No. 19-1413

In the

United States Court of Appeals

for the

Tenth Circuit

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303 CREATIVE LLC and LORIE SMITH, *Plaintiffs-Appellants*,

– v. –

AUBREY ELENIS, et al., *Defendants-Appellees.*

On appeal from a final judgment of the
United States District Court for the District of Colorado
Case No. 1:16-cv-02372-MSK

BRIEF FOR LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE SOUTHERN POVERTY LAW CENTER, THE ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, LATINOJUSTICE PRLDEF, THE LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS, THE NATIONAL ACTION NETWORK, D.C. BUREAU, AND THE CENTER FOR CONSTITUTIONAL RIGHTS AS AMICI CURIAE SUPPORTING AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for amici certifies that (1) amici do not have any parent corporations, and (2) no publicly held companies hold 10% or more of the stock or ownership interest in amici.

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INTEREST OF AMICI CURIAE[1]

Amici are organizations with different missions, but each is committed to furthering the goal of eradicating discrimination in public accommodations.

The Lawyers' Committee for Civil Rights Under Law (Lawyers' Committee) is a nonpartisan, nonprofit organization that was formed in 1963 at the request of President John F. Kennedy to enlist the private bar's leadership and resources in combating racial discrimination. The principal mission of the Lawyers' Committee is to secure equal justice for all through the rule of law. To that end, the Lawyers' Committee has participated in hundreds of impact lawsuits challenging race discrimination prohibited by the Constitution and federal statutes relating to voting rights, housing, employment, education, and public accommodation. *E.g.*, *Masterpiece Cakeshop v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018); *Shelby Cty. v. Holder*, 570 U.S. 529 (2013); *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1 (2013); *Kobach v. United States Election Assistance Comm'n*, 772 F.3d 1183 (10th Cir. 2014); *Valdez v. Squier*, 676 F.3d 935 (10th Cir. 2012). As a leading national racial justice organization, the Lawyers' Committee

[1] All parties have consented to the filing of this brief. No counsel for a party has authored this brief in whole or in part, and no person other than amici curiae, their members, and their counsel has made monetary contribution intended to fund preparing or submitting this brief.

has a vested interest in ensuring that racial and ethnic minorities, including minorities who identify as lesbian, gay, bisexual, and transgender, have strong, enforceable protections from discrimination in places of public accommodation.

The Southern Poverty Law Center (SPLC) has provided *pro bono* civil rights representation to low-income persons in the Southeast since 1971, with particular focus on seeking justice for the most vulnerable people in society. The work of the SPLC has expanded over the decades to include impact litigation to enforce the civil rights of historically disadvantaged and marginalized groups, including the lesbian, gay, bisexual, transgender (LGBT) communities, to ensure that they are treated with dignity and fairness. SPLC monitors and exposes extremists who attack or malign groups of people, including LGBT people, based, primarily, on their immutable characteristics. SPLC is dedicated to reducing prejudice and improving intergroup relations.

The Asian American Legal Defense and Education Fund (AALDEF), founded in 1974, is a national organization that protects and promotes the civil rights of Asian Americans. By combining litigation, advocacy, education, and organizing, AALDEF works with Asian American communities across the country to secure human rights for all. Plaintiffs' arguments undermine the enforcement of the civil rights

laws throughout the county and threaten the civil rights of Asian Americans and other racial, ethnic, and religious minorities.

LatinoJustice PRLDEF is an independent national nonprofit civil rights organization which advocates for and defends the constitutional rights and the equal protection of all Latinos under law. Founded in 1972, its mission is to promote the civic participation of the pan-Latino community, to cultivate Latino community leaders, and to bring impact litigation in addressing voting rights, employment opportunity, fair housing, language rights, educational access, immigrants' rights, and criminal justice reform. In its 38-year history, LatinoJustice PRLDEF has litigated numerous cases to protect opportunities for Latinos to succeed in school and work, fulfill their dreams, and to sustain their families and communities.

The Leadership Conference on Civil and Human Rights is a diverse coalition of more than 200 national organizations charged with promoting and protecting the civil and human rights of all persons in the United States, including those who face discrimination in public accommodations. It is the nation's largest and most diverse civil and human rights coalition. For nearly three-quarters of a century, The Leadership Conference, based in Washington, D.C., has led the fight for civil and human rights by advocating for federal legislation and policy, securing passage of every major civil rights statute since the Civil Rights Act of 1957. The Leadership Conference works to build an America that

is inclusive and as good as its ideals. Towards that end, The Leadership Conference has participated as an amicus in cases of great public importance that will affect many individuals other than the parties before the court and, in particular, the interests of constituencies in The Leadership Conference coalition.

