No. 17-1344

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

303 CREATIVE LLC and LORIE SMITH,

Plaintiffs - Appellants,

v.

AUBREY ELENIS, et al.,

Defendants - Appellees.

On Appeal from the United States District Court
for the District of Colorado, No. 1:16-cv-02372
The Honorable Marcia S. Krieger

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION OF COLORADO AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

No *amici* have parent corporations or are publicly held corporations.

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STATEMENT OF *AMICI CURIAE*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with over 1.6 million members dedicated to defending the principles of liberty and equality embodied in the Constitution. The ACLU of Colorado is one of the ACLU's statewide affiliates with over 37,000 members. As organizations that advocate for First Amendment liberties as well as equal rights for lesbian, gay, bisexual, and transgender people, the ACLU, the ACLU of Colorado, and their members have a strong interest in the application of proper standards when evaluating constitutional challenges to civil rights laws. The ACLU and ACLU of Colorado are counsel to Respondents Charlie Craig and David Mullins in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, No. 16-111, which is currently pending before the Supreme Court and which raises many of the same issues presented in this case.[2]

AUTHORITY TO FILE *AMICI* BRIEF

Pursuant to Federal Rule of Appellate Procedure 29(a)(2), *amici* state that all parties have consented to the filing of this brief.

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[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amici* state that no party's counsel authored this brief in whole or in part, and that no party or person other than *amici* and their members contributed money toward the preparation or filing of this brief.

[2] *Amici* do not address standing or the District Court's decision to stay this case until the Supreme Court decides *Masterpiece Cakeshop*.

SUMMARY OF ARGUMENT

This appeal seeks a constitutional right to deny equal service in violation of Colorado's Anti-Discrimination Act, a civil rights statute whose origins date to 1885. Like the public accommodation laws of nearly every state in the Union, the Anti-Discrimination Act bars businesses that are open to the public from refusing service based on certain aspects of a person's identity—including, in Colorado, their sexual orientation. While many citizens take for granted equal access to goods and services in the commercial marketplace, members of minority groups often cannot. For those who are lesbian, gay, bisexual, or transgender ("LGBT"), these laws ensure equal opportunity to participate in the "transactions and endeavors that constitute ordinary civic life in a free society." *Romer v. Evans*, 517 U.S. 620, 631 (1996).

There is no question that Colorado has the authority to prohibit discrimination in sales by businesses that choose to operate there. Plaintiffs-Appellants 303 Creative LLC and Lorie Smith (together, "303") argue, however, that because the services 303 sells involve "expression," and because Ms. Smith objects to marriage for same-sex couples on religious grounds, the First Amendment entitles the business to discriminate based on sexual orientation with respect to wedding-related services it intends to offer for sale, notwithstanding state law barring such discrimination. What is more, 303 seeks a constitutional

right to post a notice on its website—a sign in its virtual shop window—proclaiming that it provides wedding websites for heterosexuals only.

This is not the first time a business open to the public has sought to avoid an anti-discrimination law by invoking the First Amendment. In every prior case, the Supreme Court has rejected such claims, whether framed as involving the freedom of expression, association, or religion. Discriminatory conduct by business entities "'has never been accorded affirmative constitutional protections.'" *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984) (quoting *Norwood v. Harrison*, 413 U.S. 455, 470 (1973)); *see also Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 n.5 (1968); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258-60 (1964).

The Colorado Anti-Discrimination Act applies to businesses that choose to serve the public at large and requires that once they offer a product to the public, they not refuse service based on enumerated personal characteristics, including race, religion, and sexual orientation. 303's stated intent to offer wedding website design services for heterosexual couples—but not same-sex couples—violates that basic rule. Its objection is not to any particular *message* requested by any particular customer, but to providing a particular *service* to non-heterosexual customers.

Colorado's prohibition against discrimination in the sale of goods and services to the public is a permissible regulation of commercial conduct that affects expression only incidentally. The Supreme Court has uniformly rejected First

Amendment defenses to discrimination lodged by commercial entities that provide expressive goods or services with minimal scrutiny. 303's attempts to invoke strict scrutiny by arguing that the Anti-Discrimination Act is content- and viewpoint-based or compels speech fail. The Anti-Discrimination Act does not compel 303 to speak any state-selected message or host any state-selected speaker.

