent to discriminate in violation of the law, has never been protected by the First Amendment. CADA's limited prohibition on such speech is part and parcel of preventing discrimination in public accommodations.

CADA advances the government's strong interest in preventing discrimination in the public marketplace on the basis of protected characteristics, including sex and sexual orientation. The law is specifically tailored to achieving this government interest, as it merely prevents businesses from engaging in discriminatory commercial conduct and in speech that facilitates such conduct, without preventing them from expressing personal beliefs in public or private forums. Both the Public Accommodations and Communications Clauses of CADA withstand scrutiny under any standard of review.

III. The protections provided by public accommodations laws would be at dire risk of unraveling if this Court created First Amendment exemptions for commercial businesses that seek to discriminate against customers. A commercial business's denial of services to customers based on protected characteristics—here, the Company's preemptive refusal to provide wedding website services to customers based on sexual orientation—is an example of the most blatant form of discrimination that public accommodations laws are intended to prohibit. Allowing the Company to evade CADA would undermine crucial legal protections and grant businesses license to discriminate in

ways that would be impossible to cabin. Petitioners' arguments that seek to apply these exemptions to companies that provide "creative" services are likewise unavailing and would create limitless exceptions to civil rights laws that address and prevent discrimination.

ARGUMENT

I. Public Accommodations Laws Are Essential to Protecting Women, LGBTQ Individuals, and Others from Discrimination Based on Protected Characteristics.

Public accommodations laws, like CADA, require equal access for all and are an important component for societies that value nondiscrimination and inclusion. Public accommodations laws reflect the recognition that discrimination on the basis of protected characteristics, such as sex, has long generated and perpetuated economic and social inequality. These essential laws serve the "profoundly important goal" of guaranteeing equal access to the marketplace for groups that historically have been excluded, including women. *Jaycees*, 468 U.S. at 632 (O'Connor, J., concurring). In doing so, such laws work to "vindicate the deprivation of personal dignity" that discrimination in and exclusion from public accommodations cause. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250 (1964) (quotation marks omitted).

Recognizing this important interest in ensuring equal access, forty-five states and the District of Columbia have enacted public accommodations laws to prohibit discrimination, including sex discrimination,

in the provision of publicly available goods and services.[4] Colorado is one of twenty-five states that explicitly prohibit discrimination based on sexual orientation.

A. Women, Including LGBTQ Women and Women of Color, Have Long Faced Discrimination in Public Accommodations, Resulting in Economic and Dignitary Harms.

Women in the United States have long faced discrimination in public places and the public marketplace, including in ways "rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage." *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973); *see also id.* at 684–85 ("The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. . . . 'The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator.'") (quoting *Bradwell v. Illinois*, 83 U.S. 130, 141 (1872) (Bradley, J., concurring)).

This discrimination has come not only from private business owners, but also from the government. For generations, "it remained the prevailing doctrine that government, both federal and state, could withhold from women opportunities accorded men" for "any basis in reason." *United States v. Virginia*, 518 U.S. 515, 531 (1996). *See also Obergefell v. Hodges*, 576 U.S.

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[4] *See* National Conference of State Legislatures, *State Public Accommodations Laws* (June 25, 2021), https://bit.ly/3QxbCJ1.

644, 660 (2015) ("[A] married man and woman were treated by the State as a single, male-dominated legal entity.").

As a result of these types of attitudes about women's alleged "unsuitability" for independent participation in the public sphere, women endured exclusion from a range of economic activities and opportunities, including commercial businesses, services, networking organizations, and other public places. Women were barred from a variety of spaces that welcomed men, including stores, restaurants, hotels, bars, and athletic facilities.[5] *See, e.g.*, *DeCrow v. Hotel Syracuse Corp.*, 288 F. Supp. 530, 531 (N.D.N.Y. 1968) (hotel refused to serve unescorted women); *Seidenberg v. McSorleys' Old Ale House, Inc.*, 317 F. Supp. 593, 595 (S.D.N.Y. 1970) (New York City tavern refused to serve women for 114 years).

Decades of *de jure* sex discrimination promoted and maintained the economic and dignitary inequality of women. For example, in 1908, the Court upheld legislation limiting women's work hours because "woman has always been dependent upon man . . . [and] in the struggle for subsistence . . . is not an equal competitor with her brother." *Muller v. Oregon*, 208 U.S. 412, 421–22 (1908). And in 1948, the Court upheld a statute prohibiting women from bartending unless they were a wife or a daughter of the bar owner on the ground that states were not precluded "from drawing a sharp line between the sexes." *Goesaert v. Cleary,* 335 U.S. 464, 466 (1948); *see also Markham v. Colonial Mortg. Serv. Co.*, 605 F.2d 566, 569 (D.C. Cir.

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[5] *See Discrimination in Access to Public Places: A Survey of State and Federal Accommodations Laws*, 7 N.Y.U. Rev. L. & Soc. Change 215, 238 (1978) (cited in *Jaycees*, 468 U.S. at 624).