The National Action Network, D.C. Bureau has, since 2011, worked within the spirit and tradition of Dr. Martin Luther King, Jr. to promote a modern civil rights agenda that includes the fight for one standard of justice, decency and equal opportunities for all people regardless of race, religion, ethnicity, citizenship, criminal record, economic status, gender, gender expression, or sexuality. Plaintiffs' arguments undermine the enforcement of the civil rights laws throughout the county and threaten the civil rights of racial, ethnic, and religious minorities nationwide.

The Center for Constitutional Rights (CCR) is a national, not-for-profit legal, educational and advocacy organization dedicated to protecting and advancing rights guaranteed by the United States Constitution and international law. Founded in 1966 to represent civil rights activists in the South, CCR has litigated numerous landmark civil and human rights cases on behalf of individuals impacted by arbitrary and discriminatory policies and practices, including those that disproportionately impact racial minorities and LGBTQI people.

SUMMARY OF ARGUMENT

303 Creative seeks a broad exemption to the application of anti-discrimination laws. Amici submit this brief in support of appellees to detail how 303 Creative's proposed free speech exception to anti-discrimination public-accommodation laws would decimate those laws' critical protections for racial and ethnic minorities, including those who identify as lesbian, gay, bisexual, transgender, and/or questioning (or queer) (LGBTQ+), that have been subjected to a clear history of discrimination.

State public-accommodation laws that prohibit discrimination by businesses against vulnerable populations are constitutional and necessary. Throughout this country's history, public-accommodation laws have played a vital role in ensuring that businesses are open to everyone on a nondiscriminatory basis and that individuals from marginalized communities are not treated like second-class citizens. The Supreme Court has repeatedly and emphatically rejected challenges to public-accommodation laws similar to the challenges brought by plaintiffs 303 Creative LLC and Lorie Smith (together, "303 Creative") because a state's "commitment to eliminating discrimination and assuring its citizens equal access to publicly available goods and services" is a "goal, which is unrelated to the suppression of expression, [that] plainly serves compelling state interests of the highest order." *Roberts v. U.S.*

Jaycees, 468 U.S. 609, 624 (1984); *see also Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 260 (1964) ("[I]n a long line of cases this Court has rejected the claim that the prohibition of racial discrimination in public accommodations interferes with personal liberty.").

In upholding the constitutionality of public-accommodation laws, the Supreme Court has not limited its reasoning to laws that protect against racial discrimination; rather, it has observed that public-accommodation statutes prohibiting discrimination on the basis of "race, color, religious creed, national origin, sex, sexual orientation … , deafness, blindness or any physical or mental disability or ancestry" are "well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination and do not, as a general matter, violate the First or Fourteenth Amendments." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 572 (1995).

Despite the advances our country has made in eradicating segregation and other forms of invidious discrimination, racial and ethnic minorities, including LGBTQ+ individuals who experience discrimination at the intersection of race and sexual orientation or gender identity, continue to suffer from structural and pervasive discrimination, as evidenced by the recent increase in hate crimes across the country. *See The Year In Hate and Extremism*, Southern Poverty Law Center (2020), https://perma.cc/YJQ8-EFYZ. Today, consumers of color continue to re-

ceive worse treatment in the marketplace and experience disparate access to goods and services as a result of business owners' biased attitudes. Public-accommodation laws remain vital in ensuring access to services, promoting equality, and providing relief when consumers experience discrimination.

303 Creative seeks to take the country back in time with its arguments that, as a custom wedding website designer, it is free to refuse service to gay couples and can advertise that it will not provide that design service, all on the basis of "free speech" and "free exercise." But public-accommodation laws were designed to combat the very arguments 303 Creative makes, and such laws strengthen our country by ensuring our economy is an inclusive one where all people regardless of background, identity, or belief can participate free of discrimination. This Court must see 303 Creative's arguments for what they are—a demand to discriminate without consequence. Business owners' religious and speech interests cannot supplant the rights of disenfranchised and vulnerable individuals to be free from discrimination in the marketplace. 303 Creative's proposed license to discriminate would potentially apply to any business, overturn well-established precedent, and nullify long-standing state, federal, and local public-accommodation laws, causing jurisprudential chaos and a dramatic rollback of hard-won civil rights protections.

ARGUMENT

I. Civil rights laws have played an integral role in rooting out discrimination in public accommodations.

Civil rights laws in this country have a deep and storied history. To combat racial oppression and segregation, Congress and most states enacted public-accommodation laws, which consistently have been upheld as constitutional. *State Public Accommodation Laws*, Nat'l Conference of State Legislators (April 8, 2019), https://perma.cc/GX6R-Q2QB. These state and federal efforts to root out discrimination, while vitally important during past decades, continue to be necessary to ensure that places of public accommodation cannot deny goods and services to individuals based on their personal characteristics.