303's free exercise claim similarly fails to trigger strict scrutiny. 303 does not even attempt to argue that the Anti-Discrimination Act is not valid or neutral on its face, and its as-applied challenge bears no resemblance to the kind of religious gerrymander that could warrant heightened judicial review. Moreover, its unsuccessful free exercise claim cannot avoid rational basis review simply by being paired with an otherwise unsuccessful free speech claim.

Even if strict scrutiny applied, however, application of the Anti-Discrimination Act to 303's provision of commercial services would be constitutional. The Anti-Discrimination Act furthers the State's compelling interest in eradicating invidious discrimination, and uniform enforcement is the least restrictive means of achieving that goal.

While the particular facts of this case involve a website design company refusing to create websites for the weddings of same-sex couples, the implications of 303's arguments are not limited to sexual orientation discrimination or weddings. If the First Amendment bars a state from applying an anti-

discrimination law to the provision of wedding websites because they involve expression, then website design companies could refuse to provide websites for an interracial or interfaith couple's wedding. Indeed, designers that provide corporate websites could refuse to provide them for businesses owned by women, Muslims, African Americans or any other group the company's owner does not wish to serve. Under 303's rule, because numerous sellers provide goods or services that involve expression (including stationers, printers, and artisans of all kinds), a wide range of businesses could claim a First Amendment exemption from generally applicable regulations of commercial conduct. 303's free exercise claim presents the same problem. There is no doubt that Ms. Smith's religious objections are sincere, but granting such a religious-based exemption would allow every business owner "to become a law unto himself." *Reynolds v. United States*, 98 U.S. 145, 167 (1878).

As the Supreme Court of Nebraska explained in one of the earliest public accommodation decisions:

> A barber, by opening a shop, and putting out his sign, thereby invites every orderly and well-behaved person who may desire his services to enter his shop during business hours. The statute will not permit him to say to one: "You are a slave, or a son of a slave; therefore I will not shave you."

Messenger v. State, 41 N.W. 638, 639 (Neb. 1889). To recognize either of 303's asserted First Amendment objections would run counter to the basic principle,

reflected in over a century of public accommodation laws, that all people, regardless of status, should be able to receive equal service in American commercial life.

ARGUMENT

I. DISCRIMINATION BASED ON SEXUAL ORIENTATION IN THE PROVISION OF A RETAIL SERVICE VIOLATES THE ANTI-DISCRIMINATION ACT.

The Colorado Anti-Discrimination Act applies to businesses that are open to the public. It regulates their sales by prohibiting them from refusing to serve a customer based on certain personal characteristics—specifically, disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry. Colo. Rev. Stat. § 24-34-601(1), (2). 303's stated plan to offer wedding website design services to the public at large but refuse them to same-sex couples would violate this basic principle.

Although framed as a constitutional challenge to the Anti-Discrimination Act, much of 303's brief quarrels with the conclusion that its proposed course of conduct is discriminatory. To be clear, a business that chooses to offer a particular good or service to heterosexual customers may not refuse to sell the same good or service to customers because they are lesbian or gay. That is identity-based discrimination prohibited by Colorado law.

303 asserts that its decision whether or not to provide its services turns on its objection "to a message, not a person," 303 Br. 34, but that is refuted by the injunction it seeks and Supreme Court precedent. 303 seeks a blanket right to refuse service to any same-sex couple seeking a website for their wedding, regardless of the requested text or design. That is an objection to the *who*, not the *what*. A company that refused to provide wedding websites for interracial or Jewish couples would be discriminating based on race or religion, even if it said it did so because it disapproved of those unions. If a business needs to know *who* the product is for in order to decide whether or not to sell it, the business is discriminating on the basis of identity, not making a decision about any "message" inherent in the product itself. Indeed, the Supreme Court has rejected the notion that discrimination against gay people who marry can be separated from the status of being gay. *See Christian Legal Soc'y v. Martinez*, 561 U.S. 661, 689 (2010); *Lawrence v. Texas*, 539 U.S. 558, 583 (2003); *cf. Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993) ("A tax on wearing yarmulkes is a tax on Jews.").[3]

[3] 303 resists this conclusion by comparing discrimination against gay people who marry to other (hypothetical) business interactions that do not actually implicate the Anti-Discrimination Act. 303 Br. 40-41. For example, it is not true that the Anti-Discrimination Act would compel "a Muslim printer to print a synagogue's pro-Israel pamphlets," 303 Br. 41, because a customer's views on Israel (or any other political topic) are not protected under the Anti-Discrimination Act, which 303 impliedly concedes. And an individual such as a "sculptor" or "speechwriter,"

II. THE FREE SPEECH CLAUSE DOES NOT AUTHORIZE A BUSINESS TO ENGAGE IN DISCRIMINATION PROHIBITED BY A REGULATION OF CONDUCT THAT INCIDENTALLY AFFECTS EXPRESSION.

