No. 21-476

IN THE
Supreme Court of the United States

303 CREATIVE LLC, A LIMITED LIABILITY COMPANY; LORIE SMITH,

Petitioners,

v.

AUBREY ELENIS; SERGIO RAUDEL CORDOVA; CHARLES GARCIA; RICHARD LEE LEWIS, JR.; MAYUKO FIEWEGER; CHERYLIN PENISTON; JEREMY ROSS; DANIEL WARD; PHIL WEISER,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF *AMICUS CURIAE* NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC., IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

The NAACP Legal Defense and Educational Fund, Inc. (LDF) is a non-profit civil rights legal organization that, for over 80 years, has fought to enforce the guarantees of equal protection and due process in the United States Constitution on behalf of victims of discrimination.

LDF was counsel of record in *Newman v. Piggie Park Enters.*, 390 U.S. 400 (1968), a landmark case solidifying the power of public accommodations laws to eradicate discrimination. LDF has also participated as *amicus curiae* in cases across the country concerning the civil and human rights of lesbian, gay, bisexual, transgender, and queer individuals, and the broader LGBTQIA+ community. *See, e.g., Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719 (2018); *Obergefell v. Hodges*, 576 U.S. 644 (2015); *United States v. Windsor*, 570 U.S. 744 (2013); *Romer v. Evans*, 517 U.S. 620 (1996); *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014); *Jackson v. Abercrombie*, 585 F. App'x 413 (9th Cir. 2014); *Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014); *Perry v. Schwarzenegger*, 591 F.3d 1147 (9th Cir. 2010); *State v. Arlene's Flowers, Inc.*, 389 P.3d 543 (Wash. 2017); *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009); *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008); *Conaway v. Deane*, 932 A.2d 571 (Md. 2007); *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006);

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* state that no counsel for a party authored this brief in whole or in part and that no person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief.

Gifford v. McCarthy, 23 N.Y.S.3d 422 (N.Y. App. Div. 2016). Consistent with its opposition to all forms of discrimination, LDF has a strong interest in the fair application of public accommodations laws, including the Colorado Anti-Discrimination Act.

INTRODUTION AND SUMMARY OF ARGUMENT

More than half a century ago, this Court held that the First Amendment does not grant commercial proprietors license to discriminate based on a prospective customer's identity. In *Newman v. Piggie Park Enterprises*, 390 U.S. 400 (1968), the Court held that a white barbecue proprietor did not have a constitutional right to refuse to serve Black patrons based on his belief that doing so, and contributing to racial integration in any way, "contravene[d] the will of God." *Id.* at 402 n.5. Having chosen to open a business and make his services commercially available, the proprietor was bound to comply with Title II of the Civil Rights Act and its prohibition on discrimination.

Like the proprietor in *Piggie Park*, Lorie Smith has chosen to open a business, 303 Creative,[2] and therefore is bound by public accommodations laws in the operation of her business, including Colorado's prohibition on businesses discriminating against customers based on their sexual orientation. And, like the proprietor in *Piggie Park*, Petitioner is asking this Court to create a new constitutional right that would allow her to violate Colorado's public accommodations law and deny services to customers based on their

[2] We refer to Ms. Smith and her business as "Petitioner" throughout this brief.

sexual orientation, specifically to same-sex couples who choose to marry.