Since this country's founding, racial and ethnic minorities have faced discriminatory laws and practices that excluded them from places of public accommodation. In the post-Reconstruction United States, African Americans were systematically relegated to second-class citizenship through a system of laws, ordinances, and customs that separated white and African American people in every conceivable area of life. C. Vann Woodward, *The Strange Career of Jim Crow* 7 (1955). This code of segregation "lent the sanction of law to a racial ostracism that extended to churches and schools, to housing and jobs, to eating and drinking," and "that ostracism extended to virtually all forms of public transportation, to sports and recreations, to hospitals, orphanages, prisons, and

asylums, and ultimately to funeral homes, morgues, and cemeteries." *Id.* Such racial segregation was not limited to the post-Civil War South. To the contrary, some northern states maintained separate schools for white and African American children and had laws against intermarriage, while the United States military remained segregated through the Civil War. *See* John Hope Franklin, *History of Racial Segregation in the United States*, in The Annals of the American Academy of Political and Social Science Vol. 304, 1-9 (Mar. 1956).

Congress first attempted to prohibit discrimination on the basis of race in places of public accommodation by enacting the Civil Rights Act of 1875. Franklin, *supra*, at 6-9; *see also Civil Rights Cases*, 109 U.S. 3 (1883). However, the Act was found to exceed Congress's power under the Thirteenth and Fourteenth Amendments. *Id.* Soon after, southern states introduced a steady onslaught of legislation to ensure that African Americans remained segregated in nearly every aspect of society. *Id.*[2] The supply of ideas for new ways to segregate seemed inexhaustible: "Numerous devices were employed to perpetuate segregation in housing, education, and places of public accommodation," including "[s]eparate Bibles for oath taking in courts of law, separate doors . . .,

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[2] It was not until 1964 that the Supreme Court distinguished the *Civil Rights Cases* and affirmed Congress's Commerce Clause authority to establish federal public-accommodation laws affecting interstate com-

separate elevators and stairways, separate drinking fountains, and separate toilets existed even where the law did not require them." Franklin, *supra*, at 8.

Colorado's history too contains horrible chapters of pervasive racial and ethnic discrimination. In the 1880s, anti-Chinese sentiment in Denver prompted a riot that attacked Chinese residents and burned their businesses and homes. *See* Mark R. Ellis, "Denver's Anti-Chinese Riot," *Encyclopedia of the Great Plains* (visited Apr. 22, 2020), https://perma.cc/N28T-Z6L6. And, despite an 1895 state public-accommodation law, segregation was custom with "white politicians and business owners routinely ignor[ing] the equal access statute." *See* Dani Newsum, *Lincoln Hills and Civil Rights in Colorado* 12 (2015), https://perma.cc/SNL5-4ED2. African Americans too were routinely discriminated against; during the early 20th century, Colorado had one of the largest Ku Klux Klan organizations in the United States. *Id.* at 4. Mexican American families suffered an Alamosa school's policy of sending all Mexican American children to a separate school, despite the Colorado Constitution's prohibition on such segregation. *See* Sylvia Lobato, *School Lawsuit from 1914 Remembered*, Valley Courier (May 12, 2018), https://perma.cc/WKW9-CA9T. And in the 1940s, Japanese Americans were separated entirely and forced into internment camps,

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merce through the enactment of the Civil Rights of Act of 1964. *See*

including the Amache Camp in southeastern Colorado. *See* Nathan Heffel, *Amache: Japanese-American Internee Remembers His Years Without Freedom*, Colorado Public Radio (May 18, 2018), https://perma.cc/7X43-8DGY.

Given the painful brutality of segregation, and despite the very real threat of arrest and severe physical harm, African Americans and others opposed to segregation staged protests and boycotts throughout the early and mid-twentieth century. *See generally* David Benjamin Oppenheimer, *Kennedy, King, Shuttlesworth and Walker: The Events Leading to the Introduction of the Civil Rights Act of 1964*, 29 U.S.F. L. Rev. 645 (1995). Those efforts eventually brought national attention to segregation's inhumanity and resulted in strategic legal challenges to discrimination in access to voting (*Smith v. Allwright*, 321 U.S. 649 (1944) (outlawing white-only Democratic primary election)), interstate buses (*Morgan v. Virginia*, 328 U.S. 373 (1946) (Virginia law requiring segregated buses interfered with freedom to travel interstate)), graduate school facilities (*McLaurin v. Okla. State Regents for Higher Ed.*, 339 U.S. 637 (1950) (segregated graduate school facilities unconstitutional)), law school admissions (*Sweatt v. Painter*, 339 U.S. 629 (1950) (separate law schools unconstitutional)), and, of course, public school education (*Brown v. Board of Educ.*, 347 U.S. 483 (1954) (segregated

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Heart of Atlanta Motel v. United States, 379 U.S. 241, 250–62 (1964).

public schools unconstitutional)), which slowly but steadily chipped away at segregation's reach.

