

Case No. 19-1413

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

303 CREATIVE LLC AND LORIE SMITH,
Plaintiffs–Appellants,

v.

AUBREY ELENIS, ET AL.,
Defendants–Appellees.

APPEAL FROM THE U.S. DISTRICT COURT FOR THE DISTRICT OF COLORADO
HON. MARCIA S. KRIEGER, CHIEF JUDGE • CASE No. 1:16-cv-02372-MSK

***AMICI CURIAE* BRIEF OF SCHOLARS OF BEHAVIORAL SCIENCE AND
ECONOMICS IN SUPPORT OF APPELLEES**

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STATEMENT OF IDENTITY, INTEREST, & AUTHORITY

Amici are 10 professors in the fields of economics, sociology, psychology, law, and public policy who engage in significant research and teaching on behavioral science and behavioral economics (the “the Behavioral Economics Scholars”). *See* Appendix of Amici (listing individual *amici*). This brief addresses issues that are within the Behavioral Economics Scholars’ particular areas of scholarly expertise.

Behavioral economics applies psychological and sociological insights into human behavior to explain economic decision-making. This field has shown that consumer behavior in many situations systematically departs from that predicted by traditional, neoclassical economic theory, which assumes more purely rational, mathematical decision making.

Another set of *amici curiae*, the Law and Economics Scholars (“L&E Scholars”), write in support of Appellants and ask the Court to find Colorado’s anti-discrimination law invalid because, they say, principles of neoclassical economics prove the law is unnecessary and counterproductive. But the research of the Behavioral Economics Scholars and others working in similar and related disciplines has shown that those neoclassical principles often provide an incomplete or artificially constrained view of the real world, with corresponding limits on their predictive abilities. As a result, the Behavioral Economics Scholars can help the Court better evaluate whether the arguments presented by L&E Scholars provide a reliable basis upon which to evaluate Colorado’s law.

In addition to their arguments based on neoclassical economics, L&E Scholars present a surprising amount of non-economic editorial regarding the perceived dangers of political correctness (*see* L&E Scholars *Amici Curiae* Brief (“L&E ACB”) at 21), the threats to social welfare and public debate (L&E ACB at 17), the threats to diversity (L&E ACB at 21-22), and the unsubstantiated belief that people of faith face greater discrimination in the United States than members of the lesbian, gay, bisexual, and transgender (“LGBT”) community (*see* L&E ACB at 14-16). The Behavioral Economics Scholars offer no response to these normative arguments except to note the extent to which they are based on selective anecdote, at most, and not on scholarly authorities of any kind. Rather, the Behavioral Economics Scholars write only to dispel the notion that any contemporary consensus regarding economic principles supports discrimination as a societal good.

All parties have consented to the filing of this brief. *See* Fed. R. App. P. 29(a)(2) & (4)(D).

STATEMENT OF AUTHORSHIP/FUNDING

No counsel for any party has authored this brief in whole or in part, and no person other than *amici* or their counsel has made a monetary contribution to the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(E).

SUMMARY OF ARGUMENT

Appellants 303 Creative, LLC and Lorie Smith, and L&E Scholars attack the State of Colorado’s anti-discrimination law as unjustified by economic necessity. Notwithstanding the fact that the district court did not consider an economic justification when upholding Colorado’s law, they argue that it is unnecessary to prohibit commercial discrimination because market forces alone will “ensure access to goods and services to same-sex couples.” L&E ACB at 2. In support, they cite neoclassical economic theories, which assume that all economic actors make purely rational choices designed to maximize their economic self-interest and are often used to predict macro-economic decision making. In this way, they suggest a kind of scientific justification for their belief that discriminatory business practices ought not to be regulated.

But decades of behavioral-economic research reveal that those neoclassical assumptions are often incorrect. As common sense would suggest, modern scholarship has shown conclusively that human beings are not perfectly rational and, as a result, whatever traditional models would predict in theory, the actual market does not reliably self-correct and produce welfare-maximizing outcomes. *E.g.*, Oren Bar-Gill, *Seduction by Contract: Law, Economics, and Psychology in Consumer Markets* (“*Seduction by Contract*”) (2012). As a result, the Court’s consideration of policy implications of constitutional claims should not rest on the incomplete and often

inaccurate assumptions of neoclassical economics. L&E Scholars' arguments reflect policy preferences, rather than the scientific certitude.