A. Colorado's Law Regulates Commercial Conduct and Affects Expression Only Incidentally.

Where a law regulates commercial conduct and affects speech only incidentally, it does not trigger strict scrutiny. Indeed, when confronted with First Amendment challenges to laws that aim to regulate commercial conduct regardless of what it communicates, the Supreme Court has applied minimal scrutiny and upheld the law.[4]

1. Generally applicable laws that regulate commercial conduct and do not target speech receive minimal First Amendment scrutiny.

As an initial matter, "it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either

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303 Br. 40-41, is not subject to the Anti-Discrimination Act unless that person chooses to operate as a "business offering wholesale or retail sales to the public," Colo. Rev. Stat. § 24-34-601(1), which 303 admittedly has, Dist. Ct. Op. 4.

[4] Even outside the commercial context, the Supreme Court has applied the deferential test set forth in *United States v. O'Brien*, 391 U.S. 367 (1968), to determine whether regulation of expressive conduct violates the Constitution. Whether the Anti-Discrimination Act is evaluated under the commercial conduct cases or *O'Brien*, the result is the same: The law is a permissible regulation of conduct that does not violate the First Amendment.

spoken, written, or printed." *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949); *see also Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978).

Moreover, the First Amendment is not infringed when the government enforces a generally applicable regulation of commercial conduct against a business that is "expressive." Even newspaper publishers, whose very product is protected speech, can be subject "to generally applicable economic regulations" without implicating the First Amendment. *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 581 (1983). "The fact that the publisher handles news while others handle food does not . . . afford the publisher a peculiar constitutional sanctuary in which he can with impunity violate laws regulating his business practices." *Associated Press v. United States*, 326 U.S. 1, 7 (1945); *Associated Press v. NLRB*, 301 U.S. 103, 132 (1937); *see also Citizen Publ'g Co. v. United States*, 394 U.S. 131, 139-40 (1969) (no First Amendment immunity from antitrust laws); *Okla. Press Publ'g Co. v. Walling*, 327 U.S. 186, 192-93 (1946) (no First Amendment immunity from Fair Labor Standards Act). In contrast, a law specifically requiring a newspaper to print particular content (or forbidding it from printing such content) directly intrudes on the First Amendment. *See, e.g.*, *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

Accordingly, the Supreme Court has uniformly rejected businesses' challenges to laws barring discrimination, even where those businesses dealt in

expressive goods or services. For example, in *Hishon*, a law firm argued that applying Title VII to require it to consider a woman for partnership "would infringe [its] constitutional rights of expression or association." 467 U.S. at 78. Although a law firm's work product constitutes "speech," *see, e.g.*, *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 545 (2001), the *Hishon* Court dismissed the law firm's First Amendment defense, holding that there is "no constitutional right . . . to discriminate." 467 U.S. at 78. By contrast, a law that specifically targeted a law firm's speech by, for example, preventing it from bringing cases that "challenge existing welfare laws," would "implicat[e] central First Amendment problems." *See, e.g.*, *Velazquez*, 531 U.S. at 547-48.

303 likens its websites to tattoos, custom-painted clothing, and stained glass windows. 303 Br. 31. But businesses that provide these products to the public at large are just as subject to generally applicable regulations of their commercial conduct as newspapers and law firms. A video game business cannot claim an exemption from the Fair Labor Standards Act to allow it to hire child laborers, and a tattoo parlor cannot claim an exemption from a general health code regulation governing the disposal of needles, simply because video games and tattoos are artistic expression protected by the First Amendment. Nor are such businesses exempt from anti-discrimination laws.

