Case No. 19-1413

In the

United States Court of Appeals

for the

Tenth Circuit

303 CREATIVE, LLC, a limited liability company; LORIE SMITH,
Plaintiffs-Appellants,

v.

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

Appeal from a Decision of the United States District Court for the District of Colorado (Denver), Case No. 1:16-CV-02372-MSK-CBS · Honorable Marcia S. Krieger, U.S. District Judge

BRIEF OF *AMICI CURIAE* LAW AND ECONOMICS SCHOLARS IN SUPPORT OF PLAINTIFFS-APPELLANTS

THERESA LYNN SIDEBOTHAM
TELIOS LAW PLLC
19925 Monument Hill Road
Monument, Colorado 80132
(855) 748-4201 Telephone
tls@telioslaw.com

Counsel for Amici Curiae, Law and Economics Scholars

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

INTEREST OF AMICI CURIAE[1]

The *amici* listed in the Appendix are scholars in law, economics, and philosophy who study, teach, and have published on the application of economic principles to the law and to public policy. *Amici* submit this brief to bring to the Court's attention economic analyses that bear on the issues in this case. In particular, *amici* show that proper economic analyses demonstrate that application of antidiscrimination laws in cases such as this diminishes social welfare. In addition, *amici* address common arguments that any accommodation of religious persons under the antidiscrimination laws would cause dignitary harm and reduce diversity.

INTRODUCTION

Lorie Smith, through her solely-owned company, 303 Creative (Appellants), creates original, customized graphic designs and websites. The parties have stipulated that these graphic and website designs are expressive in nature and that Appellants are willing to work with all people regardless of race, creed, sexual orientation, or gender. In particular, Appellants will create graphics and websites for gay, lesbian, or bisexual clients or organizations run

[1] No party or counsel for a party authored this brief in whole or in part. No one other than *Amici* or their counsel made a monetary contribution to preparing or submitting this brief. Each of the parties has consented to the filing of this amicus brief.

by such persons. Appellants, however, are not willing to create graphic or website designs that promote messages, purposes, events, causes, or goals that would violate their sincerely held religious beliefs, such as messages that demean or disparage others, incite violence, or (as relevant here) promote or celebrate same-sex marriages.

As the parties have stipulated, Ms. Smith is compelled by her religious beliefs to use her talents to promote traditional marriage through the design, creation, and publication of wedding websites. Should Appellants do so, however, it is undisputed that any refusal to produce websites promoting and celebrating same-sex marriages would violate the Colorado Anti-Discrimination Act (CADA). Indeed, Appellants would violate CADA by announcing that they would refuse to produce such websites. In other words, the government seeks to compel Appellants (and every other person engaged in any form of commerce) to either produce websites that promote ceremonies contrary to their religious convictions or abandon the marketplace.

This absolutist position is entirely without support in logic, policy, or precedent. Basic economic principles demonstrate that application of antidiscrimination laws to coerce those with sincere religious objections is unnecessary to ensure access to goods and services to same-sex couples. That point is even more true when the only exception sought by Appellants is

limited to that tiny sliver of the market where a customer requests original, customized designs that conflict with the designer's religious beliefs.

There is, moreover, no social reason to force such merchants to conform to the dominant social consensus. Designers such as Appellents are typically small businesses consisting of one or two individuals with no market power. Due to a plethora of online vendors, competition among such businesses is national in scope. Competitive market forces have produced, and will continue to produce, providers willing and eager to provide products and services for same-sex weddings (as revealed by a simple internet search for "gay friendly" wedding vendors). Indeed, the ordinary give-and-take of the market will lead to better provider-consumer matches, lower prices, and greater market coverage than any coercion regime.

Market forces also ensure that exceptions are narrow and limited. It is not in the interest of any vendor to separate itself from its customer base. It is therefore no surprise that Appellants and those like them only seek to decline requests to create designs that conflict with their religious scruples. As Appellants' behavior demonstrates, they neither seek nor want a blanket exception to providing products to a class of persons. Appellants simply seek to avoid being coerced to produce expressive designs for same-sex weddings in violation of their religious beliefs.