Many states also stepped in to combat discriminatory business practices by enacting public-accommodation statutes. *See Jaycees*, 468 U.S. at 624. Such state laws "provided the primary means for protecting the civil rights of historically disadvantaged groups until the Federal Government reentered the field in 1957" with the Civil Rights Act of 1957. *Id.* After numerous legal challenges and demonstrations of non-violent resistance to racial segregation in places of public accommodation, Congress passed the Civil Rights Act of 1964, which prohibited discrimination or segregation in places of public accommodation. *See* 42 U.S.C. § 2000a(a) (Title II) ("All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin."). A watershed enactment, Title II aimed to eliminate the loss of "personal dignity that surely accompanies denials of equal access to public establishments." S. Rep. No. 88-872 (1964), *reprinted in* 1964 U.S.C.C.A.N. 2355, 2370. The Senate Committee on Commerce recognized that "[d]iscrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel

when he is told that he is unacceptable as a member of the public because of his race or color." *Id.*

By ensuring that goods and services are available to all people regardless of who they are, these statutes prevent and, when necessary, respond to discrimination in places of public accommodation, remedying the deprivation of personal dignity that accompanies a discriminatory refusal to serve.

II. Courts emphatically uphold state and federal public-accommodation laws against free speech challenges, and Colorado's law should be no different.

Just like the Colorado public-accommodation statute at issue here—and similar state statutes throughout the country—Title II faced strong opposition from recalcitrant business owners beholden to the Jim Crow system of segregation. Those opponents, like 303 Creative here, raised free speech and other liberty-related arguments to justify their refusal to serve African Americans. As one commentator notes, "[o]pponents argued that Title II violated the rights of owners of public accommodations to decide whom to serve, characterizing this as both an individual right of association and a property right." Brian K. Landsberg, *Public Accommodations and the Civil Rights Act of 1964: A Surprising Success?*, 36 Hamline J. Pub. L. & Pol'y 1, 4 (2014). 303 Creative's arguments resurrect those of Title II's opponents: that offer-

ing services on a nondiscriminatory basis infringes a right to free speech. *See* 303 Creative Br. 15, 29-57.

A. The Supreme Court has emphatically upheld state and federal public-accommodation laws against free speech challenges.

The Supreme Court has routinely and without reservation upheld federal and state public-accommodation laws against freedom of expression and association challenges. In *Heart of Atlanta Motel*, the Supreme Court squarely "rejected the claim" that Title II violated the speech and property rights of business owners. 379 U.S. at 260.

Likewise, the Supreme Court has repeatedly confirmed that state public-accommodation laws do not generally infringe on free speech or other liberty interests. *E.g.*, *N.Y. State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 13-14 (1988) (upholding local public-accommodation law against First Amendment challenge by private clubs and rejecting notion that "every setting in which individuals exercise some discrimination in choosing associates, their selective process of inclusion and exclusion is protected by the Constitution"); *Jaycees*, 468 U.S. at 625 (upholding public-accommodation statute against constitutional challenge and stating that "[a] State enjoys broad authority to create rights of public access on behalf of its citizens"). Similarly, the Court has rejected free exercise challenges to antidiscrimination laws. *Newman v. Piggie Park Enters., Inc.*, 256 F. Supp. 941, 945 (D.S.C. 1966), *aff'd in*

relevant part and rev'd in part on other grounds, 377 F.2d 433 (4th Cir. 1967), *aff'd and modified on other grounds,* 390 U.S. 400 (1968) (holding that business owner did not have absolute to exercise and practice religious beliefs in utter disregard to the constitutional rights of other citizens); *Hishon v. King & Spalding*, 467 U.S. 69 (1984) (rejecting First Amendment defenses against Title VII enforcement). The Supreme Court has emphasized the important role of public-accommodation laws, which evince states' "strong historical commitment to eliminating discrimination and assuring its citizens equal access to publicly available goods and services"—a goal "which is unrelated to the suppression of expression," and which "plainly serves compelling state interests of the highest order." *Jaycees*, 468 U.S. at 624; *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987) ("Even if the [public-accommodation statute] does work some slight infringement on Rotary members' right of expressive association, that infringement is justified because it serves the State's compelling interest in eliminating discrimination against women.").

The Supreme Court's analysis has not wavered even as state public-accommodation laws have expanded beyond the protected characteristics and categories of public accommodations Title II originally covered. Indeed, the Supreme Court has affirmed the states' power to expand public-accommodation protections to additional groups that the state believes are the target of discrimination. *Hurley*, 515 U.S. at 572.

Public-accommodation statutes, the Supreme Court found, are an extension of the common-law principle that "innkeepers, smiths, and others who 'made profession of a public employment' were prohibited from refusing, without good reason, to serve a customer." *Id.* at 571.

