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THE SUPREME COURT OF THE STATE OF COLORADO
2 E. 14th Avenue
Denver, CO 80203

On Petition for Writ of Certiorari to the Colorado Court of Appeals, Case No. 2021CA1142, Judges Dunn, Grove, Schutz

Defendants-Petitioners: MASTERPIECE CAKESHOP INC. and JACK PHILLIPS,

and

Plaintiff-Respondent: AUTUMN SCARDINA.

▲ COURT USE ONLY ▲

Case Number: 2023SC116

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BRIEF OF AMICI CURIAE MASSACHUSETTS AND 17 OTHER STATES IN SUPPORT OF PLAINTIFF-RESPONDENT

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28, C.A.R. 29, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that the brief complies with C.A.R. 28(g) and C.A.R. 29, because it contains 4,725 words. I acknowledge that this brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28, C.A.R. 29, and C.A.R. 32.

/s/ Eric Olson

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Attorney for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS AND STATUTES

MISCELLANEOUS

INTERESTS OF AMICI CURIAE

Massachusetts, Connecticut, Delaware, the District of Columbia, Hawai'i, Illinois, Maine, Maryland, Michigan, Minnesota, Nevada, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington share sovereign and compelling interests in protecting our residents and visitors from discrimination. Like Colorado, we support civil rights protections for people belonging to historically disenfranchised groups, including prohibitions on discrimination in places of public accommodation: the restaurants, stores, and other businesses that are part of daily life in a free society. Responding to the pervasive discrimination that members of these groups have long suffered and continue to suffer today, public accommodations laws ensure equal enjoyment of goods and services and combat the severe personal, economic, and social harms caused by discrimination.

We also share interests in upholding the rights protected by the First Amendment. We do not seek to abridge the right to hold and express views regarding gender identity, which underlie Petitioners' objection to Colorado's public accommodations law. But, as courts have

long recognized, the right to freedom of speech is not infringed by prohibiting businesses open to the public from turning away customers on the basis of their race or other characteristics protected by public accommodations laws.

While the Supreme Court held last year in *303 Creative LLC v. Elenis*, 600 U.S. 570 (2023), that the First Amendment protects certain market participants from enforcement of antidiscrimination laws in limited circumstances where they object to a message the consumer requests that they create, that decision indicates that a close examination of the facts underlying a claimed First Amendment defense is necessary—and here, those facts counsel in favor of a finding in Respondent's favor. To hold otherwise—and thus to allow Petitioners to refuse to make Respondent's requested product even though it means nothing in particular to Petitioners—would allow market participants to deny service to members of protected classes in a broad array of circumstances and would undermine the vital benefits public accommodations laws provide to residents and visitors. We therefore join Respondent in supporting affirmance of the judgment below.

ARGUMENT

I. State Public Accommodation Laws Are Deeply Rooted in History and Serve to Combat Invidious Discrimination.

A. Public Accommodations Statutes Have Long Been a Centerpiece of Efforts to Prevent Discrimination in Commercial Establishments.

The American legal and political system has long recognized the importance of public accommodations being open to all. Modern statutes codify and expand upon a common law doctrine, dating back at least to the sixteenth century, that generally required public accommodations to serve all customers. *See Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261 (1964); *see also, e.g.*, *Lombard v. Louisiana*, 373 U.S. 267, 275-77 & n.6 (1963) (Douglas, J., concurring). "At common law," the Supreme Court has explained, "innkeepers, smiths, and others who 'made profession of a public employment,' were prohibited from refusing, without good reason, to serve a customer." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 571 (1995) (quoting *Lane v. Cotton*, 12 Mod. 472, 484-85, 88 Eng. Rep. 1458, 1464-65 (K.B. 1701)).