At the same time, Appellants and others like them are all too aware that in today's world of social media they will face inspired boycotts and social pressure, including insults and threats of violence from groups with political power and influence far greater than their own. Under Colorado's antidiscrimination statute, consumers, gay rights organizations, and other businesses may freely discriminate against merchants such as Appellants, explicitly based on a dislike for their religious beliefs. Thus, the fear that allowing religious-based exceptions will undermine the goals of anti-discrimination laws is entirely unfounded.

In contrast, enforcing Colorado's antidiscrimination law against isolated religious believers like Appellants will diminish social welfare in two ways. It will either force unwilling associations or force the exit of a class of market participants. The former market distortion results in poorly matched providers and consumers. The latter reduces social welfare by removing from the market merchants that some consumers may prefer (with or without regard to the merchant's religious views). A smaller marketplace is necessarily *less diverse* and *less competitive* than a larger market with a diverse set of providers.

Enforcement is also not justifiable on the ground that it is necessary to prevent negative externalities, including preserving diversity and affronts to

personal dignity. The key mistake in these claims is that they look only at one side. The argument is that any exceptions for sincere religious objectors will decrease diversity based on sexual-orientation. But, by this logic, allowing for no religious-based exceptions will decrease diversity based on religion. With regard to personal dignity, both sides suffer dignitary losses. Any individual merchant coerced to violate his or her religious conscience or to exit the market certainly has at least an equal claim to dignitary harm. But, as the U.S. Supreme Court has affirmed, the fact that some take personal offense at the conduct of others cannot justify state intrusion into the exercise of First Amendment rights. *Matal v. Tam*, 137 S. Ct. 1744, 1767 (2017).

Accordingly, in the absence of monopoly, there is no economic basis to rule out the granting of exceptions from antidiscrimination laws to those limited by religious convictions. Refusing to do so reduces social welfare.

ARGUMENT

Our country has a long tradition of accommodating diverse viewpoints, especially those motivated by religion. Such accommodations are of critical importance given the explosive growth of regulation in an increasingly religiously diverse and pluralistic society. *See, e.g.*, STEPHEN L. CARTER, THE CULTURE OF DISBELIEF 124-144 (1993) (showing that accommodations are

necessary to avoid tyranny, and debunking argument that religious persons can simply avoid regulatory conflicts by changing their conduct).

In the context of CADA, a thoughtful accommodation based on First Amendment principles would enhance social welfare, increase freedom, and constrain no one's opportunities. Conversely, allowing the state to coerce religiously motivated merchants into violating their religious convictions would diminish social welfare, reduce freedom, and harm not only Appellants but other market participants.

I. Markets Enhance Social Welfare by Matching Provider and Consumer Preferences and Mitigating Discrimination.

It is now beyond debate that markets premised on voluntary exchange serve as bulwarks that protect freedom, advance innovation, and enhance social welfare. *See, e.g.*, MILTON FRIEDMAN, CAPITALISM AND FREEDOM 8-21 (2002). "Underlying most arguments against the free market is a lack of belief in freedom itself." *Id.* at 15.

Because both sides gain from any voluntary transactions, competitive market dynamics lead to the most efficient allocation of goods and services. While economists typically focus on product, price, terms, and quality, markets match providers and consumers based on a wider spectrum of preferences. Examples abound. Merchants who prefer to engage in "socially responsible" business practices will be matched with consumers who prefer

to deal with such providers. Merchants who deal in only "Made in America" products will be matched with consumers who prefer such wares. At the same time, other merchants aim for a larger audience and systematically avoid adopting any idiosyncratic practices that might offend certain political, ethnic, or religious groups.