Implicitly recognizing the weight of *Piggie Park*, though conspicuously failing to cite it, Petitioner casts her request for a First Amendment-based exception to public accommodations laws not as discrimination based on a customer's identity, but rather as a religion-based rejection of the message that, in Petitioner's view, is sent when two members of the same sex marry. But even a cursory probing of Petitioner's claim shows that her proposed constitutional right to violate a generally applicable public accommodations law is foreclosed by *Piggie Park*. As this Court has recognized, a person's choice to marry someone of the same sex is, of course, inextricably intertwined with their sexual orientation. *See Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1727 (2018); *Obergefell v. Hodges*, 576 U.S. 644, 675 (2015). Refusing service to a customer who wishes to celebrate a same-sex wedding is, therefore, a type of discrimination based on sexual orientation, which Colorado has chosen to prohibit. Petitioner's religion-based objection to same-sex marriage does not create a constitutional right to operate a business in a manner that violates a generally applicable public accommodations law. As the Court unanimously recognized in *Piggie Park*, the Constitution does not permit religious beliefs to trump anti-discrimination laws in the operation of commercial businesses. Petitioner cannot overcome that fact by recasting her claim as one based on the "message" that is sent when two persons of the same sex marry any more than the proprietor in *Piggie Park* could overcome Title II by focusing on the

"message" about integration that is sent when customers of different races choose to patronize the same restaurant.

Crediting Petitioner's manufactured First Amendment exception to neutral public accommodations law would risk opening the door to vendors to engage in wide-ranging identity-based discrimination, allow vendors to stigmatize same-sex couples and the broader LGBTQIA+ community, and compound discrimination faced by Black members of that community. Applying the precedent of *Piggie Park*, this Court should reject Petitioner's theory and affirm the decision below.

ARGUMENT

Public accommodations laws are vital to ensuring free and full access to society and its benefits on an equal basis to all. When merchants exclude individuals from commercial transactions based on their identity—as Petitioner wishes to do here—the excluded individuals suffer a stigma that the law is meant to guard against. Creating the exception to anti-discrimination laws that Petitioner requests in this action would contravene precedent and would undermine the purpose and protection of public accommodations laws.

I. NEUTRAL AND GENERALLY APPLICABLE PUBLIC ACCOMMODATIONS LAWS DO NOT AND SHOULD NOT PERMIT A FIRST AMENDMENT EXCEPTION.

This Court's settled precedent precludes a First Amendment exception to compliance with neutral, generally applicable public accommodations laws.

The Court need look no further than the story of another vendor of specialty products, barbecue proprietor Maurice Bessinger, who tried, and failed, to avoid federal public accommodations law through a First Amendment objection.

Title II of the federal Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, religion, or national origin in restaurants, hotels, gas stations, and places of entertainment. *See* 42 U.S.C. § 2000a. The law was designed to "vindicate the deprivation of personal dignity that surely accompanies denials of equal access to public establishments." *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 250 (1964) (internal quotation marks omitted).

Two years after its enactment, the Court upheld Title II in the face of a religiously based First Amendment challenge. *See Newman v. Piggie Park Enters.*, 390 U.S. 400, 402 n.5 (1968). Maurice Bessinger, the white proprietor of several barbecue restaurants in South Carolina, refused service to three Black customers on two separate occasions. He believed that serving Black customers or contributing to racial integration "contravene[d] the will of God." *Id.*; *Newman v. Piggie Park Enters.*, 256 F. Supp. 941, 944 (D.S.C. 1966). When the customers sued Mr. Bessinger under Title II, in a case litigated by LDF, Mr. Bessinger defended against the suit by arguing in part that "his religious beliefs compel him to oppose any integration of the races whatever," and that compliance with Title II would therefore force him to violate his religious beliefs in violation of the First Amendment. *Newman*, 256 F. Supp. at 944. The Court dismissed his challenge to the statute as

"patently frivolous." *Piggie Park*, 390 U.S. at 402 n.5. As the *Piggie Park* district court explained, Mr. Bessinger was entitled to "espouse the religious beliefs of his own choosing," but that entitlement did not give him "the absolute right to exercise and practice such beliefs in utter disregard of the clear constitutional rights of other citizens." *Newman*, 256 F. Supp. at 945. Half a century later, it remains firmly established that First Amendment objections cannot justify differential treatment of individuals when such treatment would contravene neutral and generally applicable public accommodations laws. *See Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1727 (2018).

