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I. INTRODUCTION

Randall and Jose—two men from Houston, Texas—recently became engaged.[1] The couple took a cab ride home late one night, sharing a brief kiss during the car ride.[2] The cab driver, enraged by the kiss, pulled over and demanded the men exit the car.[3] Terrified, Randall and Jose complied with the driver's demands and exited the car, leaving them stranded on the side of a highway.[4] They had to walk along the highway, under a bridge, and across a busy road to wait for another cab to drive them home.[5] Thankfully, the couple returned home safely.[6]

Usually, anti-discrimination laws provide protection from this type of conduct.[7] However, Texas is one of the many states without any anti-discrimination laws for LGBTQ+ people, so the couple had no legal recourse under public accommodations laws.[8] Usually, cities also have ordinances extending protections to LGBTQ+ people from this type of discrimination, but Houston repealed their ordinance, leaving Jose and Randall without protection.[9]

Recently, controversy over anti-discrimination laws has focused on the tension between First Amendment religious freedom arguments and services for LGBTQ+ people.[10] For example, wedding service providers, like bakeries, claim that providing services to LGBTQ+ couples infringes on their First Amendment rights.[11] They argue that providing a cake or services for a gay wedding forces

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1. *Randall Magill & Jose Chavez*, FACES OF FREEDOM, https://www.facesoffreedom.org/randall-magill-jose-chavez/ (last visited Apr. 24, 2022) (on file with the *University of the Pacific Law Review*).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *See Randall Magill & Jose Chavez*, *supra* note 1 (detailing how the couple wanted to share their story after their experience with the cab driver).

7. CAL. CIV. CODE § 51(b) (West 2022) (California's public accommodations law, for example, provides protection for, all persons on the basis of "sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status").

8. *See Randall Magill & Jose Chavez*, *supra* note 1 (quoting Randall) ("It would be nice to know that if I tried to take legal action against discrimination like this, I would have the law on my side."); *see also Nondiscrimination Laws*, MVMT. ADVANC. PROJ., https://www.lgbtmap.org/equality-maps/non_discrimination_laws (last updated Apr. 20, 2023) (on file with the *University of the Pacific Law Review*) (listing Texas as one of the states without any public accommodations anti-discrimination laws protecting LGBTQ+ individuals).

9. *See Randall Magill & Jose Chavez*, *supra* note 1 ("Several cities in Texas have voted to extend local non-discrimination protections to LGBTQ people via municipal ordinance. But in Houston, a 2015 ballot campaign repealed the city-wide 'Houston Equal Rights Ordinance,' following anti-LGBTQ opponents' aggressive and deceptive push that singled out transgender people for discrimination.").

10. *See* Jeremy W. Peters, *Fighting Gay Rights and Abortion with the First Amendment*, N.Y. TIMES (Nov. 22, 2017), https://www.nytimes.com/2017/11/22/us/politics/alliance-defending-freedom-gay-rights.html (on file with the *University of the Pacific Law Review*) ("The First Amendment has become the most powerful weapon of social conservatives fighting to limit the separation of church and state and to roll back laws on same-sex marriage and abortion rights.").

11. *See* Jo Yurcaba, *A "Troubling" Rise in Business Owners Refusing Gay Couples, Advocates Say*, NBC

them to express a message supporting gay marriage in violation of their religious beliefs.[12] The Supreme Court has left this constitutional question open.[13] However, the LGBTQ+ community's struggle goes beyond the denial of marriage services.[14] In the transgender community, one-third experienced discrimination in public accommodations in 2015.[15] Denial of services to the LGBTQ+ community has increased in 2021.[16]

The Civil Rights Act of 1964 does not cover gender identity or sexual orientation.[17] Due to this gap in federal law, twenty-one states do not have laws directly prohibiting discrimination based on sexual orientation or gender identity.[18] As a result, discrimination against the LGBTQ+ community persists.[19] Moreover,

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NEWS (Apr. 21, 2021), https://www.nbcnews.com/nbc-out/out-news/troubling-rise-business-owners-refusing-gay-couples-advocates-say-rcna735 (on file with the *University of the Pacific Law Review*) (describing examples of a florist and a wedding photographer refusing services to LGBTQ+ couples); *see also* Samantha Grindell, *A North Carolina Wedding Venue Refused to Host a Same-Sex Couple's Wedding*, INSIDER (Apr. 14, 2021), https://www.insider.com/wedding-venue-refused-to-host-same-sex-couples-wedding-2021-4 (on file with the *University of the Pacific Law Review*) (describing a wedding venue in North Carolina refusing to host a same-sex couple's wedding on religious freedom grounds).

12. *See* Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1723 (2018) (describing petitioner's argument that providing a cake for a same-sex couple wedding would force them to adopt a message of acceptance of same-sex marriage in violation of their religious beliefs).

13. *See id.* at 1724 (focusing on the Commission's bias against the religious beliefs of Petitioners and remanding the case for consideration free of such bias).

14. *Widespread Discrimination Continues to Shape LGBT People's Lives in Both Subtle and Significant Ways*, CTR. FOR AM. PROG. (May 2, 2017), https://www.americanprogress.org/article/widespread-discrimination-continues-shape-lgbt-peoples-lives-subtle-significant-ways/ (on file with the *University of the Pacific Law Review*) (documenting that approximately 25.2% of LGBTQ+ people experienced discrimination in some form in 2016); *see also 2021 Officially Becomes Worst Year in Recent History for LGBTQ State Legislative Attacks as Unprecedented Number of States Enact Record-Shattering Number of Anti-LGBTQ Measures Into Law*, HUM. RTS. CAMPAIGN (May 7, 2021), https://www.hrc.org/press-releases/2021-officially-becomes-worst-year-in-recent-history-for-lgbtq-state-legislative-attacks-as-unprecedented-number-of-states-enact-record-shattering-number-of-anti-lgbtq-measures-into-law (on file with the *University of the Pacific Law Review*) (describing the enactment of seventeen anti-LGBTQ+ bills and the introduction of 250 anti-LGBTQ+ bills in state legislatures, including bills providing religious exceptions to not serve LGBTQ+ people).

15. *Transgender Identities*, PLANNED PARENTHOOD, https://www.plannedparenthood.org/learn/gender-identity/transgender (last visited Apr. 24, 2022) (on file with the *University of the Pacific Law Review*) (defining transgender as someone who feels "that the sex they were assigned at birth doesn't match their gender identity, or the gender that they feel they are inside"); *see also* S. E. HERMAN JAMES ET AL., NAT'L CTR. FOR TRANSGENDER EQUAL., THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 212 (2016) (describing thirty-one percent of respondents experiencing mistreatment in at least one place of public accommodation including fourteen percent being denied equal treatment or service, twenty-four percent who were verbally harassed and two percent who were physically attacked).

16. *See* Yurcaba, *supra* note 11 (noting an increase in similar events like a tax accountant having a sign rejecting homosexual marriages encouraged by legal efforts by the Alliance Defending Freedom).

17. *Know Your Rights: LGBTQ Rights*, ACLU, https://www.aclu.org/know-your-rights/lgbtq-rights/#am-i-protected-from-discrimination-in-public-accommodations-like-shops-and-restaurants (last visited Apr. 24, 2022) (on file with the *University of the Pacific Law Review*) (noting that there is no federal protection from discrimination for public accommodations).

18. *See Nondiscrimination Laws*, *supra* note 8 (cataloging the number of states with no anti-discrimination laws).

19. *Kim Bowman & Debbie Beach*, FACES OF FREEDOM, https://www.facesoffreedom.org/kim-bowman-debbie-beach/ (last visited Apr. 24, 2022) (on file with the *University of the Pacific Law Review*) (describing this

this lack of protection places members of the LGBTQ+ community—like Randall and Jose—in potentially dangerous positions.[20] Without federal civil rights protections in the law, LGBTQ+ people are left defenseless in an era where they are the subject of increasing legal and social inequality.[21]

Addressing this issue, in 2021, the House of Representatives passed the Equality Act to prohibit discrimination based on sexual orientation and gender identity.[22] The Senate must also pass the bill for it to become effective, but the bill is currently pending in the Senate Judiciary Committee.[23] As of January 1, 2023, the bill died after the Senate failed to take any action on the legislation.[24] While this legislative effort has stalled, a recent 2021 Supreme Court decision, *Cedar Point Nursery v. Hassid* (*Cedar Point*), may provide other means to discriminate against LGBTQ+ individuals.[25]

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couple's experience of preparing to file taxes in Houston, Texas, but the clerk refusing to complete their tax forms due to his anti-LGBTQ views); *see also* Yurcaba, *supra* note 11 ("In the absence of a federal measure like the Equality Act or a statewide nondiscrimination law, the Mudds and couples like them don't have any options for legal recourse . . . and businesses can - and do - continue to refuse to serve them."); see also *Nondiscrimination Laws*, *supra* note 8 (listing Texas as one of the states without any public accommodations anti-discrimination laws protecting LGBTQ+ individuals).

20. *Randall Magill & Jose Chavez*, *supra* note 1.

21. *See 2021 Officially Becomes Worst Year in Recent History for LGBTQ State Legislative Attacks as Unprecedented Number of States Enact Record-Shattering Number of Anti-LGBTQ Measures Into Law*, HUM. RTS. CAMPAIGN (May 7, 2021), https://www.hrc.org/press-releases/2021-officially-becomes-worst-year-in-recent-history-for-lgbtq-state-legislative-attacks-as-unprecedented-number-of-states-enact-record-shattering-number-of-anti-lgbtq-measures-into-law (on file with the *University of the Pacific Law Review*) (describing the enactment of seventeen anti-LGBTQ+ bills and the introduction of 250 anti-LGBTQ+ bills in state legislatures, including bills providing religious exceptions from serving LGBTQ+ people).

