

No. 21-476

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IN THE  
*Supreme Court of the United States*

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303 CREATIVE LLC, ET AL.,

*Petitioners,*

—v.—

AUBREY ELENIS, ET AL.,

*Respondents.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE TENTH CIRCUIT

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**BRIEF OF *AMICI CURIAE* FORMER U.S.  
REPRESENTATIVE ANTHONY (“TONY”) COELHO,  
THE ASSOCIATION OF LATE DEAFENED ADULTS,  
THE AUTISTIC SELF ADVOCACY NETWORK, THE CIVIL  
RIGHTS EDUCATION AND ENFORCEMENT CENTER,  
DISABILITY RIGHTS ADVOCATES, DISABILITY RIGHTS  
BAR ASSOCIATION, THE DISABILITY RIGHTS  
EDUCATION & DEFENSE FUND, THE JUDGE DAVID L.  
BAZELON CENTER FOR MENTAL HEALTH LAW,  
LIGHTHOUSE FOR THE BLIND AND VISUALLY IMPAIRED  
OF SAN FRANCISCO, NATIONAL ASSOCIATION OF THE  
DEAF, AND NATIONAL FEDERATION OF THE BLIND  
IN SUPPORT OF RESPONDENTS**

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**INTEREST OF *AMICI CURIAE***<sup>1</sup>

Over 60 million Americans have a disability. Disability Impacts All of Us, Centers for Disease Control and Prevention, <https://www.cdc.gov/ncbddd/disabilityandhealth/infographic-disability-impacts-all.html> (last visited July 27, 2022). The Americans with Disabilities Act (“ADA”) protects individuals with physical or mental impairments that substantially limit one or more major life activities; individuals with a record or history of such impairment; and individuals regarded as having such impairment. See 42 U.S.C. § 12102. This definition “offers a broad scope of protection,” and “should not demand extensive analysis.” See 42 U.S.C. §§ 12101, note (b)(1) and (5).

As we show in this brief, if successful, Petitioner’s assault on the Colorado Anti-Discrimination Act (“CADA”)’s protection of LGBTQ people would also seriously weaken federal, state, and local statutory protection of the right of people with disabilities to “equality of opportunity, full participation, independent living, and economic self-sufficiency,” the express goals of the ADA. 42 U.S.C. § 12101(a)(7).

*Amici* are former U.S. Representative Anthony (“Tony”) Coelho, a principal author of the Americans With Disabilities Act (“ADA”), joined by the following leading disability rights organizations which each have substantial expertise related to federal, state, and local disability rights law, policy, and litigation:

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<sup>1</sup> No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution to the preparation or submission of this brief. All parties have consented in writing to the filing of this brief.

the Association of Late Deafened Adults, the Autistic Self Advocacy Network, the Civil Rights Enforcement and Education Center, the David L. Bazelon Center for Mental Health Law, Disability Rights Advocates, the Disability Rights Bar Association, the Disability Rights Education and Defense Fund, the LightHouse for the Blind and Visually Impaired, the National Association for the Deaf, and the National Federation of the Blind.

These organizations all have different missions, but each is dedicated to vindication of the dignity of people with disabilities by enforcing their rights to full and equal participation in all aspects of our society and eradicating disability discrimination in public accommodations. The organizational amici and the people who work with and for them are on the front lines enforcing the ADA and state and local civil rights laws. They frequently encounter First Amendment defenses that if accepted would impede full enforcement of these important civil rights statutes.

## **INTRODUCTION AND SUMMARY OF ARGUMENT**

In *Obergefell v. Hodges*, this Court affirmed the equal dignity of same-sex couples by guaranteeing them their fundamental right to marry. 135 S. Ct. 2584, 2604-05 (2015). Consistent with the core of *Obergefell*, the CADA prohibits discrimination based on sexual orientation in and by places of public accommodation. Colo. Rev. Stat. § 24-34-601. Like its federal counterpart Title II of the Civil Rights Act of 1964, the CADA regulates economic conduct, with “[t]he fundamental object ... to vindicate ‘the deprivation of personal dignity that surely

accompanies denials of equal access to public establishments.” *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250 (1964) (quoting S. Rep. No. 872, 88th Cong., 2d Sess., at 16-17); see *Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm’n*, 138 S. Ct. 1719, 1728 (2018).

