

No. 21-476

In The
Supreme Court of the United States

—◆—
303 CREATIVE LLC, ET AL.,

Petitioners,

v.

AUBREY ELENIS, ET AL.,

Respondents.

—◆—
**On Writ Of Certiorari To The
United States Court Of Appeals
For The Tenth Circuit**

—◆—
**BRIEF OF LOCAL GOVERNMENTS AND MAYORS
AS AMICI CURIAE IN SUPPORT OF
RESPONDENTS AUBREY ELENIS, ET AL.**

—◆—
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IDENTITY AND INTEREST OF AMICI CURIAE¹

Amici Curiae are 54 cities, counties, and towns, as well as 20 mayors, representing a wide range of communities throughout the United States.² Amici include large cities such as New York, Los Angeles, Chicago, and Dallas, as well as smaller cities and towns such as Doraville, Georgia, Whitefish, Montana, and Hillsborough, North Carolina. Amici represent the level of government most closely connected to our communities, providing a variety of essential programs and services to meet local needs. To that end, many Amici have enacted laws prohibiting discrimination in public accommodations based on characteristics such as race, religion, sex, sexual orientation, gender identity and expression, disability, and age. These local protections reflect Amici's experience with the significant harms that result when people in our communities are denied equal treatment because of these characteristics. Some Amici have not enacted their own public accommodations laws, but they benefit from the protections of statewide laws.

Amici have a substantial interest in the question of whether a public accommodations law violates the First Amendment's Free Speech Clause when it

¹ Pursuant to Rule 37.3(a), written consents from Petitioners and Respondents to the filing of amicus briefs are on file with the Court. No counsel for a party authored this brief in whole or in part, and no person other than Amici or their counsel made any monetary contribution to the preparation or submission of this brief.

² A complete list of Amici is in the Appendix.

requires businesses that sell goods and services to the public to do so without regard to customers' protected characteristics. Amici depend on the enforcement of public accommodations laws to protect the health and welfare of our communities and to ensure equal treatment in the public sphere.

◆

SUMMARY OF ARGUMENT

As local governments and elected officials, Amici are responsible for protecting and promoting the health, safety, and welfare of our communities. As such, Amici have a critically important interest in ensuring that everyone in our communities is treated fairly and equally under the law and has an equal opportunity to engage in the “almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society.” *Romer v. Evans*, 517 U.S. 620, 631 (1996). The enforcement of public accommodations laws such as the Colorado Anti-Discrimination Act (CADA) is necessary to achieve this goal.

Although our country has made great progress toward promoting equal access and opportunity, a significant number of Americans continue to experience discrimination in many areas of life, including public accommodations. Such discrimination “deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life.” *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625 (1984). Amici have seen firsthand how

discrimination harms the health and well-being of community members and diminishes participation in public life. It also harms Amici's ability to provide health care and other essential services, and it impacts the broader economic climate of Amici's communities.

Many Amici have responded to these harms by enacting local ordinances requiring public accommodations to serve all members of the public without regard to race, religion, sex, sexual orientation, gender identity and expression, disability, age, and other characteristics localities have deemed necessary to protect. These laws, which are features of cities, counties, and towns throughout the country, reflect a democratically determined commitment to equality and inclusion in the public sphere. They are informed by local experience and are designed to meet local needs. They are a crucial tool to ensure that all members of our communities—regardless of their religious beliefs, sexual orientation, or other characteristics—have the right to go to public establishments without worrying they will be turned away, given inferior service, or humiliated based on their identity. These laws do not dictate what community members must believe or say, but govern how community members treat each other when engaging in commercial transactions and other aspects of public life.

Like other nondiscrimination laws, CADA requires businesses selling goods and services to the public to do so without regard to customers' disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry. Colo. Rev. Stat.

§ 24-34-601(2)(a) (2021). The Free Speech Clause of the First Amendment does not mandate an exception from this uniform requirement, as Petitioners seek. Petitioners' proposed exception would harm Amici by directly contravening our efforts to ensure equal treatment in our communities. Nothing in Petitioners' argument is limited to same-sex couples. A system of speech-based exceptions would permit some businesses to engage in other forms of status-based discrimination when selling goods and services to members of the public. It would impede Amici's ability to protect the health and well-being of our communities and our efforts to ensure that all people in our jurisdictions can participate in public life. It would also lead to uncertainty and confusion in our communities about the scope of our laws.

◆

ARGUMENT

I. Amici have a critical interest in the enforcement of nondiscrimination laws.

As local governments and elected officials, Amici have a critically important interest in ensuring that all people in our jurisdictions are treated fairly and equally under the law, have an equal opportunity to earn a living and access services, and can participate fully in society and public life. The enforcement of nondiscrimination laws, such as the Colorado Anti-Discrimination Act at issue here, is crucial to achieving these goals.