The common-law duty of an establishment engaged in a public or common calling to "to entertain all persons," as William Blackstone described it, arose from the understanding that when a store "hangs out a sign and opens" itself for business, the offer of service implicitly extends to all customers. *See* Joseph Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 Nw. U. L. Rev. 1283, 1309-10, 1322-25 (1996). This duty applied broadly to a range of businesses, *see* Charles Burdick, *The Origin of the Peculiar Duties of Public Service Companies*, 11 Colum. L. Rev. 514, 522 & nn. 33-39 (1911), and it applied even when the business would otherwise prefer to exclude a particular customer based on, for example, their status as a foreigner, *see* David S. Bogen, *The Innkeeper's Tale: The Legal Development of a Public Calling*, 1996 Utah L. Rev. 51, 76-77 (1996).

Drawing from this common law history, States since the mid-nineteenth century have enacted statutes barring discrimination in places of public accommodation. *See Romer v. Evans*, 517 U.S. 620, 627-28 (1996). These statutes emerged from the recognition, informed by the Civil War and debates leading up to the ratification of the

Fourteenth Amendment, that despite the clarity of the doctrine, in practice common law often did not adequately protect Black Americans' access to goods and services in commerce. *See id.*; *Hurley*, 515 U.S. at 571 (describing the post-Civil War enactment of public accommodations statutes). The first such statute, adopted by Massachusetts in 1865, provided that "[n]o distinction, discrimination or restriction on account of color or race shall be lawful in any licensed inn, in any public place of amusement, public conveyance or public meeting." Act Forbidding Unjust Discrimination on Account of Color or Race, 1865 Mass. Acts, ch. 277 (May 16, 1865). And in the two decades that followed, 13 more States—Colorado, Connecticut, Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Nebraska, New Jersey, New York, Ohio, and Rhode Island—enacted comparable laws. *See* Lisa G. Lerman & Annette K. Sanderson, *Discrimination in Access to Public Places: A Survey of State and Federal Public Accommodation Laws*, 7 N.Y.U. Rev. L. & Soc. Change 215, 239-40 & nn. 171-72, 179 (1978).

Today, there is widespread agreement across American jurisdictions that society must not tolerate discrimination by entities

that choose to provide goods and services to the public. Forty-five States, as well as the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands, have enacted public accommodations laws that protect the public from discrimination based on a range of characteristics.[1] All of these jurisdictions forbid discrimination on the basis of race, sex, ancestry or national origin, and religion or creed.[2] In addition, 26 of these jurisdictions forbid discrimination on the basis of sexual orientation, 25 on the basis of gender identity, 18 on the basis of marital status, 7 on the basis of veteran or military status, 35 on the basis of disability, and 20 on the basis of age.[3] These statutes have long been held constitutional as applied to a range of establishments, including commercial businesses. *See, e.g.*, *Heart of Atlanta*, 379 U.S. at 260. Indeed, the laws "are well within the State's usual power to enact when a legislature has reason to believe that a given group is the target

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1 *See* National Conference of State Legislatures, *State Public Accommodation Laws* (June 25, 2021), https://tinyurl.com/ed8mnpm5; P.R. Laws Ann. Tit. 1 § 13; V.I. Code Ann. Tit. 10 § 3; 19 Guam Code Ann. § 2110.

2 *See id.*

3 *See id.*

of discrimination, and they do not, as a general matter, violate the First or Fourteenth Amendments." *Hurley*, 515 U.S. at 572.

Importantly, state laws requiring non-discriminatory access to public accommodations do not regulate conduct by private organizations that do not hold themselves open to the public. Instead, they regulate only the conduct of business establishments and other similar entities that do make the choice to hold themselves open to the public at large. Some States define the covered commercial entities in general terms. See, e.g., Iowa Code § 67-5902(9); La. Rev. Stat. § 51:2232(10); Vt. Stat. Ann. tit. 9, § 4501(1). Others list with particularity the types of establishments covered by the laws. *See, e.g.*, N.J. Stat. Ann. § 10:5-5(*l*); S.C. Code § 45-9-10. Still others, like Colorado—which defines "place of public accommodation" to include "any place of business engaged in any sales to the public and any place offering services, facilities, privileges, advantages, or accommodations to the public" and then lists examples of such businesses—employ a hybrid approach. Colo. Rev. Stat. § 24-34-601(1). But all public accommodations laws

limit their reach to establishments that choose to provide goods or services to the public.