1979) (noting the purpose of the Equal Credit Opportunity Act was to "eradicate credit discrimination waged against women, especially married women whom creditors traditionally refused to consider apart from their husbands as individually worthy of credit").

Despite progress, the economic and dignitary inequality faced by women is not a historic relic. Women and girls continue to experience the harm associated with long-term sex-based discrimination, demonstrating public accommodations laws' continued relevance and necessity. For example, just recently, the Fourth Circuit struck down a policy by a North Carolina Charter School that required girls to wear skirts to school, based on the idea of women being "'fragile vessels' deserving of 'gentle' treatment by boys." *Peltier v. Charter Day Sch., Inc.*, 37 F.4th 104, 112 (4th Cir. 2022). And in the workplace, discrimination against women remains a significant challenge, with about 4 in 10 working women reporting having experienced some form of sex discrimination at work.[6] In the context of public accommodations, it was only in 2019 that a federal law was passed offering some protections for breastfeeding in public buildings. Fairness for Breastfeeding Mothers Act of 2019, 40 U.S.C. § 3318.

LGBTQ women, particularly LGBTQ women of color, face heightened discrimination and the resulting economic and dignitary harms in public spaces, as well as in housing, employment and education. As of

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[6] Paychex, *Employment and Discrimination: Exploring the Climate of Workplace Discrimination from 1997 to 2018* (Aug. 1, 2019), https://bit.ly/3QxmwOW.

2020, in a survey of LGBTQ individuals, more than half reported experiencing harassment or discrimination in a public place.[7] Additionally, 43 percent of Hispanic LGBTQ individuals report that discrimination was a barrier to renting or purchasing a home, and 78 percent of Black LGBTQ individuals report that discrimination negatively impacted their ability to be hired.[8] The National Center for Transgender Equality's 2015 U.S. Transgender Survey found that transgender women of color experience pervasive housing discrimination.[9] A 2016 audit study also found that employers were about 30 percent less likely to request an interview or further information from a female job applicant perceived as LGBTQ compared to one perceived as heterosexual.[10]

LGBTQ youth also face discrimination in many settings, including schools. In this moment, LGBTQ youth face increasing attacks and challenges, as compared to other recent generations and non-LGBTQ

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[7] *See* Lindsay Mahowald et al., Center for American Progress, *The State of the LGBTQ Community in 2020*, at 4 (Oct. 6, 2020), https://ampr.gs/3SYL8ll.

[8] *See* Lindsay Mahowald, Center for American Progress, *Hispanic LGBTQ Individuals Encounter Heightened Discrimination* (July 29, 2021), https://ampr.gs/3A0zPjF; Lindsay Mahowald, Center for American Progress, *Black LGBTQ Individuals Experience Heightened Levels of Discrimination* (July 13, 2021), https://ampr.gs/3c2zFAu.

[9] S.E. James et al., National Center for Transgender Equality, *Report of the 2015 U.S. Transgender Survey* 180 (2016), https://bit.ly/3dATnDT.

[10] *See* Emma Mishel, *Discrimination Against Queer Women in the U.S. Workforce: A Résumé Audit Study*, 2 Socius 1, 7–8 (Jan. 2016), https://bit.ly/3Cc9XnY.

youth.[11] Discrimination in school, including in the form of sexual assault, compounds with the increased likelihood of LGBTQ youth facing homelessness, hiring discrimination, and severely impaired mental and physical health. In fact, LGBTQ youth are 2.2 times more likely to be homeless than their non-LGBTQ counterparts, and Black LGBTQ youth have the highest rates of homelessness of any group of young people.[12] This discrimination puts members of the LGBTQ community at a significant financial disadvantage that would be exacerbated if the right to equally access public accommodations is abandoned or chipped away at by the Court.

Continued discrimination against LGBTQ people across numerous settings thus inflicts both financial and dignitary harms, compounded for LGBTQ women and people of color and for those at the intersections of these identities. LGBTQ people who also face racial discrimination are subject to heightened and intertwining layers of discrimination, further highlighting the importance of public accommodations laws that prohibit discrimination on the basis of race, sex, and other protected characteristics. Public accommodations laws are essential to mitigating these harms by

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[11] *See* CDC, *Health Disparities Among LGBTQ Youth*, https://bit.ly/3CbhhA1; Edwith Theogene et al., Center for American Progress, *LGBTQI+ Members of Generation Z Face Unique Social and Economic Concerns* (Nov. 10, 2021), https://ampr.gs/3SYiWic.

[12] *See* Chapin Hall at the University of Chicago, *Missed Opportunities: LGBTQ Youth Homelessness in America* (2018), https://bit.ly/3A47lFW.

protecting LGBTQ individuals from discrimination and promoting equal access to the public sphere.

