No. 19-1413

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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303 CREATIVE LLC et al.,

Plaintiffs-Appellants,

v.

AUBREY ELENIS, et al.,

Defendants-Appellees.

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

BRIEF OF FLOYD ABRAMS, ERWIN CHEMERINSKY, WALTER DELLINGER, KERMIT ROOSEVELT, AMANDA SHANOR, AND REBECCA TUSHNET AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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INTEREST OF *AMICI CURIAE*[1]

Amici are scholars of the First Amendment.[2] They have an interest in promoting the sound interpretation of the First Amendment, in a way that is faithful to its purpose and precedent, to avoid diluting the rigorous protection of free expression.

Amici's names are set forth in the Appendix.

SUMMARY OF THE ARGUMENT

A business that opens its doors to the public cannot use the First Amendment as a shield for discrimination. A designer's work may be creative. The designs she chooses to create may reflect her values. But *whom* she serves is not an act of constitutionally protected expression. Whether a business sells art, artisanship, or brute labor, its proprietors cannot claim a constitutional right to discriminate in the customers they will serve.

Appellant is a website designer with a business plan to refuse service to same-sex couples. She would like to open her doors to *some* of the public, and has sought the blessing of the courts of her right to do so notwithstanding Colorado's public accommodations law forbidding businesses to deny service on grounds

[1] Pursuant to Fed. R. App. P. 29(a)(1)(2), counsel for *amici* states that all parties have consented to the filing of this brief. 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 fund the preparation or submission of this brief.

[2] Pursuant to Fed. R. App. P. 29(a)(1)(4), counsel for *amici* states that *amici* are individuals and therefore have no parent corporations to disclose.

including sexual orientation. But an artist that chooses to sell her creations to the public is, like any commercial actor, bound by generally applicable laws, including laws that forbid businesses to refuse service on particular grounds. Rembrandt may refuse to paint religious scenes, but the First Amendment would not shelter him from antidiscrimination laws if he resolved to sell his paintings only to Calvinists, not Catholics.

Colorado's public accommodations law regulates conduct, not the creation of messages. One can imagine a difficult case in which a general law is applied to compel or constrain the message a vendor must sell. This is not that case. Colorado has not applied its public accommodations law to require Appellant to design a website with any particular content or point of view. Appellant may refuse to create a message if she would refuse to create the message for any customer. She may decline to create for any and all customers a website saying "God Bless This Gay Marriage," or "Bong Hits 4 Jesus," or "The South Will Rise Again." But as this case comes to the Court, no message has been forced upon Appellant; she simply seeks a facial ruling that she has a First Amendment license to discriminate among her clientele. And the Colorado law, on its face, regulates only the conduct of selecting customers; this case raises only the question of whether a public business has a First Amendment right to discriminate in the

provision of services. Under established precedent, the answer to that question is no.

Appellant claims that if she is compelled to create wedding websites for same-sex couples she will be conscripted in service of a message she rejects. But selling her services to all customers on equal footing no more inculpates a designer in the promotion of marriage equality than it allies the pro-segregation proprietor of a Dixie-themed barbecue restaurant with a message of racial mixing, or the webmaster of this Court's website with the rules and opinions the site contains. As First Amendment jurisprudence has never recognized a conscience-based exception to conduct-regulating laws of general application, no reasonable observer would infer that Appellant's compliance with Colorado's public accommodations law communicates her views on marriage.

Colorado provides that its citizens may purchase goods and services even if they do not look, or love, or worship like the vendor. Appellant has a First Amendment right to pick her message, but not to discriminate among her customers based on their sexual orientation.

BACKGROUND

Two background points bear mention.

First, Colorado's Anti-Discrimination Act (the "Act") regulates conduct, not speech. The provision that Appellant preemptively seeks to avoid provides:

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

Colo. Rev. Stat. § 24-34-601(2)(a). The law regulates the act of refusing, withholding, or denying service. It does not regulate what messages a business owner can or must create for sale.