B. Public Accommodations Laws Serve to Protect Individuals and Society At Large from Significant Harms.

The Supreme Court has long recognized that the protections afforded by public accommodations laws "'plainly serv[e] compelling state interests of the highest order.'" *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987) (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 624 (1984)). "[N]o action is more contrary to the spirit of our democracy and Constitution—or more rightfully resented by a . . . citizen who seeks only equal treatment"—than a denial of equal service by a business "ostensibly open to the general public." *Daniel v. Paul*, 395 U.S. 298, 306-08 (1969) (quotations omitted); *see also Heart of Atlanta*, 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 because of his race or color." (quoting S. Rep. No. 872, 88th Cong., 2d Sess., 16 (1964))).

Discrimination by places of public accommodation causes unique and severe economic, personal, and social harms. It denies equal access to important goods and services and, by segregating the market, has a well-established "substantial and harmful effect" on the economy. *Heart of Atlanta*, 379 U.S. at 258 (acknowledging broad impacts of seemingly local discrimination); *see also Roberts*, 468 U.S. at 625-26. And many Americans, particularly those who live in less populated areas, cannot, having been turned away by one business on account of their identity, simply obtain the same goods or services from another business: Across wide swaths of this country, customers do not have a choice among bakeries or funeral homes.[4] And more than that,

[4] *See, e.g.*, First Amended Compl., *Zawadski v. Brewer Funeral Servs.*, No. 17-cv-19, Dkt. 12 (Cir. Ct., Pearl River Cnty., Miss., Mar. 7, 2017) (complaint against Mississippi funeral home that had the only crematorium in the county and abruptly refused to provide mortuary services upon learning the deceased man was married to a man, forcing the spouse to scramble to find services at the last minute, 90 miles from their home).

discrimination by places of public accommodation stigmatizes its victims, causing them intense dignitary injuries and encouraging social fragmentation and conflict. *See Roberts*, 468 U.S. at 625-26; *Daniel*, 395 U.S. at 306; *Heart of Atlanta*, 379 U.S. at 250; *see also Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1727 (2018) (allowing wedding service providers to refuse to provide goods and services to same-sex couples would create "a community-wide stigma inconsistent with the history and dynamics of civil rights laws").

Thus, beyond the harms to individuals, discrimination by covered business establishments engenders balkanization in society, harming the social fabric of the States and the marketplace of ideas fostered by the First Amendment. *See Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). This Court has long recognized the "importance, both to the individual and to society, of removing the barriers to . . . political and social integration that have historically plagued certain disadvantaged groups." *Roberts*, 468 U.S. at 626. When all members of society can access the restaurants and coffee shops, barber shops and florists, photography companies and tailors

that dot the American landscape, Americans of different creeds, backgrounds, and viewpoints converge and engage in open discourse. The right of access upheld by public accommodations laws thereby *contributes* to the exchange of ideas between groups that the First Amendment safeguards. *See, e.g.*, *Knox v. Service Empls. Int'l Union, Local 1000*, 567 U.S. 298, 309 (2012) ("The First Amendment creates an open marketplace in which differing ideas about political, economic, and social issues can compete freely for public acceptance without improper government interference." (cleaned up)). Conversely, broadly construed First Amendment exemptions to public accommodations laws—under which businesses with some self-identified expressive aspect could refuse to serve customers belonging to protected classes based on meaning that those customers attribute to those businesses' products—would give rise to segregation in the commercial sphere detrimental to the very values the First Amendment protects.