B. Public Accommodations Laws Promote the Well-Recognized State Interest in Addressing and Preventing Discrimination.

Public accommodations laws "are fundamentally a way of according recognition, of embracing and opening the doors to those traditionally excluded."[13] These laws codify societal recognition of the equal worth and dignity of groups that historically have been left behind and establish norms about what is, and is not, permissible. As this Court has long recognized, anti-discrimination laws like CADA guard against the real-world harms that exclusion from public accommodations causes.

As society increasingly has acknowledged the equal dignity and value of women, this Court has issued opinions rejecting the archaic, oppressive narratives that had been used to justify discrimination based on sex. In the 1980s, the Court specifically addressed the important ways in which public accommodations laws mitigate these harms in cases challenging the constitutionality of applying laws prohibiting sex discrimination to Rotary Clubs and the United States Jaycees. The Court acknowledged that when women are excluded from public accommodations, they are deprived of non-tangible goods and privileges like leadership skills, business contacts, and employment promotions. *Jaycees*, 468 U.S. at

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[13] Louise Melling, *Religious Refusals to Public Accommodations Laws: Four Reasons to Say No*, 38 Harv. J. L. & Gender 177, 190 (2015).

626; *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987). These types of "stigmatizing" harms undeniably lead to economic inequality, in addition to the serious deprivation of personal, individual dignity. *See Jaycees*, 468 U.S. at 625.

Because of the significant harms such exclusion causes, this Court has recognized repeatedly that eliminating sex discrimination through public accommodations laws is a "compelling" state interest "of the highest order." *See id.* at 624; *Duarte*, 481 U.S. at 549. About a decade following *Jaycees* and *Duarte*, this Court further held that sex-based "classifications may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women." *United States v. Virginia*, 518 U.S. at 534.

This Court similarly has recognized the significant discrimination LGBTQ people face and the need for legal protections to combat longstanding inequality. In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, the Court made clear that, under the law, "gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth," and "[t]he exercise of [LGBTQ individuals'] freedom on terms equal to others must be given great weight and respect by the courts." 138 S. Ct. 1719, 1727 (2018). This is why, the Court reasoned, "laws and the Constitution can, and in some instances must, protect them in the exercise of their civil rights." *Id.* Though it ruled for the baker on other grounds tied to the specific facts of the state agency's decisionmaking, the *Masterpiece* Court clearly recognized the importance of public accommodations laws in protecting LGBTQ individuals from discrimination.

In *Masterpiece*, the Court warned that a broad exemption to public accommodations laws would be dangerous, resulting in "a long list of persons who provide goods and services for marriages and weddings [that] might refuse to do so for gay persons, thus resulting in a *community-wide stigma inconsistent with the history and dynamics of civil rights laws* that ensure equal access to goods, services, and public accommodations." *Id.* at 1727 (emphasis added). Petitioners' arguments in this case are not new. They invoke many of the same arguments that were used to subordinate women throughout history. But this Court has rejected such arguments time and time again, recognizing that states have an important interest in enforcing their public accommodations laws as a means of addressing and preventing discrimination.

II. The First Amendment's Free Speech Clause Does Not Exempt Commercial Businesses from Compliance with Public Accommodations Laws.

This Court and other courts have consistently held that First Amendment-based objections, including the free speech objections Petitioners present here, are not legitimate bases for businesses to engage in discriminatory conduct in violation of public accommodations laws. *See, e.g.*, *Pittsburgh Press*, 413 U.S. at 388–89. Businesses and business owners remain free to express their viewpoints. But they may not engage in discriminatory commercial conduct or commercial speech that effectuates discrimination based on protected characteristics in violation of state public accommodations laws.

Here, Petitioners seek to engage in both discriminatory commercial conduct (by denying wedding website services to LGBTQ couples) and commercial speech effectuating discrimination (by posting a statement on their website declaring their intent to deny wedding website services to LGBTQ couples).[14] Under this Court's well-established precedents, Colorado can require Petitioners to comply with CADA in order to advance the state's interest in prohibiting discrimination in public accommodations.

A. CADA's Public Accommodations Clause Regulates Commercial Conduct, Not Speech.

Public accommodations laws such as CADA target *conduct*, not speech, when they prohibit discrimination in the marketplace. CADA's Public Accommodations Clause requires a commercial actor who seeks to offer goods or services for sale to the public make that product or service available to *all*, without regard to the protected characteristics of potential customers. Commercial businesses may "choose the products [they] sell[], but not the customers [they] serve[], no matter the reason." *Masterpiece*, 138 S. Ct. at 1733 (Kagan, J., concurring).

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[14] These are, by necessity, hypothetical facts because the Company brought this case as a pre-enforcement challenge. The Company has not yet offered any wedding website services. Consequently, the Company has not yet violated CADA, and Colorado has not taken steps to investigate or limit the Company's commercial activities. It is not possible to know at this stage what the Company's wedding websites would look like when provided to real customers, or even whether Colorado would enforce CADA against the Company at all.

Here, the Company seeks to choose the customers to whom it offers its wedding website services based on sexual orientation. Providing goods and services to the public is straightforward commercial conduct. CADA does not require the Company to offer this wedding website service at all. But if the Company decides to offer this service, CADA requires it to be offered without discrimination tied to protected characteristics among potential customers.