Markets thus allow merchants who decide to cater to the particular tastes of their chosen customer base. Merchants may, and frequently do, cater to certain ethnicities, religious groups, age groups, occupations, economic groups, etc. Consumers are free to choose the merchants who best suit their preferences.

The central insight is that neither providers nor consumers are homogeneous. There is great variety beyond simply product differentiation. This variety and diversity is a social good because it expands opportunities for producers and consumers alike.

In the absence of monopoly, therefore, consumers benefit from being able to choose among those providers who most closely serve their tastes. In the context of web designers, for instance, consumers may choose to purchase from a particular designer for numerous reasons other than the price and quality of the product, such as seeking to support members of a particular race or ethnicity, a preference for designers of a particular political persuasion, a

like-mindedness with regard to theological issues, etc. By facilitating the accurate matching of consumer and merchant preferences, markets enhance social welfare.

As the U.S. Supreme Court has long recognized, the right of providers and consumers to choose their trading partners is a bulwark that underlies this country's market-based system. The common law guaranteed the right to engage in voluntary trade by protecting the "long recognized" right of a merchant "freely to exercise his own independent discretion as to parties with whom he will deal." *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919). This right is part and parcel of the right to pursue an ordinary calling or trade, which is the "very essence of the personal freedom" protected by the Fourteenth Amendment. *Truax v. Raich*, 239 U.S. 33, 41 (1915).

These rights cover not only economic issues but religious ones. Thus, in *Meyer v. Nebraska*, 262 U.S. 390 (1923)), the U.S. Supreme Court struck down a law prohibiting the instruction of children in a foreign language. The Court held the right of the instructor in a parochial school to teach a foreign language "as part of his occupation" and "the right of parents to engage him so to instruct their children" to be "within the liberty of the [Fourteenth] Amendment." *Id.* at 400. And in *Pierce v. Society of Sisters*, 268 U.S. 510,

534-35 (1925), the Court struck down an Oregon law that prohibited all persons, including those with religious beliefs, from attending private schools.

These rights should be understood as part of a broader framework that embraces freedom of contract and voluntary association in religious and economic life. As Thomas Jefferson wrote, "the first principle of association" is "'the guarantee to every one of a free exercise of his industry, and the fruits acquired by it.'" *Letter to Albert Gallatin (Oct. 16, 1815), in* THE WRITINGS OF THOMAS JEFFERSON (Andrew A. Lipscomb, Albert E. Bergh, & Richard H. Johnston, eds., 1903).

The only exception to this principle is a monopoly situation, in which consumers are faced with a sole supplier who could decide for all sorts of reasons, including invidious motives, to refuse to deal with a group of potential consumers. Long before the rise of modern antidiscrimination laws, common law judges held that all common carriers and public utilities—the two main classes of providers that held monopoly powers—were obligated to supply services to all comers at fair, reasonable, and nondiscriminatory rates. The doctrine was explicitly incorporated into English law in *Allnut v. Inglis*, 104 Eng. Rep. 206 (K.B. 1810). It was carried into American constitutional law dealing with rate regulation in *Munn v. Illinois*, 94 U.S. 113, 126-28 (1876). *See* RICHARD A. EPSTEIN, PRINCIPLES FOR A FREE SOCIETY:

RECONCILING INDIVIDUAL LIBERTY AND THE COMMON GOOD 279-86 (1998). The key rationale behind these decisions is that in the presence of a monopoly no consumer can find any close substitute for the needed good or service.

Those conditions do not hold in the absence of a monopoly; the presence of multiple alternatives greatly mitigates, if not eliminates, the effects of discrimination on any consumer and renders the complex structure of rate regulation superfluous. *See* FRIEDMAN, *supra*, at 108-115; RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 15-58 (1992); GARY S. BECKER, THE ECONOMICS OF DISCRIMINATION 39-47 (2d ed. 1971). Markets ensure that consumers who face potential discrimination can find other, better suited merchants from which to obtain services. Markets punish merchants who choose not to serve certain persons, limiting the prevalence of discrimination. In contrast, imposing antidiscrimination laws on merchants with conscience-based objections undermines the workings of the market. And those merchants do not have any easy way to avoid the imposition. They must either go out of business or face ruinous fines and other sanctions.