Petitioner 303 Creative LLC and its owner, Lorie Smith (collectively, “the Company”) are a wedding website designer whose business undisputedly is a public accommodation under the CADA. The Company seeks a federal constitutional exemption from the CADA that will allow it to discriminate in providing goods and services expressly on the basis of sexual orientation. It contends that applying the CADA to its business compels Ms. Smith to engage in speech that is anathema to her as a person of religious faith who opposes non-heterosexual marriage. Anti-discrimination laws, however, protect members of historically excluded groups and should be fully enforced even in the face of First Amendment claims of exemption. Accepting the Company’s defense will weaken all anti-discrimination laws in our country and will have terrible consequences for all protected groups, including people with disabilities.

Congress has found that discrimination against people with disabilities “costs the United States billions of dollars in unnecessary expenses.” 42 U.S.C. § 12101(a)(8). Adoption of the Company’s defense will harm the American economy in the manner Congress highlighted in enacting the Americans with Disabilities Act.

In enacting the ADA, Congress provided a “broad mandate” meant “to remedy widespread discrimination against disabled individuals.”

*PGA Tour, Inc. v. Martin*, 532 U.S. 661, 674 (2001). The express purpose is “to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities.” 42 U.S.C. § 12101(b)(2).

If adopted, the Company’s defense could severely weaken the ADA’s public accommodations provisions. And the harm would be even more extensive. For example, the courts rely on cases interpreting the public accommodations provisions of the ADA when interpreting analogous provisions found in other titles of the ADA. *See, e.g., California Council of the Blind v. Cnty. of Alameda*, 985 F. Supp. 2d 1229, 1240-41 (N.D. Cal. 2013) (relying on case law interpreting public accommodations provisions of ADA to interpret provisions applicable to state and local governments).

In this brief, *Amici* marshal examples, *inter alia*, of past First Amendment defenses raised by opponents of full enforcement of the ADA and describe the economic and societal benefits of ensuring that disability anti-discrimination laws continue to be fully enforceable.

## ARGUMENT

### **I. The Company’s Free Speech Defense Would Upset the Balance that Civil Rights Laws Have Struck Between the First Amendment and Equal Treatment**

The Company’s complaint that it is being forced to speak content that it abhors flies in the face of the jurisprudence that permits government to regulate conduct that discriminates against protected groups. Because conduct often involves some amount of

speech, the government must be able to restrict speech that facilitates or is incidental to unlawful discrimination or other unlawful conduct while other speech remains subject to First Amendment protections. Examples abound: *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 62 (2006) (Solomon Amendment's requirement that law schools provide military recruiters with access to facilities, including posting notices and circulating emails from recruiters, did not violate schools' constitutional free speech rights because "compelled speech" was "plainly incidental to the Solomon Amendment's regulation of conduct"); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 66 (1986) (recognizing claims of sexual harassment, including verbal conduct, under Title VII of Civil Rights Act); *Pittsburgh Press Co. v. Pittsburgh Comm'n on Hum. Rels.*, 413 U.S. 376, 391 (1973) (local government's order prohibiting newspaper from running job advertisements in sex-designated advertising columns did not violate newspaper's constitutional free speech rights); *Aguilar v. Avis Rent A Car Sys., Inc.*, 21 Cal. 4th 121, 126 (1999) (rejecting argument that remedial injunction, issued to remedy hostile work environment violative of state law, prohibiting defendants from using racial slurs and epithets was unconstitutional prior restraint).

## **II. Approving the Company's Proposed Constitutional Free Speech Defense Could Allow Businesses to Refuse to Serve People with Disabilities**

Just like LGBTQ people, people with disabilities face stigma and discriminatory treatment throughout society. *See e.g.*, Debra McKinney, "The Invisible Hate Crime," Southern Poverty Law Center (Aug. 5, 2018), <https://www.splcenter.org/fighting-hate/intel>

[ligence-report/2018/invisible-hate-crime](#) (chronicling hate crimes against people with various disabilities); Jasmine E. Harris, “The Aesthetics of Disability,” 119 COLUM. L. REV. 895, 914-15, 930 (2019) (discussing research showing ongoing attitudinal biases against people with disabilities); Mark Sherry, *Disability Hate Crimes: Does Anyone Really Hate Disabled People?* (2016). This stigma originates from outdated notions about the capabilities of people with disabilities, distaste for the appearance or approach of people with disabilities, cultural attitudes, and sometimes religion. Allowing the Company’s proposed constitutional free speech defense would open the door to similar defenses to disability access claims, which would work to undermine the promise of accessibility and equal treatment that the ADA and similar state laws provide.