C. LGBTQ Americans Suffer the Harms from Discrimination That Public Accommodations Laws Strive to Eliminate.

A broad First Amendment exemption to public accommodations laws threatens to exclude people of any religion, race, sex, or nationality from businesses across our States—and, of course, threatens antidiscrimination laws the States have enacted to protect LGBTQ Americans in particular. LGBTQ Americans have faced a long history of invidious discrimination: fired from their jobs, evicted from their homes, targeted by police, and denied service by businesses simply because of their "distinct identity." *Obergefell v. Hodges*, 576 U.S. 644, 660 (2015); *see also id.* at 660-61, 673-74, 677-78. At present, "'[o]ur society has come to the recognition that [LGBTQ] persons . . . cannot be treated as social outcasts or as inferior in dignity and worth.'" *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1882 (2021) (quoting *Masterpiece Cakeshop*, 138 S. Ct. at 1727). And because the governmental interest in preventing such adverse treatment "is a weighty one," *id.*, many States and other jurisdictions prohibit discrimination against LGBTQ people in places of public accommodation. *See* Part I.A, *supra*.

Yet harmful discrimination against LGBTQ Americans remains a persistent problem. LGBTQ Americans are still much more likely to be bullied, harassed, and attacked in hate crimes than their non-LGBTQ peers.[5] LGBTQ people also report overt discrimination, particularly in the form of denial of service by businesses, at rates comparable to, or greater than, those for other historically disadvantaged groups.[6] Indeed, a recent major survey of transgender and gender-nonconforming Americans indicate that roughly one in ten respondents

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[5] *See* Tasseli McKay et al., *Understanding (and Acting On) 20 Years of Research on Violence and LGBTQ + Communities*, 20 TRAUMA, VIOLENCE, & ABUSE 665, 669-70 (2019); Tim Fitzsimons, *Nearly 1 in 5 Hate Crimes Motivated by Anti-LGBTQ Bias, FBI Finds*, NBC News (Nov. 12, 2019), https://tinyurl.com/53awb4mx.

[6] *See* Christy Mallory & Brad Sears, *Refusing to Serve LGBT People: An Empirical Assessment of Complaints Filed under State Public Accommodations Non-Discrimination Laws*, 8 J. RES. GENDER STUD. 106, 113-16 (2018); Christy Mallory & Brad Sears, *LGBT Discrimination, Subnational Public Policy, and Law in the United States*, *in* OXFORD RESEARCH ENCYCLOPEDIA OF POLITICS 1, 2-8 (2020), https://tinyurl.com/yvtrkmwc.

had been denied service or equal treatment because of their gender identity within the last year.[7]

This continuing discrimination harms the health and well-being of LGBTQ people, their families, and their communities. A large and growing body of evidence shows that discriminatory social conditions have severe negative health impacts on LGBTQ people, including increased rates of mental health disorders and suicide attempts, especially for LGBTQ youth.[8] Notably, these outcomes are less severe and less pervasive in communities that provide LGBTQ people with

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[7] S.E. James et al., *Early Insights: A Report of the 2022 U.S. Transgender Survey*, National Center for Transgender Equality 21 (2024), http://tinyurl.com/4x5c659n.

[8] Ctr. for the Study of Inequality, What We Know Project, *What Does the Scholarly Research Say About the Effects of Discrimination on the Health of LGBT People?*, Cornell University (2019), https://tinyurl.com/2faxfjnu (detailing findings from 300 peer-reviewed studies); *see also, e.g.*, Julia Raifman et al., *Association of State Laws Permitting Denial of Services to Same-Sex Couples with Mental Distress in Sexual Minority Adults: A Difference-in-Difference-in-Differences Analysis*, 75 JAMA PSYCHIATRY 671, 672 (2018); Julia Raifman et al., *Difference-in-Differences Analysis of the Association Between State Same-Sex Marriage Policies and Adolescent Suicide Attempts*, 171 JAMA PEDIATRICS 350, 351 (2017); Mark L. Hatzenbuehler, *Structural Stigma: Research Evidence and Implications for Psychological Science*, 71 AM. PSYCHOLOGIST 742, 745-46 (2016).

legal protection against discrimination, including in public accommodations.[9]