Although Petitioners' challenge does not warrant heightened scrutiny, the government interest in preventing discrimination satisfies any level of judicial review. This Court has long recognized that governments have an interest "of the highest order" in eliminating discrimination to ensure "equal access to publicly available goods and services." *Roberts*, 468 U.S. at 624. Laws prohibiting discrimination in public accommodations address the "unique evils that government has a compelling interest to prevent," *id.* at 628, and "respond[] precisely to the substantive problem which legitimately concerns" the State, *id.* at 629 (citation omitted).

As Amici have experienced firsthand in our local communities, discrimination in public accommodations "deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life." *Roberts*, 468 U.S. at 625. Many Amici have responded to the harms of such discrimination by enacting local laws requiring equal treatment. Such laws reflect local needs and are crucial to allowing us to function as diverse, pluralistic communities.

A. Discrimination imposes significant harms on local communities.

The strength of Amici's interest in preventing discrimination in our communities reflects the significant harms it causes. Our society has made substantial progress in combating discrimination and promoting

equal opportunity for all. Nonetheless, discrimination remains “a prominent and critically important matter,” according to a national study showing “widespread experiences of discrimination for many groups in America, across many areas of life.”³ Americans continue to face discrimination based on race, religion, sex, sexual orientation, gender identity and expression, disability, age, and other characteristics. And many in our communities experience the compounding effects of discrimination based on multiple aspects of their identities.⁴ Discrimination harms the health, well-being, and economic security of the individuals who experience it, and it impacts Amici and our communities as a whole.

Many Americans experience discrimination in public accommodations such as stores, restaurants, and other businesses. For example, in a recent study of Muslim Americans, almost half of respondents said

³ NPR, Robert Wood Johnson Found. & Harvard T.H. Chan Sch. of Pub. Health, *Discrimination in America: Final Summary 2* (Jan. 2018), archived at <https://perma.cc/9ZMX-E7HR> [hereinafter *Final Summary*]; see U.S. Dep’t of Health & Hum. Servs., *Healthy People 2030, Discrimination*, archived at <https://perma.cc/LN7B-MUFS>.

⁴ See, e.g., NPR, Robert Wood Johnson Found. & Harvard T.H. Chan Sch. of Pub. Health, *Discrimination in America: Experiences and Views of LGBTQ Americans* 11 (Nov. 2017), archived at <https://perma.cc/5PNU-LU9Q> [hereinafter *LGBTQ Americans*] (finding that 32% of LGBTQ people of color reported experiencing discrimination because of their LGBTQ identity when applying for jobs, compared to 13% of white LGBTQ people).

they personally experienced some form of discrimination because of their religion in the past year.⁵ A Gallup poll in 2021 reported that 35% of Black respondents and 16% of Hispanic respondents said they were treated unfairly in a store where they were shopping in the preceding 30 days.⁶ In another 2021 study, 40% of Asian Americans reported having experienced discrimination in stores.⁷ Disability discrimination in stores, restaurants, hotels, and other types of businesses remains pervasive.⁸ And in a survey of lesbian, gay, bisexual, transgender, and queer (LGBTQ) people in 2020, more than half of respondents reported experiencing harassment or discrimination in public spaces in the past year.⁹

⁵ Besheer Mohamed, Pew Rsch. Ctr., *Muslims Are a Growing Presence in the U.S., But Still Face Negative Views From the Public* (Sept. 1, 2021), archived at <https://perma.cc/PKP6-RVWG>.

⁶ Jeffrey M. Jones & Camille Lloyd, Gallup, *Black Americans' Reports of Mistreatment Steady or Higher* (July 27, 2021), archived at <https://perma.cc/9WUQ-9LU5>.

⁷ Associated Press-NORC Ctr. for Pub. Affs. Rsch. at the Univ. of Chi., *Increasing Discrimination Against Asian Americans a Major Concern* (May 26, 2021), archived at <https://perma.cc/A52L-D45N>.

⁸ See, e.g., Cal. Dep't of Fair Empl. & Hous., *2020 Annual Report 25 tbl.5* (2022), archived at <https://perma.cc/LU2U-NDZ5> (noting that more than half of all complaints alleging discrimination in public accommodations are disability-related).

⁹ Lindsay Mahowald et al., Ctr. for Am. Progress, *Discrimination and Experiences Among LGBTQ People in the US: 2020 Survey Results* (Apr. 21, 2021), archived at <https://perma.cc/69Y5-BP7N> [hereinafter *2020 Survey Results*].

Research shows that many Americans also experience discrimination based on their race, sex, LGBTQ status, religion, age, or disability when going to a doctor or health clinic.¹⁰ Older people, for example, report a variety of harmful experiences in health care due to age discrimination, such as being ignored when they raise concerns or not being consulted on key decision making, which results in “inappropriate and inadequate care.”¹¹ LGBTQ people, particularly transgender people, have also reported various types of discriminatory treatment, ranging from negative comments from providers to outright refusals to provide care.¹² In a

¹⁰ See, e.g., NPR et al., *Final Summary, supra*, at 13 fig.8 (showing prevalence of experiences of discrimination when going to a doctor or health clinic based on race or ethnicity, gender, or LGBTQ status); Stephanie E. Rogers et al., *Discrimination in Healthcare Settings Is Associated with Disability in Older Adults: Health and Retirement Study, 2008-2012*, 30 J. of Gen. Internal Med. 1413 (2015); Goleen Samari et al., *Islamophobia, Health, and Public Health: A Systematic Literature Review*, 108 Am. J. Pub. Health No. 6, e5 (June 2018); U.S. Nat’l Council on Disability, *Health Equity Framework for People with Disabilities* (Feb. 2022), archived at <https://perma.cc/2HVR-GYZ8>.