**A. Validating the Company’s Free Speech Defense Risks Subjecting People with Disabilities to Additional Discrimination**

Since the beginning of recorded history, people who look different from the majority have been shunned and marginalized. *See* Jasmine E. Harris, “Processing Disability,” 64 AM. U. L. REV. 457, 466-73 (2015) (discussing history of laws prohibiting people with disabilities from appearing in public places and practices of isolating people with disabilities and excluding them from aspects of public life).

Some people with disabilities appear physically different. They have disabilities that affect their skin appearance or facial structures, or scarring related to their disabilities or from related treatment. *See, e.g.*, Disability Evaluation Under Social Security, 8.00 Skin Disorders – Adult, Social Security Administration, <https://www.ssa.gov/disability/>

[professionals/bluebook/8.00-Skin-Adult.htm](#) (last visited Jul. 27, 2022); Noonan syndrome – Symptoms and causes, Mayo Clinic, <https://www.mayoclinic.org/diseases-conditions/noonan-syndrome/symptoms-causes/syc-20354422> (last visited Jul 27, 2022). To this day, people are stigmatized by society, and experience discriminatory exclusions from public accommodations. Justin Caba, “Golden Corral Restaurant Pays \$50K To Family Who Was Asked To Leave For Daughter’s Skin Disorder” (Medical Daily, May 17, 2013), <https://www.medicaldaily.com/golden-coral-restaurant-pays-50k-family-who-was-asked-leave-daughters-skin-disorder-245990>; Kathleen Hale, “*Toyota v. Williams*: Further Constricting the Circle of Difference,” 4 J.L. SOCIETY 275, 303 n.135 (2003) (discussing research finding that many co-employees are very uncomfortable working with people with certain disabilities, including people with “facial disfigurement”).

Some people hold outdated, paternalistic views of people with disabilities, viewing them as the downtrodden in need of perpetual assistance or unavailable repair. See Elizabeth Penn, “Disability Civil Rights Law & Policy,” 75 MISS. L.J. 1085, 1086 n.4 (2006). In contrast, many people with disabilities view disability more positively, as simply another form of natural human diversity. See, e.g., Marc Maurer, “The Nature of Blindness,” National Federation of the Blind (2015), <https://nfb.org/sites/default/files/images/nfb/publications/fr/fr34/4/fr340414.htm> (describing advantages of blindness).

If the Court approves the Company’s free speech defense, website makers, photographers, and other business proprietors who contend that they offer goods and services with expressive content could justify refusing to provide goods and services with

disability-related content, such as a photographer who makes family portraits refusing to photograph a family with a visibly disabled child, because the proprietor finds people with disabilities to be unsightly or distasteful. But the business proprietors who contend that they offer goods and services with expressive content are places of public accommodation not private *fora* for speech. If they can exclude protected classes of people because they abhor them, where would it end? How do they differ from architects, construction contractors, bicycle builders, or greeting card writers? The list is endless.

**B. People with Disabilities Often Encounter Religion-Based Stigma and Discrimination**

The question on which the Court granted review concerns the Company's First Amendment freedom of speech defense which includes protection from being compelled to speak despite the speaker's disapproval of the message's content. However, the Company's disapproval is based on the website owner's religious beliefs, a right that is of course also protected by the First Amendment. *See* *Pets.*' Brief at 3-8; *see also Masterpiece Cakeshop*, 138 S. Ct. at 1727 (discussing relationship between constitutional free exercise right and anti-discrimination laws); *Bob Jones Univ. v. United States*, 461 U.S. 574, 605 (1983) (private university argued that First Amendment free exercise rights permitted it to discriminate on the basis of race while maintaining tax exempt status in violation of applicable policy); *Christian Legal Soc. Chapter of the Univ. of California, Hastings Coll. of the L. v. Martinez*, 561 U.S. 661, 668-69 (2010) (Christian law student group argument that its First Amendment free exercise rights permitted it to exclude students based on religion and sexual