II. Protecting Merchants Like Appellants Will Not Undermine the Goals of the Antidiscrimination Laws.

These economic principles give ample basis for protecting merchants like Appellants and others who have conscience-based objections.

A. Market Forces Prevent the Exclusion of Those Seeking Products for Same-Sex Weddings.

A ruling for the state cannot be justified on the ground that consumers will be unable to obtain products for same-sex weddings. Such a result is precluded by powerful market forces.

Those who contend that people like Appellants must be punished invariably cite Title II of the 1964 Civil Rights Act. *See, e.g.*, *Elane Photography, LLC v. Willock*, 309 P.3d 53, 79 (N.M. 2013) (Bosson, J., concurring). But the analogy is inapt. The social conditions under segregation that led to the enactment of that law attacked public institutions that actively supported private aggression and backstopped pervasive private discrimination. At the time, therefore, the "best practical argument for Title II was that it functioned as a corrective against private force and public abuse in government." Richard A. Epstein, *Public Accommodations Under the Civil Rights Act of 1964: Why Freedom of Association Counts as a Human Rig*ht, 66 STAN. L. REV. 1241, 1254-61 (2014). Such conditions do not exist today.

There also is no monopoly here. The custom-made wedding website business is highly fragmented and competitive. Barriers to entry are virtually non-existent, ensuring rapid response to any exclusion.

What is more, a legion of well-structured intermediaries reduces search costs as multiple sites cater to same-sex weddings so that the typical consumer

need only turn on his or her computer to gain full access to a rich array of services from *willing* merchants, including those actively seeking their business.[2] Indeed, a simple internet search for "gay friendly website designer" provides links to designers who explicitly seek to cater to members of the LGBT community.

Coercing the tiny fraction of the market that seeks a religious-based exception cannot be justified by a threat of market exclusion:

> Because antidiscrimination laws' economic purposes are a response to pervasive discrimination, they are not frustrated by discrimination that is unusual. If the law requires religious objectors to identify themselves to the public in order to be accommodated, few are likely to take advantage of that. If gay people are generally protected against discrimination, then a few outliers won't make any difference.

Andrew Koppelman, *Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law*, 88 S. CAL. L. REV. 619, 627-28 (2015); *see also* Thomas C. Berg, *Symposium: Religious Accommodation and The Welfare State*, 38 HARV. J.L. & GENDER 103, 138 (2015) (when balancing

[2] *See, e.g.*, GayPages.com (listing gay friendly website designers - http://www.gaypages.com/category/website-developers/); Equally Wed (https://equallywed.com/), MyGayWedding.com (https://my-gay-wedding.com/), MiLGBTWedding.com (http://milgbtwedding.com/the-expo/), LGBTWeddings.com (http://www.lgbtweddings.com/about-us.html), My-Gay-Wedding.com (https://my-gay-wedding.com), Purple Unions (https://www.purpleunions.com), Here Comes the Guide (https://www.herecomestheguide.com/best/lgbtq-weddings), and RainbowWeddingNetwork.com (http://www.rainbowweddingnetwork.com).

interests, if "the patrons have access, without hardship, to another provider, then the legal burden on the provider is the more serious one").

