No. 21-476

IN THE
Supreme Court of the United States

303 CREATIVE LLC, ET AL.,

Petitioners,

v.

AUBREY ELENIS, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE
U.S. COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF 137 MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici are 14 United States Senators and 123 Members of the United States House of Representatives, (together, "Members of Congress").[2]

Petitioners urge this Court to adopt a broad rule holding that commercial enterprises that do business with the public have a constitutional right to discriminate. The Court's decision will therefore have significant implications not just for the Colorado Anti-Discrimination Act ("CADA"), but also for federal civil rights laws with public accommodation provisions, including Title II of the Civil Rights Act of 1964 ("Civil Rights Act"), 42 U.S.C. § 2000a, and Title III of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12182, which were enacted to protect historically marginalized classes from discrimination in places of public accommodation. Creating exemptions for businesses that claim to be "speaking" through their commissioned work—exemptions that are exceedingly difficult both to define and to limit—would have serious repercussions for federal statutory schemes like the Civil Rights Act and the ADA.

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[1] Pursuant to Supreme Court Rule 37.3(a), *amici* certify that Petitioners and Respondents have given blanket consent to the filing of *amicus* briefs. Pursuant to Rule 37.6, counsel for *amici curiae* certifies that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

[2] A complete list of *amici* appears in the Appendix to this brief.

As Members of Congress, *amici* have a unique and inherent interest in the application and enforceability of federal laws, particularly when differing views on the applicability of these laws affect our constituents' rights. Because the way this Court interprets CADA could affect the applicability and enforceability of similar federal laws, *amici* are well positioned to advise the Court on the purpose of these federal laws and the adverse implications of a ruling for Petitioners.

Amici urge this Court to affirm the Tenth Circuit's decision requiring Petitioners to comply with CADA and reject Petitioners' broad proposed exemption for commercial enterprises that hold themselves out as "artists" and "speakers" and decline to work for certain individuals on that basis. To recognize a constitutional right, as Petitioners advocate, for such businesses to discriminate, even where such discrimination arises around alleged expression, would contravene the spirit, purpose and plain language of federal laws like the Civil Rights Act and the ADA. This Court should not establish a precedent inviting discrimination against historically marginalized communities, including but not limited to the lesbian, gay, bisexual, transgender and queer (LGBTQ) community.

Because there is nothing unconstitutional about barring commercial entities, like Petitioners, from discriminating against potential customers, there is likewise nothing unconstitutional about barring such entities from publishing notices advertising their intent to discriminate. A host of federal nondiscrimination laws include similar prohibitions. *See, e.g.*, Title VII of the Civil Rights Act, 42 U.S.C.

§ 2000e-3(b), the Fair Housing Act, 42 U.S.C. § 3604(c), and the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 623(e). A ruling against the constitutionality of this provision in CADA risks undermining analogous provisions in federal statutes, which *amici* have a compelling interest in protecting.

Finally, *amici* urge the Court to reject Petitioners' suggestion that Colorado could achieve its anti-discrimination goals by "narrow[ing] what it considers a public accommodation . . . . to physical spaces". *See* Brief for Petitioners 48-49. Such precedent would likewise threaten to limit the reach of federal laws such as Title II of the Civil Rights Act and Title III of the ADA and would harm this country's most marginalized groups.

SUMMARY OF ARGUMENT

Colorado's public accommodations law, CADA, includes an Accommodations Clause and a Communications Clause. The Accommodations Clause provides, in relevant part:

> It is a discriminatory practice and unlawful . . . to refuse, withhold from, or deny to an individual or a group, because of disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry, the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation . . . .

Colo. Rev. Stat. § 24-34-601(2)(a) (2021).

The Communications Clause similarly states:

> It is a discriminatory practice and unlawful . . . to publish, circulate, issue, display, post, or mail any written, electronic, or printed communication, notice, or advertisement that indicates that the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation will be refused, withheld from, or denied an individual or that an individual's patronage or presence at a place of public accommodation is unwelcome, objectionable, unacceptable, or undesirable because of disability, race, creed, color, sex, sexual orientation, gender identity, gender expressions, marital status, national origin, or ancestry.

Id.

CADA provides expansive civil rights protections for historically marginalized groups, working in tandem with federal laws like Title II of the Civil Rights Act and Title III of the ADA, both of which similarly contain public accommodations provisions. Nondiscrimination laws like these, which exist in nearly every state in the country, target commercial conduct, not expression. These laws ensure that membership in a historically marginalized community is not synonymous with exclusion and protect members of these communities from the indignity and humiliation that comes from being denied service on a discriminatory basis. These laws

make it possible for everyone to participate in public life.

Allowing the exemption to CADA that Petitioners seek would not only undermine CADA and countless nondiscrimination laws in state and local jurisdictions, but it could also damage the public accommodations provisions and bars against discriminatory notices set forth in federal civil rights laws. There is simply no way to meaningfully cabin the exemption to CADA's Accommodations Clause urged by Petitioners without undercutting crucial elements of federal public accommodations laws, and there is no way to accept Petitioners' challenge to CADA's Communications Clause without undermining similar federal provisions.