Indeed, tacitly recognizing that their prediction of a self-correcting free market has proven inaccurate in the context of racial discrimination, L&E Scholars' argue that economic conditions in the Jim Crow South involved a "monopoly" of discriminatory businesses, which interfered with the proper functioning of the market. *See* L&E ACB at 5, 7, 10, 11. They contend that no similar distortion is present in today's market that would inhibit gay individuals from participating in the marketplace—despite overtly acknowledging that same-sex couples still find themselves resorting to lists of "gay-friendly" businesses to avoid homophobic reactions from business owners, harassment, or worse. *See* L&E ACB at 11, 12 & n.2. But, their arguments reveal no principled reason to distinguish between the expected economic impacts of discrimination based on sexual orientation and the impacts of racial discrimination. Neoclassical assumptions fall short in both scenarios.

ARGUMENT

I. Appellants argue that Colorado’s anti-discrimination law is not justified by economic impacts on the LGBT community, and L&E Scholars write to support that argument with neoclassical economic principles.

Contrary to arguments raised in this case, economic theories provide no meaningful or reliable basis for this Court to evaluate the lawfulness of Colorado’s anti-discrimination law. Appellants’ opening brief seeks primarily to establish constitutional rights to discriminate. AOB 18-53. Near the conclusion of their brief, however, Appellants balance those asserted rights against Colorado’s interest in prohibiting discrimination and find the State’s position lacking. AOB 53-57. In support, Appellants argue that Colorado has no legitimate interest in prohibiting discriminatory, commercial statements because, they say, existing discrimination has not rendered goods and services completely unavailable to the LGBT community. AOB 54.

L&E Scholars focus and expand on this narrow point. They argue that the State need not regulate in this area because economic forces will prevent widespread discrimination. *See* L&E ACB 11-18. Briefly stated, discrimination carries negative economic impacts for the discriminator. As a result, say L&E Scholars, only businesses with sincerely held religious motivations will be willing to incur the consequences of discriminating against potential customers, while the market will provide alternative sources of goods and services to the LGBT community, so long as there is no monopoly to impede consumer choice. *Id.* Thus, for example, the problem

with Jim Crow laws in the South was not discrimination; it was that white people had a monopoly on southern lunch counters. *See* L&E ACB, 11-12.

Generalized editorializing aside, L&E Scholars' position rests on neoclassical economic theories, which assume that people make decisions based strictly on rational considerations, maximizing their self-interest. *E.g.*, Richard H. Thaler, *Misbehaving: The Making of Behavioral Economics*, 4-5 (2015) ("*Misbehaving*"); Christine Jolls, Cass R. Sunstein, & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 *Stan. L. Rev.* 1471, 1476 (1998) ("*Behavioral Law and Economics*"). For example, they claim that the "ordinary give-and-take of the market" and vendors' self-interest to not "separate [themselves] from [their] customer base" will eventually overcome systemic prejudice in the market. L&E ACB at 3. In support, they cite articles by Andrew Koppelman, Thomas Berg, and Nathan Oman. L&E ACB at 12, 13. But each relies, implicitly or explicitly, on neoclassical assumptions about human behavior. Nathan Oman invokes the 18th-century "doux-commerce" theory, which proposes that, in a market setting, gentle manners and cordiality will be favored because individuals all act rationally and with maximum self-interest—an idea that "harks back to eighteenth-century theorists of the market[.]" Nathan B. Oman, *Doux Commerce, Religion, and the Limits of Antidiscrimination Law*, 92 *Ind. L.J.* 693, 719 (2017). Andrew Koppelman supposes without supporting evidence that, so long as people are largely protected from discrimination, allowing "a few outliers" to refuse to serve for discriminatory reasons "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).

Likewise, Thomas C. Berg concludes that “only a very small number of deeply committed business owners” will discriminate because of market pressures to compete and maximize profits. Thomas C. Berg, *Symposium: Religious Accommodation and the Welfare State*, 38 Harv. J.L. & Gender 103, 138 (2015).

Understanding this theoretical background for L&E Scholars’ arguments is critical because, as discussed below, the ability of those theories to predict individual behavior has been significantly called into doubt.

II. Contemporary scholarship in behavioral economics has exposed flaws in neoclassical assumptions and undermined the policy conclusions that flow from those assumptions.

Neoclassical theory remains a viable basis for predicting macroeconomic impacts in contexts where its underlying assumptions of rational, informed action can be shown to be accurate. But more recent work in “behavioral economics”—which stands at the intersection of traditional economics and other social sciences, especially psychology—reveals the ways in which rational decision-making is not the norm. Rather, decisions in the real world are often impacted by cognitive limitations, biases, and mental shortcuts. *See* Thaler, *Misbehaving*, *supra*, at 5-6; *see also* Jolls, *Behavioral Law and Economics*, *supra*, at 1471. Behavioral economics explores these very human—and typically unseen—cognitive and emotional predispositions, which so heavily influence

the decisions we make. Amongst other benefits, that exploration allows the public to better understand the practical effects of laws and policies.