While the Company characterizes its planned refusal to provide wedding website services as based on whether the websites would reference LGBTQ weddings, rather than on the couple's sexual orientation, this conduct–status distinction is illusory. *See* Pet. Br. 5. There is no such thing as an LGBTQ wedding without LGBTQ persons. Ultimately, Petitioners seek to withhold services from certain couples and not from others, based entirely on the protected characteristics of sexual orientation and the sex of the individuals involved. Just as a photographer's refusal to photograph an interracial wedding cannot be separated from race, and a florist's refusal to serve a Muslim wedding cannot be separated from religion, the Company's refusal to provide wedding website services to LGBTQ couples cannot be separated from sexual orientation.

The conduct at issue in this case—publication of wedding websites where couples can share their event details—is not protected expressive conduct, and reasonable onlookers would not understand it to be such. For conduct to amount to protected "expressive conduct," there must be (1) an intent to convey a particularized message, and (2) a reasonable likelihood that the message would be understood. *Spence*

v. Washington, 418 U.S. 405, 410–11 (1974). That test is not met here.

Courts have regularly found that the public sale of goods and services, like the Company's intended wedding website services, is not protected expressive conduct. The Supreme Court of Washington, for example, has found that the "commercial sale" of flowers by a flower shop owner to a gay man for his wedding did not convey a particularized message that would be understood by those who viewed it. *State v. Arlene's Flowers, Inc.*, 389 P.3d 543, 557 (Wash. 2017), *aff'd on remand*, 441 P.3d 1203, 1209–10 (Wash. 2019) (reviewing and reaffirming 2017 opinion in light of *Masterpiece*). Similarly, the Supreme Court of New Mexico rejected a claim by a photography company that a public accommodations law prohibiting discrimination on the basis of sexual orientation violated the Free Speech Clause. The court emphasized that the public accommodations law "applies not to Elane Photography's photographs but to its business operation, and in particular, its business decision not to offer its services to protected classes of people. While photography may be expressive, the operation of a photography business is not." *Elane Photography, LLC v. Willock*, 309 P.3d 53, 68 (N.M. 2013).

The cases Petitioners cite do not compel a different result. *Hurley v. Irish-American Gay, Lesbian & Bisexual Group* is inapplicable to the free speech rights of a commercial business engaged in providing services to the public, as is the case here. 515 U.S. 557 (1995). In *Hurley*, which concerned the First Amendment rights of private organizers of a parade, the Court emphasized the particular nature of parades in finding them to be "a form of expression" and *not* a

place of public accommodation. *Id.* at 569, 575. Unlike the private parade organizers in *Hurley*, the Company here does *not* hold the status of a "private speaker," but rather that of an ordinary commercial business providing services to the public.

Similarly, *Boy Scouts of America v. Dale* is inapposite because the Company here is a *commercial* entity, not an "expressive association" like the Boy Scouts. 530 U.S. 640 (2000). The association between a business open to the public and its customers is not based on membership or like-mindedness, but rather the provision or exchange of goods and services made available to the public. While the Boy Scouts is comprised of members, a traditional public accommodation, such as a for-profit restaurant open to the public, is not.

Both this Court and lower courts have repeatedly rejected First Amendment challenges to laws prohibiting discriminatory commercial conduct. For example, in *Jaycees*, the Court upheld a Minnesota public accommodations law prohibiting discrimination on the basis of sex over a membership organization's objections that application of the law violated its First Amendment right of free association. 468 U.S. at 614–17. The Court concluded that Minnesota's compelling interest in eliminating the "unique evils" of sex discrimination justified any impact the law might have on the organization's First Amendment freedoms. *Id.* at 623, 628. The Court further underscored that the public accommodations law "reflects the State's strong historical commitment to eliminating discrimination and assuring its citizens equal access to publicly available goods and services." *Id.* at 624. *See also Masterpiece*, 138 S. Ct. at 1727

("[I]t is a general rule that [religious and philosophical] objections [to gay 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 under a neutral and generally applicable public accommodations law."). The Court's emphasis in *Jaycees* on the government's interest is even more compelling in this case, where a for-profit commercial business—not a quasi-commercial nonprofit organization like that at issue in *Jaycees*—seeks to refuse certain services to people based on a protected characteristic.

Numerous state courts similarly have rejected First Amendment challenges to laws prohibiting sex discrimination.[15] *See Warfield v. Peninsula Golf & Country Club*, 896 P.2d 776, 797–98 (Cal. 1995) (application of public accommodations law to a male-only private golf club did not violate members' First Amendment rights); *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274, 280 (Alaska 1994) (state anti-discrimination statute applied to landlord

[15] *Brush & Nib Studio, LC v. City of Phoenix*, does not compel a different result. 448 P.3d 890 (Ariz. 2019). In finding that the public accommodations law in *Hurley* was applied to "compel speech," the Supreme Court of Arizona mischaracterized the key distinction that made the application of the law in *Hurley* "peculiar." The issue in *Hurley* was the application of the public accommodations law to regulate commercial access to an organization's choice of *what* to sell (or display), unlike the traditional application of such laws to regulate access to an organization's offered goods and services. Under this Court's precedent, regulation of the sale of goods and services has always been upheld where the organization's *choice* of goods and services or messages remains untouched, as is the case here.

who refused to rent to an unmarried woman cohabitating with a man over the landlord's free exercise objection to premarital cohabitation).