¹¹ Judith Graham, “They Treat Me Like I’m Old and Stupid”: Seniors Decry Health Providers’ Age Bias, Kaiser Health News (Oct. 20, 2021), archived at <https://perma.cc/Y6W7-R5YQ>.

¹² See, e.g., Hum. Rts. Watch, “You Don’t Want Second Best”: Anti-LGBT Discrimination in US Health Care (2018), archived at <https://perma.cc/QX7B-BGWB>; Caroline Medina et al., Ctr. for Am. Progress, *Protecting and Advancing Health Care for Transgender Adult Communities* (Aug. 2021), archived at <https://perma.cc/K855-JWFX>.

2020 study, nearly half of transgender people, including 68% of transgender people of color, reported experiencing mistreatment by a medical provider in the year before the survey, including “care refusal as well as verbal or physical abuse.”¹³

Incidents of discrimination in public accommodations occur throughout the country in large cities, small towns, suburbs, and rural areas. For example, a same-sex couple in New York City said they were subjected to anti-gay remarks at a restaurant and asked to leave.¹⁴ A man in Charleston, West Virginia filed a lawsuit alleging that a store manager yelled anti-gay slurs at him and chased him out of the store.¹⁵ A Muslim woman in Denver, Colorado reported that she was refused entry to a sports arena unless she removed her hijab.¹⁶ A transgender woman in Washington, D.C. was asked to show identification to use a restroom at a

¹³ Medina et al., *supra*, at 17; see Lindsay Mahowald, Ctr. for Am. Progress, *LGBTQ People of Color Encounter Heightened Discrimination* (June 24, 2021), archived at <https://perma.cc/36SA-CCLP>.

¹⁴ Cynthia Silva, *Gay Couple Says NYC Restaurant Kicked Them Out Because of Their Sexuality*, NBCNews.com (Jan. 25, 2021), archived at <https://perma.cc/C5LP-JVEL>.

¹⁵ Complaint at ¶¶ 6-12, *Anderson v. Spirit Halloween Superstores LLC*, Civil Action No. 22-C-216 (Circuit Court of Kanawha Cnty., W. Va., Mar. 23, 2022).

¹⁶ Minyvonne Burke & Suzanne Ciechalski, *Muslim Woman Says Denver Arena Worker Told Her to Remove Hijab, Refused to Let Her Enter*, NBCnews.com (Nov. 13, 2019), archived at <https://perma.cc/UNS6-K2SB>.

restaurant.¹⁷ A deaf woman from Atlantic City, New Jersey filed a lawsuit alleging that she was refused service and treated rudely when she attempted to order food at two locations of a fast-food restaurant chain.¹⁸ And a same-sex couple in Glasgow, Kentucky reported that they drove an hour to see an accountant who prepared taxes for a low flat rate, only to see a sign in the window saying “Homosexual marriage not recognized.”¹⁹

Such discrimination not only impedes access to goods and services in Amici’s communities but also harms the health and well-being of community members. As the U.S. Department of Health and Human Services has recognized, discrimination is a “social stressor that has a physiological effect on individuals . . . that can be compounded over time and can lead to long-term negative health outcomes.”²⁰ A large body of

¹⁷ Justin Wm. Moyer, *D.C. Restaurant Fined \$7,000 After Asking Transgender Woman for ID Before Letting Her Use Bathroom*, Wash. Post (Jan. 17, 2019), archived at <https://perma.cc/R9KB-QSX5>.

¹⁸ Complaint at ¶ 1, *Cirrinzione v. Taco Bell Corp.*, No. 16-cv-04248-JBS-KMW (D.N.J. July 13, 2016).

¹⁹ Jo Yurcaba, *A “Troubling Rise” in Business Owners Refusing Gay Couples, Advocates Say*, NBCnews.com (Apr. 21, 2021), archived at <https://perma.cc/NGE4-R8EJ>.