First, Congress enacted federal statutory schemes like the Civil Rights Act and the ADA to fulfill the Government's compelling interest in eliminating discrimination generally and in places of public accommodation in particular. It is critical that these federal nondiscrimination schemes remain intact to protect the Government's compelling interest and preserve Congress's ability to continue to enact nondiscrimination protections. Any interest served by creating the type of exemption sought by Petitioners is outweighed by the overriding federal interest in eradicating the dignitary and economic harms that flow from allowing discrimination in places of public accommodation. This is only more true where, as here, nondiscrimination laws target commercial sales, not expressive conduct, and any expression would be attributed to the customer, not to the business claiming the exemption.

Second, the exemption Petitioners seek for businesses that claim to speak through their commercial work is untenable. The purpose of these nondiscrimination laws is to ensure that everyone can participate freely in all aspects of public life. In doing so, these laws prohibit *any* commercial actor who voluntarily provides services to the general public from discriminating on the basis of certain protected characteristics. The exemption Petitioners seek would create a loophole whereby businesses could decline to provide services to members of historically marginalized groups. Moreover, there is no practicable limitation to the exemption Petitioners seek. If such an exemption were recognized, not just web designers but all businesses which have arguably expressive components would be permitted to discriminate against potential customers on the basis of not only sexual orientation but also race, religion and ability, among other characteristics. Petitioners downplay the breadth of their requested exemption by claiming that they wish to discriminate on "message" rather than "status". This position is untenable and at odds with this Court's precedents.

Third, Petitioners' challenge to CADA's Communications Clause would, if accepted, undermine similar prohibitions in federal nondiscrimination statutes. A host of federal laws, including Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-3(b), the Fair Housing Act, 42 U.S.C. § 3604(c), and the ADEA, 29 U.S.C. § 623(e), include provisions, like CADA's Communications Clause, that prohibit advertising illegal commercial activity. The scope of those protections is thus at risk should Petitioners' position be adopted.

Finally, Petitioners are wrong to suggest that Colorado could narrow the definition of a "public accommodation" to include only physical spaces and still achieve its compelling interest in eradicating discrimination. *See* Brief for Petitioners 48-49. Such a proposal risks leading to a similarly untenable constriction of the definition of "public accommodation" within the meaning of various federal nondiscrimination laws.

ARGUMENT

I. Federal Nondiscrimination Laws Fulfill a Compelling Governmental Interest in Eliminating Discrimination in Places of Public Accommodation and More Generally.

Congress has a compelling interest in eliminating invidious discrimination in all aspects of American society, including in places of public accommodation. Over the past 60 years, Congress has passed a wide variety of nondiscrimination laws to protect the dignity of historically marginalized groups and ensure that individuals receive equal treatment in the United States. For example, in 1964, Congress passed Title II of the Civil Rights Act, which guarantees equal enjoyment of public accommodations "without discrimination . . . on the ground of race, color, religion, or national origin". 42 U.S.C. § 2000a. Congress passed Title II of the Civil Rights Act because, as it said in the language of the time, "[n]o action is more contrary to the spirit of our democracy and Constitution—or more rightfully resented by a Negro citizen who seeks only equal treatment—than the barring of that citizen from . . . public

accommodations and facilities." 109 Cong. Rec. 11,942 (1963).

For the enacting Congress, equal treatment in places of public accommodation was an essential feature of a functioning and successful American society. To erect barriers to equal treatment or otherwise perpetuate "the daily affront and humiliation involved in discriminatory denials of access to facilities ostensibly open to the general public", *Daniel v. Paul*, 395 U.S. 298, 307-08 (1969) (quoting H.R. Rep. No. 88-914, at 18 (1964)), was to "contravene[] the concepts of liberty and democracy which have guided us in achieving our amazing growth and progress during the past century". 110 Cong. Rec. 7413 (1964) (statement of Sen. Magnuson). Ultimately, Congress envisioned a federal statutory scheme that would "both end discriminatory access to public places and protect against unfair competition those citizens who wish voluntarily to treat all Americans on an equal basis". *Id.* (statement of Sen. Magnuson). In passing Title II, Congress simply conferred on historically marginalized groups the "right to enter and be served in establishments holding themselves out to serve the public"—nothing more and nothing less. 110 Cong. Rec. 7379 (1964) (statement of Sen. Kennedy). Title II reinforced the basic and fundamental right to be treated as an equal in American society. *Id.*

Similarly, Title III of the ADA provides that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation." 42 U.S.C. § 12182(a). Like the Civil

Rights Act, Congress enacted the ADA to ensure that individuals with disabilities possessed certain basic, fundamental rights and to eliminate "the unjustified segregation and exclusion of persons with disabilities from the mainstream of American life". Presidential Statement on Signing the Americans with Disabilities Act of 1990, 2 Pub. Papers 1071 (July 26, 1990). The Act was "a civil rights priority" intended to "give to the disabled of our country back their personal and professional dignity". *Hearing on H.R. 2273, The Americans with Disabilities Act of 1989*, 101st Cong. 2 (1989) (statement of Rep. Matthew G. Martinez, Chairman, H. Subcomm. on Employment Opportunities).