22. *See* Danielle Kurtzleben, *House Passes the Equality Act: Here's What It Would Do*, NPR (Feb. 24, 2021), https://www.npr.org/ 2021/02/24/969591569/house-to-vote-on-equality-act-heres-what-the-law-would-do (on file with the *University of the Pacific Law Review*) (explaining that the Equality Act would amend the Civil Rights Act of 1964 to prohibit discrimination based on sexual orientation or gender identity).

23. Equality Act, S. 393, 117th Cong. (as referred by S. Comm. On the Judiciary, Feb. 23, 2021).

24. *H.R. 5, Equality Act*, BILL TRACK 50, https://www.billtrack50.com/billdetail/1321652 (last visited April 23, 2023) (describing the bill as "dead").

25. *See* Mark Joseph Stern, *The Supreme Court's Latest Union-Busting Decision Goes Far Beyond California Farmworkers*, SLATE (June 23, 2021), https://slate.com/news-and-politics/2021/06/supreme-court-union-busting-cedar-point-nursery.html (on file with the *University of the Pacific Law Review*) ("With *Cedar Point*, the Supreme Court has handed business owners a loaded gun to aim at every regulation they oppose."); *see also* Eduardo M. Peñalver, *The Obscure Case That Could Blow up American Civil-Rights and Consumer-Protection Laws*, ATLANTIC (Mar. 25, 2021), https://www.theatlantic.com/ideas/archive/2021/03/cedar-point-scotus/618405 (on file with the *University of the Pacific Law Review*) ("By the farmer's reasoning, government regulations that require owners to grant outsiders even occasional access to their commercial property, no matter how circumscribed, would amount to permanent physical occupation and would automatically violate the Constitution's protection of private ownership."); Nathan Newman, *This Supreme Court Case Could Wreck the New Deal Legal Order*, NATION (Dec. 2, 2020), https://www.thenation.com/article/society/supreme-court-labor-unions (on file with the *University of the Pacific Law Review*) ("The Fifth Amendment argument made in this case is little different from that made by Barry Goldwater and others who denounced the 1964 Civil Rights Act as violating businesses' property rights to exclude whomever they wished to from their property.").

In *Cedar Point*, the Supreme Court held that a California regulation requiring labor union access to private farms qualified as a taking.[26] The *Cedar Point* decision seems to revive property rights as a challenge to anti-discrimination laws.[27] The decision could undermine anti-discrimination laws, which restrain private owners' right to exclude and provide a right of access to the public.[28] For example, anti-discrimination laws would qualify as a taking because they provide racial minorities entry onto private land in the same way the labor regulation allowed union representatives.[29]

This Comment argues that First Amendment religious exceptions to anti-discrimination laws and a misreading of *Cedar Point* by private businesses would make LGBTQ+ discrimination legally acceptable.[30] Because the current anti-discrimination framework does not protect the LGBTQ+ community, the Senate should enact the Equality Act to extend formal legal protection to the LGBTQ+ community.[31] Part II explains the history of anti-discrimination laws and suggests racial discrimination as a model for responding to LGBTQ+ discrimination, and demonstrates why *Cedar Point* seems to legitimize arguments raised to try to avoid

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26. *See* Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2070 (2021) (articulating the agricultural employers' argument that the regulation violated the Takings Clause since it granted an easement to labor unions without compensation); *see also Taking*, MERRIAM-WEBSTER, https://www.merriam-webster.com/legal/taking (last visited Apr. 24, 2022) (on file with the *University of the Pacific Law Review*) (defining a taking as "a seizure of private property or a substantial deprivation of the right to its free use or enjoyment that is caused by government action").

27. *See* Newman, *supra* note 25 ("The Fifth Amendment argument made in this case is little different from that made by Barry Goldwater and others who denounced the 1964 Civil Rights Act as violating businesses' property rights to exclude whomever they wished to from their property.").

28. *See* Peñalver, *supra* note 25 (describing the farmers' arguments as extending the scope of Takings jurisprudence to render typical regulations as permanent occupations of private property); *see also* Commonwealth v. Beasy, 386 S.W.2d 444, 446-47 (Ky. 1965) (rejecting restaurant owner's arguments that Louisville ordinance prohibiting discrimination violated his constitutional rights of property); Pinnock v. Int'l House of Pancakes Franchisee, 844 F. Supp. 574, 586–89 (S.D. Cal. 1993) (refusing to accept the argument that making restaurants wheelchair-accessible under the Americans with Disabilities Act was an unconstitutional taking).

29. *See Cedar Point Nursery*, 141 S. Ct. at 2074 ("The regulation appropriates a right to physically invade the growers' property—to literally 'take access.'").

30. *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258 (1964) (holding that the Civil Rights Act of 1964 is a permissible exercise of Congress's authority under the Commerce Clause to prohibit racial discrimination).

31. *See* Katelyn Burns, *Where LGTBQ Equality Legislation Goes to Die*, NEW REPUBLIC (June 30, 2021), https://newrepublic.com/article/162861/lgbtq-equality-act-joe-manchin-compromise-betrayal (on file with the *University of the Pacific Law Review*) ("[T]here have been over 250 anti-LGBTQ statehouse bills filed this year . . . making 2021 the most prolific year for anti-queer and anti-trans legislation in recent memory."); *see also* Nick Volturo, *Chambersburg City Council Repeals LGBTQ Anti-discrimination Ordinance*, LOCAL 21 NEWS (Jan. 24, 2022), https://local21news.com/news/local/chambersburg-city-council-repeals-lgbtq-anti-discrimination-ordinance (on file with the *University of the Pacific Law Review*) ("The repeal of the ordinance marks the first time an LGBTQ inclusive law has been revoked in Pennsylvania."); Pete Williams, *Supreme Court to Decide Whether Some Businesses Can Refuse to Serve Gay Customers*, NBC NEWS (Feb. 22, 2022), https://www.nbcnews.com/politics/supreme-court/supreme-court-decide-whether-businesses-can-refuse-serve-gay-customers-rcna17165 (on file with the *University of the Pacific Law Review*) (reporting that the Supreme Court will hear a case involving a website designer who claims that designing websites for LGBTQ+ couples violates her religious beliefs).

compliance with the 1964 Civil Rights Act.[32] Part III argues in support of the Equality Act to provide necessary protections for the LGBTQ+ community and explains why *Cedar Point* does not apply to anti-discrimination laws.[33]

II. PUBLIC ACCOMMODATIONS AND THE RIGHT TO EXCLUDE

In 1964, Congress passed the Civil Rights Act (1964 Act), outlawing discrimination on the basis of race, color, sex, religion, and national origin.[34] Title II of the 1964 Act applies specifically to businesses open to the public and prohibits discrimination only on the basis of race, color, religion, and national origin.[35] Congress was reacting specifically to the demands of the civil rights movement, seeking an end to segregation on the basis of race and color.[36] At the time, however, the LGBTQ+ community's concerns were not yet on Congress's mind.[37] As a result, there is no federal protection for the LGBTQ+ community.[38] At the state level, a number of states have not provided such protections under their state public accommodations laws.[39] The 1964 Civil Rights Act provides a framework for how to remedy such discrimination.[40] Section A establishes that the response to racial discrimination should serve as a guiding principle for addressing LGBTQ+ discrimination.[41] Section B discusses the ruling in *Cedar Point Nursery v. Hassid*, and how the decision may undermine civil rights protections.[42]

A. Racial Exclusion, Public Accommodation Law, and the Struggle for Equality

At common law, common carriers and innkeepers had to serve the public and could exclude people from their business, but only if they had reasonable grounds to do so.[43] The common law required common carriers and innkeepers to provide

32. *Infra* Part II.

33. *Infra* Part III.

34. Civil Rights Act of 1964, 42 U.S.C. § 2000a.

35. *Id.*

36. *Civil Rights Act of 1964*, HISTORY.COM (Jan. 20, 2022), https://www.history.com/topics/black-history/civil-rights-act (on file with the *University of the Pacific Law Review*) (describing President Kennedy's push for the bill in response to protests in the South against segregation).

37. *See id.* (specifying the Act's application only to racial minorities, and not those based on sex, sexual orientation or gender identity).

38. Civil Rights Act of 1964, 42 U.S.C. § 2000a (providing no protection in public accommodations on the basis of sex, sexual orientation, or gender identity).

39. *See id.*; *LGBT People in the US Not Protected by State Non-Discrimination Statutes*, UCLA WILLIAMS INST. (Apr. 2020), https://williamsinstitute.law.ucla.edu/publications/lgbt-nondiscrimination-statutes/ (on file with the *University of the Pacific Law Review*).

40. Civil Rights Act of 1964, 42 U.S.C. § 2000a.

41. *Infra* Section II.A.

42. *Infra* Section II.B.

43. Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1291 (1996) (summarizing the common perception that innkeepers and common carriers can restrict access only based on "reasonable regulations," but other businesses have an absolute right to exclude

accommodations to everyone.[44] All businesses open to the public were also required to provide services under this common law duty.[45] After the Civil War, the newly-emancipated Black citizens were included in the common law protection, but state courts permitted segregation as a reasonable restriction on business.[46] Several Supreme Court decisions supported this view.[47]

With the abolition of slavery, Congress enacted the 1875 Civil Rights Act (1875 Act), prohibiting racial discrimination in public accommodations.[48] In the *Civil Rights Cases*, the U.S. Supreme Court declared the 1875 Civil Rights Act unconstitutional.[49] The 1875 Act simply codified the common law rule prevalent at the time.[50] The Court rejected the 1875 Act's broad application to private conduct and interpreted the Fourteenth Amendment to apply only to "state action."[51] This meant that only where states enacted laws discriminating against race could Congress provide a remedy, but Congress could not alone address private racial discrimination.[52] This decision created the state action doctrine, which permitted private businesses to exclude African Americans without any remedy available from the state.[53] The *Civil Rights Cases* resulted in state courts changing the common law rule to permit racial discrimination and legislatures

unless barred by a civil rights statute); *Common Carrier*, LEG. INFO. INST., https://www.law.cornell.edu/wex/common_carrier (last updated June 2021) (on file with the *University of the Pacific Law Review*) (defining common carrier as "a person or a commercial enterprise that transports passengers or goods for a fee and establishes that their service is open to the general public").

44. *See id.* at 1292 (describing the Civil Rights Act of 1964 as "ratify[ing] the common-law rule requiring public service by innkeepers and common carriers . . . and accept[ing] the law of the states that had imposed a duty to serve" on places of entertainment, gas stations and restaurants).

45. *See id.* at 1294–95 (explaining that courts in the 1850s held that the right of access included every person without regard to race).

46. *See id.* (demonstrating how courts narrowed the right of access to allow racial segregation by businesses.)

47. *See id.* at 1294 ("[O]nly after the Civil War, when civil rights were extended to African-Americans for the first time, did the courts clearly state for the first time that most businesses had no common-law duties to serve the public.").

48. *See* The Civil Rights Cases, 109 U.S. 3, 9 (1883) (quoting Section 1 of the Civil Rights Act of 1875, which required "full and equal enjoyment accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement").

49. *See id.* at 11 (rejecting Congress's ability to outlaw racial discrimination in public accommodations under the Fourteenth Amendment because "individual invasion of individual rights is not the subject matter of the amendment").

50. *See id.* at 9 (summarizing the 1875 Act's call for "full and equal enjoyment" in access to public accommodations); *see also* Singer, *supra* note 43, at 1294–95 (articulating the view in the 1850s courts routinely held that the right of access did extend to every person without regard to race, but also authorizing racial segregation as a reasonable regulation of business).

51. *See* The Civil Rights Cases, 109 U.S. 3, 11 (1883) ("[The Fourteenth Amendment] does not authorize Congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of State laws, and the action of State officers, executive or judicial, when these are subversive of the fundamental rights specified in the amendment.").

52. *See id.*

53. *See* Isaac Saidel-Goley & Joseph William Singer, *Things Invisible to See: State Action & Private Property*, 5 TEX. A&M L. REV. 439, 452 (2018) ("The state action doctrine allowed states to adopt common law rules that severely limited African Americans' access to the marketplace.").

enacting explicitly segregationist statutes.[54] When a challenge to a statute explicitly separating Black people from white people on Louisiana train cars arrived at the Supreme Court, the Court upheld the law.[55] In the South, these decisions led to the expansion of Jim Crow laws, leading to the subjugation of Black people.[56]

It took nearly a century before Congress undertook to correct this flagrant discrimination.[57] In 1964, Congress passed the Civil Rights Act (1964 Act), prohibiting discrimination based on race, color, or national origin.[58] The 1964 Act rested on Congress's authority under the Commerce Clause to regulate the national economy.[59] In response, private businesses sued the federal government alleging the Act was unconstitutional because the law infringed their right to exclude in violation of the Fifth Amendment.[60]

The most important of these cases, *Heart of Atlanta v. United States*, determined that Congress could prohibit racial discrimination in businesses accessible to the public.[61] After the 1964 Act became law, the Heart of Atlanta motel in Georgia continued discriminating against Black people who tried to stay at the motel.[62] The motel owners challenged the law in federal court, alleging that

54. *See id.* ("This retrogressive change in common law was accompanied by a widespread repeal of state public accommodations statutes passed throughout the South during the height of Reconstruction. . .explicitly requiring segregation.").

55. Plessy v. Ferguson, 163 U.S. 537, 540, 551–52 (1896), *overruled by* Brown v. Board of Education, 347 U.S. 483 (1954).

56. *Jim Crow Laws*, HISTORY.COM (Jan. 11, 2022), https://www.history.com/topics/early-20th-century-us/jim-crow-laws (on file with the *University of the Pacific Law Review*) (defining Jim Crow laws as "a collection of state and local statutes that legalized racial segregation").

57. Civil Rights Act of 1964, 42 U.S.C. § 2000a.

58. *Id.*

59. *Id.*; *see also* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258 (1964) (holding that the Civil Rights Act of 1964 is a permissible exercise of Congress's authority under the Commerce Clause to prohibit racial discrimination).

60. *See* Singer, *supra* note 43, at 1293 ("In 1964, it was still plausible to argue that business had a right to exclude African-American customers simply because the businesses were property owners."); *see also* Willis v. Pickrick Rest., 231 F. Supp. 396, 399 (N.D. Ga. 1964) (restaurant owners argued Title II of the Civil Rights Act was unconstitutional and they could exclude African Americans because their restaurant was a "local" business, and not one engaged in interstate commerce); Pinkney v. Meloy, 241 F. Supp. 943, 944 (N.D. Fla. 1965) (defendant barber argued that the Civil Rights Act of 1964 did not apply to him as a professional and he had a constitutional right to exclude African Americans); McClung v. Katzenbach, 233 F. Supp. 815, 820 (N.D. Ala. 1964) (restaurant owners argued the Civil Rights Act of 1964 was unconstitutional because federal government did not have power to regulate private business that lawfully and legitimately had right to choose its own customers).

61. *Heart of Atlanta Motel*, 379 U.S. at 261–62.

62. *See id.* at 243 ("Prior to passage of the Act, the motel had followed a practice of refusing to rent rooms to [Black people], and it alleged that it intended to continue to do so.").

the 1964 Act violated the Fifth Amendment because it deprived them of their right to exclude.[63] They argued that the law's application resulted in the government taking their private property away from them without compensation.[64]

The Court responded in two ways.[65] First, it determined that Congress acted under its Commerce Power, and the motel, as a business in interstate commerce, fell under the 1964 Act.[66] Second, the Court rejected the taking argument because the owner's rights were only incidentally affected.[67] The Court also avoided the issue of the *Civil Rights Cases* because it placed Congress's power to prohibit racial discrimination under the Commerce Power.[68] The Court determined that the impact of racial discrimination on interstate commerce was so disruptive that Congress acted appropriately in terminating this obstruction.[69]

A subsequent exercise of Congress's power in public accommodations occurred with the American with Disabilities Act (ADA) in 1990.[70] This law, also resting on the Commerce Clause, broadened the scope of public accommodations under the law, extending to a much broader collection of businesses.[71] The ADA also added disability as a protected class under federal public accommodations law.[72] Further attempts at broadening civil rights protections have resulted in proposed legislation, like the Equality Act, which passed the House of Representatives in 2021.[73] This proposed law would remedy a major gap in federal anti-discrimination law for the LGBTQ+ community, adding sexual orientation and gender identity as protected statuses.[74] Adding federal protections would push states without these protections for the LGBTQ+ community to finally enact

63. *See id.* at 243–44 (presenting an argument by challengers the Act is unconstitutional as an unlawful taking of private property since it restricts their ability to exclude).

64. *Id.*

65. *Id.* at 241.

66. *See Heart of Atlanta Motel*, 379 U.S. at 258 ("One need only examine the evidence which we have discussed above to see that Congress may—as it has—prohibit racial discrimination by motels serving travelers, however 'local' their operations may appear.").

67. *See id.* at 261 ("Neither do we find any merit in the claim that the Act is a taking without just compensation.").

68. *See id.* at 258 (holding that the Civil Rights Act of 1964 is a permissible exercise of Congress's authority under the Commerce Clause to prohibit racial discrimination).

69. *See id.* at 257 ("But that fact does not detract from the overwhelming evidence of the disruptive effect that racial discrimination has had on commercial intercourse. It was this burden which empowered Congress to enact appropriate legislation . . . .").

70. Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101 (providing disability as a protected status under federal accommodations law).

71. *See* 42 U.S.C. § 12181(7)(A)–(L) (expanding the definition of public accommodations beyond the limited definition in the Civil Rights Act of 1964 to include private businesses that are open to the public or provide goods or services to the public); *see also* 42 U.S.C. § 1981 ("All persons within the jurisdiction of the United States shall have the same right in every State and Territory . . . to the full and equal benefit of all laws and proceedings for the security of persons and property.").

72. Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101.

73. *See* Kurtzleben, *supra* note 22.