That general common-law duty, however, "proved insufficient in many instances" and gave way to modern statutes that build on common-law protections by "enumerating the groups or persons within their ambit of protection." *Romer v. Evans*, 517 U.S. 620, 627-28 (1996). In so doing, the Supreme Court recognized that states and localities have not "limited antidiscrimination laws to groups that have so far been given the protection of heightened equal protection scrutiny under our cases[;] . . . [r]ather, they set forth an extensive catalog of traits which cannot be the basis for discrimination, including . . . sexual orientation." *Id.* at 628-29. That "[e]numeration is the essential device [states] used to make the duty not to discriminate concrete and to provide guidance for those who must comply." *Id.* at 628.

Such expanded protections generally satisfy both the First and Fourteenth Amendments because they do not "on [their] face, target speech or discriminate on the basis of [their] content, the focal point of [their] prohibition being rather on the act of discriminating against individuals in the provision of publicly available goods, privileges, and services on the proscribed grounds." *Hurley*, 515 U.S. at 572. The Colorado public-accommodation law thus continues the "venerable history"

of state efforts to weed out discriminatory treatment of its residents in the provision of goods and services.

Likewise, "one would expect" retail shops, including businesses that deliver custom goods like 303 Creative, "to be places where the public is invited," that is, "clearly commercial entities" properly subject to state nondiscrimination provisions. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 657 (2000). 303 Creative and other small custom-goods businesses thus fall squarely within the traditional ambit of nondiscrimination laws that the Supreme Court considers constitutional. 303 Creative therefore must provide its goods and services in a nondiscriminatory manner; after all, retailers are not guaranteed "a right to choose . . . customers . . . or those with whom one engages in simple commercial transactions, without restraint from the State." *Jaycees*, 468 U.S. at 634 (O'Connor, J., concurring). This Court must not grant businesses like 303 Creative the constitutional right to deal only with persons of one background or identity.

B. 303 Creative's attempt to create a new exception to public-accommodation laws fails.

This Court should reject 303 Creative's attempt to establish a novel and expansive exception to public-accommodation laws for custom goods like its websites. *See generally* 303 Creative Br. 29-45.[3] 303

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[3] 303 Creative principally challenges CADA's Accommodation Clause rather than the Communication Clause because, as 303 Creative seem-

Creative argues that the Colorado public-accommodation law forces it to endorse same-sex marriage by creating custom wedding websites for same-sex couples and that its website design services are entitled to First Amendment free-speech protection. *See id*. 303 Creative's design of websites for sale cannot exempt it from public-accommodation laws that mandate equal access to goods and services. By requiring 303 Creative to offer its services on a nondiscriminatory basis, Colorado's public-accommodation statute does not compel 303 Creative to endorse same-sex marriage nor does Colorado compel 303 Creative to participate in a wedding ceremony to which it objects.

This case is simpler than 303 Creative presents it. The First Amendment employs an objective test to determine whether expression is compelled or infringed. That is, a court does not take at face value whether a party subjectively believes its actions convey a message. Rather, it asks whether the expression is likely to be understood by a reasonable observer to convey a particular message. *E.g.*, *Morse v. Frederick*, 551 U.S. 393, 402 (2007) (focusing on the "pro-drug interpretation" that school officials assessed to student's sign reading "Bong Hits 4 Jesus," rather than student's testimony that the sign's expression was meant to be "meaningless and funny"). The Supreme Court "reject[s]

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ingly admits, if the Accommodation Clause is constitutional, then the Communication Clause is constitutional as well. 303 Creative Br. 43-44. Amici accordingly focus on the Accommodation Clause.

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." *Texas v. Johnson*, 491 U.S. 397, 404 (1989). Instead, as in *Jaycees*, *New York State Club*, and *Duarte*, the Supreme Court examines the actual expression at issue to determine whether application of the public-accommodation law objectively and materially affects the speaker's message. In conducting that analysis, it matters whether "[a]n intent to convey a particularized message [is] present, and . . . [whether] the likelihood [is] great that the message would be understood by those who viewed it." *Spence v. Washington*, 418 U.S. 405, 410-11 (1974).

This Court thus cannot accept 303 Creative's bare assertion that its websites convey an implicit message that is inextricably intertwined with the identity of the customers themselves, 303 Creative Br. 31-36, when nothing about the design of 303 Creative's websites conveys 303 Creative's own views on the propriety of the particular wedding celebrated, much less an endorsement of the couple's same-sex wedding. *See Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 69 (2006) (observing that law schools were not permitted to "'erect a shield' against laws requiring [equal] access [by military recruiters] 'simply by asserting' that mere association 'would impair its message'" (citations omitted)). Nor does the mere fact that a website may be an expressive medium render it immune to civil rights laws.

See Pittsburgh Press Co. v. Human Rel. Comm'n, 413 U.S. 376 (1973) (upholding application of civil rights ordinance to newspaper that ran a sex-segregated "help wanted" section).