The broad exemption Petitioners seek from Colorado's public accommodations law enables precisely the sort of discrimination that has historically burdened LGBTQ Americans. The company will provide a pink cake with blue frosting—a cake with no particular meaning to Petitioners—to a cisgender customer but refuses to do so for Respondent because of what that cake means to her in light of her transgender status. This refusal cannot reasonably be divorced from discrimination based on LGBTQ identity, as the lower court correctly concluded. *See Scardina v. Masterpiece Cakeshop, Inc.*, 528 P.3d 926, 937-38 (Colo. Ct. App. 2023) ("[T]he Supreme Court has rejected efforts to differentiate between discrimination based on a person's status and discrimination based on conduct that is inextricably intertwined with such status."); *see also*, *e.g.*, *Bostock v. Clayton County*, 140 S. Ct. 1731, 1741-42 (2020); *Christian Legal Soc. v. U.C. Hastings*, 561 U.S. 661, 689

[9] *See* Raifman et al. (2018), *supra* n.8, at 673-75; Raifman et al. (2017), *supra* n.8, at 353-55.

(2010); *Lawrence v. Texas*, 539 U.S. 558, 583 (2003). Nor is it a defense to provide other cakes for LGBTQ customers, *see* Pet. Br. 31. Public accommodations laws exist to prevent not only outright exclusion, but also separate and unequal treatment. Otherwise, our country would be blighted by segregated businesses that serve in perniciously unequal ways, reserving some services only for customers who are members of preferred groups. *See, e.g.*, *Katzenbach v. McClung*, 379 U.S. 294, 296-97 (1964) (restaurant serving African American customers only through a take-out window, not in the dining area). The First Amendment does not require permitting such unequal treatment by businesses that offer their goods and services to the public.

II. The Fact-Intensive Inquiry *303 Creative* Requires Does Not Create a First Amendment Exemption from Colorado's Public Accommodations Law in This Case.

A. The *303 Creative* opinion requires courts to pay close attention to the facts before them in analyzing First Amendment claims.

The Supreme Court's decision last year in *303 Creative LLC v. Elenis* establishes that determining whether the First Amendment may be invoked by market participants against public accommodations laws,

as Petitioners seek to do here, requires a highly fact-intensive inquiry—an approach consistent with other threads of First Amendment doctrine. 600 U.S. at 588-92. For that reason, *303 Creative*'s ultimate holding in favor of a wedding website designer claiming a constitutional exemption from antidiscrimination protections does not reflexively compel the same result here. Rather, it requires reviewing courts to take careful account of the facts before them in assessing whether enforcement of public accommodations laws infringe on First Amendment freedoms. *See id.* at 599 ("Doubtless, determining what qualifies as expressive activity protected by the First Amendment can sometimes raise difficult questions."). In *this* case, the facts before the Court are dramatically different from the facts of *303 Creative*, and they compel a ruling in favor of Respondent.

The *303 Creative* Court's opinion makes abundantly clear that its ultimate holding was driven strongly by a series of stipulations entered into by the parties. Of particular import, the parties stipulated that the plaintiffs' "original, customized" wedding websites were "expressive in nature" and "express [the plaintiffs'] message" concerning marriage. *Id.*

at 582-83. These agreed-to facts grounded the legal conclusions that led to the Court's ultimate conclusion: Its holding that the plaintiffs' wedding websites constitute "pure speech" "flow[ed] directly from the parties' stipulations," *id.* at 587, just as "the parties' stipulations lead the way to [the] conclusion" that the plaintiffs' wedding websites "involve [*their*] speech," *id.* at 588 (emphasis in original); *see also id.* (observing that the ruling in favor of plaintiffs follows from these conclusions).

