No. 19-1413

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 OF COLORADO AND THE AMERICAN CIVIL LIBERTIES UNION 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 approximately two 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 36,000 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.[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.

[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 justiciability in this brief.

SUMMARY OF ARGUMENT

Appellants seek a constitutional right to deny equal service in violation of Colorado's Anti-Discrimination Act ("CADA"). Like the public accommodation laws of nearly every state, CADA 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 lesbian, gay, bisexual, and transgender ("LGBT") individuals, these laws help 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 businesses choosing to operate within it from discriminating in their sales of goods and services to the general public. Plaintiffs-Appellants 303 Creative, LLC and Lorie Smith (together, "303") argue, however, that because the services 303 sells are "expressive," and because Ms. Smith objects to marriage for same-sex couples on religious grounds, the First Amendment entitles 303 to discriminate based on sexual orientation with respect to wedding-related commercial services it intends to offer for sale. What is more, 303 seeks a constitutional right to post a notice on

its website—a literal sign in its virtual shop window—proclaiming that it provides websites for heterosexuals only.

CADA applies to businesses choosing to serve the public at large. It requires that once they choose to offer a product to the public, they not refuse service based on enumerated personal characteristics, including race, religion, and sexual orientation. 303's plan to offer wedding website design services for heterosexual couples—but not same-sex couples—violates that basic rule. At its core, 303's objection is not to a particular *message* requested by any particular customer, but to providing a *service* to an entire class of customers who are not heterosexual.

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. The Supreme Court has never accepted the argument that an evenly applied, neutral non-discrimination law violates the First Amendment. In fact, the Court has clearly stated that discriminatory conduct by business entities "has never been accorded affirmative constitutional protections." *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984); *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). Rather, "[religious and philosophical] objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public

accommodations law." *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rights Comm'n*, 138 S. Ct. 1719, 1727 (2018).

The Supreme Court also has uniformly rejected free-speech defenses lodged by commercial entities that wish to discriminate in the provision of expressive goods or services. None of the ordinary reasons for applying heightened scrutiny is present here. CADA is content- and viewpoint-neutral. Colorado is not attempting to restrain or alter the exchange of ideas or to compel businesses to speak any state-selected message. Rather, CADA is targeted to proscribing a particular form of conduct: discrimination in the provision of goods and services to the public.

303's free exercise claim similarly fails to trigger strict scrutiny. CADA is valid and facially neutral, and there is no indication that CADA cannot or would not be applied neutrally to 303. Moreover, its unsuccessful free exercise claim cannot avoid rational basis review simply by being paired with an unsuccessful free speech claim.[3]

Under any standard of review, moreover, applying CADA to 303's provision of commercial services would be constitutional. CADA furthers Colorado's

[3] The Supreme Court recently granted certiorari in *Fulton v. City of Philadelphia*, 922 F.3d 140 (3d Cir. 2019), *cert. granted* No. 19-123. One of the questions presented reviews the prevailing standard for free exercise claims articulated in *Employment Division v. Smith*, 494 U.S. 872 (1990).

compelling interest in eradicating invidious discrimination, and uniform enforcement is the least restrictive means of achieving that goal.

While the 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 cannot be limited to weddings or sexual orientation discrimination. If the free speech protections of the First Amendment bar a state from applying an anti-discrimination law to the provision of wedding websites because they involve expression, then web-design companies could refuse to provide websites for an interracial or interfaith couple's wedding. Designers providing corporate websites could refuse to do so for businesses owned by women, Muslims, African Americans, or any other group the company's owner did not wish to serve. And under 303's rule, because numerous sellers provide goods or services that involve expression (including stationers, printers, and other producers of custom products), 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.

Similarly, there is no doubt that Ms. Smith's religious objections are sincere, but granting such a religious-based exemption would allow every business owner—expressive or not—"to become a law unto himself." *Reynolds v. United States*, 98 U.S. 145, 167 (1878); *see also Masterpiece Cakeshop*, 138 S. Ct. at 1727

("[I]f [the] exception [permitting a clergy member to object to performing a marriage] were not confined, then a long list of persons who provide goods and services for marriages and weddings might refuse to do so for gay persons, thus resulting in a community-wide stigma inconsistent with the history and dynamics of civil rights laws that ensure equal access to goods, services, and public accommodations.").