²⁰ U.S. Dep’t of Health & Hum. Servs., *Healthy People 2030*, *supra*; Am. Psych. Ass’n, *Stress in America: The Impact of Discrimination* 8 (Mar. 10, 2016), archived at <https://perma.cc/3HHZ-N27E>.

research documents the health impacts of discrimination, including disparities in health outcomes.²¹

Discrimination in public accommodations also diminishes participation in public life, harming the social climate of Amici's communities. For example, in a 2020 survey of LGBTQ people, one-third of all respondents, and more than half of those who had experienced discrimination in the past year, avoided public places like stores or restaurants to avoid experiencing discrimination.²² Discrimination also undermines the stability of local communities. A national survey found that 31% of LGBTQ respondents, and 23% of Black respondents, had thought about moving because they had experienced discrimination or unequal treatment where they live.²³

Discrimination also harms Amici's ability to provide health care and other necessary services to local

²¹ See, e.g., U.S. Dep't of Health & Hum. Servs., *Healthy People 2020, Discrimination*, archived at <https://perma.cc/LR49-C37G>; U.S. Ctrs. for Disease Control & Prevention, *Racism is a Serious Threat to the Public's Health*, archived at <https://perma.cc/7CPZ-3HBG>; What We Know Project, Cornell Univ., *What Does the Scholarly Research Say about the Effects of Discrimination on the Health of LGBT People* (2019), archived at <https://perma.cc/4AJQ-KX76>.

²² Mahowald et al., *2020 Survey Results*, *supra*.

²³ NPR et al., *LGBTQ Americans*, *supra*, at 13; NPR, Robert Wood Johnson Found. & Harvard T.H. Chan Sch. of Pub. Health, *Discrimination in America: Experiences and Views of African Americans* 13 (Oct. 2017), archived at <https://perma.cc/5PUL-9BL2>.

communities. A national survey found that a “significant share of Americans” avoid seeking medical care due to concerns about discrimination, which can lead to serious conditions being undiagnosed or untreated.²⁴ In particular, a national study found that 22% of Black Americans, 17% of Latinos, 15% of Native Americans, and 9% of Asian Americans, as well as 18% of LGBTQ people and 9% of women, had avoided seeking medical care for themselves or a family member due to concerns they would be discriminated against or treated poorly because of their race or ethnicity, LGBTQ status, or gender.²⁵ This impacts the public health of our communities and undermines Amici’s ability to effectively serve the people in our jurisdictions.²⁶

In addition, discrimination affects the economic climate of Amici’s communities. Local governments collectively employ more than 14 million workers.²⁷ As

²⁴ NPR et al., *Final Summary, supra*, at 19. Fear of discrimination causes people to forgo seeking other services as well. See Mahowald et al., *2020 Survey Results, supra* (concluding that nearly 1/5 of LGBTQ respondents, and 39% of transgender respondents, had avoided getting services they needed for themselves or their family to avoid discrimination).

²⁵ NPR et al., *Final Summary, supra*, at 13.

²⁶ Discrimination in employment, housing, and other areas can also lead to economic instability, which makes people more likely to rely on government benefits and services. See Christy Mallory et al., Williams Inst., *The Impact of Stigma and Discrimination Against LGBT People in Pennsylvania* 46 (Nov. 2021), archived at <https://perma.cc/L7XS-W8PT>.

²⁷ U.S. Census Bureau, *Local Government: Employment and Payroll Data by State and by Function: March 2019* (May 2021), archived at <https://perma.cc/DXZ3-S33A>.

a general matter, discrimination in the workplace imposes significant costs on employers due to increased absenteeism and turnover, as well as lower productivity.²⁸ In addition, local communities often bear the economic costs when their states enact discriminatory laws. For example, when North Carolina enacted a law in 2016 excluding transgender people from restrooms and restricting local jurisdictions from enacting comprehensive nondiscrimination protections, local jurisdictions throughout the state lost millions of dollars due to canceled business expansions and relocated conventions, sports events, and concerts.²⁹

Nondiscrimination laws ensure equal opportunity to participate in the “almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society,” *Romer v. Evans*, 517 U.S. 620, 631 (1996), and they improve the health, welfare, and economic security of Amici’s community members and jurisdictions as a whole. For example, research

²⁸ See, e.g., Soc’y for Hum. Res. Mgmt., *Absenteeism, Productivity Loss, and Turnover: The Cost of Racial Injustice* 10-11 (2021), archived at <https://perma.cc/836S-PV6Y>; Christy Mallory et al., Williams Inst., *Workplace Discrimination and Harassment Against LGBT State & Local Government Employees* 11 (Nov. 2021), archived at <https://perma.cc/B85S-6A8X>.

²⁹ Emery P. Dalesio & Jonathan Drew, “*Bathroom Bill*” to Cost North Carolina \$3.76B, AP News (Mar. 30, 2017), archived at <https://perma.cc/KF8R-YJQE>; Dan Schulman, Press Release, *PayPal Withdraws Plan for Charlotte Expansion*, PayPal.com (Apr. 5, 2016), archived at <https://perma.cc/RHX3-5WAF>; WCNC Staff, *Greensboro Misses Out on Millions from Lost NCAA Games*, WCNC.com (Mar. 21, 2017), archived at <https://perma.cc/M2LS-C6QX>.

demonstrates that nondiscrimination laws explicitly prohibiting discrimination based on sexual orientation and gender identity have “resounding benefits” for LGBTQ people, including improved mental and physical health, higher employment and wages, improved employment experiences, improved school environments, less social stigma and discrimination, and less housing discrimination.³⁰ Such protections also benefit the wider community, leading to increased business performance, entrepreneurship, and economic growth,³¹ as well as direct financial savings.³²

³⁰ Lindsay Mahowald, Ctr. for Am. Progress, *LGBTQI+ Nondiscrimination Laws Improve Economic, Physical, and Mental Well-Being* (Mar. 24, 2022), archived at <https://perma.cc/VWZ8-JH9H>.