303's far-fetched appeals to the work of Jackson Pollock and Michelangelo, 303 Br. 37, are equally misguided. Individual artists generally do not operate as "business[es] engaged in . . . wholesale or retail sales to the public," and therefore would not be subject to Colorado's Anti-Discrimination Act. Colo. Rev. Stat. § 24-34-601(1). However, when they do open businesses that serve the general public, artists are not immune from anti-discrimination laws in selling their art. If Jackson Pollock had operated a retail store in Colorado offering paintings to the public, he too would have been subject to the Anti-Discrimination Act and could not have discriminated in sales to the public based on customers' race, religion, sexual orientation, or other enumerated characteristics. *Cf. Elane Photography, LLC v. Willock*, 309 P.3d 53, 66 (N.M. 2013).

Thus, even though 303's work product involves "words, graphics, and other forms of expression," 303 Br. 31, that "hardly means" that any regulation of its business operations "should be analyzed as one regulating [303's] speech rather than conduct." *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006) ("*FAIR*"). If the Anti-Discrimination Act targeted the expressive aspects of websites by regulating their design or the text on them, as such, it could run into the same problems as the laws in *Velazquez* and *Tornillo*. But it does no such thing; it regulates sales.

2. The Anti-Discrimination Act is not content- or viewpoint-based, so there is no basis for applying strict scrutiny.

Seeking to avoid the minimal scrutiny the Supreme Court has applied to generally applicable regulations of commercial conduct, 303 argues that strict scrutiny should apply because the Anti-Discrimination Act is content- and viewpoint-based. 303 Br. 38-39, 42-44.

But "federal and state anti-discrimination laws" are "an example of a permissible *content-neutral regulation of conduct*." *Wisconsin v. Mitchell*, 508 U.S. 476, 487 (1993) (emphasis added). As the Supreme Court explained in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 572 (1995), public accommodation laws do not, on their face, "target speech or discriminate on the basis of its 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." *See also Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987) (public accommodation laws "make[] no distinctions on the basis of [an] organization's viewpoint").

303 nonetheless contends that the Anti-Discrimination Act is content-based because it applies only to certain "content," such as marriage for same-sex couples. 303 Br. 38. That is false. The Anti-Discrimination Act is triggered not by the topic of marriage for same-sex couples (or by any topic at all), but by refusals of service

based on identity (disability, race, creed, color, sex, sexual orientation, marital status, national origin, and ancestry). Strict scrutiny would apply if the government passed a law prohibiting companies from creating websites depicting crosses or with text criticizing the President. It does not apply when the government requires a company that produces websites not to discriminate against members of the public in its provision of retail services.

303 also argues that the Anti-Discrimination Act is content-based because it is triggered by the business's decision to offer wedding website design as opposed to websites for other purposes, such as "discussing dishwasher detergent." 303 Br. 38. 303 misunderstands how the Anti-Discrimination Act works. The law's equal-treatment requirement means that a company may not refuse to create a website discussing dishwasher detergent for an African-American customer if it would make the same website for a white customer. That is to say that the Anti-Discrimination Act requires a company to provide a particular service only to the extent that it would provide the same service to similarly situated customers without regard to sexual orientation (or race or religion), and only as an incident to the requirement of equal treatment. It does not require 303 to offer websites bearing particular words about particular topics, or for that matter, any websites bearing words at all, so long as it treats its customers equally.

303 maintains that the Anti-Discrimination Act favors businesses that support marriage for same-sex couples over those that do not, and therefore is viewpoint-based. 303 Br. 39. But it does nothing of the kind. It prohibits refusing sales on grounds of customers' sexual orientation, regardless of a business's views on marriage or any other subject. Under the Anti-Discrimination Act, it is just as unlawful to refuse to provide a wedding website because a couple is heterosexual as it is to refuse to do so because the couple is gay. 303's argument would invalidate not only Colorado's Anti-Discrimination Act, but all such laws as "viewpoint-based": a law prohibiting race discrimination could be said to favor businesses that support integration, while a law prohibiting sex discrimination could be said to favor businesses that support women's work outside the home. But the Supreme Court has rightly rejected that position. *See, e.g.*, *Mitchell*, 508 U.S. at 487.

B. Any "Compelled Expression" Is Incidental to the Anti-Discrimination Act's Regulation of the Conduct of Sales and Does Not Alter the First Amendment Analysis.

303's objection that the Anti-Discrimination Act compels it to express a message with which it disagrees does not alter the constitutional analysis or result. As shown above, the Anti-Discrimination Act is a neutral regulation of commercial conduct. It requires no state-mandated messages from Colorado businesses.