In competitive markets, protecting merchants like Appellants does not present "a threat to meaningful participation in commercial life." Nathan B. Oman, *Doux Commerce, Religion, and the Limits of Antidiscrimination Law*, 92 IND. L.J. 693, 719 (2017). Nor will it lead to economic balkanization. Indeed, if these fears were warranted, no merchant could ever refuse service to any potential customer for any reason, including their political orientation or other social beliefs. Yet the same law that makes it impossible for religious individuals like Appellants to honor their own beliefs allows other merchants to express their political beliefs by refusing, for example, to provide wares that support President Trump. *See, e.g.*, Herb Scribner, *This 9-year-old boy can't find anyone to bake him a pro-Donald Trump cake*, THE DAILY AMERICAN (Somerset, Pennsylvania), August 9, 2017. It is the redundancy in a competitive market that prevents these individual preferences from dominating social norms.

The prospect of market exclusion is nothing short of fanciful.

B. Market Forces Ensure That Only Those with Sincerely Held Beliefs Will Seek an Exception to the City Statute.

Not only does the market ensure that those seeking services will find well-matched providers, the market also limits the number of people who will

seek an exception to Colorado's statute. *See* BECKER, *supra*, at 39-45 (2d ed. 1971) (showing that competitive forces drive out most forms of market discrimination). Designers who decline requests to create products for same-sex weddings face a number of costs, which will winnow out the insincere, leaving only those whose consciences would force them to leave the marketplace in the face of coercive antidiscrimination law.[3]

First, such merchants bear the cost of lost sales, not only from the declined orders but also from many others who disagree with that provider's stance. For instance, merchants who have declined to provide services for same-sex weddings have faced social-media-led boycotts and a flood of negative reviews on sites such as Yelp.[4]

Potential losses include corporate accounts that fear retribution for doing business with such providers. Indeed, merchants such as Appellants

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[3] *See, e.g.*, Colleen Shalby, *Winery that refused to hold a wedding for same-sex couple reverses course following criticism*, LOS ANGELES TIMES, Sept. 13, 2019, https://tinyurl.com/rbz5ajk.

[4] *See* Amelia Irvine, *How technology and the free market can eliminate discrimination*, THE EXAMINER (Washington D.C.), July 13, 2017; Chris Taylor, *Anti-equality Indiana pizza joint gets seriously trolled, shuts up shop*, MASHABLE.COM, Apr. 2, 2015; Emily Pfund, *Walkerton police still investigating threats to 'burn down' Memories Pizza, prosecutors say*, THE ELKHART TRUTH (Indiana), Apr. 3, 2015; Steve Mocarsky, *Venue reportedly receives threats after refusing to host gay wedding receptions*, THE TIMES LEADER (Wilkes-Barre, Pennsylvania), July 11, 2014.

have experienced the loss of large corporate accounts. And others face the same risk. Consider that the Human Rights Campaign, which rates workplaces on "LGBT equality" and boasts that "199 of the Fortune 500-ranked businesses achieved a 100 percent rating," penalizes companies "found to have a connection with an anti-LGBT organization or activity."[5] The consequences in individual cases can be disastrous, sometimes forcing businesses to close.[6]

Second, merchants who decline requests to create products for same-sex weddings also face *illegitimate* forms of aggressive behaviors, including death threats, abusive phone calls, and a torrent of vitriolic hate mail.[7]

Third, merchants like Appellants must defend against legal challenges. Even if this Court rules in favor of Appellants, businesses seeking protection from antidiscrimination laws will likely still be forced to litigate. After all, a number of legal organizations are eager to challenge such positions.

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[5] Human Rights Campaign, Corporate Quality Index at 6, 9 (2017), http://www.hrc.org/campaigns/corporate-equality18index.

[6] *See, e.g.*, George Brown, *Bakery Forced To Close Over Gay Wedding Denial*, CBS-3 WREG (Memphis, Tennessee), Sept. 4, 2013.

[7] *See, e.g.*, Nikki Krize, *Bridal Shop Owners Get Death Threats Over Same-Sex Policy*, ABC-16 WNEP (Wilkes Barre, Scranton, Pennsylvania), Aug. 2, 2017; Warren Richey, *For those on front lines of religious liberty battle, a very human cost,* THE CHRISTIAN SCIENCE MONITOR, July 16, 2016.