Second, the Act has not been applied in this case to require Appellant to create any particular website. Appellant filed this lawsuit before fielding a single wedding website order, from anyone. Appellant is seeking a declaration that she can refuse to design wedding websites for customers who are gay, without regard for what the website would contain. The message inherent to a wedding website is one that Appellant is willing to create and sell. The interest asserted here is in choosing who gets to buy the product bearing that message.

ARGUMENT

THE FIRST AMENDMENT DOES NOT PROTECT A RIGHT TO CHOOSE CUSTOMERS BASED UPON SEXUAL ORIENTATION

a. A public accommodations law that restricts a commercial business's refusal of customers, but not the messages put to market, does not implicate the First Amendment. The Constitution prohibits laws "abridging the freedom of speech." It does not "guarantee a right to choose employees, customers, suppliers, or those with whom one engages in simple commercial transactions, without

restraint from the State." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 634 (1984) (O'Connor, J., concurring in part and concurring in the judgment). On its face, Colorado's public accommodations law is a content-neutral, speech-neutral law. The Act prohibits commercial actors from discriminating among potential customers based on their sexual orientation, but it does not restrict or mandate the messages they create. It therefore does not offend the First Amendment. *See, e.g.*, *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 572 (1995) (provisions that ensure access to public accommodations "do not, as a general matter, violate the First or Fourteenth Amendments").

Of course, creating a website may be expressive. But the Act does not regulate expressive content: It does not require the creator of the message to adopt it as her own, nor does it compel businesses to incorporate in their products a unique message that they have not produced and would not produce for any other customer. Under the Act, a jeweler may refuse to create a swastika pendant if she is unwilling to make that pendant for any other buyer. A purveyor of Confederacy memorabilia may refuse to stock "Black Lives Matter" signage not otherwise in its inventory. Appellant is not obliged to produce a website advocating for marriage equality if she would design that message for no couple. The Act does not infringe a speaker's "autonomy to choose the content of his own message," *Hurley*, 515 U.S. at 573, including the message he is willing to sell to the market.

The Court's First Amendment precedents forbid the "peculiar" application of antidiscrimination law in such a way as to interfere with an individual's own speech. *Hurley*, 515 U.S. at 572, 578. Thus, the organizers of a parade cannot be compelled to include a banner they do not endorse. *Id.* at 574. A private membership organization cannot be required to include leaders who espouse values antithetical to the organization's own. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 655, 659 & n.4 (2000). But Appellant is not obliged by the Act to create a website any different in content from the websites she is willing to create for other customers. Appellant wishes to sell to customers whatever expression may inhere in a wedding website. Colorado law merely forbids her to discriminate in her sales against African Americans, women, gays, interracial couples, persons of Irish descent, and other groups protected under the Act.

The regulation of commercial conduct in this way is entirely consistent with the protections of the First Amendment. The First Amendment does not include the right to violate content-neutral laws regulating commercial conduct. *Rumsfeld v. Forum for Acad. & Inst. Right, Inc.*, 547 U.S. 47, 65-66 (2006) ("*FAIR*"). Commercial transactions are open to "rational regulation." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 634 (1984) (O'Connor, J., concurring in part and concurring in the judgment). Commercial activities are subject to generally applicable tax laws, safety rules, and labor regulations that have only an incidental

effect on speech, even if the daily business of the regulated entity or person is expression. *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 581 (1983)*; see Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011). A law firm produces speech by authoring briefs and memoranda, but the First Amendment does not protect its hiring decisions based on race even if the firm believes that the race of attorneys signing the briefs will communicate a message about its commitments. An orchestra engages in speech at every symphonic performance, but likewise has no constitutionally protected right to refuse to hire female percussionists even if it believes their public appearance with the orchestra will communicate a message about its musical philosophy. The neutral regulation of these businesses' employment activity is not subject to heightened scrutiny simply because their daily work is expressive. *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.").