74. *Id.*

them.[75] Public accommodations protections for the LGBTQ+ community face an additional challenge due to private business owner's arguments that serving the LGBTQ+ community intrudes on their religious beliefs and expressions since, by providing those services, they are adopting a message of acceptance.[76] Subsection 1 discusses the First Amendment issues that have unfolded in public accommodations and LGBTQ+ discrimination.[77]

1. Free Exercise of Religion Claims: A Loophole for LGBTQ+ Discrimination?

The constitutional question as to whether religious claims provide an exception to anti-discrimination laws remains open.[78] *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission* (*Masterpiece Cakeshop*) did not resolve the issue.[79] In *Masterpiece Cakeshop*, a bakery owner raised two First Amendment challenges against serving a gay couple.[80] First, he argued forcing him to create a cake for a same-sex couple violates his free speech rights by compelling him to express a message he disagreed with.[81] Second, he argued requiring him to create cakes for same-sex couples infringes his religious practice and violates the First Amendment's free exercise of religion.[82]

Instead of answering the First Amendment questions, the Court focused on evidence that Colorado's Civil Rights Commission made "disparaging" comments during the hearings to resolve the case.[83] The Court thus declined to reach the actual issue presented in the case, leaving the question unresolved.[84] The controlling case on the free exercise question is *Employment Division, Department*

75. *See What You Need to Know About the Equality Act*, CTR. FOR AM. PROG. (Mar. 15, 2021), https://www.americanprogress.org/article/need-know-equality-act/ (on file with the *University of the Pacific Law Review*) ("This means that businesses open to the public, such as restaurants and pharmacies, would face accountability if they discriminate against, mistreat, or refuse to serve LGBTQ individuals.").

76. *See* Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719 (2018) (avoiding the issue of whether First Amendment rights override anti-discrimination laws when such laws require service for LGBTQ+ people).

77. *Infra* Section II.1.

78. *See Masterpiece Cakeshop*, 138 S. Ct. at 1732 (holding that the Colorado Civil Rights Commission acted with hostility to religion or religious viewpoint but neglecting to decide the extent to which First Amendment views are protected where they discriminate against LGBTQ+ people in public accommodations).

79. *See Masterpiece Cakeshop*, 138 S. Ct. at 1729.

80. *Id.* at 1727.

81. *Id.* at 1726.

82. *Id.*

83. *See id.* at 1729 (referencing various statements made during the hearings such as one encouraging the owner to compromise to do business in the state and another evoking various examples of prior usage of religious beliefs to discriminate against minorities, including an evocation of the Holocaust, creating an implication that the bakery owner's beliefs were motivated to do harm instead of being sincere religious beliefs).

84. *See id.* at 1732 (avoiding the central issue as to the extent to which First Amendment views are protected where they discriminate against LGBTQ+ people in public accommodations).

of Human Resources. of Oregon v. Smith (*Smith*).[85] In *Smith*, the Court held the free exercise clause does not provide an exception for an individual's religious beliefs under neutral, generally applicable laws.[86]

The Court has grown increasingly skeptical of *Smith*.[87] The Supreme Court was intensely divided by the *Smith* issue when it was last before the Court.[88] In *Fulton v. City of Philadelphia*, Justice Alito, joined by Justices Gorsuch and Thomas, supported providing religious exemptions in certain contexts.[89] Justice Coney Barrett, joined by Justices Kavanaugh and Breyer, rejected the historical argument in Alito's concurrence and declined to revisit *Smith*.[90] As it stands currently, where a law is neutral and generally applicable, there is no exemption for religious beliefs from compliance.[91]

Another instructive case is *Runyon v. McCrary*, where a private school discriminated against Black children attempting to enroll.[92] The private school association argued that desegregating the school violated the parents' rights of free association, privacy, and their right to determine the education of their children.[93] The Court rejected the parent's freedom of association claim, arguing that private discrimination was not constitutionally protected.[94] Taken together, *Smith* and *Runyon* instruct that neutral, generally applicable laws must be followed because there is no protected right to freely discriminate.[95]

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85. Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 882 (1990) (rejecting the respondents' claim that when religious convictions accompany prohibited conduct by law, such conduct must be free from government regulation).

86. *Id.* at 879 (1990) ("Subsequent decisions have consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'").

87. Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1882–83 (2021) (Barret, J., concurring) (Alito, J., concurring).

88. Linda C. McClain, *Is There a Center to Hold in Supreme Court Jurisprudence on Religious Liberty and LGBTQ+ Rights?*, GEO. UNIV.: BERKELEY CTR. FOR RELIGION, PEACE & WORLD AFFS. (July 26, 2021), https://berkleycenter.georgetown.edu/responses/is-there-a-center-to-hold-in-supreme-court-jurisprudence-on-religious-liberty-and-lgbtq-rights (on file with the *University of the Pacific Law Review*) (explaining that the unanimous ruling in *Fulton* conceals much of the disagreement on the Court over *Smith* with Justices Alito, Thomas, and Gorsuch joining only in the judgment, and Barrett unwilling to approach the issue right now).

89. *Fulton*, 141 S. Ct. at 1912 (Alito, J., concurring) (concluding the text of the Free Exercise clause and historical evidence about the originalist understanding of the Free Exercise clause support the conclusion that Smith must be overturned).

90. *Id.* at 1882 (2021) (Barrett, J., concurring) ("While history looms large in this debate, I find the historical record more silent than supportive on the question whether the founding generation understood the First Amendment to require religious exemptions from generally applicable laws in at least some circumstances.").

91. *Emp. Div.*, 494 U.S. at 879 (drawing the principle that the Court's free exercise jurisprudence does not create exceptions for individual religious conduct or beliefs where neutral, general laws are applied).

92. Runyon v. McCrary, 427 U.S. 160, 173 (1976) (describing the children denied enrollment's suit against the schools alleging a violation of section 1981 and Title II of the Civil Rights Act).

93. *Id.* (evaluating the parent's argument that section 1981 does not apply to private discrimination).

94. *Id.* at 176 (stating that invidious discrimination has never been afforded constitutional protection on First Amendment grounds, and such discrimination has been made unlawful by Congress).

95. *Emp. Div.*, 494 U.S. at 879; *Runyon*, 427 U.S. at 176.

B. Cedar Point Nursery v. Hassid*: The Right to Exclude Strikes Back*

Cedar Point Nursery v. Hassid cements the right to exclude as an important property right.[96] In this case, private farm owners challenged a California regulation, arguing it violated their right to determine who accessed their property.[97] The regulation required agricultural employers permit union representatives onto the land up to three hours a day, 120 days out of the year.[98] In response to attempts by United Farmworkers' Union representatives to enter their premises, Cedar Point Nursery (Cedar Point) and Fowler Packing Company (Fowler), brought a takings claim against California in federal court.[99] They argued that the regulation imposed an obligation to permit the union organizers' entry onto their land, effectively requiring them to give away their right to exclude.[100] According to Cedar Point and Fowler, this obligation permitted the government to appropriate their property for someone else to use in violation of their Fifth Amendment rights.[101]

The lower courts rejected this argument.[102] First, the district court rejected the argument because the regulation did not require continuous public access.[103] Second, the companies did not satisfy the *Penn Central* test because they failed to show economic harm.[104] Under *Penn Central*, affected persons have to show that the regulation harms their economic interests in the property, and they must show the extent of that harm.[105] The court also examines the regulation to determine whether the government action crosses over into a "physical invasion" of property.[106] In the district court's view, plaintiffs did not allege economic harm, so

96. *See* Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2074 (2021) (holding that when a regulation appropriates a right to physically invade property, it is a taking).

97. *Id.* at 2070.

98. *Id.* at 2069.

99. *See id.* at 2070 (noting that the agricultural employers alleged that the California regulation "effected an unconstitutional per se" taking because it appropriated an easement for union organizers to enter their property without providing compensation); *see also Taking*, LEGIS. INFO. INST., https://www.law.cornell.edu/wex/takings (last visited Apr. 24, 2022) (on file with the *University of the Pacific Law Review*) (describing a taking as a physical removal or a regulatory restriction such that the regulation is equivalent to a physical removal of property).

100. *Cedar Point Nursery*, 141 S. Ct. at 2070.

101. *See id.*; *see also* U.S. CONST. amend. V (establishing that the government may not take private property unless for a public purpose and with the payment of just compensation).

102. *Cedar Point Nursery*, 141 S. Ct. at 2070.

103. *Id.*

104. Cedar Point Nursery v. Gould, No. 116CV00185LJOBAM, 2016 WL 3549408, at *6 (E.D. Cal. June 29, 2016) (applying the *Penn Central* test, which looks at the regulation's form and its economic impact to weigh whether it goes beyond promoting the public good and interferes with investment expectations).

105. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

106. *Id.*

the court ruled against the farm owners.[107] The Ninth Circuit Court of Appeals agreed with the district court, finding the regulation did not amount to continuous physical access, and union access did not result in economic harm.[108]

The Supreme Court reversed the Ninth Circuit's decision.[109] *Cedar Point* held that a taking has occurred when the government permits physical invasions of property, whether temporary or permanent.[110] The Court determined that a *per se* taking occurs when a "regulation results in a physical appropriation of property."[111] The California regulation "appropriates" the right to invade the companies' property, and therefore, goes beyond acceptable regulation on private property.[112]

The Court relied on two reasons for its conclusion.[113] First, the Court argued that the right to exclude is "one of the most essential sticks in the bundle of rights. . . [of] property."[114] Therefore, the Court determined greater attention applies to regulations that permit physical access onto private property.[115] Second, "government-authorized physical invasions" are takings because they take a right to use the property for a specified purpose away from the landowner and give it to another party.[116] The Court compared the labor regulation to takings that resulted from government flights over private farmland and access by the public to a private pond.[117] Similarly to those prior cases, the regulation at issue impaired the companies' right to exclude by requiring union access, thus resulting in a physical invasion.[118] *Cedar Point* thus holds that where the government authorizes physical invasions—temporary or permanent—it is a *per se* taking in violation of the Fifth Amendment.[119]

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107. *Cedar Point Nursery*, 141 S. Ct. at 2070 (finding here that the Plaintiff did not argue any economic harm at all, and therefore, the regulation did not violate the Penn Central test).