Just as it would not impermissibly "compel speech" for a state to prohibit a photography studio that offers corporate headshots to the public at large from refusing to provide the same portraits for female employees that it provides for male employees, so, too, Colorado does not impermissibly "compel speech" by prohibiting 303 from refusing to provide same-sex couples with the same service that it provides for heterosexual couples.

303's reliance on *Hurley*, 303 Br. 36-37, is misplaced. *Hurley* involved a "peculiar" application of a public accommodation law to a privately organized St. Patrick's Day parade that the Court emphasized was "inherent[ly] expressive[]." 515 U.S. at 568, 572. The Court found this application to be impermissible because, instead of regulating conduct with only an incidental effect on expression, it directly regulated nothing *but* expression—the content of the private parade sponsor's speech. *Id.* at 573. Here, 303 is not a private expressive association, but a commercial establishment that sells goods to the general public. *Hurley* itself distinguished the standard application of public accommodation laws to commercial businesses as constitutional. *Id.* at 578 (anti-discrimination laws properly protect "any member of the public wanting a meal at the inn").

The Bakery's reliance on other compelled speech cases is equally unavailing. *Wooley* and *Barnette* involved laws requiring citizens to express a specific, state-selected message: a law that required motorists to display the state

motto "Live Free or Die" on their license plates, *Wooley v. Maynard*, 430 U.S. 705, 715 (1977), and a law requiring schoolchildren to recite the Pledge of Allegiance, *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 628-29 (1943). The Anti-Discrimination Act does not require Coloradans to "personally speak the government's message." *FAIR*, 547 U.S. at 63. It does not require businesses to speak or express a specific, state-chosen message at all. It requires only equal treatment of customers.

In two cases, the Supreme Court struck down content-based laws that required businesses to publish particular messages of others with whom they disagreed. In *Tornillo*, 418 U.S. 241, a right-of-reply statute required newspapers that published articles attacking the character of a political candidate to afford the candidate free space for a written reply in the newspaper itself. And in *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 475 U.S. 1 (1986) ("*PG&E*"), a state agency ordered a utility company to include in its billing envelope the newsletter of an environmental group with which the utility disagreed. In both instances, the state regulation favored opposing speech in a content-based way: The right of reply was triggered by certain content (editorials critical of political candidates in *Tornillo*; utility's newsletters in *PG&E*), and the regulation imposed a content-based penalty (replies to the criticism in *Tornillo*; environmental newsletters in *PG&E*). Here, the Anti-Discrimination Act has

merely told all Colorado businesses open to the public that whatever goods and services they offer to heterosexual couples they must also offer to lesbian and gay customers and vice versa. That is true whether the product offered is wedding websites or dishwasher detergent. *See* 303 Br. 38. Any effect on speech is entirely incidental.

Even where, unlike here, a law requires entities to speak particular words or to provide access for third-party speakers, the Supreme Court has rejected First Amendment challenges where the law regulates conduct and any compulsion to speak is incidental. In *FAIR*, for example, the Court rejected a First Amendment challenge to the Solomon Amendment, which required law schools to provide equal access both to military and non-military recruiters on campus. 547 U.S. at 54. A coalition of law schools argued that the Solomon Amendment compelled the schools to endorse the military recruiters' message of discrimination embodied in the Don't Ask, Don't Tell policy. *Id.* at 52-53. The schools specifically objected that they would be required to engage in speech by sending e-mail messages and posting notices on a bulletin board on behalf of the military. *Id.* at 61-62. The Supreme Court rejected the law schools' claim, reasoning that "[a]s a general matter, the Solomon Amendment regulates conduct, not speech. It affects what law schools must *do*—afford equal access to military recruiters—not what they may or may not *say*." *Id.* at 60.

C. The Free Speech Clause Does Not Protect a Public Accommodation's Right to Publish Its Unlawful Policy of Discrimination.

Just as there is no constitutional right to discriminate, there is no concomitant right to publish a policy of discrimination. As the Supreme Court explained in *FAIR*, 547 U.S. at 62, Congress "can prohibit employers from discriminating in hiring on the basis of race. The fact that this will require an employer to take down a sign reading 'White Applicants Only' hardly means that the law should be analyzed as one regulating the employer's speech rather than conduct." Were it otherwise, longstanding bans on discriminatory advertisements in employment, housing, and public accommodations throughout the country would have to be struck down on free speech grounds. *See, e.g.*, 42 U.S.C. § 3604(c) (prohibiting discrimination in real estate advertisements). No court has countenanced such an intolerable result.