³¹ See *id.* (citing studies).

³² For example, in the first five years after San Francisco required city contractors to extend spousal health benefits to their employees’ domestic partners, more than 51,000 people received health benefits, and San Francisco likely saved a minimum of \$10 million as a result of the increase in insured residents. S.F. Hum. Rts. Comm’n, *Five Year Report on the San Francisco Equal Benefits Ordinance* 5 (Nov. 14, 2002), archived at <https://perma.cc/9YGU-8UE3>; Jennifer C. Pizer et al., *Evidence of Persistent and Pervasive Workplace Discrimination Against LGBT People: The Need for Federal Legislation Prohibiting Discrimination and Providing for Equal Employment Benefits*, 45 Loy. L.A. L. Rev. 715, 775-76 (2012).

B. To further their interest in protecting community members from discrimination, cities and counties across the country have enacted a range of local laws to ensure equal treatment in public accommodations.

To protect the health and welfare of their communities, hundreds of local governments, including many Amici, have enacted laws prohibiting discrimination in public accommodations. Such laws ensure that people are treated equally by prohibiting discrimination based on characteristics such as race, national origin, religion, age, sex, sexual orientation, gender identity and expression, disability, veteran status, or other characteristics. Some local governments have had public accommodations laws for decades,³³ while others recently enacted them.³⁴ These laws are the product of the democratic process and reflect the desires of local community members. They allow us to function as pluralistic communities and protect residents and visitors who make our communities more diverse and contribute to our economy. They are features of local jurisdictions across the country, including large urban centers,

³³ *See, e.g.*, Minneapolis, Minn., Code of Ordinances §§ 139.10, 139.40 (2022); Greensboro, N.C., Code of Ordinances § 12-97 (2022); S.F., Cal., Police Code §§ 3301, 3305 (2022).

³⁴ *See, e.g.*, Asheville, N.C., Code of Ordinances § 10-2(f) (2022); Wichita, Kan., Code of Ordinances §§ 2.06.010, 2.06.050(c) (2022).

mid-size and small cities and counties, towns, and suburbs.³⁵

As Amici’s diverse experiences show, local nondiscrimination ordinances are designed to meet local needs. For example, Atlanta’s nondiscrimination ordinance notes the city’s “great cosmopolitan population consisting of large numbers of people of every race, color, creed, religion, sex, marital status, parental status, familial status, sexual orientation, national origin, gender identity, and age, many of them with physical and mental disabilities. . . .”³⁶ Driggs, Idaho, whose population is approximately 2,000, “determined that discrimination on the basis of sexual orientation and gender identity/expression must be addressed, and appropriate legislation be enacted.”³⁷ Many local ordinances have explicit findings that discrimination in

³⁵ See, e.g., Allentown, Pa., Code § 27-6 (2022); Austin, Tex., Code of Ordinances § 5-2-1 et seq. (2022); Brookhaven, Ga., Code of Ordinances § 15-595 (2022); Chi., Ill., Mun. Code § 2-160-070 (2022); Driggs, Idaho, Code of Ordinances § 5-5-3.B (2022); Iowa City, Iowa, Code of Ordinances § 2-3-2 (2022); Ketchikan, Alaska, Mun. Code § 9.08.020 (2022); L.A., Cal., Mun. Code § 51.03.A (2022); Omaha, Neb., Code of Ordinances § 13-84 (2022); N.Y.C., N.Y., Admin. Code § 8-107.4 (2022); S.F., Cal., Police Code § 3305 (2022); Shreveport, La., Code of Ordinances § 39-2 (2022); South Bend, Ind., Code of Ordinances § 2-127.1(a) (2021); Traverse City, Mich., Code of Ordinances § 605.04 (2022); Tucson, Ariz., Code of Ordinances § 17-12(h) (2022); Whitefish, Mont., City Code § 1-10-4 (2022).

³⁶ Atlanta, Ga., Code of Ordinances § 94-11 (2022).