108. *Id.*

109. *Id.* at 2074.

110. *Id.*

111. *Id.* at 2072.

112. *Id.*

113. *Cedar Point Nursery*, 141 S. Ct. at 2073–74.

114. *See id.* at 2072 (relying on Blackstone's qualification of property as "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe").

115. *See id.* ("Given the central importance to property ownership of the right to exclude, it comes as little surprise that the Court has long treated government-authorized physical invasions as takings. . . .").

116. *See id.* at 2072–74 ("The essential question. . .is whether the government has physically taken property for itself or someone else. . .or has instead restricted a property owner's ability to use his own property.").

117. *See id.* at 2073-74 (relying on examples such as government flights that touched treetops and terrorized chickens; a public developer's private marina project requiring public access and a cable wire's permanent intrusion).

118. *Id.*

119. *See Cedar Point Nursery*, 141 S. Ct. at 2074 ("The [access] regulation appropriates a right to physically invade the growers' property. . .[and] therefore a per se taking.").

III. *CEDAR POINT* AND THE POTENTIAL FOR IMPACT ON ANTI-DISCRIMINATION LAWS

Cedar Point holds that a per se taking occurs when the government authorizes a physical invasion of private land.[120] Under this holding, anti-discrimination laws would be considered government-authorized "physical invasions" into private businesses because such laws permit access onto private land by minority patrons.[121] However, anti-discrimination laws apply to businesses open to or accessible by the public whereas *Cedar Point* applies solely to entirely private businesses with no public access.[122] Cedar Point Nursery was not open for public access, as people could not access the farm, nor did it advertise itself as such.[123] *Cedar Point*'s holding cannot be applied beyond the wholly private business at issue there.[124] Anti-discrimination laws are still constitutionally sound, even with *Cedar Point*'s holding.[125]

Since anti-discrimination laws are still constitutionally sound, the Equality Act is an appropriate response to the issue of LGBTQ+ discrimination.[126] The Equality Act updates the 1964 Civil Rights Act to ban discrimination in public accommodations based on sex, sexual orientation or gender identity.[127] The Equality Act would fill a huge gap in federal public accommodations law, and require States to enact anti-discrimination laws protecting the LGBTQ+ community.[128] Section A rejects the arguments for First Amendment exceptions to public accommodations law and argues that racial anti-discrimination laws should guide responses to LGBTQ+ discrimination.[129] Section B argues that anti-discrimination laws do not qualify as a taking under Congress's Commerce

120. *See id.* (holding a taking occurs when a regulation provides a third party with authority to access private property).

121. *Id.*

122. *See* Civil Rights Act of 1964, 42 U.S.C. § 2000a(a) (outlawing discrimination in public accommodations defined as inns, hotels, restaurants or movie theaters based on "race, color, religion, or national origin"); *see also* Americans with Disabilities Act, 42 U.S.C. § 12181(7)(A)–(L) (expanding the scope of public accommodations to include many private businesses open to the public or providing goods or services to the public).

123. *See Cedar Point Nursery*, 141 S. Ct. at 2069–70 (documenting that Cedar Point Nursery employs over 400 seasonal workers and around 100 full-time workers while Fowler Packing Company employs 1,800–2,500 employees and describing attempts by union organizers to enter the farm property).

124. *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258 (1964) (holding that the Civil Rights Act of 1964 is a permissible exercise of Congress's authority under the Commerce Clause to prohibit racial discrimination).

125. *Cedar Point Nursery*, 141 S. Ct. at 2074; *see also Heart of Atlanta Motel*, 379 U.S. at 258 (holding that Congress can regulate racial discrimination under the Commerce Clause).

126. Equality Act, S. 393, 117th Cong. (as referred by S. Comm. On the Judiciary, Feb. 23, 2021).

127. *Id.*

128. *Id.*; *see also What You Need to Know About the Equality Act*, *supra* note 75 ("This means that businesses open to the public, such as restaurants and pharmacies, would face accountability if they discriminate against, mistreat, or refuse to serve LGBTQ individuals.").

129. *Infra* Section III.A.

Power.[130] Section C argues that *Cedar Point*'s two exceptions extend to anti-discrimination laws, and the Equality Act remains a constitutional effort to address LGBTQ+ discrimination.[131]

A. The First Amendment Should Not Provide a Loophole for LGBTQ+ Discrimination

Even in states with anti-discrimination provisions, the Supreme Court has not clarified whether the First Amendment allows private businesses to discriminate based on religious beliefs or speech.[132] The Supreme Court has heard argument in *303 Creative LLC v. Elenis* (*303 Creative*), addressing whether First Amendment religious claims against LGBTQ+ people are permissible exceptions to compliance with anti-discrimination laws, effectively permitting LGBTQ+ discrimination.[133] In 2018, in *Masterpiece Cakeshop*, a bakery owner argued that creating a cake for same-sex couples violated his right to free speech and exercise of his religious beliefs.[134] The Court, however, did not answer either of the constitutional questions the plaintiffs' arguments posed.[135] Instead, the Court viewed the Commission's "disparaging" comments during the administrative hearing as evidence of religious bias against the bakery owners, depriving them of a fair hearing.[136]

The same question in *Masterpiece Cakeshop* is once again before the Court.[137] Given the fact that religious arguments for race-based discrimination have been wholly rejected by the Court, the Court should also adopt a similar approach in *303 Creative*.[138] *Piggie Park v. Newman* rejected a white owner's religious arguments that the 1964 Civil Rights Act burdened his right to free expression.[139] *Runyon v. McCrary* rejected the First Amendment associational claim made by the

130. *Infra* Section III.B.

131. *Infra* Section III.C.

132. *See* Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1732 (2018) (holding that the Colorado Civil Rights Commission acted with hostility to religion or religious viewpoint).

133. *See* Williams, *supra* note 31.

134. *Masterpiece Cakeshop*, 138 S. Ct. at 1726.

135. *Id.* at 1729 ("The Civil Rights Commission's treatment of his case has some elements of a clear and impermissible hostility toward the sincere religious beliefs that motivated his objection.").

136. *See id.* (referencing various statements made during the hearings such as one encouraging the owner to compromise to do business in the state and another evoking various examples of prior usage of religious beliefs to discriminate against minorities, including an evocation of the Holocaust, which was particularly outrageous for the Court).

137. *See* Williams, *supra* note 31.

138. Newman v. Piggie Park Enters, Inc., 256 F. Supp. 941, 945 (D.S.C. 1966), *rev'd*, 377 F.2d 433 (4th Cir. 1967), *aff'd*, 390 U.S. 400 (1968) (upholding the district court's ruling rejecting the white owner's free exercise requirements and addressing only a question about attorney's fees).

139. *See id.* (recognizing defendant has a constitutional right to practice his religious beliefs, but not to an extent he affects the rights of his fellow citizens).

private schools challenging desegregation.[140] The analogy to racial discrimination provides a guiding principle to address LGBTQ+ discrimination and religious expression challenges.[141]

Laws addressing discrimination against LGBTQ+ individuals should be analogous to those prohibiting racial discrimination because they both prevent a "caste system."[142] Congress enacted the 1964 Civil Rights Act to remedy such social stratification.[143] In *Brown v. Board of Education*, the Court reasoned that school-segregation laws create a sense of inferiority among those the laws exclude.[144] In 2020, LGBTQ+ individuals reported experiencing adverse mental and economic effects from discrimination.[145] More than one in three experienced some form of discrimination while three of five transgender individuals also experience discrimination.[146] Leaving LGBTQ+ individuals without legal protections exposes them to second-class treatment, on top of the adverse mental and economic effects they are likely already facing.[147]

Similar concerns regarding the accompanying demeaning stigma and injury to same-sex couples motivated Justice Kennedy in *Obergefell v. Hodges* (*Obergefell*).[148] The centrality of marriage in U.S. society, and the "constellation of benefits" denied to same-sex couples but not heterosexual couples established a sense of inferiority in same-sex couples.[149] This sense of inferiority, like in the

140. Runyon v. McCrary, 427 U.S. 160, 175–76 (1976) (determining that the First Amendment right to association does not extend to excluding racial minorities).

141. Kyle Velte, *Free Exercise and LGBTQ Discrimination: The Race Analogy in Historical Perspective*, GEO. UNIV.: BERKELEY CTR. FOR RELIGION, PEACE & WORLD AFFS. (July 26, 2021), https://berkleycenter.georgetown.edu/responses/free-exercise-and-lgbtq-discrimination-the-race-analogy-in-historical-perspective (on file with the *University of the Pacific Law Review*) ("[T]he Court's commitment to respecting all sincerely held religious beliefs, suggests that the Court may. . .achieve coherence in anti-discrimination law by denying sexual orientation religious exemptions.").

142. *See* Steven G. Calabresi & Hannah M. Begley, *Originalism and Same-Sex Marriage*, 70 U. MIAMI L. REV. 648, 702 (2016) ("[A]ny legislation that treats one group as inherently lesser or inferior to other groups is suspect under the Fourteenth Amendment, because [it] calls for equality between groups.").

143. *See* Civil Rights Act of 1964, 42 U.S.C. § 2000a(a) (declaring that discrimination or segregation "on the ground of race, color, religion, or national origin" is prohibited).