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 CADA.

CADA applies to businesses open to the public. The Accommodation Clause 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) (2014). The Communication Clause prohibits such businesses from displaying a notice that any customer will be refused on those bases. *Id.* 303's plan to offer wedding website design services to the public at large but refuse them to same-sex couples—and announce as much on its website—violates these basic principles.

Although framed as a constitutional challenge to CADA, much of 303's brief avows that its proposed course of conduct is not discriminatory. 303 asserts that its refusal is not based on sexual orientation because it will provide other services to LGBT customers, just not wedding websites. 303 Br. 1, 6, 31–32. Yet offering a limited set of services based on a customer's characteristics *is* discrimination. "[I]f a restaurant offers a full menu to male customers, it may not refuse to serve entrees to women, even if it will serve them appetizers." *Elane Photography, LLC v. Willock*, 309 P.3d 53, 62 (N.M. 2013).

303 purports that—knowing nothing but the customers' names (and presumed genders)—it refused to design a wedding website for "Stewart and Mike." 303 Br. 25–26. That illustrates that, regardless of the words or content under consideration, 303 would turn customers away because of their sexual orientation; 303 would have created a website for Stewart and *Mikaela*. If a

business needs to know *who* the service is for to decide whether it will serve them, that is identity-based discrimination. A company refusing to provide wedding websites for interracial or Jewish couples would be discriminating based on race or religion, not making a decision about any "message" inherent in the product itself, even if it said it did so because it disapproved of those unions. Indeed, the Supreme Court has rejected the notion that discrimination against gay people because of their intimate relationships can be separated from discrimination based on 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.").[4]

[4] 303 resists this conclusion by comparing discrimination against gay people who marry to other (hypothetical) business interactions that do not actually implicate CADA. 303 Br. 38–39. For example, it is not true that CADA would compel "a gay tattoo designer to ink" a Bible verse condemning homosexuality, 303 Br. 39, because it is not a service the business would offer to any customers, regardless of their identity. The same holds for an "LGBT-owned printing company['s]" ability to decline to "design t-shirts condemning bisexuality" or a "progressive bar association['s]" refusal to "publish statements promoting Israel." Nor could CADA be read to force "an Atheist singer to sing hymns at a Catholic Easter service," *id.*, since it covers only public accommodations. Even if singers qualify in some circumstances, CADA still would not cover any refusal of service based on a business's disagreement with the *message* a product would convey, as long as its refusal of service is not based on a customer's *status*.

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.

A law that regulates commercial conduct and affects speech only incidentally does not trigger strict scrutiny. 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.[5]

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

"[I]t 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 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).

[5] 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 CADA 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.

The First Amendment is not infringed when the government enforces a generally applicable regulation of commercial conduct against an "expressive" business. 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 . . . business practices." *Associated Press v. United States*, 326 U.S. 1, 7 (1945); *Associated Press v. NLRB*, 301 U.S. 103, 132 (1937).[6] In contrast, a law specifically requiring a newspaper to print particular content (or forbidding the same) 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

[6] 303's invocation of speech cases interpreting a provision of the Communications Decency Act does not alter the analysis. *See* 303 Br. 36–38 & n.8. As 303 acknowledges, hosting of *third-party content* is not at issue here, and "the CDA does not immunize [it]." *Id.* at 38 n.8.

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 specifically targeting a law firm's speech by, for example, preventing it from bringing cases that "challenge existing welfare laws," would "implicat[e] central First Amendment concerns." *See, e.g.*, *Velazquez*, 531 U.S. at 547–48.

303 asserts that its websites and graphics are "pure speech." 303 Br. 30. But CADA does not tell the company how to design or edit its websites; it regulates only its sale of services. Businesses that provide websites to the public are just as subject to generally applicable regulations of their commercial conduct as newspapers and law firms. *See Elane Photography*, 309 P.3d at 66. 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 health regulation governing needle disposal, simply because video games and tattoos are expression protected by the First Amendment. Such businesses are likewise not exempt from anti-discrimination laws.