orientation in violation of public law school policy requiring non-discrimination by student groups); *Newman v. Piggie Park Enter., Inc.*, 390 U.S. 400, 402 n.5 (1968) (*per curiam*) (rejecting business owner's constitutional challenge to the Civil Rights Act's bar on racial discrimination in public accommodations based on his view that racial integration "contraven[ed] the will of God"); *Smith v. Fair Emp. & Hous. Com.*, 12 Cal. 4th 1143 (1996) (landlord argued that First Amendment free exercise rights permitted her to refuse to rent to unmarried couples in violation of state law).

*Amici* do not question the commitment to disability inclusion of the overwhelming majority of people of faith. At the same time, many faiths have at least some citable, scriptural basis for shunning people with disabilities that can be packaged within First Amendment free speech protection. *See, e.g.*, Leviticus 21:17-20 ("[N]one of your descendants who has a defect may come near to offer the food of his God."); Sarah M. Whitman, MD, Pain and Suffering as Viewed by the Hindu Religion, *THE JOURNAL OF PAIN*, Vol. 8, No. 8 (Aug. 2007), at 607-13; "The Buddha Speaks the Sutra on Cause and Effect in the Three Periods of Time," Translated by the Buddhist Text Translation Society ("The blind of this world bear a heavy burden for past failure to tell the way clearly to travelers."); Koran 6:39 ("Those who reject our Signs are deaf and dumb—in the midst of darkness profound.").

Former United States Representative Anthony Coelho, the principal sponsor of the ADA, faced religiously based discrimination himself. At a congressional hearing leading up to passage of the ADA, Representative Coelho testified that after his epilepsy was disclosed to the Catholic Church, the

Church barred him from becoming a Catholic priest pursuant to Canon Law (*Codex Iuris Canonici*), applicable at the time, which forbade ordination of “those who are or were epileptics either not quite in their right mind or possessed by the Evil One.”<sup>2</sup> S. 2345 to Establish a Clear and Comprehensive Prohibition of Discrimination on the Basis of Handicap: Joint Hearing Before the Subcomm. on the Handicapped of the S. Comm. on Labor & Human Res. & Subcomm. on Select Ed. of the H. Comm. of Ed. & Labor, 100th Cong. 11-12 (1988) (statement of Rep. Coelho).

Individuals who rely on service dogs are often denied service by stores and other public accommodations, including taxis and rideshare services, which violates the ADA. *See* 28 C.F.R. §§ 36.104, 36.302(c). Blind or low-vision individuals disproportionately rely on taxi services for transportation, but frequently encounter denials because of the presence of a service animal. *See, e.g., Nat’l Fed’n of the Blind of California v. Uber Techs., Inc.*, 103 F. Supp. 3d 1073 (N.D. Cal. 2015) (challenging pervasive discriminatory denials of transportation service for blind riders with guide dogs in California); *see also Stevens v. Optimum Health Institute*, 810 F. Supp. 2d 1074 (S.D. Cal. 2011). Such denials are sometimes religiously motivated. *See, e.g., “Minnesota’s Muslim Cab Drivers Face Crackdown,”* Reuters, Apr. 17, 2007 (detailing large number of Muslim taxi drivers in the

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<sup>2</sup> In the subsequently revised Code of Canon Law, promulgated in 1983, reference to physical disability and the connection between possession by evil and epilepsy were removed, and replaced by a prohibition on “insanity or other psychic defect,” evaluation of which is to be done by experts.

area of the Minneapolis-St. Paul International Airport who refused to transport dogs because they are unclean), *available at*: <https://www.reuters.com/article/us-Muslims-taxis/minnesotas-muslim-cab-drivers-face-crackdown-idUSN1633289220070417>.