Congress's interest in eradicating discrimination extends beyond the public accommodation context, as well. For instance, through the passage of Title VII of the Civil Rights Act in 1964 and its subsequent expansions in 1972 and 1991, Congress made unlawful employment discrimination "because of such individual's race, color, religion, sex, or national origin". 42 U.S.C. § 2000e-2(a)(1). In so doing, Congress aimed to "target[] the elimination of all forms of discrimination [in employment] as a 'highest priority'". *EEOC v. Pac. Press Publ'g Ass'n*, 676 F.2d 1272, 1280 (9th Cir. 1982). The ADEA was similarly enacted to ensure the "elimination of discrimination in the workplace". *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979). And in the housing context, Congress enacted the Fair Housing Act "in 1968 'to eradicate discriminatory practices within a sector of our Nation's economy'". *Revock v. Cowpet Bay W. Condo. Ass'n*, 853 F.3d 96, 104 (3d Cir. 2017) (quoting *Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Comtys.*

Project, Inc., 576 U.S. 519, 539 (2015)). Indeed, "the Fair Housing Act was intended to have 'the broadest objectives and scope' and to prohibit not only open, direct discrimination but also all [discriminatory] practices which have a . . . discouraging effect." *Zuch v. Hussey*, 394 F. Supp. 1028, 1047 (E.D. Mich. 1975) (quoting *Mayers v. Ridley*, 465 F.2d 630, 652-53 (D.C. Cir. 1972)).

All together, these and the many other federal nondiscrimination measures reflect and reinforce Congress's compelling interest in eliminating invidious discrimination and ensuring that all constituents are spared "the denial of equal opportunities", *see Robert v. U.S. Jaycees*, 468 U.S. 609, 625 (1984)—an interest Petitioners challenge here. *See* Brief for Petitioners 37. Indeed, this Court has long recognized that governments have a "legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination". *Regents of Univ. of Calif. v. Bakke*, 438 U.S. 265, 307 (1978). Thus, in *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964), the Court upheld Title II of the Civil Rights Act, which bars discrimination on the basis of race, color, religion or national origin in public accommodations, as a legitimate exercise of Congress's "interest in civil rights legislation", *id.* at 245. The "right to service" in places of public accommodation is "a right or privilege secured . . . . by virtue of the 1964 Act", *United States v. Johnson*, 390 U.S. 563, 565-66 (1968), and this Court has recognized the "compelling state interests" in "eliminating discrimination and assuring its citizens equal access to publicly available goods and services", *Jaycees*, 468

U.S. at 624; *see also PGA Tour, Inc. v. Martin*, 532 U.S. 661, 675 (2001) (noting, with respect to the ADA, that "[a]fter thoroughly investigating the problem, Congress concluded that there was a 'compelling need' for a 'clear and comprehensive national mandate' to eliminate discrimination against" individuals with disabilities, "and to integrate them 'into the economic and social mainstream of American life.'" (quoting S. Rep. No. 101-116, at 20 (1989)).)

Following this Court's holdings, lower courts also have consistently acknowledged Congress's compelling interest in eliminating discrimination in all aspects of life. *See, e.g.*, *EEOC v. R.G. &. G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 591 (6th Cir. 2018) (holding that the government has a "compelling interest in combatting discrimination in the workforce"), *aff'd on other grounds sub nom. Bostock v. Clayton County*, 140 S. Ct. 1731 (2020); *EEOC v. Miss. Coll.*, 626 F.2d 477, 488 (5th Cir. 1980) ("[T]he government has a compelling interest in eradicating discrimination in all forms."). Indeed, "with open minds attuned to the clear and strong purpose of the [Civil Rights] Act", *Rousseve v. Shape Spa for Health & Beauty, Inc.*, 516 F.2d 64, 67 (5th Cir. 1975) (quoting *Miller v. Amusement Enters., Inc.*, 394 F.2d 342, 349 (5th Cir. 1968)), courts have supported the full enforcement of nondiscrimination laws as the "highest priority", *Pac. Press Publ'g Ass'n*, 676 F.2d at 1280.