Thus, even though 303's work product involves "editorial control and judgment," 303 Br. 29, 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.* ("*FAIR*"), 547 U.S. 47, 62 (2006). The relevant question is not the nature of a business's product, but whether CADA targets expression or prohibits a course of conduct. Here, it prohibits conduct: discriminating in the provision of goods and services. *See id.* at 62 (finding no "abridgement of freedom of speech" when a law "make[s] a course of conduct illegal" even where "the conduct was in part initiated, evidenced, or carried out by means of language").

2. CADA is not content- or viewpoint-based, so there is no reason to apply 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 CADA is content- and viewpoint-based. 303 Br. 40–45.

To the contrary, "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). Public accommodation laws do not "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." *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 572

(1995); *see also Martinez*, 561 U.S. 661, 694–95 (2010) (non-discrimination policies "draw[ing] no distinction between groups based on their message or perspective . . . [are] textbook viewpoint neutral"); *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 CADA is content-based because it compels the communication of content that it would not otherwise convey. 303 Br. 40. Yet CADA does not compel the creation of any content at all, let alone content on any particular topic. 303 also argues that CADA is content-based because it is triggered by the business's decision to offer wedding websites as opposed to websites for other purposes, such as those about "clean energy or gun control." *Id.* 303 misunderstands how CADA's equal-treatment requirement works: A company may not refuse to create a website discussing clean energy for an African American customer if it would make the same website for a white customer. That is, CADA requires a company to provide a 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).

303's reliance on *Telescope Media Group v. Lucero*, 936 F.3d 740 (8th Cir. 2019), and *Brush & Nib Studio, LC v. City of Phoenix*, 448 P.3d 890 (Ariz. 2019), is unavailing. 303 Br. 40–44. Those cases reasoned that antidiscrimination laws

applied to a videography company and calligraphy studio were content-based because they required the creation of products related to the topic of same-sex weddings. To begin with, *Brush & Nib*'s analysis was "limited" to only the "custom wedding invitations" that were "materially similar" to those contained in the record; the court did not confer a "blanket exemption" for all of the studio's business operations, notwithstanding that it created other custom paper products for weddings. *See* 448 P.3d at 895–96, 916. By contrast, 303 has not limited its objection to particular text on custom websites. In any event, those cases not only miss the mark, they upend decades of First Amendment jurisprudence.

The relevant inquiry is not whether application of the law would result in businesses having to create products reflecting content to which they object. The question is whether the *law* draws distinctions based on content. And CADA does not "target speech or discriminate on [that] basis." *Hurley*, 515 U.S. at 572; *see also Martinez*, 561 U.S. at 695 ("[A] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.").

303 contends that CADA is viewpoint-based because it compels only viewpoints "promoting" same-sex marriage. 303 Br. 41. But CADA prohibits businesses from refusing to provide goods and services on grounds of customers' sexual orientation, regardless of a business's views on marriage or any other

subject. *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 623–24 (1984).

303's argument would invalidate not only Colorado's law, 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. The Supreme Court has rightly rejected that position. *See, e.g.*, *Mitchell*, 508 U.S. at 487; *see also Madsen v. Women's Health Ctr.*, 512 U.S. 753, 763 (1994) (reasoning that "the fact that [an] injunction cover[s] people with a particular viewpoint does not . . . render the injunction content or viewpoint based").

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

303's objection that CADA compels it to express a message with which it disagrees, 303 Br. 33, does not alter the analysis. CADA requires no state-mandated messages. Just as it would not impermissibly "compel speech" for a state to prohibit a photography studio that offers corporate headshots to the public from refusing to provide the same portraits for female employees that it provides for male employees, Colorado does not impermissibly "compel speech" by requiring that 303 offer same-sex couples the same services it would offer heterosexual couples.