144. Brown v. Board of Education, 347 U.S. 483, 494 (1954) (describing the sense of inferiority leading to negative educational and psychological impacts that segregation enforced by law has on Black students).

145. *State of the LGBTQ Community in 2020*, CTR. FOR AM. PROG. (Oct. 6, 2020), https://www.americanprogress.org/article/state-lgbtq-community-2020/ (last visited Apr. 24, 2022) (on file with the *University of the Pacific*).

146. *Id.*

147. *Id.*

148. *See* Obergefell v. Hodges, 576 U.S. 644, 671 (2015) (holding that same-sex marriage is also included under the fundamental right to marry, and that states cannot treat same-sex marriages differently from heterosexual marriages).

149. *See id.* at 674–75 (arguing that the denial of marriage benefits to same-sex couples places a stigma upon their marriages as less worthy of recognition and protection by the state).

race-based cases, motivated the Court in *Obergefell* to reject denial of marriage for same-sex couples.[150] While access to public accommodations is not a fundamental right, its denial also perpetuates social stigma and discrimination.[151]

In *Romer v. Evans* (*Romer*), the Supreme Court rejected Colorado's attempt to enact a constitutional amendment withdrawing all legal protections for gays and lesbians.[152] The Court rejected Colorado's claim that it enacted the amendment to protect the associational rights of those with personal or religious opposition to homosexuality.[153] In rejecting the amendment, the Court declared, "A State cannot so deem a class of persons a stranger to its laws."[154] *Romer* instructs that creating a secondary class of citizens by denying them protection is impermissible.[155] While the Colorado amendment withdrew existing legal protections, states without legal protections create a second-class status for LGBTQ+ Americans.[156]

The Court's race-based cases provide the instruction that religious exemptions to discriminate are not permissible.[157] When the state neutrally enforces a generally applicable law, that law is permissible even if there are incidental effects on religious groups or persons.[158] The 1964 Civil Rights Act is a neutral law applying generally because it applies to all private businesses open to the public engaged in interstate commerce.[159] Therefore, despite any incidental effects on religion, the law is constitutional as a neutral, generally applicable law.[160]

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150. *See id.* at 670 (illustrating that "locking" same-sex couples out of the institution marriage demeans them).

151. *See* Calabresi & Begley, *supra* note 142, at 702.

152. Romer v. Evans, 517 U.S. 620, 630 (1996) (noting that the amendment's broad language repealed laws enacted specially for lesbians and gays, but also reached "general laws . . . that prohibit arbitrary discrimination in governmental and private settings").

153. Romer, 517 U.S. at 635 ("The primary rationale the State offers. . .is respect for other citizens' freedom of association, and in particular the liberties of landlords or employers who have personal or religious objections to homosexuality.").

154. *Id.*

155. *See id.* (characterizing the Amendment as inflicting "immediate, continuing, and real injuries" that cannot be legitimated).

156. *See id.* (describing that the withdrawal of protections under the law for gay and lesbian people diminishes their standing and directs serious injury to them).

157. Newman v. Piggie Park Enters., Inc., 256 F. Supp. 941, 945 (D.S.C. 1966), *rev'd*, 377 F.2d 433 (4th Cir. 1967), *aff'd*, 390 U.S. 400 (1968) (standing for the proposition that individual rights only go so far when in conflict with the rights of others); *see also Romer*, 517 U.S. at 635 (arguing that the retraction of laws protecting gays and lesbians exposes them to harm since they are denied all legal protection).

158. Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 872 (1990) (holding that neutral and generally applicable laws are not unconstitutional, solely because they slightly burden religious exercise); *see also* 42 U.S.C. § 1981; *see also* Runyon v. McCrary, 427 U.S. 160, 176 (1976) ("'Invidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment . . . it has never been accorded affirmative constitutional protections.'").

159. Civil Rights Act of 1964, 42 U.S.C. § 2000a.

160. *Emp. Div.*, 494 U.S. at 872; *see also* McClain, *supra* note 88 ("Smith held that when the government has a 'generally applicable' law or regulation and enforces the law neutrally, the government's action is presumptively legitimate, even if it has some 'incidental' adverse impact on a religious group or person.").

Providing an exception for religious claims against LGBTQ+ peoples undermines the Court's race-based cases.[161] It also denigrates LGBTQ+ peoples into second-class citizen status in violation of *Romer*.[162] Additionally, the Court has held that private discrimination is not constitutionally protected.[163] The response to race-based discrimination provides the most compelling support for the Equality Act's passage since it prevents the denigration of LGBTQ+ peoples.[164] The Equality Act also creates coherence in anti-discrimination law by not permitting loopholes that render anti-discrimination laws inconsistent.[165]

B. Why Cedar Point *Does Not Make Anti-Discrimination Laws Unconstitutional*

Fear over *Cedar Point* focuses on the ruling potentially being used to sweep away anti-discrimination laws and usher in the legitimation of the right to exclude as a license to discriminate.[166] Since *Cedar Point* holds that such physical invasions are unconstitutional, then anti-discrimination laws arguably fall under the Court's decision.[167] In dissent, Justice Breyer discusses concern over the majority decision's applicability to everyday regulations that "regulate property."[168] He explains that the majority ruling could upend food and safety inspection regimes, workplace safety inspections, environmental inspections, amongst others.[169] Because such regulations operate in similar ways to anti-discrimination laws,

161. Newman v. Piggie Park Enters., Inc., 256 F. Supp. 941 (D.S.C. 1966), *rev'd*, 377 F.2d 433 (4th Cir. 1967), *aff'd*, 390 U.S. 400 (1968) (rejecting the claim that there is an absolute right to exercise religion to the exclusion of all other rights); *see also* Brown v. Board of Education, 347 U.S. 483, 493–94 (1954) (describing that segregation not only creates this sense of inferiority in Black students, but that it has subsequent effects in that it inhibits their "educational and mental development").

162. *Romer*, 517 U.S. at 635 (holding that the denial of protections under the law for gays and lesbians creates an immediate injury).

163. *Runyon*, 427 U.S. at 176 (rejecting the constitutional claim made by the private school's parents that desegregating would violate their right to freely associate and acknowledging that private discrimination is not constitutionally protected).

164. Equality Act, S. 393, 117th Cong. (as referred by S. Comm. On the Judiciary, Feb. 23, 2021).

165. *See* Velte, *supra* note 141 (suggesting that protecting the rights of LGBTQ+ people while recognizing the sincerity of religious beliefs is possible only if the Court rejects religious exceptions for LGBTQ+ discrimination); *see also* 42 U.S.C. § 1981.

166. *See* Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2074 (2021) (holding the regulation physically takes a right to invade and grants it to a third party violating the Takings Clause); *see also* Brief for National Employment Law Project National Women's Law Center et al. as Amici Curiae Supporting Respondents, Cedar Point Nursery v. Hassid, 141 S. Ct. 2063 (2021) (No. 20-107) (arguing that if the Supreme Court decides in the farm's favor, protections against discriminating on the basis of race in hiring would be undermined).

167. *See Cedar Point Nursery*, 141 S. Ct. at 2074 (2021) (describing the regulation as an appropriation of a right to invade violating the Takings Clause).

168. *See Cedar Point Nursery*, 141 S. Ct. at 2087–88 (Breyer, J., dissenting) (describing the range of regulated activity that requires temporary entry onto a property owner's land, including examples such as examination of food products, inspections of workplaces, inspections of coastal wetlands, etc.).

169. *See id.* (explaining the three exceptions created by the majority decision as (1) isolated physical invasions remain[ing] actionable as torts; (2) government access resting on traditional "background restrictions on property rights" and (3) where the property owner receives a government benefit, the government may require the owner "to cede a right of access").

Justice Breyer's concerns reflect *Cedar Point*'s disruptive potential.[170] Labor and civil rights groups also raised alarm that private businesses could discriminate against workers hired and retained if the Supreme Court adopted the property owner's arguments.[171]

However, such fears are misplaced because anti-discrimination laws remain constitutional under Congress's Commerce Power.[172] The 1964 Civil Rights Act functioned to remedy economic and social discrimination because they are so entwined.[173] The Equality Act is also a valid exercise of legislative and constitutional authority because it addresses national economic concerns over the impact of LGBTQ+ discrimination.[174] That Congress is legislating against a moral wrong makes no difference.[175] Subsection 1 articulates why anti-discrimination laws are not takings under Congress's Commerce Power.[176]

1. Under Congress's Commerce Power Anti-Discrimination Laws are Constitutional

In *Heart of Atlanta*, the Supreme Court held the 1964 Civil Rights Act constitutional, prohibiting racial discrimination under the Commerce Power.[177] The Court reasoned that Congress only needed a reasonable connection between the 1964 Act's prohibition on racial discrimination and the impediment such discrimination posed to interstate commerce.[178] The Court relied on numerous studies showing that racial discrimination impacted Black people's ability to travel

170. *See Cedar Point Nursery*, 141 S. Ct. at 2088–89 (Breyer, J., dissenting) (describing the majority's approach as a "complex legal scheme" and pondering, "So, if a regulation authorizing temporary access for purposes of organizing agricultural workers falls outside of the Court's exceptions and is a per se taking, then to what other forms of regulation does the Court's per se conclusion also apply?").

171. Brief for National Employment Law Project National Women's Law Center et al. as Amici Curiae Supporting Respondents, Cedar Point Nursery v. Hassid, 141 S. Ct. 2063 (2021) (No. 20-107).