Last term, this Court cautioned against "rely[ing] on 'broadly formulated interests'" when assessing whether a government's nondiscrimination policy could survive strict scrutiny, noting that "courts must 'scrutinize[] the asserted harm of granting specific

exemptions to particular religious claimants'". *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1881 (2021) (quoting *Gonzales v. O Centro Espírita Beneficente União de Vegetal*, 546 U.S. 418, 431 (2006)). That admonition is less applicable here, where Colorado's nondiscrimination law regulates conduct, not speech, and therefore is not subject to strict scrutiny. *See supra* Section II; *see also* Brief for Respondents 13-15.[3] But in any event, in the context of public accommodation laws like CADA, the Civil Rights Act and the ADA, the government has a "weighty" and "particular" interest against granting individualized exemptions. *See Fulton*, 141 S. Ct. at 1882. As this Court recognized, any exceptions to the ability of the state to compel equal provision of services must be confined for the law to have any meaningful effect. Otherwise, if the "long list of persons who provide goods and services for marriages and weddings [could] refuse to do so for gay persons", the result would be "a community-wide stigma inconsistent with the history and dynamics of civil rights laws that ensure equal access to goods, services, and public accommodations". *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n*, 138 S. Ct. 1719, 1727 (2018). Petitioners' requested exemption here, which would apply to any and all

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[3] At most, CADA's application in this case is subject to intermediate scrutiny because any burden on 303 Creative's speech is incidental to the regulation of the company's conduct. *See, e.g.*, *United States v. O'Brien*, 391 U.S. 367, 376 (1968). Under that standard, the state must show an "important or substantial governmental interest". *See id.* As this Court's precedents make clear, preventing discrimination is more than substantial; it is compelling.

commercial sales of custom products, would have precisely this stigmatizing effect.

In short, federal nondiscrimination laws serve critical goals. *Amici*, as members of Congress, have a well-recognized compelling interest in ensuring that these laws are enforced.

II. Federal Nondiscrimination Laws Are Necessary To Curb Discriminatory Practices by Public Accommodations and Could Be Alarmingly Impaired by the Exemptions Sought by Petitioners.

Federal laws like the Civil Rights Act and the ADA are necessary because they ensure that businesses operating as public accommodations do not serve only certain customers and discriminate "as they see fit". *Heart of Atlanta Motel*, 379 U.S. at 282 (Douglas, J., concurring) (quoting *Shelley v. Kraemer*, 334 U.S. 1, 19 (1948)). These laws are designed so that an interracial couple or a person who uses a wheelchair cannot be told "we don't serve your kind here". But this is precisely the kind of conduct that a ruling in favor of Petitioners would sanction.

A. Petitioners' Proposed Exemption Is Impracticable and Would Condone Discrimination in Public Accommodations in Violation of State and Federal Nondiscrimination Laws.

The exemption Petitioners seek—a broad rule permitting discrimination by businesses that claim to engage in expression—is unworkable. If 303 Creative chooses to provide goods or services to the public, then

public accommodation laws demand that it do so without discriminating against certain historically marginalized groups.

Petitioners assert that applying CADA to businesses selling "expressive" goods or services would impose "severe harms on the individual, the marketplace of ideas, and democratic self-government". Brief for Petitioners 36. However, to recognize the exemptions sought by Petitioners would effectively create a constitutional rule condoning broad-based discriminatory conduct while hamstringing Congress from enacting comprehensive nondiscrimination legislation in the future. Equal treatment in places of public accommodation is an essential feature of a functioning and successful American society, and abiding by such requirements is simply the "cost" of doing business. Indeed, "[i]t is unexceptional that Colorado law can protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public." *Masterpiece Cakeshop*, 138 S. Ct. at 1728.

Petitioners understate the breadth of their requested exemption, insisting that they wish to engage in "message-based, not status-based" discrimination. Brief for Petitioners 22. Such word play strikes at the heart of what Colorado aims to combat with CADA and what Congress seeks to combat with its federal nondiscrimination laws. If 303 Creative is willing to design wedding websites for opposite-sex couples and is not willing to design wedding websites for same-sex couples, then it is discriminating against same-sex couples, and it is

doing so based on a protected trait. *See Bostock v. Clayton County*, 140 S. Ct. 1731, 1742, 1746 (2020) (where a "trait[] or action[]" is "inextricably bound up" with a protected characteristic, such as "race, color, religion, sex, [or] national origin", then discrimination on the basis of one is necessarily discrimination on the basis of the other); *see also Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993) ("A tax on wearing yarmulkes is a tax on Jews."). The fact that the company does not intend to discriminate against LGBTQ individuals in all aspects of its business does not excuse its proposed discrimination here.

Moreover, it would be impracticable for this Court to accept Petitioners' argument and attempt to draw broad-based distinctions between or otherwise define what is or is not an expressive profession. *See, e.g.*, *Elane Photography, LLC v. Willock*, 309 P.3d 53, 71 (N.M. 2013) ("Courts cannot be in the business of deciding which businesses are sufficiently artistic to warrant exemptions from antidiscrimination laws."). To attempt to draw such a line would disrupt the basic function of state and federal nondiscrimination laws by creating exemptions that state legislatures and Congress did not intend.