In particular, state courts have repeatedly upheld public accommodations laws in the face of First Amendment challenges by those who, like Petitioners, seek to deny commercial services to LGBTQ persons. *See, e.g.*, *N. Coast Women's Care Med. Grp., Inc. v. San Diego Cnty. Super. Ct.*, 189 P.3d 959, 964, 966–67 (Cal. 2008) (rejecting physicians' claims of a First Amendment right to deny fertility treatment to lesbian patients); *Elane Photography*, 309 P.3d at 58–59 (rejecting photography company's claims of a First Amendment right to refuse to photograph a wedding for an LGBTQ couple); *Gifford v. McCarthy*, 137 A.D.3d 30, 38–43 (N.Y. 2016) (rejecting wedding facility operators' claims of a First Amendment right to refuse to host a wedding for an LGBTQ couple).

This Court recently affirmed the importance of "protect[ing] [gay persons and gay couples] in the exercise of their civil rights," noting in the 2018 *Masterpiece* decision that the "exercise of their freedom on terms equal to others must be given great weight and respect by the courts." *Masterpiece*, 138 S. Ct. at 1727. *See also, e.g.*, *Arlene's Flowers*, 441 P.3d at 1209–10 (reviewing prior opinion in light of *Masterpiece* and reaffirming rejection of flower shop owner's claims of First Amendment right to refuse to sell flowers to a gay man for his wedding); *Klein v. Or. Bureau of Lab. & Indus.*, 506 P.3d 1108, 1114 (Or. Ct. App. 2022) (reviewing prior opinion in light of *Masterpiece* and reaffirming holding that a baker has no First Amendment right to refuse to bake a wedding cake for

an LGBTQ couple in violation of a public accommodations law, even if the law burdens the baker's religious exercise), *petition for review denied*, 509 P.3d 119 (Or. 2022).

Petitioners' insistence that the Court set aside these well-established principles so that the Company may engage in a prototypical example of discriminatory commercial conduct—the denial of certain services to certain consumers on the basis of their protected characteristics—must be rejected. The denial of wedding website services to LGBTQ couples is a business decision, not an expressive one. As this Court has found time and time again, the regulation of such commercial conduct does not infringe on a business's First Amendment freedom of speech, and no different conclusion may be drawn here. *See, e.g.*, *Newman v. Piggie Park Enters., Inc.*, 256 F. Supp. 941, 945 (D.S.C. 1966) ("Undoubtedly [the restaurant owner] has a constitutional right to espouse the religious beliefs of his own choosing, however, he does not have the absolute right to exercise and practice such beliefs in utter disregard of the clear constitutional rights of other citizens."), *aff'd in relevant part & rev'd in part on other grounds*, 377 F.2d 433 (4th Cir. 1967), *aff'd & modified on other grounds*, 390 U.S. 400 (1968).

B. CADA's Communications Clause Regulates Only Unprotected Speech That Facilitates Illegal Conduct.

In addition to denying wedding website services to LGBTQ couples, the Company also seeks to advertise its intention to do so, in contravention of CADA's Communications Clause. Pet. Br. 7. CADA, like many

anti-discrimination laws, properly prohibits statements through which businesses seek to effectuate illegal discrimination on the basis of protected characteristics. Colo. Rev. Stat. § 24-34-601(2)(a). As this Court has recognized, the First Amendment does not offer protection for noncompliance with anti-discrimination laws simply because the discrimination is effectuated through words.

The regulation of commercial speech that facilitates illegal conduct is itself unremarkable. For example, states commonly prohibit inquiries regarding protected characteristics in the sale and leasing of real estate in order to prevent discriminatory conduct. *See, e.g.*, Alaska Stat. § 18.80.240(3); La. Rev. Stat. § 46:2254(C)(6); Me. Stat. tit. 5, § 4581-A(1)(A); Neb. Rev. Stat. § 20-318(5).

Similarly, many federal, state, and local employment laws seek to prevent discrimination on the basis of protected characteristics by prohibiting employers from asking about those characteristics. For example, the Equal Employment Opportunity Commission has interpreted Title VII generally to prohibit inquiries by employers into job applicants' pregnancy status. 29 C.F.R. § 1604.7. *See also, e.g.*, *King v. Trans World Airlines, Inc.*, 738 F.2d 255, 258 n.2 (8th Cir. 1984) (questions about pregnancy are unlawfully discriminatory under Title VII); *Barbano v. Madison Cnty.*, 922 F.2d 139, 143 (2d Cir. 1990) (same). *See also* Title I of the Americans with Disabilities Act of 1990 (prohibiting certain private and public employers from discriminating against qualified individuals with disabilities in a range of employment-related conditions, including job application procedures). Similar restrictions on pre-employment inquiries also can be

found throughout state laws aimed at preventing workplace discrimination on the basis of sex, disability, and other protected characteristics. *See, e.g.*, N.J. Stat. Ann. § 10:5-12(c); Or. Rev. Stat. §§ 659A.030(1)(d), 659A.112(g); 43 Pa. Cons. Stat. § 955(b)(1).