To ensure broad access, the ADA permits public accommodations to ask people with disabilities only two questions about their service animals: “if the animal is required because of a disability and what work or task the animal has been trained to perform.” 28 C.F.R. § 36.302(c)(6). Crediting a free speech defense to anti-discrimination laws would open the door to public accommodations asserting constitutional free speech defenses to justify interrogating people with disabilities about their service animals. Even if such defenses are ultimately unsuccessful, interrogating people with disabilities about their service animals would have a chilling effect on people with disabilities’ traveling in public spaces with their service animals.

Refusing service to a person because of HIV/AIDS status also violates the ADA. *See Bragdon v. Abbott*, 524 U.S. 624, 641 (1998) (recognizing clear congressional intent to prohibit discrimination based on HIV status, and holding that asymptomatic HIV infection is a disability under the ADA); *see also* Carrie Griffin Basas, “The Sentence of HIV,” 101 KY. L.J. 543, 563 (2013) (discussing research finding that people with HIV face stigmatizing attitudes from a significant share of the public).

Cases of discrimination against people with HIV persist. Fear and pseudo-science motivate some of the denials of access, and in some cases religious scruples, have been asserted as a defense to providing service to people with HIV. *Doe v. Deer Mountain*

*Day Camp, Inc.*, 682 F. Supp. 2d 324, 331 (S.D.N.Y. 2010) (plaintiff claim that defendant basketball camp discriminated against him—in denying him admission to the camp—on the basis of his HIV-positive status, in violation of ADA and New York law, was defended on the basis of pseudo-science about the danger of HIV and its transmissibility); *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1118 n.7 (9th Cir. 2009) (pharmacists with religious objections unsuccessfully brought constitutional challenge to Washington law prohibiting pharmacies from refusing to deliver lawfully prescribed or approved medicines). Adopting the Company’s defense would credit this unlawful conduct.

### **III. Adopting the Company’s Free Speech Defense Would Jeopardize Access to Information, the Internet, Premises, and Academic Programs by People with Disabilities**

#### **A. The Company’s Free Speech Defense Threatens People with Disabilities’ Access to Information**

Access to the internet and modern media is an essential part of daily life. It is even more critical for shopping, communication, education, and entertainment for people with disabilities who often have less access to transportation compared with their peers without disabilities. If adopted, the Company’s free speech defense would endanger access to the Internet and media for people with disabilities because businesses that provide these services may argue that providing disability accommodations amounts to compelled speech.

### **1. The Company's Freedom of Expression Defense Risks Limiting People with Disabilities' Entitlement to Audio Description**

Audio description is a verbal description of the visual aspects of a movie, television program or other video, or live performance. 28 C.F.R. § 36.303(g)(1)(ii). It is provided through a recorded audio track that plays in synchrony with a film, television program, or video, or by a sighted individual for live performances. Audio description is necessary to provide blind people with access to audiovisual content. *See* 81 Fed. Reg. 87348, 87355 (“for individuals who are blind or who have low vision, the only auxiliary aid presently available that would effectively communicate the visual components of a movie is audio description.”). Providing people who are blind or low vision with access to video content exposes them to new ideas, knowledge that “contributes to their development, communication, and literacy,” and “integrates them into society.” *See id.* at 87357.

Federal law requires public accommodations and television broadcasters to provide audio description.<sup>3</sup> 47 C.F.R. § 79.3; 42 U.S.C. § 12182(b)(2)(a)(iii); 28 C.F.R. § 36.303(a), (g) (ADA regulations requiring public accommodations to provide auxiliary aids to facilitate effective communication with people with disabilities and specifically requiring movie theaters

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<sup>3</sup> Internet accessibility guidelines also provide that online videos should have audio description to make them accessible to people who are blind. Web Content Accessibility Guidelines Version 2.1 Success Criteria 1.2.5, *available at* <https://www.w3.org/WAI/WCAG21/Understanding/audio-description-prerecorded.html>.

to make audio description available); Nondiscrimination on the Basis of Disability by Public Accommodations—Movie Theaters; Movie Captioning and Audio Description, 81 Fed. Reg. 87348, 87355 (Dec. 2, 2016) (audio description “fall[s] within the type of auxiliary aid contemplated by the [ADA]”); *Arizona ex rel. Goddard v. Harkins Amusement Enterprises, Inc.*, 603 F.3d 666, 668 (9th Cir. 2010) (audio description is a type of auxiliary aid that ADA may require public accommodations to provide).