In *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973), for example, the Court held that the City of Pittsburgh could constitutionally enforce its anti-discrimination ordinance to prevent a newspaper from publishing help wanted advertisements in separate, sex-designated columns. *Id.* at 389 ("Any First Amendment interest . . . is altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity."); *see also Ragin v. N.Y. Times Co.*, 923

F.2d 995, 1003 (2d Cir. 1991) (holding that a newspaper's "publication of real estate advertisements that indicate a racial preference is . . . not protected commercial speech," and stating that "Congress's power to prohibit speech that directly furthers discriminatory sales or rentals of housing" is "unquestioned").

This case is even more straightforward than *Pittsburgh Press* and *Ragin*. In those cases, the question was whether a newspaper could be held liable for publishing a third party's discriminatory advertisements. Here, the question is simply whether a business has a free speech right to publish its own policy of unlawful discrimination. No such right exists. Federal, state, and local governments undoubtedly have the power to prevent invidious discrimination, regardless of whether it comes in the form of individual discriminatory acts or a publicized discriminatory policy.[5]

III. THE FREE EXERCISE CLAUSE DOES NOT PERMIT A BUSINESS TO ENGAGE IN DISCRIMINATION PROHIBITED BY A NEUTRAL AND GENERALLY APPLICABLE LAW.

As the Supreme Court explained in *Employment Division v. Smith*, 494 U.S. 872 (1990), "the right of free exercise does not relieve an individual of the

[5] 303's suggestion that the Anti-Discrimination Act is overbroad because it "bans creative professionals wholesale from stating their beliefs on marriage," 303 Br. 56, is false. Ms. Smith is free to express her own views about marriage for same-sex couples, as she has done. In addition, 303 is free to post a notice saying that it does not support or endorse customer events for which it has provided design services. *See FAIR*, 547 U.S. at 65. What 303 may not do is enjoy the advantages of serving the public at large while advertising that it categorically "will not" serve certain members of the public because of their sexual orientation.

obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Id.* at 879 (internal quotation marks omitted).

A law that is neutral and generally applicable is constitutionally permissible if it is rationally related to a legitimate government interest. *See Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993). 303's attempts to invoke a higher standard of judicial review under the Free Exercise Clause fail and, in any event, the Anti-Discrimination Act survives even the most searching form of judicial review.

A. The Anti-Discrimination Act Is Neutral on Its Face and as Applied.

The Anti-Discrimination Act is neutral on its face, and 303 does not contend otherwise.

303 instead argues that the application of the Anti-Discrimination Act here was not neutral based on the results of the Division's investigation into four charges of discrimination filed against four businesses unrelated to 303. In the first case, which is now under review by the Supreme Court, Masterpiece Cakeshop turned away a gay couple seeking a cake for their wedding reception, and the Division found probable cause to believe the bakery discriminated because of sexual orientation. Aplt. App. 260-61, 310-39 (¶¶ 24-27, Ex. C-F). In the other three cases, a man named William Jack alleged that three bakeries discriminated

against him because of religion by refusing to fill his orders for cakes bearing derogatory messages about gay people. Aplt. App. 261, 340-63 (¶ 28, Ex. G-L). The Division investigated each of Mr. Jack's allegations and determined that none of the bakeries discriminated against him because of his religion. Aplt. App. 347, 353, 359. Instead, it found, the bakeries declined to produce the cakes, not because of Mr. Jack's religious identity, but because they objected to the requested "derogatory language and imagery." *Id.* Because the bakeries would have refused to produce the cakes Mr. Jack requested for anyone—whether Christian, Muslim, agnostic, or atheist—the Division found that they did not discriminate against Mr. Jack "because of" his religion. *Id.*

That is a correct application of the Anti-Discrimination Act, and the Division did not favor secular beliefs over religious beliefs through these determinations. It simply found that Masterpiece Cakeshop engaged in discrimination based on a proscribed characteristic of its customers, while the bakeries Mr. Jack approached did not. That does not render the Division's application of the Anti-Discrimination Act non-neutral as to religion.[6] Thus, there is no unequal application of the Anti-Discrimination Act that favors businesses that are neutral as to marriage equality over businesses that oppose it. *Cf. Bob Jones*

[6] For the same reasons, the findings of no probable cause in the complaints lodged by William Jack do not establish that the Anti-Discrimination Act is not generally applicable.