³⁷ Driggs, Idaho, Code of Ordinances § 5-5-1.A (2022); U.S. Census Bureau, *Annual Estimates of the Resident Population for Incorporated Places in Idaho: April 1, 2020 to July 1, 2021* (2022), archived at <https://perma.cc/R6ZE-WDAJ>.

public accommodations harms the health, safety, and general welfare of community members.³⁸ Local governments have also found that discrimination in public accommodations harms their local economies.³⁹

Local governments also consider community needs when crafting the scope of their ordinances, as discrimination in public accommodations is a “matter[] of local concern.”⁴⁰ Whitefish, Montana’s ordinance, for example, explicitly seeks to “ensure a balanced approach,” including with respect to the “rights of freedom of association and expression,” and it exempts certain clubs or places that are “distinctly private.”⁴¹ Many local public accommodations ordinances do not apply to religious organizations or private places and clubs.⁴²

³⁸ *See, e.g.*, Atlanta, Ga., Code of Ordinances § 94-67(a) (2022); Austin, Tex., Code of Ordinances § 5-2-1(B) (2022); Ketchikan, Alaska, Mun. Code § 9.08.005 (2022); S.F., Cal., Police Code § 3302 (2022); Seattle, Wash., Mun. Code § 14.06.030(A) (2022).

³⁹ *See, e.g.*, Driggs, Idaho, Code of Ordinances § 5-5-1.D (2022) (finding that “[t]he denial of fair and equal treatment under the law due to sexual orientation or gender identity/expression . . . damages a city’s economic well being”); Pittsburgh, Pa., Code of Ordinances § 651.01(e) (2022) (finding discrimination in public accommodations “detrimental to the . . . economic growth of the city”).

⁴⁰ Atlanta, Ga., Code of Ordinances § 94-67(a) (2022).

⁴¹ Whitefish, Mont., City Code §§ 1-10-1(E), 1-10-2 (2022).

⁴² *See, e.g.*, Chi., Ill., Mun. Code §§ 2-160-070, 2-160-080 (2022); Denver, Colo., Code of Ordinances § 28-96(c)(4) (2022); Scottsdale, Ariz., Code of Ordinances §§ 15-15.O, 15-17.A (2022); Whitefish, Mont., City Code § 1-10-2 (2022).

When considering the need for local protections from discrimination in public accommodations and other contexts, many Amici have engaged in extensive factfinding, analysis, and public discussion. For example, San Francisco enacted local nondiscrimination protections in public accommodations and other contexts after “public hearings and consideration of testimony and documentary evidence.”⁴³ The Board of Supervisors concluded that state and federal protections were “not adequate to meet the particular problems of this community, and that it is necessary and proper to enact local regulations adapted to the special circumstances which exist in this City and County.”⁴⁴ More recently, Wichita enacted nondiscrimination protections, including in public accommodations, after months of public discussion, including city council hearings with public comment as well as review and input from an advisory board appointed by local officials.⁴⁵

In many jurisdictions, public accommodations ordinances further local governments’ interest in protecting community members from discrimination by filling in gaps in state law. In Florida, for example, some local jurisdictions prohibit age discrimination in public accommodations, which is not prohibited under

⁴³ S.F., Cal., Police Code § 3302 (2022).

⁴⁴ *Id.*

⁴⁵ Lily Wu, *Wichita City Council Approves Non-Discrimination Ordinance*, KWCH.com (Oct. 11, 2021), archived at <https://perma.cc/V5GS-HEVN>; Wichita, Kan., Code of Ordinances §§ 2.06.010, 2.06.050 (2022).

state law.⁴⁶ In North Carolina, where state protections are limited,⁴⁷ local jurisdictions prohibit discrimination in public accommodations based on numerous characteristics, such as “race, natural hair or hairstyles, ethnicity, creed, color, sex, sexual orientation, gender identity or expression, national origin or ancestry, marital or familial status, pregnancy, veteran status, religious belief or non-belief, age, or disability.”⁴⁸ And in states that do not explicitly prohibit discrimination in public accommodations based on sexual orientation and gender identity or expression, many local jurisdictions do so.⁴⁹ For example, Whitefish’s ordinance, which was amended in 2016, states that adding explicit prohibitions of discrimination based on sexual orientation and gender identity or expression is “necessary and desirable” because state and federal laws

⁴⁶ See, e.g., Orange Cnty., Fla., Code of Ordinances § 22-42(a) (2022); Osceola Cnty., Fla., Code of Ordinances § 27-12(a) (2022); Volusia Cnty., Fla., Code of Ordinances § 36-41(a) (2022); cf. Fla. Stat. § 760.08 (2022).

⁴⁷ N.C. Gen. Stat. §§ 127B-13, 130A-148(i), 168A-6 (2022) (prohibiting discrimination in public accommodations based on membership in U.S. Armed Forces, AIDS/HIV status, and disability).

⁴⁸ See, e.g., Asheville, N.C., Code of Ordinances § 10-2(f) (2022); Buncombe Cnty., N.C., Ordinance No. 21-04-18 (2021); Carrboro, N.C., Town Code § 8-82 (2022).

⁴⁹ See Movement Advancement Project, *Local Nondiscrimination Ordinances* (updated Aug. 4, 2022), archived at <https://perma.cc/TU7S-V5NA>. Some state agencies also interpret state laws prohibiting sex discrimination to prohibit discrimination because a person is LGBTQ, consistent with *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020). See, e.g., Fla. Comm’n on Hum. Rels., *Notice*, archived at <https://perma.cc/F22F-85C2>.