Colorado's Anti-Discrimination Act, which extends the prohibition against discrimination in public accommodations to sexual orientation,[3] and covers retail establishments like flower shops, bakeries, and web designers, does not and should not provide a First Amendment exception. Indeed, in addressing such a challenge to Colorado's law in *Masterpiece Cakeshop*, the Court explained that while "religious and philosophical objections [to same-sex

[3] This legislative gap-filling reflects the fundamental principle that, although "[r]ace has a unique history in our country, and racial discrimination in public accommodations was an essential aspect of the racial caste system that was sanctioned by law until the civil rights movement . . . no one should be denied full citizenship in public spaces because of who they are." Sherrilyn Ifill, *Symposium: The First Amendment Protects Speech and Religion, Not Discrimination in Public Spaces*, SCOTUSblog (June 5, 2018), https://www.scotusblog.com/2018/06/symposium-the-first-amendment-protects-speech-and-religion-not-discrimination-in-public-spaces/.

marriage] are protected, it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law." 138 S. Ct. at 1727 (citing *Piggie Park*, 390 U.S. 402 n.5). This remains the case even when religious objections are framed as compelled speech, rather than free exercise. Nothing in the First Amendment suggests that discrimination motivated by religious beliefs is exempt from public accommodations laws, and the preclusive effect of *Piggie Park*, so long as it is framed as a free speech claim rather than a free exercise claim. Indeed, Mr. Bessinger could easily have framed his challenge to Title II as speech-based, claiming the law interfered with his ability to "oppose any integration of the races whatever." *Newman*, 256 F. Supp. at 944. It cannot be that such a simple reframing would change the outcome.

II. PETITIONER'S PROPOSED CIRCUMVENTION OF THE LAW WOULD CAUSE GRAVE HARM TO SAME-SEX COUPLES, AND BY EXTENSION TO THE LGBTQIA+ COMMUNITY.

Despite this settled precedent, which the Court reaffirmed just four years ago, Petitioner seeks to circumvent Colorado's Anti-Discrimination Act, and to avoid the preclusive effect of *Piggie Park*, by casting her refusal to service same-sex weddings as "a message-based, not status-based, decision." Pet'r's Br. 21–22; *id.* at 39 (claiming to serve "every client regardless of status"); *id.* at 40 ("Smith does not discriminate against anyone."). Similarly, *amici*

National Association of Evangelicals, et al., argue that Smith "does not discriminate against wedding participants because of their sexual orientation," but instead wishes to discriminate "against a message." Br. of *Amici Curiae* Nat'l Ass'n of Evangelicals et al. 14–19, 26 (arguing "the vendor's decision is not rooted in the *status* of the customers, but in the *message* of the customers and those with whom they associate."). As such, *amici* argue, the refusal of service in which Petitioner wishes to engage does not constitute discrimination, but merely the neutral "making of distinctions," which does not involve any "mistreatment." Br. of *Amici Curiae* Ethics & Pub. Pol'y Ctr. et al. 21.

Faithful application of this Court's precedent shows, however, that Petitioner's proposed conduct does, in fact, discriminate on the basis of identity, and that such discrimination, in which businesses refuse to provide services to same-sex couples getting married, imposes serious dignitary harms. These harms will be felt not only by same-sex couples who choose to marry, but will also stigmatize the broader LGBTQIA+ community, and will have a particularly harmful effect on Black members of that community.

A. Petitioner seeks to discriminate on the basis of identity, not message.

Contrary to Petitioner's and amici's arguments, the conduct and any purportedly associated "message" against which Petitioner wishes to discriminate freely—same-sex marriage—is inextricable from the betrothed couple's sexual orientation.