Univ. v. United States, 461 U.S. 574, 604 n.30 (1983) (IRS policy barring racial discrimination does not "prefer[] religions whose tenets do not require racial discrimination over those which believe racial intermixing is forbidden").[7]

B. The Anti-Discrimination Act Is Generally Applicable.

In determining whether a law is generally applicable, this Court has looked at whether the government enforces it "in a selective manner" to "impose burdens only on conduct motivated by religious belief" and not on similar conduct motivated by other reasons. *See Lukumi*, 508 U.S. at 543.

The Anti-Discrimination Act is generally applicable because it applies across the board to all businesses open to the public, regardless of the religious commitments of their owners, and it regulates sales to the public, a secular activity. Unlike *Lukumi*, where "almost the only conduct subject to [the challenged ordinances was] the religious exercise of Santeria church members," *id.* at 535, the Anti-Discrimination Act applies to all places of public accommodation doing business in the State, without regard to religion.

The Anti-Discrimination Act also is generally applicable because the Commission does not apply it only to religiously motivated discrimination, while

[7] Moreover, the isolated comment of a single commissioner (whose term on the Civil Rights Commission has since expired) in connection with *Masterpiece Cakeshop*, 303 Br. 47, cannot establish that the Anti-Discrimination Act or the Commission targets religiously motivated conduct. Even if it could, there is nothing biased about saying that religious practice should not be used as a sword to harm others.

permitting the same conduct when engaged in for non-religious reasons. That 303 seeks the right to violate the Anti-Discrimination Act because of its owner's religious beliefs does not mean that the law targets religion. On that view, Title II and Title VII would unconstitutionally target religion if a hotel owner or employer discriminated on the basis of race out of a sincerely held religious conviction. *But see Bob Jones Univ.*, 461 U.S. at 603-04; *Piggie Park*, 390 U.S. at 402 n.5.[8]

IV. THE ANTI-DISCRIMINATION ACT SATISFIES EVEN STRICT SCRUTINY.

As shown above, application of the Anti-Discrimination Act fails to trigger strict scrutiny under the Free Speech or Free Exercise Clauses. But even if strict scrutiny applied, application of the law would be constitutional.

[8] Application of the Anti-Discrimination Act also fails to trigger strict scrutiny under the hybrid rights doctrine, which applies in cases involving both a free exercise claim as well as a companion constitutional claim on which the plaintiff "establishes a 'fair probability, or a likelihood,' of success." *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1295 (10th Cir. 2004). As explained above, 303's free speech claim is not viable, and so 303 has failed to present a hybrid rights claim triggering strict scrutiny.

Similarly, 303's attempts to invoke strict scrutiny under the Equal Protection Clause and unconstitutional conditions doctrine, both of which are premised on its free speech and free exercise claims, 303 Br. 49-50, fail because 303 has not shown that the Anti-Discrimination Act impinges on those rights.

A. Colorado Has a Compelling Interest in Eradicating Discrimination in Public Life.

Colorado has a compelling interest in fostering full inclusion in civic life by guaranteeing equal access to businesses open to the public, an essential component of equal participation in a free society. *See Romer*, 517 U.S. at 631; *Duarte*, 481 U.S. at 549. Anti-discrimination laws ensure "society the benefits of wide participation in political, economic and cultural life." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625 (1984); *see also Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2783 (2014).

The Supreme Court has recognized repeatedly that the government has a compelling interest in "eliminating discrimination and assuring . . . citizens equal access to publicly available goods and services." *Roberts*, 468 U.S. at 624; *see also id.* at 628 (discrimination "cause[s] unique evils that government has a compelling interest to prevent"); *N.Y. State Club Ass'n, Inc. v. City of N.Y.*, 487 U.S. 1, 14 n.5 (1988) (recognizing the "State's 'compelling interest' in combating invidious discrimination"); *Duarte*, 481 U.S. at 549; *Bob Jones Univ.*, 461 U.S. at 604.