These huge economic and social costs, some legitimate, but many not, ensure that the goals of antidiscrimination laws are not undermined by protecting the few whose convictions would lead them to endure the consequent losses and abuse.

C. Coercing Appellants to Create Websites Over Their Religious Objections Diminishes Social Welfare.

By compelling Appellants and similar merchants to create designs that violate their religious beliefs, the application of antidiscrimination laws in cases like this undermines the workings of market mechanisms. Those merchants forced to violate their beliefs would likely do so reluctantly, decreasing their incentives to do their best work. Moreover, given the threat of legal retaliation, such providers would likely hide their lack of motivation. Consumer search costs are thus increased, and they are less able to find the best provider to match their preferences. In turn, social welfare is diminished by the resulting poor match of provider with consumer.

Alternatively, providers with conscience-based objections will exit the market. This will reduce the variety of providers, diminishing consumer choice. Consumers may prefer such excluded providers for a number of reasons. For instance, some may respect or value the provider's commitment to his or her religious convictions, even if they do not agree with those convictions. Others may hold values that are closely aligned with the

provider's religious or moral convictions. Or another group of consumers, not caring about the merchant's convictions, might simply like the style or quality of the provider's services.

By forcing such merchants out of the market, application of the antidiscrimination law not only harms the providers, it also harms other market participants, diminishing social welfare. *Cf. Telescope Media Grp. v. Lucero*, 936 F.3d 740, 753 (8th Cir. 2019) (holding that application of nondiscrimination ordinance to require religious objector to create videos for same-sex marriages or leave the market violates First Amendment; "this type of compelled self-censorship, a byproduct of regulating speech based on its content, unquestionably 'dampens the vigor and limits the variety of public debate'").

D. Purported Economic Reports Used to Justify Punishment for Merchants Like Appellants Are Inapposite and Faulty.

Proponents of the absolutist, no-exceptions position have cited one-sided reports purporting to demonstrate that discrimination based on sexual orientation "in places of public accommodation has measurable adverse economic effects." *Mullins v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 293 (Colo. App. 2015) (citing Mich. Dep't of Civil Rights, *Report on LGBT Inclusion Under Michigan Law with Recommendations for Action* 74-90

(Jan. 28, 2013) ["*Michigan Report*"])). But such reports do not support that court's claim.

First, the report (and others like it) is irrelevant. It seeks to show economic harm flowing from the failure to enact an antidiscrimination law protecting sexual orientation. *Michigan Report* 74-90. But the issue before this Court concerns only protection for that tiny subset of merchants who, like Appellants, are asked to produce expressive products that conflict with their sincerely held religious beliefs. Whether sexual orientation antidiscrimination laws are desirous does not speak to that narrower issue.

Second, the report is fundamentally flawed on methodological grounds. Its data largely consists of anecdotes and anonymous statements. And the report does not even address, let alone quantify, the losses to companies like Appellants and their customers in its economic calculations. Nor does the report try to explain or quantify the damage that violent and abusive protestors can do to religious merchants like Appellants and their customers. It is, therefore, wildly speculative to attribute any positive economic effect to government-imposed punishment against a merchant's decision not to produce art for same-sex weddings. By imposing heavy administrative burdens and disrupting voluntary markets, it is far more likely that such punishment will have an adverse effect on economic growth.

Third, the report claims to find support in the fact that most major Fortune 50, 100 and 500 companies have adopted policies that forbid discrimination based on sexual orientation. Rather than justifying the need to apply antidiscrimination laws here, the voluntary and widespread adoption of these policies by major corporations gives assurance that LGBT customers will find merchants willing to serve them.

In sum, state coercion against small businesses like Appellants will undercut market choices, not improve them.