This Court has already recognized that discrimination against same-sex marriage itself imposes a "serious stigma on gay persons." *Masterpiece Cakeshop*, 138 S. Ct. at 1729. And the Court has repeatedly refused to artificially separate conduct from status in the manner that Petitioner and her *amici* propose. In *Christian Legal Society Chapter of the University of California, Hastings College of the Law v. Martinez*, 561 U.S. 661 (2010), for instance, the Supreme Court "declined to distinguish between status and conduct" where the targeted activity was engaging in "homosexual conduct." *Id.* at 672, 689. Similarly, in *Lawrence v. Texas*, 539 U.S. 558 (2003), the Court explained that a Texas criminal statute that forbade two persons of the same sex from engaging in intimate sexual conduct stigmatized gay individuals. *Id.* at 575; *see also id.* at 583 (O'Connor, J., concurring in judgment) (explaining that "the conduct targeted by this law is conduct that is closely correlated with being homosexual" and thus the law is "directed toward gay persons as a class")*; see also Bob Jones Univ. v. United States*, 461 U.S. 574, 605 (1983) (rejecting the argument that a school which admitted Black students, but banned interracial dating, did not discriminate on the basis of race).

The Court's precedent on Title VII of the Civil Rights Act of 1964 demonstrates the inextricable link between a person's identity—their sexual orientation—and their choice to marry someone of the same sex. Title VII prohibits discrimination in employment decisions "because of" an individual's "sex." 42 U.S.C. § 2000e-2(a)(1). Under Title VII, if discrimination on the basis of sex is a "but for" cause

of an adverse employment action, the employer has violated the law. *Bostock v. Clayton Cnty., Ga.*, 140 S. Ct. 1731, 1739 (2020). The Court can discern whether a factor is a "but-for" cause of an action by "chang[ing] one thing at a time and see[ing] if the outcome changes." *Id.*

Applying these principles in *Bostock*, the Court held that discrimination based on sexual orientation is prohibited by Title VII's ban on discrimination because of sex. The plaintiffs in *Bostock* were fired because they were gay or transgender. The defendant employers resisted liability under Title VII of the Civil Rights Act, arguing in part that they had discriminated not on the basis of sex, which is prohibited by Title VII, but on the basis of the employees' sexual orientation or gender identity. *Id.* at 1744. The Court rejected that argument, reasoning that "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex." *Id.* at 1741. The Court recognized that employers may not "perceive themselves as motivated by a desire to discriminate based on sex," but that nonetheless, "[w]hen an employer fires an employee for being homosexual or transgender, it necessarily and intentionally discriminates against that individual in part because of sex." *Id.* at 1744–46.

The Court's analysis was in line with Title VII precedent holding that discrimination based on traits separate, but inextricable, from sex violates Title VII. Most notably, the Court held in 1971, in a case litigated by LDF, that discrimination against women with young children, but not against men with young children, was discrimination on the basis of sex, even

while it was also discrimination on the basis of maternal status. *See Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971) (per curiam).

The same reasoning applies here. Although Petitioner does not perceive herself as discriminating on the basis of sexual orientation, by refusing to provide services for weddings only when those weddings involve same-sex couples, she "necessarily and intentionally discriminates . . . in part because of" sexual orientation. *Bostock*, 140 S. Ct. at 1744–46. Petitioner's refusal of services has nothing to do with the specific content of a same-sex couple's desired wedding website, but hinges instead on the fact that the couple is of the same sex. *See* Pet'r's Br. 22 (objecting to the mere creation of a same-sex wedding website, regardless of what it says); *id.* at 23 n.2 (arguing that "opposite-sex wedding websites are not 'suitable for use' to celebrate a same-sex wedding"). Changing that "one thing"—the individuals' sexual orientation—would change Petitioner's conduct, making clear that her refusal of service is based on sexual orientation, not conduct or message.