172. *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258 (1964) (supporting Congress's effort to eliminate racial discrimination by only requiring a reasonable link between regulating the economic activity, and the impediment to interstate commerce).

173. Civil Rights Act of 1964, 42 U.S.C. § 2000a.

174. *Cf. Heart of Atlanta Motel*, 379 U.S. at 258 (discussing evidence in the legislative record that racial discrimination placed an obstacle to interstate commerce by discouraging African Americans from travel).

175. *See Heart of Atlanta Motel*, 379 U.S. at 257 ("Congress was not restricted by the fact that the particular obstruction to interstate commerce with which it was dealing was also deemed a moral and social wrong.").

176. *Infra* Subsection III.B.1.

177. *See Heart of Atlanta Motel*, 379 U.S. at 271 (citing Gibbons v. Ogden, 22 U.S. 1 (1824)) ("[T]he power of Congress to regulate commerce among the States is plenary, 'complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution.'").

178. *See Heart of Atlanta Motel*, 379 U.S. at 257–58 (relying on the facts in the record showing that racial discrimination had a far-reaching impact on interstate commerce and requiring nothing more than a reasonable relation between the law and its connection to alleviating the discrimination).

and engage in interstate commerce.[179] The Court's logic in *Heart of Atlanta* should also protect against LGBTQ+ discrimination because the economic impacts of LGBTQ+ discrimination similarly harm LGBTQ+ peoples.[180]

Congress's passage of the Equality Act would eliminate discrimination based on sexual orientation and gender identity.[181] The Equality Act has a reasonable connection to Congress's Commerce Power because LGBTQ+ discrimination also implicates interstate travel and interstate trade.[182] The economic results of LGBTQ+ discrimination causes "a kind of permanent recession," due to the impact on labor opportunities and health-related costs.[183] The economic implications of LGBTQ+ discrimination thus affirm the Equality Act as a valid exercise of Congress's Commerce Clause power.[184]

C. Businesses Holding Themselves Out to the Public Have a Limited Right to Exclude

There are two ways in which businesses open to the public have limited rights to exclude.[185] The first way requires them to cede a right of access in exchange for a business license.[186] The second arises from common law restrictions.[187] A business allowing the public to use its services cannot arbitrarily exclude members

179. *See Heart of Atlanta Motel*, 379 U.S. at 261–62 (declaring Congress has broad power to regulate commerce to ensure no barriers arise so long as such actions satisfy the Constitution).

180. *See* Equality Act, H.R. 5, 117th Cong. § 2(a)(3) (2021) ("This discrimination prevents the full participation of LGBTQ people in society and disrupts the free flow of commerce.").

181. Equality Act, H.R. 5, 117th Cong. (2021).

182. *See* Dayana Yochim, *Pride Month: 12 Key Numbers Highlighting the Economic Status, Challenges That LGBTQ People Face*, MSNBC (June 22, 2020), https://www.msnbc.com/know-your-value/pride-month-12-key-numbers-highlighting-economic-status-challenges-lgbtq-n1231820 (on file with the *University of the Pacific Law Review*) (explaining that hostility towards LGBT people could potentially cost the U.S. one percent of its GDP, placing a burden on interstate commerce); *see also The Relationship Between LGBT Inclusion and Economic Development: Emerging Economies*, UCLA WILLIAMS INST., https://williamsinstitute.law.ucla.edu/publications/lgbt-inclusion-economic-dev/ (last visited Apr. 24, 2022) (on file with the *University of the Pacific Law Review*) (documenting a relationship between greater rights for LGBT people and increased per capita gross domestic product (GDP) and higher human development index (HDI) in emerging countries).

183. M. V. Lee Badgett, *The Economic Case for Supporting LGBT Rights*, ATLANTIC (Nov. 29, 2014), theatlantic.com/business/archive/2014/11/the-economic-case-for-supporting-lgbt-rights/383131/ (on file with the *University of the Pacific Law Review*).

184. *See Heart of Atlanta Motel*, 379 U.S. at 261–62.

185. *See* Singer, *supra* note 43, at 1298 ("Before the Civil War . . . all businesses open to the public had the same legal obligations as inns and carriers to serve the public.").

186. *See* Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2077 (2021) ("Limitations on how a business generally open to the public may treat individuals on the premises are readily distinguishable from regulations granting a right to invade property closed to the public.").

187. *See* Singer, *supra* note 43, at 1299 (noting that courts adopted an explicit exception that businesses open to the public had a duty to serve the public after recognizing that the right of access to public accommodation included every person without regard to race); s*ee also Heart of Atlanta Motel*, 379 U.S. at 260 ("Perhaps the first such holding was in the Civil Rights Cases themselves, where Mr. Justice Bradley for the Court inferentially found that innkeepers, 'by the laws of all the States, so far as we are aware, are bound, to the extent of their facilities, to furnish proper accommodation to all unobjectionable persons who in good faith apply for them.").

of the public.[188] As a result, public accommodations do not have an unlimited right to exclude.[189] Subsection 1 addresses the role that business licensing plays in regulating the rights of private businesses.[190] Subsection 2 explores how the Equality Act merely codifies the common law rule and expands the definition of public accommodations.[191]

1. Business Licensing Restricts the Right to Exclude

Under the logic of *Cedar Point*, the Court recognizes an exception for government regulations that regulate publicly accessible businesses.[192] Since anti-discrimination laws are merely "regulating" business, it remains appropriate for the government to place limits on who such businesses may exclude.[193] The private place of business is open to the public and—to protect minorities—the government may place restrictions on the business's right to exclude.[194]

The regulation in *Cedar Point*, by contrast, arguably infringed the rights of a private business fully inaccessible to the public.[195] This difference between the accessibility and inaccessibility of the public was meaningful enough for the Court to note this distinction itself.[196] The Equality Act applies to private businesses open to the public as it adopts the definition of public accommodations under federal law.[197] To ensure businesses do not discriminate against LGBTQ+ individuals, the right to exclude may be restricted by regulation.[198] Both the federal government and states have an interest in protecting the economic participation of all groups.[199] The Equality Act provides the means through which the federal government may

188. *See* Singer, *supra* note 43, at 1299 (discussing the common law rule as applicable to everyone, regardless of race); s*ee also Heart of Atlanta Motel*, 379 U.S. at 260 (citing The Civil Rights Cases, 109 U.S. 3, 11 (1883)) (supporting the proposition that the duty to serve applied to all people regardless of race).

189. *See* Singer, *supra* note 43, at 1292 (describing the Civil Rights Act of 1964 as "ratify[ing] the common-law rule requiring public service by innkeepers and common carriers").

190. *Infra* Subsection III.C.1.

191. *Infra* Subsection III.C.2.

192. *See Cedar Point Nursery*, 141 S. Ct. at 2087–88 (2021) (Breyer, J., dissenting).

193. *See id.* at 2077 (specifying the distinction between regulations that merely require access to all and regulations that give third-parties access by restricting how exclusion occurs).

194. *See id.* (noting a difference between regulations affecting private businesses available to the public, and those applying to entirely private property).

195. *Id.*

196. *Id.*; *see also* Civil Rights Act of 1964, 42 U.S.C. § 2000a(e) (recognizing in the original statutory text an exception for "private club or other establishment not in fact open to the public").

197. Equality Act, H.R. 5, § 3(a)(4)–(5) 117th Cong. (2021); *see also* 42 U.S.C. § 2000a(b).

198. *See Cedar Point Nursery*, 141 S. Ct. at 2077 (noting a difference between regulations affecting private businesses available to the public, and those applying to entirely private property).

199. *See Heart of Atlanta Motel*, 379 U.S. at 257–58.

restrict a private business's right to exclude.[200] Since the Equality Act only updates existing protections for LGBTQ+ individuals, it is a lawful restriction on public accommodations.[201]

2. The Equality Act Codifies the Common Law Rule and Expands the Definition of Public Accommodations

During the 19th century, public accommodations had a limited right to exclude under the common law.[202] The common law operated similarly to the way anti-discrimination laws do today, but applied only to hotels, inns, and transportation.[203] In the *Civil Rights Cases*, the Court refused to extend the Fourteenth Amendment to include private discrimination, but believed that state common law would protect Black Americans.[204] It was not until passage of the 1964 Civil Rights Act that the common law rule was re-established.[205] The Court in *Heart of Atlanta* understood the 1964 Civil Rights Act to codify this rule.[206] In *Cedar Point*, the Court recognizes an exception for "longstanding background restrictions."[207] "Longstanding background restrictions," the Court notes, include access to private property where there is an emergency.[208] The common law rule for public accommodations should also fall under this exception because it also qualifies as a "longstanding background restriction."[209] The Equality Act is therefore an updating of the codified rule to include access to all regardless of sexual orientation or gender identity.[210] *Cedar Point* does not abridge this rule, but on the contrary, accounts for it.[211]

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200. Equality Act, H.R. 5, 117th Cong. (2021).

201. *See* Equality Act, § 3(a) (amending the 1964 Civil Rights Act to include sex, sexual orientation, and gender identity to section 201, which regulates public accommodations).

202. *See* Saidel-Goley & Singer, *supra* note 53, at 452.

203. *See Heart of Atlanta Motel*, 379 U.S. at 260 (quoting The Civil Rights Cases, 109 U.S. 3, 11 (1883)) ("'[B]y the laws of all the States, so far as we are aware, are bound, to the extent of their facilities, to furnish proper accommodation to all unobjectionable persons who in good faith apply for them.'").