III. No Negative Externalities Justify a Refusal to Protect Appellants.

Finally, using government power to coerce religiously motivated merchants into violating their consciences cannot be justified on notions of protecting dignity interests. Each side has claims to violations of their "dignity." *See* Oman, *supra*, at 701. The "indignity" of being forced to provide services in violation of one's conscience or to exit one's profession cannot be easily dismissed. *See* Thomas C. Berg, *What Same-Sex-Marriage and Religious-Liberty Claims Have in Common*, 5 N.W. J.L. & SOC. POL'Y 206, 207-08 (2010).

Moreover, the government seeks to regulate only one side of these voluntary transactions. Its antidiscrimination law (and all others that we are aware of) applies only to providers. Consumers are free (consistent with basic

notions of liberty) to refuse to deal with any provider for any reason. The government would thus condemn the same discrimination by one set of market participants but not the other. There is no basis for doing so. The enforcement of antidiscrimination laws against those with conscience-based objections causes the same negative outcomes that these laws aim to prevent.

The lack of coherent justification is demonstrated by the reasoning of one state supreme court justice who sought to defend such government prejudice. In the end, he simply waved his hands and said that enduring such state coercion in violation of one's conscience or being forced out of the market is simply "the price of citizenship." *Elane Photography*, 309 P.3d at 80 (Bosson, J., concurring). Why being turned down by certain establishments is not a price of citizenship is never explained.

Nor can laws like Colorado's antidiscrimination statute be justified simply by insisting that declining to create expressive products to celebrate and promote a same-sex wedding is offensive to some segments of the community. Standard economic theory takes into account only those externalities whose harm to a stated victim correlates positively with the overall reduction in social welfare. It is for that reason that the standard set of *actionable* externalities, while including aggression, nuisances, and

monopolies, do not embrace the offense that some individuals take at the activities of other persons.

That is for good reason. A broad definition of externality that covers any and all offense taken by others systematically reduces overall social welfare. It would lead to a situation in which every person could veto the activities of others based on a subjective offense. To allow such offense to restrict the activities of other individuals creates a perverse incentive to become ever angrier and more restive in order to gain a leg up on rivals. Let everyone adopt this strategy, and widespread offense by this or that segment of the community will necessarily pit every group in society against others. It is this fundamental point that drove the U.S. Supreme Court's recent and emphatic rejection of any government efforts to restrict "offensive" speech. *See Matal*, 137 S. Ct. at 1767.

Finally, permitting no exceptions cannot be justified by notions of protecting diversity. According to this logic, refusing to grant any religious-based exceptions would *reduce* diversity by driving away religious adherents. Polls already show that the Colorado area is well below the national average in the percentage of those who are religious.[8] Indeed, Denver and Boulder

[8] *See* Pew Research Center, *How religious is your state?* (Feb. 29, 2016), *available at* https://tinyurl.com/v9egunj. Colorado's 35.6% "very religious" results is several percentage points lower than the 40% national average.

have been listed as two of the least religious cities in the country.[9]

The no-exceptions-for-the-sake-of-diversity logic thus favors diversity based on LGBT persons over diversity based on religious adherence. But such discriminatory favoritism is not only unfounded, it is entirely unnecessary. Economic principles demonstrate that religious-based exceptions would increase diversity while ensuring that all are served. *See Brush & Nib Studios, LC v. City of Phx*., 448 P.3d 890, 916 (Ariz. 2019) (rejecting argument that limited exception would undermine purposes of antidiscrimination ordinance).

CONCLUSION

The decision below is socially harmful. In the absence of monopoly, markets ensure that all are served and none are coerced—that same-sex couples can obtain original, customized websites for their wedding, and that religiously motivated merchants can follow their conscience without being forced to abandon their profession. Imposing antidiscrimination laws to force merchants to violate their religious convictions or to leave the market

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Similarly, Colorado's 36.4% "not religious" result is several percentage points higher than the 31% national average.