Petitioner's statement that she would serve "gay, lesbian, or bisexual clients" in non-wedding contexts, "so long as the custom graphics and websites do not violate [her] religious beliefs" does not change the analysis. *See* Pet.App.54a. Where a business seeks to discriminate against a customer for reasons that are inextricable from identity, the fact that the business would not discriminate against the customer in other contexts is irrelevant. No one would argue, for example, that a company complies with Title II when it refuses to serve mixed-race groups of customers, so long as it serves customers of all races in non-

integrated groups. *Cf. Bob Jones Univ.*, 461 U.S. at 605 (rejecting the argument that a school which admitted Black students, but banned interracial dating, did not discriminate on the basis of race); *Newman*, 256 F. Supp. at 947 (denial of "full service" to Black customers violated Title II). Regardless of Petitioner's willingness to serve "gay, lesbian, or bisexual clients" in certain contexts, her refusal to provide full service on terms equal to customers whose sexual orientation does not offend her religious beliefs is unlawful discrimination.

B. Refusing to provide business services to individuals celebrating same-sex weddings denies gay and lesbian persons equal treatment under the law and imposes significant dignitary harms on those couples and the broader LGBTQIA+ community.

Far from being a neutral distinction, discriminating against gay and lesbian persons in the realm of marriage stigmatizes same-sex couples and the broader LGBTQIA+ community, hindering their free participation in society, based on an immutable identity characteristic.

In the context of laws that exclude same-sex couples from the institution of marriage altogether, this Court explained that such exclusion "would disparage their choices and diminish their personhood." *Obergefell v. Hodges*, 576 U.S. 644, 672 (2015). Such exclusionary lawmaking "impose[s] stigma and injury of the kind prohibited by our basic charter." *Id.* at 670–71.

Petitioner's proposed discrimination against same-sex couples is no less stigmatizing because it is undertaken through denial of a public accommodation, as opposed to the act of a governmental body. This Court has repeatedly affirmed that "[o]ur society has come to the recognition that gay persons and couples cannot be treated as social outcasts or as inferior in dignity and worth." *Fulton v. City of Phila., Pa.*, 141 S. Ct. 1868, 1882 (2021) (quoting *Masterpiece Cakeshop,* 138 S. Ct. at 1727). "Outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty." *Obergefell*, 576 U.S. at 667. And discrimination against same-sex marriage affects the LGBTQIA+ community more broadly, conveying that historical stigmas endure, despite societal progress.[4] Were this Court to sanction such discrimination and enshrine it in our nation's fundamental charter, the stigma would be particularly severe. Such a ruling would communicate to the LGBTQIA+ community that they are not worthy of fundamental legal protections established by states to shield them from discrimination on the basis of their sexual orientation and gender identities.

Providing for the equal treatment of LGBTQIA+ people under the law is one of the primary means to ensure that they are not regarded as outcasts. "If each LGBTQ person has the worth equal to that of a non-LGBTQ person," then our laws should "assign

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[4] *See* James M. Oleske, Jr., *The Evolution of Accommodation: Comparing the Unequal Treatment of Religious Objections to Interracial and Same-Sex Marriages*, 50 Harv. C.R.-C.L. L. Rev. 99, 122–123 (2015).

equal value to LGBTQ and non-LGBTQ people," and "operate in a way that reflects the equal worth of both groups."[5] When our laws do not assign equal worth to same-sex marriages and the participants in those relationships, by, for example, allowing a business to put up a sign saying, "no goods or services will be sold if they will be used for gay marriages," the right to equal treatment is plainly violated. *See Masterpiece Cakeshop*, 138 S. Ct. at 1729. The resulting discrimination offends the constitutional right to equal protection and imposes "a serious stigma on gay persons" and their broader community of interest. *Id.* at 1728–29.

Indeed, denying a generally available business service to same-sex couples stigmatizes them in at least three distinct ways. First, there is the immediate consequence and insult of the denial. "When a same-sex couple is denied service, the couple must absorb the full burden of such a denial—measured in the time and other expense incurred in locating a willing provider, along with the dignitary harm of being refused access to services that are otherwise available to the public."[6] This "direct, personal insult wounds more than the mere

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[5] Andrew S. Park, Esq., *Respecting LGBTQ Dignity Through Vital Capabilities*, 24 J. Gender Race & Just. 271, 285 (2021).