The type of speech restricted by these anti-discrimination laws has never been protected by the First Amendment because it facilitates illegal conduct. Take, for example, the case of *In re McClure v. Sports & Health Club, Inc.*, a First Amendment challenge to the Minnesota Human Rights Act. 370 N.W.2d 844 (Minn. 1985). The Commissioner of the Minnesota Department of Human Rights sought to enjoin a chain of for-profit health clubs from, among other things, questioning prospective employees about their marital status and religion. *Id.* at 846. The company argued that the Act violated an employer's First Amendment rights of free speech, free exercise, and freedom of association. *Id.* at 847–48. The Supreme Court of Minnesota held that the Act, facially and as applied, did not violate the First Amendment, recognizing that this restriction on speech is fundamental to preventing discrimination in employment and public accommodation. *Id.* at 853–54. *See also, e.g.*, *Rumsfeld v. Forum for Acad. & Inst'l Rights* [hereinafter *FAIR*], 547 U.S. 47, 62 (2006); *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1535 (M.D. Fla. 1991).

Here, the Company seeks not only to deny its wedding website services to LGBTQ couples but also to advertise its intent to do so on the Company's website. This is no different than an employer posting a "White Applicants Only" sign, *see FAIR*, 547 U.S. at 62, which

Petitioners acknowledge is "incidental to a valid limitation" on illegal discriminatory conduct, Pet. Br. 34. The Company's intended statement on its website would be lawfully prohibited by CADA because its intent and effect is to discriminate on the basis of a protected characteristic in the public marketplace. This form of speech effectuates illegal discriminatory conduct and has been long recognized as falling outside of the protection of the First Amendment's Free Speech Clause. *See, e.g.*, *FAIR*, 547 U.S. at 62 ("Congress, for example, can prohibit employers from discriminating in hiring on the basis of race. The fact that this 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.").

Public accommodations laws prevent both the "denial of equal access to goods and services" and the "denial of equal citizenship and equal dignity."[16] The dignitary harm is not about mere hurt feelings. The unworkable rule Petitioners seek would allow any business, for any reason, to tell consumers with particular protected characteristics that they are prevented from accessing goods and services that are available to others. Such discriminatory denial of services could then extend to allow other forms of blatant discrimination that civil rights laws have sought to eradicate from our nation's public life. Time and time again, this Court and other courts have upheld laws

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[16] Caroline Mala Corbin, *Speech or Conduct? The Free Speech Claims of Wedding Vendors*, 65 Emory L.J. 241, 294 (2015); Kenneth L. Karst, *Equal Citizenship at Ground Level: The Consequences of Nonstate Action*, 54 Duke L.J. 1591, 1594 (2005) ("[E]qual access to public accommodations [is] a telling indicator of civil freedom and equal citizenship.").

promoting this compelling interest of addressing and preventing discrimination against First Amendment free speech claims. The same result should follow here.

C. CADA Is a Content-Neutral Regulation of Commercial Conduct.

Both the Public Accommodations Clause and the Communications Clause of CADA are content-neutral regulations of commercial conduct instituted to further the legitimate goal of preventing discrimination in the public marketplace. *See generally* Sections II.A and II.B *supra*; *see also Masterpiece*, 138 S. Ct. at 1733 n.* (Kagan, J., concurring) ("A vendor can choose the products he sells, but not the customers he serves—no matter the reason."); *Wisconsin v. Mitchell*, 508 U.S. 476, 487 (1993) ("federal and state anti-discrimination laws" are "an example of a permissible content-neutral regulation of conduct").

Because CADA regulates commercial conduct, not speech, it need only satisfy rational-basis review. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938) ("[R]egulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional . . . [if] it rests upon some rational basis within the knowledge and experience of the legislators."). CADA easily satisfies rational-basis review. Under this Court's well-established precedents, Colorado plainly has an interest in maintaining a marketplace of goods and services that is free from discrimination. *See Jaycees*, 468 U.S. at 623–24. CADA directly advances this rational interest by prohibiting discriminatory conduct in the provision of

commercial goods and services, whether that discriminatory conduct is effectuated through words or deeds.