303's reliance on *Hurley*, 303 Br. 34–35, is misplaced. *Hurley* involved a "peculiar" application of a public accommodation law to a privately organized 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 regulated nothing *but* expression—the content of the private parade sponsor's speech. *Id.* at 573. Here, 303 is a business providing services to the public, not a private expressive association. *Hurley* itself distinguished the standard application of public accommodation laws to such businesses as constitutional. *Id.* at 578.[7]

To expand *Hurley*'s holding would put courts in the impossible "business of deciding which businesses are sufficiently artistic to warrant exemptions from antidiscrimination laws." *Elane Photography*, 309 P.3d at 71. Not only would such a result be contrary to Supreme Court precedent, it would create a standard that could

[7] The other compelled speech cases that 303 cites are not on point. 303 Br. 35–36. *Wooley v. Maynard*, 430 U.S. 705 (1977), for example, involved a law requiring citizens to express a specific, state-selected message: the state motto "Live Free or Die" displayed on their license plates. *Id.* at 715. CADA does not require businesses to express any state-chosen message.

Neither of the other cases cited dealt with applying antidiscrimination laws to businesses acting as public accommodations. *See McDermott v. Ampersand Publ'g, LLC*, 593 F.3d 950, 962 (9th Cir. 2010); *Claybrooks v. Am. Broad. Cos.*, 898 F. Supp. 2d 986, 998–99 (M.D. Tenn. 2012).

not withstand long-term application.[8]

Moreover, this case is also dramatically different from cases in which 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 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), a state agency ordered a utility company to include in its billing envelope the newsletter of an environmental group with which the utility disagreed. Both the challenged laws favored opposing speech in a content-based way: the right of reply was triggered by certain content, and the regulation imposed a content-based penalty. Here, CADA requires just that Colorado businesses open to the public offer the same goods and services to heterosexual couples as they do to LGBT customers. Any effect on speech is entirely incidental.

[8] The decisions in *Telescope Media*, 936 F.3d 740, and *Brush & Nib*, 448 P.3d 890, mistakenly invite courts to apply different First Amendment standards based on the nature of the product sold. Such a standard is neither consistent with precedent, nor susceptible to clear or uniform application. Indeed, advocates for treating wedding cakes as protected speech failed to articulate a workable test when questioned at oral argument, and the Supreme Court declined to grant them such an exemption. *See* Oral Argument Transcript 11–19, *Masterpiece Cakeshop*, 138 S. Ct. 1719.

Even where, unlike here, a law requires entities to speak particular words or 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*, a coalition of law schools argued that a law requiring them to provide equal access both to military and non-military recruiters compelled them to endorse military recruiters' message of discrimination embodied in the Don't Ask, Don't Tell policy; the schools particularly objected on First Amendment grounds that they would have to send e-mails and post bulletin board messages on those recruiters' behalf. 547 U.S. at 52–54, 61–62. The Supreme Court rejected the claim, reasoning that "[a]s a general matter, the [law] 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. The Supreme Court has explicitly disapproved of businesses posting signs saying "no goods or services will be sold if they will be used for gay marriages," as they would "impose a serious stigma on gay persons." *Masterpiece Cakeshop*, 138 S. Ct. at 1728–29. In *FAIR*, the Court explained that the government "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." 547 U.S. at 62. 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). No court has countenanced such a result.

In *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973), the Court held that Pittsburgh could constitutionally enforce its anti-discrimination ordinance to prevent a newspaper from publishing help wanted advertisements in 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 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. In *Pittsburgh Press* and *Ragin*, the question was whether a newspaper could be 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. It does not. Governments undoubtedly have the power to prevent invidious discrimination, whether in the form of discriminatory acts or a publicized discriminatory policy.[9]

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 *Smith*, "the right of free exercise does not relieve an individual of the 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)." 494 U.S. 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.

[9] 303 is free to post a notice saying it does not endorse customer events for which it has provided websites. *See FAIR*, 547 U.S. at 65. What 303 may not do is enjoy the advantages of being open to the public at large while advertising that it categorically will not serve certain members of the public. CADA's Accommodation Clause, Colo. Rev. Stat. § 24-34-601(2) (2014), bars such a practice in that it prohibits the denial of equal enjoyment of goods and services.