Public accommodation laws mandate how businesses open to the general public must treat individuals with certain protected characteristics. Indeed, no matter how much or how little a particular business engages in speech, nondiscrimination laws like CADA, Title II of the Civil Rights Act and Title III of the ADA govern any kind of commercial activity without regard to the level of expression involved. *See Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984)

(recognizing that even though lawyers "make a 'distinctive contribution . . . to the ideas and beliefs of our society'", freedom of expression did not give a law firm the right to refuse to hire women as partners or otherwise exempt the law firm from its obligation to comply with Title VII as part of running its business (quoting *NAACP v. Button*, 371 U.S. 415, 431 (1963))); *see also Willock*, 309 P.3d at 71 ("We decline to draw the line between 'creative' or 'expressive' professions and all others. While individuals in such professions undoubtedly engage in speech, and sometimes even create speech for others as part of their services, there is no precedent to suggest that First Amendment protections allow such individuals or businesses to violate antidiscrimination laws."). To attempt to articulate another standard that allows public accommodations to close themselves off to parts of the general public because the particular business claims "expressive" components is not only unworkable, but such a standard would also ignore what nondiscrimination laws seek to do in the first place—eradicate discrimination, not compel or curb expression in any way. *See Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 572 (1995) (explaining that public accommodation laws do not "as a general matter, violate the First or Fourteenth Amendments" because they do not "target speech or discriminate on the basis of its content", but instead prohibit "the act of discriminating against individuals in the provision of publicly available goods, privileges, and services on the proscribed grounds").

Indeed, accepting Petitioners' argument here could gut this country's nondiscrimination laws, as it

is hard to imagine what sort of status-based discrimination could not instead be reframed as wanting to avoid "endorsing [a] message" with which the discriminator disagrees. *See* Brief for Petitioners 29. For instance, if Petitioners prevail, a hospital could claim the right to hire women only as receptionists but not as doctors because it does not wish to "endors[e] the message[]" that women are as skilled in medicine as men. *See* Brief for Petitioners 29. Or a barber shop could agree to cut hair for all customers but shave beards only for non-Muslims because it does not want to "endors[e] the message[]" that Muslim men should be clean-shaven. Allowing certain businesses to discriminate on the basis of sex, sexual orientation, gender identity, race and ability, among other characteristics, frustrates the goal of eradicating discrimination underpinning state and federal public accommodations laws. Granting such exemptions to nondiscrimination laws would mean that marginalized individuals, some of whom were only recently assured equal treatment under the law, will once again suffer "a disadvantage, a separate status, and so a stigma" in their everyday lives. *See United States v. Windsor*, 570 U.S. 744, 746 (2013).

Not only would the exemption Petitioners seek be practically unworkable, but a decision allowing discrimination under CADA would affect far more than website design services in Colorado. Indeed, Petitioners acknowledge that their requested exemption would apply to "[e]very commissioned publisher, writer, printer, painter, calligrapher, website designer, tattoo artist, photographer, and videographer"—indeed, to every "artist" who "enter[s] the marketplace". Brief for Petitioners 2, 30. Under

Petitioners' theory, a wide range of activities that federal public accommodation laws seek to outlaw would be permitted.

Examples of how this exemption could operate to circumvent the Civil Rights Act of 1964 abound. If web designers who create wedding websites are deemed to be expressing themselves through their work and exempt from public accommodations laws on those grounds, then nearly any business with "artistic" or "expressive" components could claim a similar exemption. For instance, a banquet hall could decline to host a feast and celebration for a Jewish child's bar mitzvah because designing a menu and decorating the hall (arguably "expressive conduct") for the ceremony would purportedly convey a message the proprietor does not support. A restaurant could insist that it can refuse to serve an interracial couple requesting a catered wedding rehearsal or anniversary dinner, claiming that a custom menu is expressive conduct (with its tailor-made fonts and hand-picked courses of food and drink) that would violate the owner's views on interracial marriage. A hotel could claim that it can refuse to host that same interracial couple on their wedding night because the hotel's specially curated "honeymoon package" is expressive conduct that, if used in celebration of interracial marriage, would send a message that the proprietor does not wish to convey.

The exemption Petitioners seek would reach beyond the Civil Rights Act to other federal laws, including the ADA. Accepting Petitioners' argument raises the specter that a letterpress could refuse to design invitations for a charitable event benefitting people with HIV, who are protected under the ADA,

e.g., *Bragdon v. Abbott*, 524 U.S. 624, 641 (1998), because the letterpress proprietor views the invitation text and designs as his "expression" and he associates HIV with conduct to which he objects, such as sexual intercourse out of wedlock or between individuals of the same sex. Or that a day care center could claim the right to refuse to serve the child of a parent living with HIV. Or that a flower shop could refuse to design and sell a flower arrangement to a bereaved parent of a child who died from complications related to HIV.