The Court also relied directly on the facts of the case in rebutting arguments against its holding. Colorado, the defendant in that case, argued that the plaintiffs' wedding websites were not pure speech and that the plaintiffs sought to discriminate based on protected status, but the Court dismissed these positions as "difficult to square with the parties' stipulations." *Id.* at 593-94; *see also id.* (noting how "the case comes to us" in connection with stipulations as lens through which Colorado's position should be viewed). The Court's foundational reliance on the facts of the case—and its strongest guidance to subsequent courts analyzing similar claims—is best reflected in its

dismissal of the dissent's proposed hypotheticals concerning other putatively expressive businesses as irrelevant to the facts before it and its conclusion that "[t]he parties have *stipulated* that [the plaintiffs] seek[] to engage in expressive activity." *Id.* at 599 (emphasis in original). Moreover, the Court agreed with the Tenth Circuit's conclusion that, on the facts of the case before it, "the wedding websites [the plaintiff] seeks to create qualify as 'pure speech' under [the Supreme] Court's precedents." *Id.* at 587 (holding that this "conclusion … flows directly from the parties' stipulations").

The approach for *this* Court to take is thus clear: Engage robustly with the facts before it, which sometimes may present "difficult questions," *id.* at 599, and the answer to whether the First Amendment applies as claimed will follow. This fact-based approach is consonant with how courts apply the First Amendment in other contexts, including with respect to public accommodations laws. In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, for instance, the Supreme Court observed that "the reaches of the First Amendment are ultimately defined by the facts it is held to embrace."

515 U.S. at 567. So too in *Boy Scouts of America v. Dale*, which the Court deemed "a First Amendment case where the ultimate conclusions of law are virtually inseparable from findings of fact." 530 U.S. 640, 648 (2000).

B. The facts of this case make clear that applying Colorado's public accommodations law to Petitioners in the circumstances presented does not offend the First Amendment.

The facts of *this* case stand in stark contrast to those that drove the *303 Creative* Court's holding. The web designer in *303 Creative* sought to provide customers with a product incorporating expressive messages intended to communicate the designer's own view of marriage—leading the Court to conclude that the requested wedding websites were not just pure speech, but the web designer's speech. *303 Creative*, 600 U.S. at 582, 587-88. Here, however, Petitioners admitted at trial that the pink and blue cake requested by Respondent "has no intrinsic meaning and does not express any message." *Scardina*, 528 P.3d at 937. The stark question that this case poses, then, is whether a state law requiring a business to sell an admittedly non-expressive product to any person wishing to buy it without respect to that person's

protected status offends the First Amendment simply because the *buyer* assigns a meaning to it with which the seller disagrees.

The answer to that question is "no." Unlike *303 Creative*, in which the product for sale (custom-designed wedding websites) was stipulated to be "expressive in nature" and to "express [plaintiffs'] message celebrating and promoting [their] view of marriage," *303 Creative*, 600 U.S. at 582 (internal quotation marks omitted), Petitioners here admit that the product for sale has no expressive meaning to them whatsoever. *Scardina*, 528 P.3d at 937. And the Supreme Court has already rejected the position that the First Amendment somehow protects refusals to sell products without intrinsic expressive meaning to members of protected classes. *See 303 Creative*, 600 U.S. at 598 n.5 (noting that "our case is nothing like a typical application of a public accommodations law requiring an ordinary, non-expressive business to serve all customers or consider all applicants"). Consequently, this case is readily distinguishable from those where a state law circumscribed inherently expressive conduct and thus was found to run afoul of the First Amendment. *See 303 Creative*, 600 U.S. at 587, 594, 603 (where

Colorado law sought to regulate the sale of custom wedding websites that constituted "pure speech" and were "expressive in nature," Court held that "Colorado seeks to force an individual to speak in ways that … defy her conscience about a matter of major significance"); *Hurley*, 515 U.S. at 568 (discussing "inherent expressiveness" of parades); *Dale*, 530 U.S. at 650 (finding that "an association that seeks to transmit … a system of values engages in expressive activity"); *Texas v. Johnson*, 491 U.S. 397, 406 (1989) ("The expressive, overtly political nature of this conduct was both intentional and overwhelmingly apparent.").