Indeed, rational basis review historically has been understood to apply to such laws because the vast majority of goods and services are not understood to burden protected speech. For example, a baker writing, "You Will Be Missed" or "Happy Hanukkah" on a cake, although involving words and expressing messages, have not been understood to be the baker's "speech" in the constitutional sense. If the viewpoint of the service provider or the intent of the customer were determinative of whether conduct (i.e., bakery services) constitutes protected speech, there would be virtually no limit on the types of conduct that could be labeled "speech." *See O'Brien v. United States*, 391 U.S. 367, 376 (1968) ("We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."). Petitioners' arguments would upset that long-held understanding and require a free-speech analysis for any number of products and services that regulate conduct, but incidentally touch "speech." *See FAIR*, 547 U.S. at 65–66 ("But we rejected the view that 'conduct can be labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea.' Instead, we have extended First Amendment protection only to conduct that is inherently expressive.") (quoting *O'Brien*, 391 U.S. at 376).

Even if some portion of the Company's intended wedding website business could be construed as expressive conduct, intermediate scrutiny, rather than strict scrutiny, would apply. *O'Brien*, 391 U.S. 367. This Court has held that "an incidental burden on

speech [resulting from regulation of conduct] is no greater than is essential, and therefore is permissible under *O'Brien*, so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *United States v. Albertini*, 472 U.S. 675, 689 (1985) (citing *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 296–297 (1984)); *see also O'Brien*, 391 U.S. at 377 (content-neutral regulation of expressive conduct survive review if it (1) furthers an important or substantial governmental interest, (2) is "unrelated to the suppression of [speech]," and (3) "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest").

Here, CADA furthers a recognized important government interest, unrelated to the regulation of speech, in preventing discrimination in the public marketplace by ensuring that products and services are not refused on the basis of one or more protected characteristics. And Petitioners have "ample alternative channels for communication of the information" they wish to express. *Clark*, 468 U.S. at 293. No doubt, Petitioners have participated in numerous videos, interviews, statements, and the like expressing their views on same-sex marriage, without restraint or limitation by CADA.[17] There can be no argument

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[17] *See, e.g.*, Lorie Smith, *Why My Case Could Pick Up Where Masterpiece Cakeshop Left Off*, Nat'l Review (June 3, 2022), https://bit.ly/3w7GS91; Alliance Defending Freedom, *Lorie Smith's Story*, YouTube (Jan. 7, 2022), https://youtu.be/NazjCxnw3Yg; *Lorie Smith and Jake Warner join Ross* (630 KHOW, Denver's Talk Station broadcast July 29, 2021), *available at* https://bit.ly/3wba1R4.

that Petitioners are being silenced or that CADA restricts their ability to make their views known through any lawful means separate and apart from denying service to individuals based on protected characteristics. In this way, CADA is both narrowly-tailored and integral to furthering an important governmental interest.

Government regulation of commercial speech is not subject to heightened scrutiny unless the speech being regulated is "neither misleading nor related to unlawful activity." *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 564 (1980); *see also Nicopure Labs, LLC v. FDA*, 944 F.3d 267, 284 (D.C. Cir. 2019). Because the commercial speech regulated by CADA's Communications Clause directly facilitates unlawful discriminatory activity, *see* Section II.B *supra*, CADA is not subject to heightened scrutiny under *Central Hudson*. But even if it were, it would easily satisfy that test, which requires that the regulation "directly advance" a "substantial" government interest without being "more extensive than is necessary to serve that interest." *Cent. Hudson*, 447 U.S. at 564–66.

Even if this Court were to find that CADA regulates pure speech, the law nonetheless withstands strict scrutiny because it serves a "compelling state interest" and is "narrowly tailored" to that interest. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015). As discussed at length above, *see* Section I *supra*, this Court and lower courts have consistently recognized that the government has a "profoundly important goal of ensuring nondiscriminatory access to commercial opportunities in our society," *Jaycees*, 468 U.S. at 632, and that public accommodations laws like CADA

"plainly serve[] compelling state interests of the highest order," *id.* at 624. *See also Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983) ("[T]he Government has a fundamental, overriding interest in eradicating racial discrimination . . . ."); *Masterpiece*, 138 S. Ct. at 1727 (emphasizing that LGBTQ persons "cannot be treated as social outcasts or as inferior in dignity and worth" and that "it is a general rule that [religious and philosophical] objections do not allow business owners . . . to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law").

As noted, CADA and other similar public accommodations laws expressly prevent discrimination in the public marketplace, including on the basis of sex and sexual orientation, so that women, LGBTQ individuals and others are protected from the harmful economic and dignitary effects inherent to such discrimination. Public accommodations laws like CADA serve this compelling interest, which would be "fatally undermined" if courts were "to carve out a patchwork of exceptions for ostensibly justified discrimination." *Arlene's Flowers*, 441 P.3d at 1235. CADA plainly advances this compelling state interest by prohibiting the discriminatory denial of goods and services based on a customer's protected characteristics.