Audio description requirements require content providers to create new original content. Video content providers have opposed audio description requirements, and one court has found that audio description requirements regulate the content of speech. *See Motion Picture Ass’n of Am., Inc. v. F.C.C.*, 309 F.3d 796, 798, 803 (D.C. Cir. 2002) (explaining that “Video description is not a regulation of television transmission that only incidentally and minimally affects program content; it is a direct and significant regulation of program content”). If the Court endorses the Company’s defense, this would open the door to renewed arguments by television broadcasters and public accommodations that audio description requirements violate their First Amendment free speech rights by impermissibly compelling them to generate new, original speech.

## **2. The Company’s Freedom of Expression Defense Risks Limiting People with Disabilities’ Website Accessibility**

People with vision disabilities and other print disabilities need websites and mobile software applications to be accessible for them to use them. Website and mobile software application accessibility

is typically accomplished through compliance with digital accessibility standards. *See, e.g.*, Web Content Accessibility Guidelines (WCAG) 2.1, *available at* <https://www.w3.org/TR/WCAG21/>. Websites need to possess certain visible features such as using particular text colors and fonts to be accessible to people who are low vision. *See id.* WCAG Success Criterion 1.4.3, *available at* [https://www.w3.org/WAI/WCAG21/Understanding/contrast-minimum#:~:text=The%20minimum%20contrast%20success%20criterion,needs%20to%20provide%20sufficient%20contrast](https://www.w3.org/WAI/WCAG21/Understanding/contrast-minimum#:~:text=The%20minimum%20contrast%20success%20criterion,needs%20to%20provide%20sufficient%20contrast.). Images need text descriptions so that blind users can access the content, *see id.* WCAG Success Criterion 1.1.1, *available at* [https://www.w3.org/WAI/WCAG21/Understanding/non-text-content#:~:text=Success%20Criterion%201.1.1%20Non,for%20the%20situations%20listed%20below.&text=If%20non%2Dtext%20content%20is,name%20that%20describes%20its%20purpose](https://www.w3.org/WAI/WCAG21/Understanding/non-text-content#:~:text=Success%20Criterion%201.1.1%20Non,for%20the%20situations%20listed%20below.&text=If%20non%2Dtext%20content%20is,name%20that%20describes%20its%20purpose.). Incorporating disability access into website and mobile application benefits both businesses and the general public. *See* “Benefits of Accessible Design,” U.S. General Services Administration, <https://www.section508.gov/blog/benefits-accessible-design/> (explaining that companies that incorporate disability access into their information technology experience greater overall employee productivity and can retain skilled employees who may develop disabilities over time).

Courts across the country have held that websites and mobile software applications are subject to ADA accessibility requirements. *Nat’l Fed’n of the Blind v. Scribd Inc.*, 97 F. Supp. 3d 565, 576 (D. Vt. 2015) (digital library); *Nat’l Ass’n of the Deaf v. Netflix, Inc.*, 869 F. Supp. 2d 196, 200 (D. Mass. 2012) (video streaming service); *Robles v. Domino’s Pizza, LLC*,

913 F.3d 898, 905 (9th Cir. 2019) (pizza restaurant’s website and mobile application). Courts have ordered businesses to conform their websites and mobile apps with Internet accessibility guidelines. *See Robles*, No. CV 16-6599 JGB (EX), 2021 WL 2945562, at \*10 (C.D. Cal. June 23, 2021) (ordering that website comply with Web Content Accessibility Guidelines); *Thurston v. Midvale Corp.*, 39 Cal. App. 5th 634, 655 (Cal. App. Ct. 2019) (same).

However, for over twenty years, some businesses have claimed that constitutional free speech protections block application of accessibility requirements to websites. *See* “Applicability of the Americans with Disabilities Act (ADA) to Private Internet Sites” at 92, 98, hearing, Subcomm. on const. of the Comm. on the Judiciary, H.R., 2d Sess. (Feb. 9, 2000), *available at* [http://commdocs.house.gov/committees/judiciary/hju65010.000/hju65010\\_of.htm](http://commdocs.house.gov/committees/judiciary/hju65010.000/hju65010_of.htm). If the Company’s free speech defense succeeds, recalcitrant businesses would plausibly assert that requirements to conform websites to accessibility standards violate their constitutional free speech rights as a justification for maintaining inaccessible websites.