“do not adequately address all potential discriminatory practices that may impact the city’s diverse inhabitants and visitors.”⁵⁰

In some cases, local jurisdictions have led the way in enacting nondiscrimination protections later adopted at the state level. For example, New York City’s Human Rights Law has explicitly prohibited discrimination in public accommodations on the basis of sexual orientation since 1986 and gender identity since 2002, long before New York State enacted similar protections in 2003 and 2019.⁵¹ And in the last several years, an increasing number of local jurisdictions around the country have enacted prohibitions on race-based discrimination based on hair texture, natural or protective hairstyles, or other hairstyles associated with racial, ethnic, or cultural identities, including in states that have considered or subsequently enacted similar protections.⁵²

The common thread among local public accommodations ordinances is that, like CADA, they further the government interest in eradicating discrimination by regulating commercial conduct. Requiring local

⁵⁰ Whitefish, Mont., City Code § 1-10-1(B) (2022).

⁵¹ 2002 N.Y. Laws, ch. 2, A1971; 2019 N.Y. Laws, ch. 8, S1047; N.Y.C., N.Y., Local Law No. 2 (1986); N.Y.C., N.Y., Local Law No. 3 (2002).

⁵² Shreveport, La., Code of Ordinances §§ 39-1, 39-2 (2022); 2022 La. Acts 529; *see, e.g.*, Cincinnati, Ohio, Code of Ordinances §§ 914-1-D1, 914-1-T1, 914.7 (2022); Clayton County, Ga., Code of Ordinances §§ 62-401, 62-404 (2022); Phila., Pa., Code §§ 9-1102(e), (m.1), (v.1), 9-1106 (2021).

businesses to provide equal treatment to members of the public regardless of customers’ religious beliefs, sexual orientation, or other characteristics does not involve promoting a message or “coerc[ing] those who hold views [government] officials disfavor.” (Pet’rs Br. 50.) Some local jurisdictions have made this explicit, such as Pittsburgh, whose nondiscrimination ordinance states that “[n]othing in this Chapter shall be construed as supporting or advocating any particular doctrine, position, point of view, life style or religious view.”⁵³ Rather, as with other nondiscrimination ordinances, the goal is “that all persons are treated fairly and equally” and “to guarantee fair and equal treatment under law to all people of the city.”⁵⁴

II. Petitioners’ proposed exception would harm Amici and their communities.

The First Amendment “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). As

⁵³ Pittsburgh, Pa., Code of Ordinances § 651.02(d) (2022); *accord*, e.g., Allentown, Pa., Code § 27-2(B) (2022); Bos., Mass., Mun. Code § 12-9.1 (2022); San Antonio, Tex., City Code §§ 2-550(c), (d) (2022).

⁵⁴ Pittsburgh, Pa., Code of Ordinances § 651.02(d) (2022); *accord*, e.g., Allentown, Pa., Code § 27-2(B) (2022); Bos., Mass., Mun. Code § 12-9.1 (2022); San Antonio, Tex., City Code § 2-550(c) (2022).

Colorado explains, CADA regulates commercial conduct, not speech. (Resp't Br. 13-15.) CADA "prohibit[s] the act of discriminating against individuals in the provision of publicly available goods, privileges, and services." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 572 (1995). It requires businesses, including Petitioners, to provide the same services to members of the public without regard to customers' disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry. Colo. Rev. Stat. § 24-34-601(2)(a) (2021). CADA also prohibits businesses from advertising their intent to engage in unlawful conduct. *Id.* It does not compel Petitioners' speech, nor does it require Petitioners to create a different wedding website for a same-sex couple from what Petitioners would create for a different-sex couple. (Resp't Br. 18-20, 15-18.) Accepting Petitioners' invitation to create a speech-based exception for businesses selling goods and services to the public would undermine the effective enforcement of nondiscrimination laws, harming Amici and their communities.

Permitting businesses to refuse or restrict the sale of goods and services based on customers' legally protected status would directly contravene Amici's efforts to ensure equal treatment in the public marketplace.⁵⁵ Nothing in Petitioners' argument would limit the proposed exception to services for same-sex couples. Accepting Petitioners' argument would open the door to

⁵⁵ See, e.g., Driggs, Idaho, Code of Ordinances § 5-5-1.D (2022); Bos., Mass., Mun. Code § 12-9.1 (2022); San Antonio, Tex., Code of Ordinances § 2-550(c) (2022).

other forms of status-based discrimination, permitting Petitioners to refuse to make a wedding website for a Jewish couple or a couple where one or both members has disabilities, for example. *Cf.* Colo. Rev. Stat. § 24-34-601(2)(a) (2021) (prohibiting discrimination based on creed and disability). Petitioners’ rule, if adopted, would result in the kind of differential treatment among customers that many Amici have expressly prohibited. *Cf. Elane Photography, LLC v. Willock*, 309 P.3d 53, 62 (N.M. 2013) (“[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.”).