Rather, the conduct at issue here—selling a cake the vendor does not view as expressive—is akin to the facts of *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.* (*FAIR*), 547 U.S. 47 (2006), where law schools refused to allow military recruiters on campus to protest government policy on military service by gays and lesbians. The *FAIR* Court ruled that a law withholding federal funding to schools that disallowed recruiters on campus did not address expressive conduct "because the schools are not speaking when they host interviews and recruiting receptions." *Id.* at 64. The Court further explained that "[a]

law school's recruiting services lack the expressive quality of a parade, a newsletter, or the editorial page of a newspaper; its accommodation of a military recruiter's message is not compelled speech because the accommodation does not sufficiently interfere with any message of the school." *Id.* To hold otherwise would be to endorse an "apparently limitless" view of the First Amendment where conduct becomes protected expressive speech merely because "the person engaging in the conduct intends thereby to express an idea"—a view the Court explicitly rejected. *U.S. v. O'Brien*, 391 U.S. 367, 376 (1968); *FAIR*, 547 U.S. at 65-66 (citing *O'Brien*).

So too here: Any meaning imbued in Respondent's pink and blue cake comes from *her* personal explanation for it, or from *her* placing it in a specific context that itself lends additional meaning to the cake's colors. *Scardina*, 528 P.3d at 941. Thus, rather than being a case like *303 Creative* where state law would have compelled a business to engage in pure speech that expressed a message with which the business disagreed, this is instead a case where Petitioners wish to refuse to provide an admittedly "nonexpressive product to a protected

person based on that person's intent to use the product as part of a celebration that [Petitioners] consider[] offensive." *Id.* (citing *State v. Arlene's Flowers, Inc.*, 441 P.3d 1203 (2019)). Petitioners thus seek First Amendment protection for their own conduct not based on their own expression, but based on meaning invested in that conduct by others—a far-reaching and near-limitless view at odds with existing constitutional jurisprudence. *See, e.g.*, *FAIR*, 547 U.S. at 66 ("[W]e have extended First Amendment protection only to conduct that is inherently expressive.").

III. Petitioners' Broad Construction of *303 Creative*'s Exception to Public Accommodation Laws Would Allow for Widespread and Varied Forms of Discrimination.

Petitioners' proposed construction of *303 Creative* and related First Amendment jurisprudence would countenance broad discrimination, thus undercutting the power of public accommodations laws and furthering the harms those laws exist to combat. If the First Amendment protects refusals to make products that creators admit carry no inherent expressive messages but that may be given meaning by others, virtually any custom product could be swept into that reach—

particularly in light of the fact that the meaning at issue here comes from something as simple as the selection of two colors.

Consequently, members of protected groups could be exposed to discrimination in a broad swath of the commercial marketplace. Examples abound of businesses that could refuse to provide a service to customers based only on the businesses' objection to some "message" that, at its core, hinges only on a significance customers belonging to protected classes give to a particular product that carries no inherent meaning: A baker could make a red and green cake for a Christmas party but refuse to make that same cake for a Kwanzaa celebration; a florist could create celebratory centerpieces for a secular wedding but not a religious one; or a party planner could set up red, white, and blue decorations for a Fourth of July event while refusing service to a French immigrant who wants to celebrate Bastille Day.

Although the First Amendment protects all manner of speech in the public square, *see, e.g.*, *Snyder v. Phelps*, 562 U.S. 443 (2011), it does not require insulating from liability businesses that violate nondiscrimination laws by turning away customers simply because of

their race, religion, sex, sexual orientation, or other protected trait, as long as doing so does not involve inherently expressive conduct. This Court should adhere to the Supreme Court's longstanding recognition, founded in centuries of legal tradition, that people should not be subjected "to indignities when they seek goods and services in an open market." *Masterpiece*, 138 S. Ct. at 1732. The States must be permitted to preserve our residents' social and economic well-being and protect all within our borders from the manifest harms of discrimination in public accommodations.

CONCLUSION

This Court should affirm the judgment below.

Date: February 27, 2024 Respectfully submitted,

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I certify that on this 27th day of February 2024, a copy of this brief was electronically served via e-filing on all counsel and parties of record.

/s/ Katherine Wright