These consequences would further exclude and ostracize members of historically marginalized groups from their communities, now with the imprimatur of the United States Constitution. This result is not mitigated by the possibility that there exist other web designers, restaurants, hotels, day care centers or flower shops. Petitioners are eager to point out that "LGBT consumers may be able to obtain wedding-website design services from other businesses" as "[m]any designers in Colorado (and elsewhere) will convey the messages Smith cannot." Brief for Petitioners 38. But this Court has rejected such arguments before, observing 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. . . ." *Heart of Atlanta Motel,* 379 U.S. at 292 (Goldberg, J., concurring) (citing S. Rep. No. 88-872, at 16 (1964)). The "humiliation, frustration, and embarrassment" are surely compounded when a couple must verify that a wedding-website provider is willing to work with them. The result of the exemption Petitioners seek, then, is that members of historically

marginalized groups could continue to face indignity and humiliation as they try to participate in public life, whether engaging in the doldrums or engaging in the most momentous societal rituals—weddings, funerals, baby showers and the like. This kind of systematic exclusion carries serious implications, including increased suicide, crime and truancy rates among members of the marginalized groups.[4]

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[4] The social ills of discrimination and exclusion have been extensively studied and documented, and include detriments to physical and mental health among the excluded populations. *See, e.g.*, David R. Williams, Harold W. Neighbors & James S. Jackson, *Racial/Ethnic Discrimination and Health: Findings From Community Studies*, 93 Am. J. Pub. Health 200, 206 (2003); *Stress in America: The Impact of Discrimination*, Am. Psych. Ass'n 1, 8 (2016), https://www.apa.org/news/press/releases/stress/2015/impact-of-discrimination.pdf ("Regardless of the cause, experiencing discrimination is associated with higher reported stress and poorer reported health."). Title II of the Civil Rights Act and Title III of the ADA both work to remedy these ills in an effort to integrate historically marginalized groups in American society.

The negative impact of discrimination on the basis of sex, including on the basis of sexual orientation and gender identity, is similarly well documented. *See, e.g.*, Sarah Holmes & Sean Cahill, *School Experiences of Gay, Lesbian, Bisexual and Transgender Youth*, 1 J. Gay & Lesbian Issues in Educ., Nov. 2004, at 53, 57 (finding discrimination and harassment against LGBTQ youth "can have devastating effects . . . including higher rates of suicidal ideation and attempted suicide, higher truancy and dropout rates, substance abuse, and running away from home"); Vickie M. Mays & Susan D. Cochran, *Mental Health Correlates of Perceived Discrimination Among Lesbian, Gay, and Bisexual Adults in the United States*, 91 Am. J. of Pub. Health 1869, 1874 (2001). Should this Court rule for Petitioners, then any future legislation attempting to mitigate the negative effects of discrimination on the basis of sex, including sexual orientation

Federal nondiscrimination laws were enacted to reverse the trend of systematic exclusion of certain groups of people and to restore and preserve human dignity for all citizens. *See supra* Part I. Petitioners' requested exemption threatens to subvert those important goals.

B. Petitioners Fail To Differentiate Between Private Expressive Events and Businesses Serving the General Public.

Petitioners insist that this Court's decisions in *Hurley*, 515 U.S. 557, and *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), mandate the exemption it now seeks, but that is wrong. In *Hurley*, the Court held that the application of Massachusetts's public accommodation law to a private association organizing an expressive event—a parade—violated the First Amendment. 515 U.S. at 573. Similarly, in *Dale*, this Court held that it would violate the First Amendment rights of the Boy Scouts—"a private, not-for-profit organization" engaged in "expressive association"—to require the organization to admit members whose "conduct is inconsistent with the values it seeks to instill in its youth members". 530 U.S. at 641, 644, 654.

Operating a commercial enterprise that is open to the public like 303 Creative, however, is fundamentally different from organizing a free-speech

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and gender identity; marital status; national origin; and ancestry at the federal level would suffer the same fate as already-existing nondiscrimination laws like the Civil Rights Act and the ADA because businesses that claim to be speaking through their work would be permitted to discriminate.

event like a parade, as in *Hurley*, or admitting members to a private organization, as in *Dale*. Rather, cases involving public accommodations in commercial settings, like *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), are more instructive here. In *PruneYard*, this Court upheld a California state law that forbade the owner of a public shopping center from prohibiting pamphleteers on his property, holding that it did not violate the owner's First Amendment rights because the shopping center was "open to the public to come and go" and "[t]he views expressed by members of the public in passing out pamphlets . . . will not likely be identified with those of the owner." *Id.* at 87.