[6] Andrew Koppelman, *Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law*, 88 S. Cal. L. Rev. 619, 644–45 (2015) (quoting Ira C. Lupu & Robert W. Tuttle, *Same-Sex Family Equality and Religious Freedom*, 5 Nw. J.L. & Soc. Pol'y 274, 290 (2010)) (internal quotation marks omitted).

knowledge that there are people out there who do not want to deal with you."[7]

Second, one must grapple with the reality that one's identity is not given equal weight in society. Denying same-sex couples the same rights as opposite-sex couples "works a grave and continuing harm . . . The imposition of this disability on gays and lesbians serves to disrespect and subordinate them." *Obergefell*, 576 U.S. at 675. Especially given the history of legal sanctions and societal disapproval of same-sex relationships, *see, e.g.*, *Romer v. Evans*, 517 U.S. 620 (1996), a denial of services reinforces the idea that same-sex relationships, and therefore the people within them, are not as worthy.[8] This stigma "is seen as an indicator of not only a degraded sexuality and gender, but also of the worthlessness of the person in all other functions of life (such as being a worker, parent, student, and citizen)."[9]

Third, there is the well-documented phenomenon of "minority stress," which describes the negative mental, emotional and physical impacts that discrimination has on marginalized groups.[10] For individuals attracted to members of the same sex, this stress may include "experiencing prejudice, anticipating further prejudice, harboring internalized homophobia, and attempting to conceal or hide one's

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[7] *Id.* at 645–46.

[8] Park, *supra* note 5, at 285.

[9] *Id.* at 284; *see also* Mark Storslee, *Religious Accommodation, the Establishment Clause, and Third-Party Harm*, 86 Univ. Chi. L. Rev. 871, 939 (2019).

[10] Koppelman, *supra* note 6, at 644–45.

sexual orientation."[11] Recent studies have documented that lesbian, gay, and bisexual[12] people are more likely to report experiencing discrimination than heterosexual people, and that these experiences correlate with increased psychiatric disorders and adverse mental health outcomes.[13]

C. The LGBTQIA+ community includes Black Americans who will face especially harmful intersectional discrimination should Petitioner prevail.

Finally, Petitioner's attempt to evade anti-discrimination provisions of Colorado's public accommodations laws, if successful, would disproportionately harm Black same-sex couples and, more broadly, Black members of the LGBTQIA+ community who face intersectional discrimination because of both their race and sexual orientation.[14]

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[11] Therese M. Stewart & Mollie M. Lee, *The Role of Public Law Offices in Marriage Equality Litigation*, 37 N.Y.U. Rev. L. & Soc. Change 187, 191 (2013).

[12] These studies did not survey transgender and non-binary individuals.

[13] Vickie M. Mays & Susan D. Cochran, *Mental Health Correlates of Perceived Discrimination Among Lesbian, Gay, and Bisexual Adults in the United States*, 91 Am. J. Pub. Health 1869 (2001); Ilan H. Meyer, *Prejudice, Social Stress, and Mental Health in Lesbian, Gay, and Bisexual Populations: Conceptual Issues and Research Evidence*, 129 Psych. Bull. 674, 674–92 (2003).

[14] Soon Kyu Choi, Bianca D.M. Wilson & Christy Mallory, UCLA Sch. L. Williams Inst., *Black LGBT Adults in the U.S.: LGBT Well-Being at the Intersection of Race* (2021), https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Black-SES-Jan-2021.pdf.

The term intersectionality, first coined by legal scholar Kimberlé Crenshaw, describes how "[d]iscrimination, like traffic through an intersection, may flow in one direction, and it may flow in another. If an accident happens in an intersection, it can be caused by cars traveling from any number of directions and, sometimes, from all of them."[15] Put differently, "where two bases for discrimination exist, they cannot be neatly reduced to distinct components . . . the attempt to bisect a person's identity at the intersection of race and gender often distorts or ignores the particular nature of their experiences." *Lam v. Univ. of Haw.*, 40 F.3d 1551, 1562 (9th Cir. 1994).