204. *See* The Civil Rights Cases, 109 U.S. at 25 (relying on the common law rule as requiring the provision of accommodations to all people who apply for them, regardless of race).

205. *See Heart of Atlanta Motel*, 379 U.S. at 261 (noting that anti-discrimination statutes were fairly common, and understood not to violate property rights).

206. *See id.* at 259–60 ("It has been repeatedly held by this Court that such laws do not violate the Due Process Clause of the Fourteenth Amendment.").

207. Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2087–88 (2021) (Breyer, J., dissenting).

208. *See id.* at 2079 (describing that "longstanding background restrictions" include entering private property to avoid an "imminent public disaster" or to avoid serious harm to a person, land or property).

209. *See id.* (noting that where government-authorized physical invasions have a longstanding restriction on property rights, it does not qualify as a taking under the Court's decision).

210. *See Heart of Atlanta Motel*, 379 U.S. at 261–62 (suggesting that Congress has broad power under the Commerce Clause to determine how best to ensure the free flow of interstate commerce); *see also Cedar Point Nursery*, 141 S. Ct. at 2087–88 (Breyer, J., dissenting) (summarizing the two relevant exceptions here as government access resting on traditional background restrictions on property rights and where the property owner receives a government benefit, the government may require the owner to cede a right of access).

211. *See Cedar Point Nursery*, 141 S. Ct. at 2079 ("[M]any government-authorized physical invasions will

The Civil Rights Act of 1964 defines public accommodations as businesses such as movie theaters, restaurants, and hotels.[212] Subsequent legislation—such as the Americans with Disabilities Act—expands the definition.[213] This expansion is important because subsequent congressional action demonstrates that the limited facilities in the 1964 Civil Rights Act are not the only places discrimination is prohibited.[214] The Equality Act, therefore, modernizes both the types of public accommodations under its command, and updates the rule to eliminate sexual orientation and gender identity discrimination.[215]

IV. CONCLUSION

Cedar Point, at first glance, appears to hold destructive potential for anti-discrimination laws.[216] Its holding—physical invasions permitted under government authority are takings—could sweep a plethora of regulations into extinction.[217] However, *Cedar Point* should be understood as a narrow ruling.[218] First, prohibiting discrimination is an appropriate exercise of Congress's authority under the Commerce Clause.[219] Second, unlike the private farm in *Cedar Point*, public businesses make themselves accessible to the public.[220] As such, business licensing regimes or the traditional common law duties codified by the 1964 Civil Rights Act limits the right of public businesses to exclude.[221] Civil rights law

not amount to takings because they are consistent with longstanding background restrictions on property rights.").

212. Civil Rights Act of 1964, 42 U.S.C. § 2000a(b)(1)–(4).

213. *Compare* Americans with Disabilities Act § 12181(7)(A)–(L) (defining public accommodations as including hotels, motels, restaurant, bar, motion picture house, concert hall, stadium, auditorium, convention center, bakery, grocery store, clothing store, hardware store, laundromat, etc.), *with* Civil Rights Act § 2000a(b)(1)–(4) (specifying hotels, restaurants, movie theaters and other places of exhibition).

214. Civil Rights Act § 2000a(b)(1)–(4); *see also* Singer, *supra* note 43, at 1423 (arguing that public accommodations not specifically defined by the Civil Rights Act should also be prohibited from discriminatory practices); *see also* 42 U.S.C. § 1981.

215. *See* Singer, *supra* note 43, at 1298; *see also* Kurtzleben, *supra* note 22 (noting the Equality Act would add sex, gender, and sexual orientation to protected characteristics under public accommodations law).

216. *See Cedar Point Nursery*, 141 S. Ct. at 2074 (holding that government-authorized invasions into private property are unconstitutional).

217. *See id.* at 2087–88 (Breyer, J., dissenting) (raising concern over the variety of governmental regulations that could be subjected to elimination under the majority's ruling).

218. *See id.* at 2078–79 (explaining the holding is narrowed by retaining the distinction between trespass and takings, preserving many government-authorized intrusions, and allowing an exchange of government property access for government benefits).

219. *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 260 (1964) ("Likewise in a long line of cases this Court has rejected the claim that the prohibition of racial discrimination in public accommodations interferes with personal liberty."); *see also* District of Columbia v. John R. Thompson Co., 346 U.S. 100, 117 (1953) (describing the anti-discrimination laws there as "merely regulat[ing] a licensed business").

220. *See John R. Thompson Co.*, 346 U.S. at 117 (characterizing anti-discrimination laws at issue as simply regulating the business); *see also Cedar Point Nursery*, 141 S. Ct. at 2077 (distinguishing between regulations that restrict businesses accessible to the public, and private property that is not accessible to the public); *see also* Singer, *supra* note 43, at 1292.

221. *See* Singer, *supra* note 43, at 1292 (summarizing the 1964 Civil Rights Act as Congress's codification of the common law rule); *see also Heart of Atlanta Motel*, 379 U.S. at 260.

simply regulates how businesses may operate and does not invoke the property rights at issue in *Cedar Point*.[222] For these reasons, *Cedar Point* cannot be interpreted to apply outside entirely private actors, such as the farms at issue in the case.[223]

The impact of LGBTQ+ discrimination is rampant.[224] Despite recent recognition of workplace protections, the LGBTQ+ community remains vulnerable to discrimination in many other contexts.[225] Twenty-one states do not have public accommodations laws addressing discrimination based on gender identity or sexual orientation.[226] The economic impact of LGBTQ+ discrimination is severe, creating a recession-like effect.[227] The concerns around individual dignity that motivated the Civil Rights Act of 1964 exist for the LGBTQ+ community.[228] The Senate Commerce Committee of the Civil Rights Act of 1964 meant to "vindicate 'the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.'"[229] A similar deprivation exists

222. *See Cedar Point Nursery*, 141 S. Ct. at 2077 (discussing a difference between public businesses and private property closed off the to the public).

223. *See Heart of Atlanta Motel*, 379 U.S. at 260 (rejecting the claim that prohibiting racial discrimination interferes with personal liberty); *see also John R. Thompson Co.*, 346 U.S. at 117 (viewing the anti-discrimination law at issue in that case as solely "regulating" the business).

224. *See* Yochim, *supra* note 184; *see also* UCLA WILLIAMS INST., *supra* note 184; *see also Nondiscrimination Laws*, *supra* note 8 (listing twenty-one states and five U.S. territories as having no public accommodations laws prohibiting discrimination based on sexual orientation or gender identity and also noting that thirty-five percent of the LGBTQ+ population lives in a state where there are no protections).

225. *See* Bostock v. Clayton County, 140 S. Ct. 1731, 1743 (2020) (holding that "sex" as defined in Title VII makes it unlawful to discriminate in employment based on gender identity or sexual orientation); *see also* HERMAN JAMES ET AL., *supra* note 15, at 212 (describing thirty-one percent of respondents experiencing mistreatment in at least one place of public accommodation including fourteen percent being denied equal treatment or service, twenty-four percent who were verbally harassed and two percent who were physically attacked); *Widespread Discrimination Continues to Shape LGBT People's Lives*, *supra* note 15 (noting that 68.5% of people who experienced discrimination based on sexual orientation or gender identity reported suffering psychologically as a result and also describing measures to avoid discrimination such as changing the way they dress, taking longer commutes to LGBT-friendly cities or even avoiding stores or restaurants).

226. *See Nondiscrimination Laws*, *supra* note 8 (documenting that twenty-one states do not have anti-discrimination laws for the LGBTQ+ community).

227. *See* Charles Radcliffe, *The Real Cost of LGBTQ Discrimination*, WORLD ECON. F. (Jan. 5, 2016), https://www.weforum.org/agenda/2016/01/the-real-cost-of-lgbt-discrimination/ (on file with the *University of the Pacific Law Review*) (estimating that LGBT discrimination in India may be costing approximately $32 billion in lost economic output); *see also* Yochim, *supra* note 184; UCLA WILLIAMS INST., *supra* note 184.

228. *See Heart of Atlanta Motel*, 379 U.S. at 250 (noting the Senate Commerce Committee indicated Title II as intended "to vindicate 'the deprivation of personal dignity that surely accompanies denials of equal access to public establishments'"); *see also Kim Bowman & Debbie Beach*, *supra* note 19 (quoting Kim Bowman) ("The whole incident was very disturbing, demoralizing and demeaning. I believe that all people should be treated fairly and equally under the law, not just heterosexual individuals or couples."); *Randall Magill & Jose Chavez*, *supra* note 1 (quoting Randall) ("It would be nice to know that if I tried to take legal action against discrimination like this, I would have the law on my side.").

229. *Heart of Atlanta Motel*, 379 U.S. at 250.

against LGBTQ+ people of their dignity by their relegation to second-class citizen status.[230] Congress should pass the Equality Act to extend equal protection of the law to LGBTQ+ peoples.[231]

230. *See* Gregory S. Alexander, *The Social Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745, 768 (2009) ("Every person must be equally entitled to those things essential for human flourishing . . . the foundation of flourishing and the material resources required to nurture those capabilities.").

231. *See* Kurtzleben, *supra* note 22; *see also* Tina Fernandes Botts, FOR EQUALS ONLY: RACE, EQUALITY AND THE EQUAL PROTECTION CLAUSE 58 (2018) ("[S]ocial equality is the idea that all people should enjoy equal access to basic social goods such as flourishing lives, income, wealth, health care, education, and jobs.").

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