Further, CADA is narrowly tailored to this compelling interest. It does nothing to limit businesses and business owners from espousing their personal beliefs in a public or private forum. For example, Petitioner Smith may, if she so chooses, continue to express publicly that she believes marriage is limited to the union between one man and one woman. CADA merely prevents her Company from engaging in discriminatory

commercial conduct by refusing to serve—and declaring that it will refuse to serve—certain consumers on the basis of protected characteristics. Because CADA's regulation of commercial conduct is narrowly tailored to further Colorado's compelling interest in eliminating discrimination in the public marketplace, it withstands strict scrutiny.

III. There Is No Way to Cabin the Broad Free Speech Carve-Out Petitioners Seek from Public Accommodations Laws.

Petitioners' stated justifications for discrimination against LGBTQ couples not only lack constitutional merit but also would undermine public accommodations laws by inviting exceptions that would adversely affect women, members of additional protected groups, and those at the intersections of these identities. Petitioners' arguments in favor of a carve-out from public accommodations laws for services that involve creative effort also must be rejected because it would eviscerate a broad swath of this Court's precedent and create significant harm.

By Petitioners' logic, any editorial control or decisions about content and presentation as related to a product or service transforms such commercial conduct into "pure speech." But creativity is inherent to a vast array of services offered in the public marketplace—from food preparation to clothing design to advertising. If Petitioners' argument were accepted, customers could be denied equal access to any number of goods and services in the open market, based solely on the proprietor's personal view of the customer's race, religion, sex, national origin, or other protected

characteristics. This would undermine the very purpose of public accommodations laws.

This Court recognized in *Masterpiece* that such exceptions have the potential to enable a "a long list of persons who provide goods and services for marriages and weddings [to] refuse to do so for gay persons, thus resulting in a community-wide stigma inconsistent with the history and dynamics of civil rights laws that ensure equal access to goods, services, and public accommodations." 138 S. Ct. at 1727. And this risk has been previewed already by the continual flow of cases through the courts where LGBTQ individuals have been refused services that are available to everyone else. *See, e.g.*, *id.* (cake); *Arlene's Flowers*, 441 P.3d at 1212 (flower arrangements); *Elane Photography*, 309 P.3d at 58 (photography).

Accepting the flawed premise that providing goods or services conveys endorsement of the customer not only would harm LGBTQ persons seeking goods and services but also would undermine laws that prohibit discrimination on the basis of sex, race, religion, and other protected characteristics. Carried to its logical conclusion, a print shop whose owner disapproves of women working outside the home could deny women custom business cards. Nothing would prevent a florist who opposes particular medical procedures based on religious beliefs from refusing to sell flowers to women undergoing fertility-related medical treatments. A jeweler could refuse to make wedding rings for a mixed-faith couple. It would be dangerous to the free flow of goods and services—and the recognition of all persons' equal rights and equal dignity under law—if commercial businesses could selectively refuse to serve certain customers based on their identity.

Anti-discrimination laws are enacted to prevent these precise types of discrimination. And, contrary to Petitioners' claims, such laws are not attacks on creative or artistic judgments. CADA was not intended to—and does not—implicate any of the Company's or other businesses' artistic judgments. *See* Colo. Rev. Stat. § 24-34-601(2). All the law requires is that if a business chooses to create certain products and sell them to the public, it may not refuse to provide those same products to certain customers based on their protected characteristics.

The examples above, as well as Petitioners' intent to single out and deny wedding website services to LGBTQ couples, starkly recall the days of racially segregated lunch counters and an era in which women were excluded from the public sphere. This Court has explicitly rejected such discrimination and should not erode decades of its well-settled jurisprudence by adopting Petitioners' position.

CONCLUSION

For the reasons set forth above, Petitioners' First Amendment justifications for discrimination on the basis of sexual orientation should be rejected, and the judgment of the Tenth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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August 18, 2022

APPENDIX

APPENDIX

List of Additional *Amici Curiae*

1. A Better Balance
2. American Federation of Teachers, AFL-CIO
3. American Medical Women's Association
4. American Sexual Health Association
5. Athlete Ally
6. Birnbaum Women's Leadership Network, NYU Law
7. California Women Lawyers
8. Chicago Foundation for Women
9. Clearinghouse on Women's Issues
10. Desiree Alliance
11. Family Equality
12. Feminist Majority Foundation
13. Feminist Women's Health Center
14. International Action Network for Gender Equity & Law (IANGEL)
15. Lawyers Club of San Diego
16. League of Women Voters of the United States
17. Legal Aid at Work

18. Legal Momentum, the Women's Legal Defense and Education Fund
19. National Association of Women Lawyers
20. National CAPACD - National Coalition for Asian Pacific American Community Development
21. National Crittenton
22. National Education Association
23. National Organization for Women Foundation
24. National Women's Political Caucus
25. People For the American Way
26. Planned Parenthood Federation of America
27. Reproaction
28. Shriver Center on Poverty Law
29. The Women's Law Center of Maryland
30. Tom Homann LGBTQ+ Law Association
31. Women Lawyers Association of Los Angeles
32. Women Lawyers On Guard Inc.
33. Women's Bar Association of the District of Columbia
34. Women's Bar Association of the State of New York
35. Women's Law Project