Colorado's mandate that 303 Creative build a website without discriminating against customers on the basis of their personal characteristics does not unconstitutionally infringe on 303 Creative's expressive interests. Colorado law leaves 303 Creative's creative process entirely intact. It does not restrict content by demanding that 303 Creative design a website a particular way or interfere with whatever artistic skill goes into 303 Creative's wedding website design. The law instead restricts discriminatory conduct in 303 Creative's public business. "It has never been deemed an abridgment of freedom of speech . . . to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language." *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978) (citation omitted). More importantly, "the State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity." *Id.*

303 Creative attempts to confuse by urging this Court to focus on the artistic or putative communicative elements of website design. *See* 303 Creative Br. 31-36. But 303 Creative's primary function is to sell goods and services to customers for a profit. "Once [an association] enters the marketplace of commerce in any substantial degree it loses the

complete control over its membership that it would otherwise enjoy if it confined its affairs to the marketplace of ideas." *Jaycees*, 468 U.S. at 636 (O'Connor, J., concurring). Here, too, by operating a retail website-design enterprise, 303 Creative cannot single out certain customers on the basis of their protected characteristics because of personal preference. As long as 303 Creative keeps its business open to the public, Colorado law simply requires that 303 Creative design a website for paying customers, without regard to their sexual orientation, race, gender, or other protected classifications. *Accord Heart of Atlanta Motel*, 379 U.S. at 261 (rejecting involuntary servitude challenge to public-accommodations laws prohibiting racial discrimination). Indeed, the Court would easily dismiss an argument that refusal to design a website for an interracial couple was protected under the First Amendment as compelling speech in support of interracial relationships. The same principle applies here.

303 Creative incorrectly asserts that *Hurley*'s narrow holding governs this case. 303 Creative Br. 32. In *Hurley*, the Supreme Court described parades as "public dramas of social relations" that "indicate marchers who are making some sort of collective point, not just to each other but to bystanders along the way." *Hurley*, 515 U.S. at 568 (citation omitted). Marching in a parade, the Court observed, is "a form of expression" that "reflect[s] an exercise of . . . basic constitutional rights in their most pristine and classic form." *Id.* at 568-69 (citations omit-

ted). For that reason, the Court held that, in the context of a privately organized parade, "the selection of contingents to make [the] parade" was entitled to the core First Amendment protections due any "edited compilation of speech." *Id.* at 570.

303 Creative reads *Hurley* too broadly when it argues that its discrimination against its customers on the basis of sexual orientation merits similar constitutional protection as a parade organizer's selection of parade contingents. 303 Creative Br. 34. Commercial website designers that sell custom websites to the public may assist in the design of these websites and add certain creative elements, but the designers cannot alter or exclude from such services certain clients based upon their identity. *See Hurley*, 515 U.S. at 578 (States may "ensure by statute for gays and lesbians desiring to make use of public accommodations what the old common law promised to any member of the public . . . that accepting the usual terms of service, they will not be turned away merely on the proprietor's exercise of personal preference."). Put another way, a website design firm is simply not analogous to a parade. It is a commercial endeavor placed into the marketplace to provide a service to the public, not a privately organized public procession.

303 Creative's reliance (303 Creative Br. 31-36) on *Telescope Media Group v. Lucero*, 936 F.3d 740 (8th Cir. 2019), and *Brush & Nib Studio, LC v. Phoenix*, 448 P.3d 890 (Ariz. 2019), is similarly unavailing because both decisions contravene Supreme Court precedent.

In *Telescope Media*, the plaintiff created wedding videos, but refused to provide that service for same-sex weddings. The court concluded, based on the allegations in the complaint, that the creators of those videos had a "goal of expressing their own views about the sanctity of marriage" because they retained ultimate editorial judgment and control over the finished product. 936 F.3d at 751.

In *Brush & Nib*, the plaintiff created custom wedding invitations, but refused to create those invitations for same-sex weddings. The court concluded that creating a wedding invitation was pure speech because, among other things, the plaintiff retained "artistic control over the ideas and messages contained in the invitations." 448 P.3d at 908.

Both *Telescope Media* and *Brush & Nib* erroneously erect disparate First Amendment standards depending on the product being sold. That reasoning circumvents the Supreme Court's public-accommodation cases, including *Johnson*, *Jaycees*, *New York State Club*, and *Duarte,* by avoiding the fundamental question whether non-discrimination laws draw distinctions based on content. 303 Creative's reliance on them ignores the public-accommodation aspect of this case all together. But the Court has explained time and again that such "free speech" attacks on public-accommodation laws fail because the purpose of such laws is to ensure the equal treatment for members of protected classes when enterprises are open to the public.