On one axis is persistent racial discrimination faced by Black Americans in commercial establishments like restaurants.[16] Recent high-profile examples of this well-documented and persisting[17] form of discrimination include "the

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[15] Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 Univ. Chi. Legal F. 139, 149 (1989).

[16] See Zachary W. Brewster, Michael Lynn & Shelytia Cocroft, *Consumer Racial Profiling in U.S. Restaurants: Exploring Subtle Forms of Service Discrimination Against Black Diners*, 29 Socio. F. 476, 481, 492 (2014).

[17] *E.g.*, Margery Austin Turner et al., Off. of Pol'y Dev. & Rsch., U.S. Dep't of Hous. & Urb. Dev., *Housing Discrimination Against Racial and Ethnic Minorities 2012* (2012), https://www.huduser.gov/portal//Publications/pdf/HUD-514_HDS2012.pdf; Randy T. Lee et al., *On the Prevalence of Racial Discrimination in the United States*, PLOS ONE (Jan 10,

notorious Starbucks incident in downtown Philadelphia in which two Black men who were waiting for a meeting were forced to leave" and "the removal of a Black patron who was in the lobby of his own Hilton hotel."[18] On the other axis, persistent discrimination against LGBTQIA+ Americans endures.[19] Recent examples that received media attention include a gay couple called a homophobic slur by a waitress at a Texas restaurant and a New York broker refusing to provide housing to a lesbian couple seeking an apartment.[20]

It is at the intersection of these axes that Black members of the LGBTQIA+ community face "double-discrimination—the combined effects of practices

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2019), https://doi.org/10.1371/journal.pone.0210698; *Race Relations*, Gallup, https://news.gallup.com/poll/1687/race-relations.aspx (last visited Aug. 15, 2022) (35% of Black adult respondents in 2021 felt they had been treated unfairly in a store because they were Black).

[18] Suja A. Thomas, *The Customer Caste: Lawful Discrimination by Public Businesses*, 109 Cal. L. Rev. 141, 143–44 (2021).

[19] *E.g.*, Diane K. Levy et al., The Urb. Inst., *A Paired-Testing Pilot Study of Housing Discrimination Against Sex-Same Couples and Transgender Individuals* (2017), https://www.urban.org/sites/default/files/publication/91486/2017.06.27_hds_lgt_final_report_report_finalized_0.pdf; Lindsay Mahowald, Sharita Gruberg & John Halpin, Ctr. for Am. Progress, *The State of the LGBTQ Community in 2020* 4 (2020), https://www.americanprogress.org/article/state-lgbtq-community-2020/#Ca=10 (more than half of LGBTQ respondents reported discrimination "in a public place such as a store, public transportation, or a restroom").

[20] Isaac Saidel-Goley, *The Right Side of History: Prohibiting Sexual Orientation Discrimination in Public Accommodations, Housing, and Employment*, 31 Wis. J. L. Gender & Soc'y 117, 118–19 (2016).

which discriminate on the basis of race, and on the basis of sex."[21] This intersectional discrimination is not merely the sum of anti-Black racial discrimination and anti-LGBTQIA+ discrimination but represents a unique and synergistic harm faced by the Black LGBTQIA+ community.

The implications of Petitioner's proposed First Amendment exception to public accommodations laws will uniquely harm Black LGBTQIA+ Americans because of the compound discrimination they face based on both their race and their sexual orientation. For example, more Black LGBTQIA+ Americans reported experiencing discrimination within the last year compared to white LGBTQIA+ Americans.[22] In a recent survey, 77% of Black LGBTQIA+ adults reported discrimination adversely impacting their psychological wellbeing, a rate nearly 50% higher than the total LGBTQIA+ survey population.[23] In general, Black LGBTQIA+ adults are over 40% more likely to have made a suicide attempt in their lifetime than white LGBTQIA+ adults.[24] Discrimination also adversely affects the mental health of Black LGBTQIA+ children, with surveys demonstrating

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[21] Crenshaw, *supra* note 15, at 149.