A. CADA Is Neutral on Its Face and as Applied.

CADA is facially neutral, and 303 does not contend otherwise. Nor could 303 contend that the law was not applied neutrally to it, since the law has not been applied to it at all.

In *Masterpiece Cakeshop*, the Supreme Court invalidated, on free exercise grounds, one application of CADA based on animus evinced by the adjudicating decisionmaker. *See* 138 S. Ct. at 1728–29. Here, there has been no application of the law against 303, no decisionmaker, and no animus. 303 argues that CADA cannot be neutrally applied—apparently ever—because of the statements at issue in *Masterpiece Cakeshop*. 303 Br. 46–47. Yet none of them relates to CADA's application here. 303 offers no authority for the extraordinary contention that one suspect application of a law renders impermissible all subsequent applications.[10] The Supreme Court cannot have meant that Colorado can never enforce CADA going forward, or the decision would have said as much. To the contrary, the Court reaffirmed that CADA *can* be enforced, since "general[ly] . . . [religious] objections do *not* allow business owners . . . to deny protected persons equal access

[10] 303's citation of *Felix v. City of Bloomfield*, 841 F.3d 848 (10th Cir. 2016), does not aid it. 303 Br. 46. *Felix* sets out a test applicable under the Establishment Clause, not the Free Exercise Clause. 841 F.3d at 863.

to goods and services." *Masterpiece Cakeshop*, 138 S. Ct. at 1727 (emphasis added).

303 next maintains that "[e]ven during this litigation," Colorado has made statements evincing hostility. 303 Br. 47. But Colorado's statements are factual descriptions of the relief 303 seeks—to discriminate against same-sex couples on the basis of its religious beliefs—and an observation that such relief could extend to discriminating against interracial couples as well.

Nor does Colorado apply CADA more favorably to speakers with non-religious reasons for declining customers' requests. 303 Br. 47–49. The Supreme Court has already addressed the three charges of discrimination filed against the bakeries that 303 cites. As Justice Kagan's concurrence in *Masterpiece Cakeshop* explains, there was no inconsistency in the state's treatment of those cases, and the Court's opinion does not suggest otherwise. 138 S. Ct. at 1733–34 (Kagan, J., concurring). CADA was consistently applied where those bakeries refused service based on customers' requested messages, not customers' identities.[11] *Cf. Bob Jones Univ. v. United States*, 461 U.S. 574, 604 n.30 (1983) (IRS policy barring racial discrimination does not impermissibly "prefer[] religions whose tenets do not

[11] For the reasons explained in Section I, *supra*, contrary to 303's suggestion otherwise, *see* 303 Br. 49, 303 is not similarly situated to those bakeries.

require racial discrimination over those which believe racial intermixing is forbidden").

B. CADA Is Generally Applicable.

In determining whether a law is generally applicable, courts look 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.

CADA is generally applicable because it applies across the board to businesses open to the public and regulates sales, 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, CADA applies to all places of public accommodation doing business in the State, without regard to religion.

CADA is also generally applicable because the state applies it to prohibit discrimination—regardless of the motivation. That 303 seeks the right to violate CADA 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.[12]

IV. CADA SATISFIES EVEN STRICT SCRUTINY.

As shown above, application of CADA fails to trigger strict scrutiny under the Free Speech or Free Exercise Clause. But even if strict scrutiny applied, CADA's application would be constitutional.

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

Anti-discrimination laws ensure "society the benefits of wide participation in political, economic, and cultural life." *Roberts*, 468 U.S. at 625; *see also Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 733–34 (2014). In *Masterpiece Cakeshop*, the Supreme Court affirmed that it is "unexceptional" that the "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." 138 S. Ct. at 1728. And the Court has recognized repeatedly that the government has a compelling interest in "eliminating

[12] Application of CADA also fails to trigger strict scrutiny under the hybrid rights doctrine, which applies in cases involving both a free exercise claim and 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). Because 303's free speech claim is not viable, 303 has failed to present a hybrid rights claim.

discrimination and assuring . . . citizens equal access to publicly available goods and services." *Roberts*, 468 U.S. at 624, 628; *see also Bob Jones Univ.*, 461 U.S. at 604.