### **B. The Company’s Freedom of Expression Defense Risks Limiting People With Disabilities’ Physical Access to Premises**

The ADA and similar state and local laws generally require new construction to be “readily accessible.” *See* 42 U.S.C. § 12183(a)(1). This has not stopped recalcitrant merchants from engaging in design choices that exclude people with mobility disabilities, under the guise of branding.

Abercrombie & Fitch operated the surf-lifestyle clothing brand Hollister. As a branding exercise, to

evoke the ambience of a surf shack, Hollister stores installed “a raised porch-like platform ... two steps above ground level,” that was “not accessible to people in wheelchairs.” *Colorado Cross-Disability Coal. v. Abercrombie & Fitch Co.*, 835 F. Supp. 2d 1077, 1078 (D. Colo. 2011) *vacated on statutory grounds*, 765 F.3d 1205 (10th Cir. 2014). The district court had found that “Defendants have unnecessarily created a design for their brand that excludes people using wheelchairs from full enjoyment of the aesthetic for that brand. The steps to the center entrance are a legally unacceptable piece of that branding and violate Title III of the ADA.” *Id.* at 1083; see *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 781 (1976) (warning of “elevat[ing] commercial intercourse between a seller hawking his wares and a buyer seeking to strike a bargain to the same plane as has been previously reserved for the free marketplace of ideas” (Rehnquist, J., dissenting)).

### **C. The Company’s Freedom of Expression Defense Risks Limiting People With Disabilities’ Access to Academic Programs**

Refusal of disability accommodation on the basis of claims of First Amendment protected academic freedom further illustrates *Amici*’s concerns. See Peter David Blanck, “Civil Rights, Learning Disability, and Academic Standards,” 2 JOURNAL OF GENDER, RACE, & JUSTICE 33, 53 (1998) (When considering the reasonableness of requested academic accommodations, courts must “study the assumptions underlying academic programs,” and not merely defer to “attitudinal biases about the abilities of people with learning disabilities,” cloaked in First Amendment academic freedom.); *Redding v. Nova Se. Univ., Inc.*, 165 F. Supp. 3d 1274, 1297 (S.D. Fla.

2016) (“A determination of whether an accommodation is related to a disability involves no academic judgment and judicial review of such a decision does not offend principles of academic freedom. [Defendant] cannot immunize all of its decisions from review by waving the flag of deference merely because it is an academic institution.”). *See also, e.g.*, Settlement Agreement Under the Americans with Disabilities Act Between the United States of America and Brown University (Aug. 10, 2021), ¶ 12, [https://www.ada.gov/brown\\_sa.html](https://www.ada.gov/brown_sa.html) (settlement of claims that university’s leave policy discriminated against students with mental health disabilities required reasonable modifications but protected university’s academic standards).

In the late 1990s Boston University’s (“BU”) Provost severely downgraded a well-functioning learning disabilities support services program, and a class action suit ensued to roll back his policy changes and ensure continued reasonable accommodations for 480 enrolled students with learning disabilities, principally dyslexia, attention deficit disorder, and attention deficit hyperactivity disorder. The district court found that BU had violated the ADA and Article 114 of the Massachusetts Constitution, which provides a broad guarantee of freedom from public and private discrimination on the basis of disability. *Guckenberger v. Boston Univ.*, 974 F. Supp. 106, 117 (D. Mass.1997); *cf.* Aug. 30, 2016 letter from Rebecca B. Bond, Disability Rights Section Chief, Department of Justice to UC Berkeley Chancellor et al., DJ No. 204-11-309, *available at*: [https://www.ada.gov/briefs/uc\\_berkeley\\_lof.pdf](https://www.ada.gov/briefs/uc_berkeley_lof.pdf) (advising the University of California Berkeley that its publicly available online course content was not accessible to

people with vision, hearing, and certain mobility disabilities).