Here, as in *PruneYard*, the subject of the state's regulation is a commercial enterprise, not a private expressive organization like the ones at issue in *Hurley* and *Dale*. Moreover, whatever views, if any, expressed by any custom wedding website, though tagged as "Designed by 303Creative.com", Brief for Petitioners 6, are not attributable to Lorie Smith or 303 Creative. Rather, just as the views of the pamphleteers in *PruneYard* were be imputed only to the pamphleteers and not the shopping center owner, whatever views are arguably expressed by a wedding website would be attributed to the couple being wed.[5]

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[5] Whether or not the speech is ultimately attributed to the buyer or seller, businesses are free to adopt neutral and generally applicable terms-of-service policies. State, local and federal nondiscrimination laws simply require that if a business does adopt a terms-of-service policy, that policy must apply to everyone equally. In the case of 303 Creative, because the

III. Petitioners' Challenge to CADA's Communications Clause Threatens Similar Provisions in Federal Nondiscrimination Laws.

Petitioners' challenge to CADA's prohibition on publishing an intent to deny services to same-sex couples could have significant consequences for similar prohibitions under federal law. As this Court long ago recognized, "[a]ny First Amendment interest which might be served by advertising an ordinary commercial proposal and which might arguably outweigh the governmental interest supporting the regulation is altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity." *Pittsburgh Press Co. v. Pittsburgh Comm'n on Hum. Rels.*, 413 U.S. 376, 389 (1973).

Several federal nondiscrimination laws include similar notice provisions. For instance, the Fair Housing Act makes it unlawful "[t]o make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination". 42 U.S.C. § 3604(c). Title VII of the Civil Rights Act likewise bars "print[ing] or publish[ing] or caus[ing] to be printed or published any notice or advertisement

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company would create a wedding website for a straight couple but would refuse to create an identical wedding website for a same-sex couple, the refusal violates CADA.

relating to employment . . . indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national origin". 42 U.S.C. § 2000e-3(b). And the ADEA makes it unlawful "to print or publish, or cause to be printed or published, any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, indicating any preference, limitation, specification, or discrimination, based on age". 29 U.S.C. § 623(e).

Courts have repeatedly upheld these restrictions on discriminatory notices. *See, e.g.*, *Ragin v. N.Y. Times Co.*, 923 F.2d 995, 1002-03 (2d Cir. 1991) (holding housing advertisements in the newspaper indicating a racial preference violated the Fair Housing Act as illegal commercial speech that is unprotected by the First Amendment); *see also Campbell v. Robb*, 162 F. App'x 460, 469 (6th Cir. 2006) (holding that because discrimination in housing is illegal, a discriminatory statement made with respect to a rental transaction "'related to illegal activity,' and therefore receive[d] no First Amendment protection whatsoever" (quoting *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 564 (1980))); *Illinois v. Xing Ying Emp. Agency*, No. 15 C 10235, 2018 WL 1397427, at *3 (N.D. Ill. Mar. 20, 2018) (stating that Congress had unambiguously forbidden employment agencies from advertising the availability of workers with a particular national origin).

If Petitioners prevail here in their challenge to CADA's Communications Clause, they risk upending decades of precedent and undermining the efficacy of analogous provisions in federal nondiscrimination laws.

IV. Petitioners' Proposed Narrowing of the Definition of a "Public Accommodation" Is Untenable and Risks Undermining the Development of Federal Law.

Petitioners insist that Colorado could accommodate their preferences by simply narrowing the definition of "public accommodation" to "physical spaces, as courts have traditionally done with Title II". Brief for Petitioners 48. This proposal ignores the growing recognition among courts that "cordoning off virtual services from the protection of Title II [of the Civil Rights Act] would undermine the broad protectives provided by the CRA as more and more services and economic opportunities migrate to virtual spaces." *See Wilson v. Twitter*, No. 20 Civ. 0054, 2020 WL 3410349, at *9 (S.D.W. Va. May 1, 2020), *report and recommendation adopted*, No. 20 Civ. 0054, 2020 WL 3256820 (S.D.W. Va. June 16, 2020). Several courts have reached a similar conclusion with respect to the ADA. *See, e.g.*, *Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler's Ass'n of New England, Inc.*, 37 F.3d 12, 19 (1st Cir. 1994) (holding it would be "absurd" and inconsistent with the "purpose of the ADA" to limit the definition of "public accommodation" to businesses with a physical structure); *see also Del-Orden v. Bonobos, Inc.*, No. 17 Civ. 2744, 2017 WL 6547902, at *10 (S.D.N.Y. Dec. 20, 2017) (holding "that the term 'public accommodation' in Title III [of the ADA] extends to private commercial

websites that affect interstate commerce" because "[t]his construction, although not dictated by the ADA's text, is consistent with it; and it is compellingly supported by the ADA's purposes, legislative history, and context"). Notably, "[f]or over 20 years, the [U.S. Department of Justice] has consistently maintained that the ADA applies to private websites that meet the definition of a public accommodation." *Gorecki v. Hobby Lobby Stores, Inc.*, No. 17-CV-1131, 2017 WL 2957736, at *6 (C.D. Cal. June 15, 2017).