A retail business does not have a constitutionally protected interest in freedom of association with its customers or the manner in which its customers might later seek to use the merchant's wares for the customer's personal event or ceremony. A business that sells a good does not "join" the customer's event in any constitutionally relevant way. As the Supreme Court explained in *Jaycees*, only "highly personal relationships" characterized by "relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship" merit constitutional protections of intimate and expressive association. 468 U.S. at 619-20; *accord Dale*, 530 U.S. at 655-56 (examining the characteristics of the Boy Scouts organization before concluding that it is an expressive association). The Supreme Court has never suggested that a merchant-client relationship comes even close to meeting the standard for constitutionally protected expressive association. Nor has the Supreme Court endorsed 303 Creative's staggering assertion that, whenever a business performs a custom service or creates a custom good, the First Amendment protects its right to discriminate among its customers to avoid being "compelled" to speak content "that she would not otherwise convey." 303 Creative Br. 40. To the contrary, the Supreme Court has repeatedly endorsed the policy, dating back to early common law, that retail businesses have a duty to serve the public and have no right to discriminate among their customers. *See, e.g.*, *Hurley*, 515 U.S. at 571.

Unlike the real threat of a free speech exception that would gut civil rights laws, *see infra*, 303 Creative's slippery-slope argument (303 Creative Br. 39) misses the mark. 303 Creative says that Colorado could compel, for example, "a gay tattoo designer to ink 'Homosexuality is an abomination. Leviticus 18:33' on a Mormon's arm." *Id.* Not so. Public-accommodation laws do not and cannot require conveying a particular viewpoint regarding sexual orientation, as any denial of service is not based on a customer's status. Thus, 303 Creative would be free to refuse to write that it supports same-sex marriage, but cannot refuse to create a website for such a marriage.

At base, 303 Creative's entire theory is that creating custom webpages for clients expresses a message celebrating an event that Ms. Smith opposes because of the sexual orientation of the participants in that event. And because the webpage expresses such a message, and an observer may know that the webpage was created by 303 Creative, Colorado is forcing Ms. Smith to communicate her support for same-sex marriage.

That argument misses a critical step in the free speech analysis and would be an unprecedented subversion of public-accommodation laws with untold consequences. 303 Creative has not confined itself to the "marketplace of ideas" and expression; it is in the business of selling websites about a specific activity, a wedding, for money. Once it enters the marketplace of commerce, 303 Creative must engage in such

commerce without discrimination. *Jaycees*, 468 U.S. at 636 (O'Connor, J., concurring).

III. Minorities continue to experience discrimination and greatly need the protection of strong public-accommodation laws.

Opening the door to broad "First Amendment" exemptions to civil rights statutes will harm not only LGBTQ+ persons of all races but heterosexual and cisgender people of color as well; if LGBTQ+ persons can be excluded by citation to free speech or faith, so can any other group. Not only *can* people of color be excluded—they *will* be. Despite notions that we have conquered racial prejudice, it persists. Just as in 1968, in 2020 the integrity of public-accommodation statutes remains key for people of color to participate fully and freely in the market.

Trying to distinguish between racial discrimination and sexual-orientation or gender-identity discrimination to minimize the inevitable harm to people of color is untenable. Just as 303 Creative purports to object to the "conduct" of same-sex couples in marrying but not to individuals' sexual orientation, the state of Virginia objected to the "conduct" of the couple in *Loving v. Virginia* in forming an interracial union. 388 U.S. 1, 3 (1967). And, in any event, the Supreme Court's "decisions have declined to distinguish between status and conduct" in the context of sexual orientation. *Christian Legal Society v. Martinez*, 561 U.S. 661, 689 (2010) (collecting cases). Accordingly, expanded "First

Amendment" exemptions will not remain limited to discrimination against LGBTQ+ persons; they will undercut public-accommodation law entirely, regardless the target of discrimination.

Indeed, the arguments deployed here against LGBTQ+ persons have been used against people of color. For example, until 2000, Bob Jones University prohibited students from engaging in interracial relationships. In 1976, the IRS revoked the university's tax-exempt status because of the policy, resulting in *Bob Jones University v. United States*, which held that religious exercise objections cannot overcome the compelling state interest in eradicating discrimination, 461 U.S. 574 (1983).

Likewise, in 2015, a student filed a complaint with the Pennsylvania Human Rights Commission (PHRC) against his former college, a Catholic institution, alleging that the college expelled him for racially discriminatory reasons. *Chestnut Hill Coll. v. Pa. Human Relations Comm'n*, 158 A.3d 251, 256 (Pa. Commw. Ct. 2017). After investigating, the PHRC sued the college alleging violation of the state public-accommodation law. The college claimed that enforcing the public-accommodation law would violate the First Amendment—a defense the court rejected. *Id*. at 261, 266-67.