At over 35 years of study, behavioral economics is still a relatively new field, but in that short time it has won wide—and ever growing—academic consensus regarding the accuracy of its conclusions. Richard R. Thaler, *Misbehaving*, *supra*, at 9; *The Behavioral Economics Guide 2015*, at 2 (available at <https://www.behavioraleconomics.com/the-behavioral-economics-guide-2015/> (last visited April 29, 2020)). In fact, the Nobel Prize for Economics has twice in recent years been awarded for pioneering work in behavioral economics, to Daniel Kahneman in 2002 and to Richard Thaler in 2017.

These findings have even migrated from the academy into mainstream consciousness and policymaking circles. Such works as Daniel Kahneman’s *Thinking, Fast and Slow* (2011), Richard Thaler and Cass Sunstein’s *Nudge: Improving Decisions About Health, Wealth, and Happiness* (2008), and Michael Lewis’s *The Undoing Project: A Friendship That Changed Our Minds* (2016) have all helped to bring the key insights of behavioral economics into the popular imagination.

As relevant here, this modern line of thinking has shown that markets cannot always be counted on to “self-correct” and produce a welfare-maximizing outcome because individuals in the market are not uniformly and reliably rational in a way that would support Petitioners and L&E Scholars’ arguments. *E.g.*, Oren Bar-Gill, *Seduction by Contract* (2012).

A. Markets do not operate on a purely rational basis, as behavioral economics reveals. Accordingly, they cannot be expected to eliminate the negative effects of discrimination.

L&E Scholars claim that market pressures will eliminate nearly all instances of discrimination without the need for legal prohibitions. *See* L&E ACB at 11, 13. As support, aside from the theoretical suppositions of Koppelman, Berg, and Oman discussed above, L&E Scholars cite Gary Becker’s work on the economics of racial discrimination from his 1971 *The Economics of Discrimination*.¹ L&E ACB at 10, 14. L&E Scholars’ reliance on Becker’s work is misplaced and merits a closer examination of Becker’s research.

While Becker is generally regarded as an economist in the neoclassical tradition, his work does not support the inferences L&E Scholars would have this Court draw. He, and contemporaries, concluded not only that a “White” market may have experienced a net gain in income from discriminatory practices—at the expense of the segregated, African-American sector—but that discrimination still had a distorting effect on the economy, and the free market did not “self-correct” or produce the welfare-maximizing outcome neoclassical economic models would have predicted. *See* Gary S. Becker, *The Economics of Discrimination* at 2-3, 22-23 (U. Chi. 1971). Specifically, his model showed that discrimination led to a decrease in trade and an increase in economic segregation, which closed off access to less-expensive labor that would

¹ Originally published in 1957. *See* Gary S. Becker, *The Economics of Discrimination* (U. Chi. 1957).

otherwise maximize net capital. *Id.* at 20-22. Yet, at least with respect to discrimination against African Americans, there was no market “self-correction” in favor of maximizing capital. *See also* Anne O. Krueger, *The Economics of Discrimination*, 71 J. Polit. Econ. 481, 484-486 (1963) (discussing Becker’s work); Kerwin Kofi Charles & Jonathan Guryan, *Prejudice and Wages: An Empirical Assessment of Becker’s The Economics of Discrimination*, 116 J. Polit. Econ. 773, 775, 780-781 (2008) (validating Becker’s predictions that racial discrimination would have lasting negative effect on African-American wages); *cf.* Kenneth J. Arrow, *Some Models of Racial Discrimination in the Labor Market* 1, 6 (Rand 1971) (identifying deficiencies in neoclassical economics in analyzing racial discrimination).

That Becker’s predictions can be confirmed by contemporary data regarding wage gaps strongly suggests that the market will not self-correct to end discrimination; to the contrary, it has failed to do so to this day. *See* Charles & Guryan, *Prejudice and Wages*, *supra*, at 775-76, 782-91 & fig. 1, tbl. 1 (analyzing data from the General Social Survey (GSS) from 1972 through 2004 regarding racial prejudice); *see also* Becker, *supra*, at 2-3 (noting market discrimination against the best educated and trained non-whites actually increased, rather than decreased, since 1957). Thus, while L&E Scholars are not the first to argue that market forces will eliminate or minimize discrimination, and prejudiced businesses will be “driven out of the market,” modern economic research has demonstrated otherwise. Charles & Guryan, *Prejudice and Wages*, *supra*, at 774-75, 781 (collecting authorities).