Public accommodation laws protect "the State's citizenry from a number of serious social and personal harms." *Roberts*, 468 U.S. at 625. Being turned away from public accommodations like restaurants, doctor's offices, and retail stores because of one's identity "deprives persons of their individual dignity." *Id.* The Anti-Discrimination Act thus seeks to "vindicate the deprivation of personal

dignity that surely accompanies denials of equal access to public establishments." *Heart of Atlanta Motel*, 379 U.S. at 250 (internal quotation marks omitted); *see also Runyon v. McCrary*, 427 U.S. 160, 179 (1976) (anti-discrimination laws "'guarantee that a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man'" (quoting *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 443 (1968))).

303's contention that the government's interest in enforcing the Anti-Discrimination Act can be reduced to access to website design services, 303 Br. 52, is absurd. The harm of being refused service because of one's identity is not erased by obtaining a good elsewhere. "The government views acts of discrimination as independent social evils even if the prospective [customers] ultimately find" the goods or services they sought. *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274, 283 (Alaska 1994); *see also Heart of Atlanta Motel*, 379 U.S. at 292 (Goldberg, J., concurring) ("Discrimination 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 . . . ." (internal quotation marks omitted)).

303 also contends that applying the Anti-Discrimination Act in this case harms Ms. Smith's dignity. 303 Br. 52. That Ms. Smith's sincerely held religious beliefs are in tension with an anti-discrimination law that governs her business

undoubtedly creates difficulty. That is the case whenever people hold religious objections to complying with anti-discrimination laws or any other generally applicable business regulations. *See Bob Jones Univ.*, 461 U.S. 574 (religious objection to racial integration); *Piggie Park*, 390 U.S. at 402 n.5 (same); *EEOC v. Fremont Christian Sch.*, 781 F.2d 1362 (9th Cir. 1986) (religious belief that only a man could be the "head of household" entitled to health insurance as employment benefit); *cf. United States v. Lee*, 455 U.S. 252, 261 (1982) (religious opposition to paying Social Security taxes). But that does not negate in any way Colorado's compelling interest in eradicating discrimination and furthering equal treatment in the commercial marketplace.

B. Uniform Enforcement of the Anti-Discrimination Act Is the Least Restrictive Means for Furthering the State's Compelling Interest in Eradicating Invidious Discrimination.

Because the most carefully tailored way to ensure equal treatment is to prohibit discrimination, the Anti-Discrimination Act is "precisely tailored" to achieve its interest, and therefore would satisfy even strict scrutiny's narrow tailoring requirement. *See Burwell*, 134 S. Ct. at 2783.

Every single instance of discrimination "causes grave harm to its victims." *United States v. Burke*, 504 U.S. 229, 238 (1992); *see also Daniel v. Paul*, 395 U.S. 298, 307-08 (1969) (describing "the daily affront and humiliation involved in discriminatory denials of access to facilities ostensibly open to the general public"

(internal quotation marks omitted)). Because of the harms associated with each instance of invidious discrimination, there is simply no "numerical cutoff below which the harm is insignificant." *Swanner*, 874 P.2d at 282.

303's claim that the Anti-Discrimination Act is not narrowly tailored because Title II of the Civil Rights Act of 1964 does not reach website design companies, 303 Br. 53, cannot be taken seriously. Title II does not set the limit of anti-discrimination law or narrow tailoring. *See Roberts*, 468 U.S. at 626.

303 contends that an acceptable alternative to uniform enforcement of the Anti-Discrimination Act would be for customers to rely on privately hosted websites apprising them of businesses that are open to LGBT people. 303 Br. 52. The degradation that accompanies being refused service and the balkanization of markets would be exacerbated, not ameliorated, by this scheme.

Finally, 303 argues for an exception for any business when it "make[s] expressive classifications" and "message-based judgments." 303 Br. 53. But its proposed exception does not even encompass the facts of this case. 303 seeks a constitutional right to refuse to make *any* wedding website for a same-sex couple, regardless of the expressive or textual elements requested. This refusal to provide wedding websites is based solely on the identity of the couple seeking the service.

Because it is narrowly tailored to serve a compelling interest in eradicating discrimination in the commercial market, the Anti-Discrimination Act satisfies strict scrutiny.

CONCLUSION

The denial of 303's motion for a preliminary injunction and for summary judgment should be affirmed.

February 7, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this 7th day of February, 2018, the foregoing Brief of the American Civil Liberties Union and American Civil Liberties Union of Colorado as *Amici Curiae* in Support of Defendants-Appellees and Affirmance was filed electronically through the Court's CM/ECF system. Noting of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system. I further certify that seven hard copies of the foregoing brief are being sent to the Court via UPS.

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