Petitioners’ proposed exception would also impede Amici’s efforts to protect the health and welfare of local communities. On a practical level, a ruling in favor of Petitioners would limit access to goods and services that are otherwise available to the public. Research shows that some community members, such as Hispanic LGBTQ people, would find it harder to access alternative services such as wedding vendors if they were turned away.⁵⁶ But as the Court has recognized, the harms of discrimination are deeper and broader than having to go elsewhere. *See Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250 (1964) (citation omitted) (noting the “deprivation of personal

⁵⁶ Lindsay Mahowald, Ctr. for Am. Progress, *Hispanic LGBTQ Individuals Encounter Heightened Discrimination* (July 29, 2021), archived at <https://perma.cc/3BES-ZGBV> (noting that 56% of Hispanic LGBTQ respondents and 44% of white LGBTQ respondents reported it would be “difficult to some degree” to find an alternative wedding vendor if they were turned away).

dignity that surely accompanies denials of equal access to public establishments”); *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719, 1727 (2018) (warning of the “community-wide stigma inconsistent with the history and dynamics of civil rights laws” that would result from wedding-related businesses refusing services to same-sex couples). Many local jurisdictions have recognized that discrimination harms the health and welfare of their communities. *See* Part I.B, *supra*. A ruling in Petitioners’ favor would exacerbate these harms.

In addition, Petitioners’ proposed exception would likely have a chilling effect on participation in public life in Amici’s jurisdictions, undermining our efforts to foster inclusion. The express goal of many public accommodations ordinances is to ensure that residents and visitors have an equal opportunity to participate in the social, cultural, and economic life of a community.⁵⁷ The enforcement of nondiscrimination protections ensures that individuals in our communities have the right to go to public establishments without worrying they will be turned away, given inferior service, or humiliated based on their identity. Concerns

⁵⁷ *See, e.g.*, Denver, Colo., Code of Ordinances § 28-91(a) (2022) (stating intent “that every individual shall have an equal opportunity to participate fully in the economic, cultural, and intellectual life of the city and to have an equal opportunity to participate in all aspects of life, including, but not limited to . . . public accommodations”); Pittsburgh, Pa., Code of Ordinances § 651.02 (2022) (stating policy “to assure the right and opportunity of all persons to participate in the social, cultural, recreational and economic life of the city”).

about discrimination already cause significant numbers of Americans to avoid going to restaurants or stores, or to avoid seeking health care or other necessary services. *See* Part I.A, *supra*. Adopting a rule that would allow businesses to turn away members of the public based on their protected status—and to post notices on their websites or signs so stating—would result in more community members avoiding local businesses or other places of public accommodation to avoid encountering discrimination or the risk of it.

Furthermore, creating speech-based exceptions for businesses would cause uncertainty in Amici’s communities as to the scope of our laws, which would likely lead to more instances of unlawful discrimination, further chill participation in public life, and increase enforcement costs to local governments. When laws apply equally to all commercial transactions, covered entities know what is prohibited and individuals know what their rights are. Petitioners’ proposed framework of subjective, speech-based exceptions would be challenging for local enforcement agencies to administer. (Br. of Nat’l League of Cities et al. as Amici Curiae, Part II.) It would also cause confusion among businesses and community members. Many local businesses selling potentially “expressive” goods or services might believe they have a right to engage in discriminatory conduct and refuse service to customers based on their identities. *Cf. Rumsfeld v. Forum for Acad. & Inst. Rts., Inc.*, 547 U.S. 47, 66 (2006) (rejecting view that “a regulated party could always transform conduct into ‘speech’ simply by talking about it”). For example, the owner of

a barbershop might believe he has a free speech right based on the “expressive” or “custom” nature of his work to refuse to provide a short haircut based on a customer’s sex.⁵⁸ But that conduct would clearly violate state or local laws prohibiting sex discrimination. And when community members are turned away from businesses, or see a notice from a business that it will not provide certain services to protected groups of people, they might not know that such discrimination is in fact unlawful. Such confusion would also increase local governments’ enforcement costs, as jurisdictions enforcing their nondiscrimination ordinances would be saddled with the costs of defending against every purported Free Speech objection.

Regardless of individuals’ personal beliefs or viewpoints, public accommodations laws require the equal treatment of others in the commercial sphere so that our community members may engage in commercial transactions freely and on equal terms, without fear of discrimination. Granting Petitioners an exception to Colorado’s public accommodations law would undermine Amici’s efforts to ensure equal treatment in our communities.



⁵⁸ Cf. Stipulated Final Judgment at 2, *Oliver v. The Barbershop, R.C., Inc.*, No. CIVDS160823 (San Bernardino Cnty. Super. Ct. Jan. 19, 2017) (barbershop admitting violating California’s public accommodations law by refusing service to a transgender person based on sex).

CONCLUSION

Amici urge the Court to affirm the judgment of the court of appeals.

Respectfully submitted,

August 19, 2022

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