The decision to transact does not achieve constitutionally protected status when it is cloaked in principles of conscience, however heartfelt. The Court has "rejected the view that conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *FAIR*, 547 U.S. at 65-

66 (citation and internal quotation marks omitted); *see United States v. O'Brien*, 391 U.S. 367, 376 (1968) ("We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends to thereby express an idea."). Appellant's preference to avoid gay customers is not protected by the First Amendment.

b. Selling website design services to all customers on equal footing does not inculpate a provider of website design services in a particular message. Appellant claims she will appear complicit in the expressive conduct of her clients if she designs the websites for their weddings, but a reasonable observer could draw such a conclusion only if the law recognized a conscience-based exception to commerce-regulating laws of general application. A lunch counter is not understood to be anti-segregation when it serves African Americans. A spouse does not infer that Hallmark remembered her anniversary. The proprietors of Legacy.com have not personally comforted the bereaved by providing a forum for messages of condolence. This question has long been settled. Wedding guests would not look to Appellant for a moral accounting if the happy couple were tattooed, or divorced, or ardent Flat-Earthers. Appellant no more participates in a same-sex couple's expression of love by providing them with a website that "keep[s] a couple's friends and family informed about the upcoming wedding." Brief for Appellants 303 Creative LLC and Lorie Smith at 4. Reasonable people

do not construe messages to be endorsed, in their use, by the vendors who provide the platforms for them. Only if the court were to recognize Appellant's claim would there be any reasonable basis for concluding that artisans or businesses serving customers protected by public accommodations laws agree with those customers' lifestyles.

The Supreme Court has indicated that the "details might make a difference" if a vendor's product or service is custom-made. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1723 (2018). But this case does not present the difficult questions that could inhere in applying the Act to require a business to tailor its product for a particular customer, because the only detail is the *identity* of the customer: In this facial challenge, Appellant is seeking blanket authority to refuse to serve same-sex couples on the ground that merely identifying them on a wedding website, whatever else the website says, would create a message she rejects. The signal that detail sends, if any, concerns her conduct of serving customers consistent with the requirements of antidiscrimination laws. Appellant's argument would equally permit her to refuse the business of a couple with Jewish names; an obituary website to refuse memorials disclosing a Muslim cemetery; an electronic invitations website to refuse events hosted by a woman. Ollie McClung in *Katzenbach v. McClung*, 379 U.S. 294 (1964), and Maurice Bessinger in *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968), may

have firmly believed that serving black customers undermined their commitment to the inequality of the races. But the First Amendment provided no basis for their refusal to comply with antidiscrimination laws. Appellant too is seeking to avoid the regulation of commercial conduct, not the regulation of speech.

Appellant's argument for avoiding the Act has no discernible boundary. Appellant claims an expressive interest in choosing the user when an artistic product is sold commercially. But nearly every human activity—including activities that are offered for sale—can be cast as expressive in some way, and nearly every conduct-regulating law will have some incidental effect on behavior that is not purely mechanistic. A holding that a business owner inevitably partakes in the expressive conduct of its customers would undermine every public accommodation law in the country, and could invite erosion of fundamental First Amendment protections as courts struggle to parse the conscientious objections of business owners in the enforcement of antidiscrimination laws. There is no coherent distinction between a refusal to serve women, or Catholics, or same-sex couples, or African Americans. But courts uncomfortable with a rule permitting Ollie's Barbecue to resume its practice of refusing service to African Americans may be tempted to adopt artificial and unsound distinctions for some groups or some businesses, stretching First Amendment doctrine to its breaking point.

By faithfully adhering to the longstanding precedent upholding reasonable antidiscrimination laws from constitutional challenge, the Court can avoid the dilution of First Amendment principles that could perversely result from the freedom Appellant asserts. A business cannot claim an expressive prerogative to pick and choose its customers, however strongly held its reasons for refusing sale.

CONCLUSION

For the foregoing reasons, as well as those presented in Appellees' brief, the Court should affirm the order below.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

(1) This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because this brief contains 2,477 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

(2) This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Office Professional Plus in 14-point Times New Roman font.

Dated: April 29, 2020

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CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY REDACTIONS

I hereby certify that with respect to the foregoing:

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CERTIFICATE OF SERVICE

I hereby certify that 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 on April 29, 2020, which will automatically send notification to the counsel of record for the parties.

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