[22] Mahowald, Gruberg & Halpin, *supra* note 19, at 5.

[23] *Id* at 8–9.

[24] *Cornell University Study on Impact of Discrimination on LGBTQ of Color*, Wash. Blade (July 15, 2021), https://www.washingtonblade.com/2021/07/15/cornell-university-study-on-impact-of-discrimination-on-lgbtq-of-color/; *see also* Myeshia Price-Feeney, Amy Green & Samuel Dorison, The Trevor Project, *All Black Lives Matter: Mental Health of Black LGBTQ Youth* (2020), https://www.thetrevorproject.org/wp-content/uploads/2020/10/All-Black-Lives-Matter-Mental-Health-of-Black-LGBTQ-Youth.pdf.

that Black LGBTQIA+ youth who experience anti-LGBTQIA+ discrimination are more than twice as likely to attempt suicide compared to youth who do not (27% vs. 12%).[25] Black LGBTQIA+ youth who experience race-based discrimination also face higher odds of attempting suicide than those who do not (20% vs. 14%).[26]

Aside from being unwieldy—hinging on whether the discrimination in question was on the basis of race or sexual orientation—Petitioner's proposed First Amendment exception to public accommodations laws would result in even more discrimination against and even worse health outcomes for a subset of Black Americans. In states with public accommodations laws that protect sexual orientation, the result is obvious and immediate: that vital protection would be significantly undermined. Moreover, most Black LGBTQIA+ Americans live in southern states (51.4%, more than twice the share of any other region of the country), the overwhelming majority of which already lack explicit anti-discrimination public accommodations protections for sexual-orientation discrimination.[27] The regional concertation of Black LGBTQIA+ individuals in the South, coupled with persistent patterns of anti-Black and anti-LGBTQIA+ discrimination in public accommodations, underscores the necessity for strong anti-discrimination laws that protect all aspects of a Black person's identities. A First Amendment exception to public accommodations laws would further cement

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[25] Price-Feeney, Green & Dorison, *supra* note 24, at 13.

[26] *Id.*

[27] Choi, Wilson & Mallory, *supra* note 14, at 10.

their vulnerability to discrimination on the basis of not only their sex but also their race.[28]

A Black person's sexual orientation should not require them to forfeit the protection of anti-discrimination laws. In order to fully effectuate the purpose of state public accommodations laws and allow Black Americans to be fully included in the United States polity, regardless of their sexual orientation, states must have the ability to also protect LGBTQIA+ Black Americans.

CONCLUSION

Given the dignitary harms discussed above, states undoubtedly have a compelling interest in combatting discrimination based on sexual orientation in a broad range of public accommodations. *See e.g., Masterpiece Cakeshop*, 138 S. Ct. at 1727. Considering this compelling interest, our anti-discrimination laws cannot tolerate the denial of business services based on a merchant's personal opposition to same-sex marriage. *Id.* ("[I]t is a general rule that [religious and philosophical] objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law."); *see also Fulton*, 141 S. Ct. at 1882. Not only would creating a new constitutional right to violate neutral public accommodations laws

[28] Only two southern states, Maryland and Virginia, have public accommodations laws that protect sexual orientation and gender identity. *See State Public Accommodation Laws*, Nat'l Conf. State Legislatures (June 25, 2021), https://www.ncsl.org/research/civil-and-criminal-justice/state-public-accommodation-laws.aspx.

undermine the state's interest in ensuring the equal treatment of same-sex couples and the broader LGBTQIA+ community, it would also deeply stigmatize LGBTQIA+ people and compound harms experienced by Black LGBTQIA+ persons. Despite Petitioner's and amici's attempt to cast these denials as mere ideological disagreements, these denials mark LGBTQIA+ individuals with a badge of inferiority. The decision below should be affirmed.

Respectfully submitted,

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