Contra 303's suggestion, 303 Br. 54 & n.11, the harm of being refused service because of one's identity is not erased just because a customer might be able to obtain goods elsewhere. *Heart of Atlanta Motel*, 379 U.S. at 250 (reasoning anti-discrimination laws "vindicate the deprivation of personal dignity that surely accompanies denials of equal access to public establishments" (internal quotation marks omitted)). "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).

Both *Telescope Media* and *Brush & Nib*, relied on by 303, erred in conflating the compelled speech analysis with the compelling interest analysis by suggesting that no compelling interest is present where a business's product involves speech. *See Telescope Media*, 936 F.3d at 755; *Brush & Nib*, 448 P.3d at 914–15. Both courts recognized that the eradication of discrimination is a compelling government interest. *See Telescope Media*, 936 F.3d at 777 ("[P]ublic accommodations laws further compelling state interests of eradicating discrimination and ensuring residents have equal access to publicly available goods and services."); *Brush & Nib*, 448 P.3d at 914 ("ensuring equal access to publicly available goods and services for

all citizens, regardless of their status" is a "compelling interest"). But by concluding that this interest does not apply in the context of expressive products, they misunderstand the nature of the harm addressed by laws against discrimination. *See Heckler v. Mathews*, 465 U.S. 728, 739 (1984) ("[D]iscrimination itself . . . can cause serious non-economic injuries."); *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)). That same compelling interest in ending discrimination remains even where the product at issue is expressive.

303's contention that Colorado lacks a compelling interest in prohibiting its refusal to provide wedding-related services to same-sex couples amounts to a disagreement with the conclusion that its conduct is discriminatory. 303 Br. 54. But 303 *does* discriminate against LGBT clients if it refuses to offer them wedding website services on the same basis as other clients. *See supra* Part I.

303 maintains also that applying CADA in this case is "demeaning" to Ms. Smith. 303 Br. 55. That Ms. Smith's sincerely held religious beliefs are in tension with an anti-discrimination law governing her business undoubtedly creates difficulty for her. *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 "head of household" entitled to health insurance as employment benefit). But that does not negate Colorado's compelling interest in eradicating discrimination in the commercial marketplace.

B. Uniform Enforcement of CADA 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, CADA is "precisely tailored" to achieve its interest. *See Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 800 (1988). Every instance of discrimination "causes grave harm to its victims." *United States v. Burke*, 504 U.S. 229, 238 (1992). 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.

Contrary to 303's claims, 303 Br. 55, CADA does not cover message-based objections to service. *See*, *supra*, Section I. 303 also contends that CADA is not narrowly tailored because Colorado could choose, as it alleges other jurisdictions have done, to exempt businesses that "speak about weddings," "highly selective entities," or "expressive businesses." 303 Br. 56. But CADA is tailored to *Colorado*'s interest, which it achieves by applying the law to the extent that businesses offer goods and services to the general public. By seeking a carve-out,

303 "misperceives the breadth of the compelling interest" in eliminating discrimination against LGBT people: "[T]hough that interest may be implicated to varying degrees in particular contexts, . . . the interest remains." *Wolfson v. Concannon*, 811 F.3d 1176, 1182 (9th Cir. 2016) (internal quotation marks omitted).[13]

Because it is narrowly tailored to serve a compelling interest in eradicating discrimination in the commercial market, CADA satisfies any standard of review, including strict scrutiny.

CONCLUSION

The denial of 303's motions for a preliminary injunction and summary judgment, as well as the grant of Defendants' motions to dismiss and for summary judgment, should be affirmed.

April 28, 2020

Respectfully submitted,

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[13] 303's claim that CADA is not narrowly tailored because Title VII permits production studios to make classifications in casting decisions is meritless. 303 Br. 55. Title VII does not set the limit of anti-discrimination law or narrow tailoring. *See Hurley*, 515 U.S.at 572; *Roberts*, 468 U.S. at 625–26.

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I HEREBY CERTIFY that this 28th day of April, 2020, the foregoing Brief of the American Civil Liberties Union of Colorado and American Civil Liberties Union 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.

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