[9] *See* Antonia Blumberg, *The 30 Least Religious Cities In The United States*, HuffPost (Aug. 8, 2015), *available at* https://tinyurl.com/yd8oeh4b; Gallup, *Provo-Orem, Utah, Is Most Religious U.S. Metro Area* (Mar. 29, 2013), *available at* https://tinyurl.com/v5eaq6z.

undermines freedom and diminishes social welfare. The Court should hold that the government cannot coerce such undesirable and oppressive outcomes.

Dated: January 29, 2020

Respectfully submitted,

By: /s/ Theresa Lynn Sidebotham
Theresa Lynn Sidebotham
Telios Law PLLC
Counsel for *Amici Curiae,*
Law and Economics Scholars

CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

This brief complies with the type-volume limitation of Rules 32(a)(7)(B) and 29(a)(5) of the Federal Rules of Appellate Procedure because it contains 4,708 words, excluding the parts of the brief exempted by Rule 32(f).

This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type-style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this brief has been prepared in a proportionally spaced typeface using 14-point Times New Roman font.

Dated: January 29, 2020

Respectfully submitted,

By: /s/ Theresa Lynn Sidebotham
Theresa Lynn Sidebotham
Telios Law PLLC
Counsel for *Amici Curiae,*
Law and Economics Scholars

APPENDIX

Lloyd Cohen, J.D., Ph.D., is Professor of Law at the Antonin Scalia Law School, George Mason University.

Richard A. Epstein is the Laurence A. Tisch Professor of Law at the New York University School of Law. He is also the James Parker Hall Distinguished Service Professor of Law Emeritus at the University of Chicago, and the Peter and Kirstin Bedford Senior Fellow at the Hoover Institution.

Samuel Gregg, D.Phil. (Oxon.), is Research Director at the Acton Institute.

Timothy R. Lickness is Professor of Law at Trinity Law School, Trinity International University

Allen Mendenhall, M.A., J.D., LL.M., Ph.D., is Associate Dean at the Thomas Goode Jones School of Law, and Executive Director of the Blackstone & Burke Center for Law & Liberty, Faulkner University.

Catherine R. Pakaluk, Ph.D., is Assistant Professor of Social Research and Economic Thought, The Busch School of Business and Economics, The Catholic University of America.

Jay W. Richards, Ph.D., is Research Assistant Professor, The Busch School of Business, The Catholic University of America.

R. Neil Rodgers is Professor of Law at Trinity Law School, Trinity International University.

Lisa A Runquist is Adjunct Professor of Law at Trinity Law School, Trinity International University.

Andrew Seeley is Tutor at Thomas Aquinas College and Executive Director of the Institute for Catholic Liberal Education.

Myron Steeves is Dean and Professor of Law at Trinity Law School, Trinity International University, and Director of the Church Law Center of California.

CERTIFICATE OF DIGITAL SUBMISSION

Counsel for *Amici Curiae* Law and Economics Scholars in Support of Plaintiffs-Appellants hereby certifies that all required privacy redactions have been made, which complies with the requirements of Federal Rule of Appellate Procedure 25(a)(5).

Counsel also certifies that any and all hard copies submitted to the Court are exact copies of the ECF filing from January 29, 2020.

Counsel further certifies that the ECF submission was scanned for viruses with the most recent version of a commercial virus scanning program (Vipre software version 11.0.7633; Definitions version 81128 – 7.83635 [January 28, 2020]; Vipre engine version 3.9.2671.2 – 3.0), and, according to the program, is free of viruses.

Dated: January 29, 2020

Respectfully submitted,

By: /s/ Theresa Lynn Sidebotham
Theresa Lynn Sidebotham
Telios Law PLLC
Counsel for *Amici Curiae,*
Law and Economics Scholars

CERTIFICATE OF SERVICE

I hereby certify that on January 29 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

By: /s/ Theresa Lynn Sidebotham
Theresa Lynn Sidebotham
Telios Law PLLC
Counsel for *Amici Curiae,*
Law and Economics Scholars