Several businesses raised the First Amendment to justify discriminating against Muslim customers. In *Fatihah v. Neal*, gun range owners posted a sign at the entrance of their business stating: "This pri-

vately owned business is a Muslim-free establishment!!! We reserve the right to refuse service to anyone!!!" Compl. ¶ 24, *Fatihah v. Neal*, No. 16-cv-00058 (E.D. Okla. Feb. 17, 2016). After denying service to an African American Muslim U.S. Army reserve member because he was Muslim, the gun-range owners invoked the First Amendment, arguing that the "Muslim Free" sign is political and public issue speech such that any cause of action based on this speech is barred by the First Amendment. *See* Defts' Br. in Support of Motion to Dismiss and/or for Summary Judgment at 16-17, *Fatihah*, No. 16-cv-00058 (E.D. Okla. Apr. 28, 2017), ECF No. 67; Defts' Response in Opp. to Plaintiff's Motion for Summary Judgment at 27-29, *Fatihah*, No. 16-cv-00058 (E.D. Okla. May 12, 2017), ECF No. 77. Ultimately, the court rejected the defendants' First Amendment defense, stating simply: "The First Amendment is not a defense to a discrimination claim." Order at 10, *Fatihah*, No. 16-cv-00058 (E.D. Okla. Dec. 19, 2018), ECF No. 97.

Beyond the filed lawsuits lies an ocean of unlitigated instances of discrimination. For example, in 2019, a wedding venue refused to rent to an interracial couple citing religious beliefs. P.R. Lockhart, *A Venue Turned Down an Interracial Wedding, Citing "Christian Belief." It's Far From the First to Do So*, Vox.com (Sept. 3, 2019), https://perma.cc/5WWN-JPW2. On a video, an employee explained: "We don't do gay weddings or mixed race, because of our Christian race—I mean, our Christian belief." *Id*. Following extensive publicity, the ven-

ue eventually changed course but likely would not have done so without massive public pressure. *Id*.

One Harvard Law professor recounted an instance where a Korean student and friends were excluded from a club because they "are Korean and that apparently bugged the bouncer"; when the group spoke with the manager, "the manager backed up the bouncer": "[n]ot only did he not let them in, he used a racial epithet to express his animus toward Asians." Joseph William Singer, *We Don't Serve Your Kind Here: Public Accommodations And The Mark Of Sodom*, 95 B.U. L. Rev. 929, 930 (2015).

These examples only scratch the surface of the pervasive discrimination that still exists in business. If 303 Creative's view of free speech prevailed, there is no discernable limit for its end. 303 Creative's proposed carve-outs would go well beyond the wedding context to other businesses that are also arguably engaged in expressive activities such as culinary arts, interior design and architecture firms, fashion boutiques, beauty salons, and barber shops, who would prefer not to associate with racial, ethnic, or other underrepresented minorities. And even beyond artistic commercial enterprises, a free-speech exception could potentially exempt a broad range of businesses that claim free-speech objections from serving particular customer groups. 303 Creative's proposed exemption to public-accommodation laws would give business owners with biased and discriminatory attitudes new ammu-

nition to refuse equal service to people of racial, ethnic, and other minorities. Businesses could avoid complying with public-accommodation laws by asserting that the contents of their goods and services are imbued with subjective expressions that depend on the identity of their customers or by simply asserting that they would rather not associate with certain customers.

* * *

303 Creative's request for an exemption to public-accommodation law for custom goods cannot withstand judicial scrutiny. Finding in 303 Creative's favor would necessitate reasoning readily deployable to trample the rights of the most vulnerable by excusing discrimination based upon race, national origin, or any other protected category and would roll back the substantial strides made in eradicating discrimination in our public life and economy. This Court should not open a new avenue for discrimination by commercial businesses—one that is inconsistent with the Supreme Court's precedents and the principle that states may protect equal access to publicly available goods and services for all its residents.

CONCLUSION

This Court should affirm.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), the undersigned counsel for amici curiae certifies that this brief:

(i) complies with the type-volume limitation of Rule 29(a)(5) because it contains 6,499 words, including footnotes and excluding the parts of the brief exempted by Rule 32(f); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2016 and is set in New Century Schoolbook font in a size equivalent to 14 points or larger.

Dated: April 29, 2020 *<u>/s/ Ethan H. Townsend</u>*

CERTIFICATE REGARDING DIGITAL SUBMISSION

I certify that:

(i) all required privacy redactions have been made;

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Dated: April 29, 2020 *<u>/s/ Ethan H. Townsend</u>*

[4] Pursuant to the Court's General Order filed March 16, 2020, "the requirement for parties to submit paper copies of briefs . . . is temporarily suspended until further notice." When the Court reinstitutes the paper-copy requirement, any hard copies amici submit will be exact copies of the version submitted electronically.

CERTIFICATE OF SERVICE

I hereby certify that on April 29, 2020, I electronically filed the foregoing brief with the Clerk of this Court using the CM/ECF system, and counsel for all parties will be served by the CM/ECF system.

/s/ Ethan H. Townsend