In finding that BU had violated federal and Massachusetts law, the district court noted that the Provost was motivated both by “a genuine concern for academic standards” and by “uninformed stereotypes” about students with learning disabilities. *Guckenberger*, 974 F. Supp. at 149.

#### **IV. Full Enforcement of Anti-Discrimination Laws Is Good for Business, the Economy, and Social Cohesion**

We end where we started. *Amici* are concerned that attenuating the anti-discrimination mandates of the CADA by adopting a First Amendment compelled speech defense would impose significant burdens on the nation’s economy because such a defense will gain traction limiting the application of protections afforded by anti-discrimination laws such as the ADA and similar state and local laws.

Over sixty million people have disabilities in the United States. See “Disability Impacts All of Us,” Centers for Disease Control and Prevention, <https://www.cdc.gov/ncbddd/disabilityandhealth/infographic-disability-impacts-all.html> (last visited July 27, 2022). Working age people with disabilities in the United States have nearly \$500 billion in after-tax disposable income. Michelle Yin *et al.*, “A Hidden Market: The Purchasing Power of Working-Age Adults with Disabilities” at 1, American Institute for Research (Apr. 2018), *available at* <https://www.air.org/sites/default/files/2022-03/Hidden-Market-Spending-Power-of-People-with-Disabilities-April-2018.pdf>.

Focusing just on equal access for customers with disabilities, businesses and the economy benefit from this large market. Research indicates that large majorities of the public are more likely to patronize businesses that ensure access for people with disabilities. See “Inclusive Banking: Emerging Practices to Advance the Economic Inclusion of Persons with Disabilities,” International Finance Corporation World Bank Group, at 11 (April 2022), available at [https://www.ifc.org/wps/wcm/connect/to\\_pics\\_ext\\_content/ifc\\_external\\_corporate\\_site/gender+at+ifc/priorities/inclusion/disability](https://www.ifc.org/wps/wcm/connect/to_pics_ext_content/ifc_external_corporate_site/gender+at+ifc/priorities/inclusion/disability). Ensuring that public accommodations provide full access and equal treatment of people with disabilities boosts efficiency of employees with disabilities given that employees must often use public accommodations to perform their jobs. Kevin J. Coco, “Beyond the Price Tag: An Economic Analysis of Title III of the Americans with Disabilities Act,” 20 KAN. J.L. & PUB. POL’Y 58, 90 (2010). This is especially true with respect to websites and mobile software applications.

Ensuring full inclusion of people with disabilities also bolsters societal cohesion. First, ensuring access for, and equal treatment of, people with disabilities provides people with disabilities dignity and independence. Coco, 20 KAN. J.L. & PUB. POL’Y 58, 79. Research shows generally that sustained contact with people who are different tends to reduce prejudice toward those individuals. Kathleen Hale, “*Toyota v. Williams*: Further Constricting the Circle of Difference,” 4 J.L. SOCIETY 275, 305-08 (2003). Similarly, research has found specifically that interactions between children with and without disabilities benefits children *without* disabilities by boosting their self-esteem, reducing fear of others, and boosting acceptance of differences.

Debbie Staub & Charles A. Peck, “What are the outcomes for Nondisabled students?” (Dec. 1, 1994), <https://www.ascd.org/el/articles/what-are-the-outcomes-for-nondisabled-students>.

Further, discriminatory exclusion of people with disabilities inflicts lost revenue, lost productivity, and psychological damage. Limited access to public accommodations limits job opportunities for people with disabilities. Exclusion from public accommodations also increases the reliance of people with disabilities on others, which can reduce workforce participation by people without disabilities and slow or prevent some commerce. The Company’s discrimination and exclusion on the basis of sexual orientation (or disability) assaults the dignity and self-worth of LGBTQ people and risks the same harm to people with disabilities just as does such discrimination against people due to race, religion, national origin, sex, or age.

## CONCLUSION

Consistent with this Court’s longstanding full throated enforcement of civil rights protections against discrimination and informed by our nation’s history of discrimination against persons with disabilities and other discrete minorities, the Court should affirm the judgment of the Tenth Circuit and confirm that our nation’s civil rights laws are not subject to a constitutional exception based on the real or professed scruples of a defendant.

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