B. L&E Scholars' neoclassical assumptions provide no greater support for discrimination based on sexual orientation than they do for racial discrimination.

L&E Scholars anticipate the point that their theories have proven false in the context of racial discrimination and attempt to distinguish Appellants' plan to discriminate against same-sex couples. They claim that a monopoly of discriminatory businesses in the Jim Crow South distorted the free market in ways that "do not exist today." *See* L&E ACB at 5, 7, 10, 11. As evidence, they point to the existence of alternative businesses willing to serve gay customers and online lists recommending businesses with a reputation for being "gay friendly." *See* L&E ACB at 11, 12 & n.2.

L&E Scholars are hoisted with their own petard. After all, such lists are popular precisely because they help gay individuals and couples avoid humiliation, or worse, in the face of pervasive homophobia. In this respect, they are similar to the "Green Book" used by African-American travelers for almost three decades beginning in 1936 to find hotels, restaurants, and other businesses that would be Black-friendly in the face of rampant racial discrimination and Jim Crow laws. *See* Victor Hugo Green, *The Negro Motorist Green Book: An International Travel Guide*, N.Y. Pub. Library, (*available at* <https://digitalcollections.nypl.org/collections/the-green-book#/> (last visited Apr. 15, 2020)) ("There will be a day sometime in the near future when this guide will not have to be published. That is when we as a race will have equal opportunities and privileges in the United States."); *see also* Celia McGee, *The Open Road Wasn't Quite Open to All*, N.Y. Times, Aug. 22, 2010, <http://www.nytimes.com/2010/08/23/books/23green.html> (last

visited Apr. 15, 2020). The Civil Rights Act was passed in 1964, and only then did Mr. Green stop publishing his guide.

L&E Scholars' attempt to distinguish between discrimination based on race and sexual orientation rings particularly hollow in light of the fact that their own Richard Epstein has used the same arguments he presents here to advocate for the total repeal of the Civil Rights Act of 1964, some of which they even cite in their brief before this Court. *See* L&E ACB at 10, 11; Richard A. Epstein, *Public Accommodations Under the Civil Rights Act of 1964: Why Freedom of Association Counts as a Human Right*, 66 *Stan. L. Rev.* 1241, 1291 (2014); Richard A. Epstein, *Forbidden Grounds: The Case Against Employment Discrimination Laws* (1992). Epstein's writings only bolster the conclusion that L&E Scholars have presented no principled reason to distinguish the predicted economic consequences of discrimination based on sexual orientation from those based on racial discrimination. Rather than advance an argument supported by empirical evidence, closer inspection of L&E Scholars' brief reveals that their position is a normative one cloaked in the guise of science.

CONCLUSION

No contemporary consensus regarding economic principles supports discrimination—or exceptions to anti-discrimination laws—as a societal good. The modern corpus of economic research undermines the inferences L&E Scholars ask this Court to draw. Rather, their argument that anti-discrimination laws should be held to be unnecessary and the market should have the opportunity to self-correct is nothing more than a normative position. Its appeal to economic principles is unscientific and should not be credited.

DATED: April 29, 2020

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CERTIFICATE OF COMPLIANCE

Counsel for *Amici Curiae* Scholars of Behavioral Science and Economics in Support of Appellees hereby certifies that:

1. This document complies with the type-volume limitations of the Federal Rules of Appellate Procedure, rules 32(a)(7)(B) and 29(a)(5) because, excluding the parts of the document exempted by rule 32(f), this brief contains 2,739 words.

2. This document complies with the typeface and type style requirements of the Federal Rules of Appellate Procedure, rule 32(a)(5) and (a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Garamond.

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CERTIFICATE OF DIGITAL SUBMISSION

Counsel for *Amici Curiae* Behavioral Science and Economics Scholars in Support of Appellees hereby certifies that with respect to the foregoing:

1. all required privacy redactions have been made per 10th Cir. R. 25.5;
2. if required to file additional hard copies, that the ECF submission is an exact copy of those documents;
3. the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, Cisco AMP for Endpoints, version 7.2.5.11663, most recently updated April 7, 2020, and according to the program are free of viruses.

By: /s/ Adam Hofmann
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CERTIFICATE OF SERVICE

I hereby certify that on April 29, 2020, I electronically filed the foregoing using the Court's CM/ECF system which will send a notification of such filing to all participants in this case.

DATED: April 29, 2020

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