Much of the commercial world now exists virtually, and any suggestion that Colorado could achieve its asserted goals by treating only physical spaces as public accommodations ignores the wide swath of commercial interactions that would be eliminated from CADA's reach. Beyond its implications for citizens of Colorado, such a ruling risks stunting the interpretation of "public accommodation" under federal law. Courts must construe federal nondiscrimination laws broadly, "[i]n light of the[ir] overriding purpose . . . 'to move the daily affront and humiliation involved in discriminatory denials of access to facilities ostensibly open to the general public'". *Daniel*, 395 U.S. at 307-08 (quoting H.R. Rep. No. 88-914, at 18 (1964))). A ruling for Petitioners here, however, may lead courts to adopt an unduly restrictive view of CADA's federal counterparts.

* * *

At bottom, the Tenth Circuit's ruling should be affirmed because the First Amendment does not require or support Petitioners' proposed interpretation of CADA or their requested exemption.

A ruling in Petitioners' favor would weaken the protections of CADA and would undermine federal civil rights laws by condoning discrimination in ways that legislatures have explicitly and properly sought to proscribe.

CONCLUSION

For the foregoing reasons, we respectfully request that this Court affirm.

August 19, 2022

Respectfully submitted,

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APPENDIX

A complete list of the 14 U.S. Senators and the 123 Members of the House of Representatives participating as *amici* is provided below. Among them are:

REP. NANCY PELOSI
Speaker of the House

SEN. JEFFREY A. MERKLEY
Lead Senate Amici on Brief

REP. DAVID N. CICILLINE
Lead House Amici on Brief

I. COMPLETE LIST OF *AMICI CURIAE*

A. United States Senators (14)

Tammy Baldwin
Richard Blumenthal
Catherine Cortez Masto
Dianne Feinstein
Mazie K. Hirono
Amy Klobuchar
Edward J. Markey
Jeffrey A. Merkley
Patty Murray
Sheldon Whitehouse
Jack Reed
Brian Schatz
Jeanne Shaheen
Ron Wyden

B. Members of the United States House of Representatives (123)

Pete Aguilar
Jake Auchincloss
Nanette Diaz Barragán
Karen Bass
Ami Bera
Donald S. Beyer Jr.
Earl Blumenauer
Lisa Blunt Rochester
Suzanne Bonamici
Jamaal Bowman, Ed.D.

Anthony G. Brown
Julia Brownley
Salud Carbajal
Tony Cárdenas
André Carson
Matt Cartwright
Sean Casten
Judy Chu
David N. Cicilline
Katherine M. Clark
James E. Clyburn
Steve Cohen
Gerald E. Connolly
Angie Craig
Charlie Crist
Sharice L. Davids
Danny K. Davis
Madeleine Dean
Diana DeGette
Mark DeSaulnier
Theodore E. Deutch
Debbie Dingell
Mike Doyle
Anna G. Eshoo
Adriano Espaillat
Dwight Evans
Lois Frankel
Ruben Gallego
Sylvia Garcia
Jesús G. "Chuy" García
Jimmy Gomez
Josh Gottheimer
Raul M. Grijalva
Jahana Hayes
Brian Higgins
Chrissy Houlahan
Steny H. Hoyer
Sheila Jackson Lee
Sara Jacobs
Pramila Jayapal
Henry C. "Hank" Johnson, Jr.
Eddie Bernice Johnson
Mondaire Jones
Marcy Kaptur
Ro Khanna
Daniel T. Kildee
Derek Kilmer
Raja Krishnamoorthi
Ann McLane Kuster
James R. Langevin
John B. Larson
Brenda L. Lawrence
Barbara Lee
Teresa Leger Fernández
Ted W. Lieu
Zoe Lofgren
Alan Lowenthal
Stephen F. Lynch
Carolyn B. Maloney
Sean Patrick Maloney
A. Donald McEachin
James P. McGovern
Grace Meng
Gwen S. Moore
Jerrold Nadler
Marie Newman
Eleanor Holmes Norton
Alexandria Ocasio-Cortez

Jimmy Panetta
Chris Pappas
Nancy Pelosi
Scott H. Peters
Dean Phillips
Chellie Pingree
Mark Pocan
Katie Porter
Mike Quigley
Jamie Raskin
Kathleen M. Rice
Deborah K. Ross
Raul Ruiz
Bobby L. Rush
Linda T. Sánchez
John P. Sarbanes
Mary Gay Scanlon
Jan Schakowsky
Adam B. Schiff
Bradley S. Schneider
Robert C. "Bobby" Scott
Terri A. Sewell
Elissa Slotkin
Darren Soto
Jackie Speier
Greg Stanton
Haley Stevens
Mark Takano
Dina Titus
Rashida Tlaib
Paul D. Tonko
Ritchie Torres
Lori Trahan
David Trone
Lauren Underwood
Juan Vargas
Debbie Wasserman Schultz
Maxine Waters
Bonnie Watson Coleman
Peter Welch
Jennifer Wexton
Susan Wild
Nikema Williams
Frederica S. Wilson
John Yarmuth