

303 Creative v. Elenis: Unresolved Conflict, Gay Rights, and a Future of Uncertainties

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Abstract:

On the last day of June 2023, First Amendment supporters all across the nation cheered with glee when the U.S. Supreme Court handed down its decision in *303 Creative v. Elenis*. The Court held that, under the First Amendment, a wedding website designer, who believes that same-sex marriage is wrong, could refuse to provide services to a same-sex couple seeking a wedding website. Instead of treating the website as an ordinary commercial product, the Court treated it as pure speech worthy of Constitutional protections. The decision should be seen as nothing less than a major victory by First Amendment supporters because Gorsuch’s short, yet direct, majority opinion brought free speech absolutism back to life. However, that did not come without a price. By holding that the wedding website designer could not be subjected to state public accommodations laws, the Court called into question the place of these laws in modern society. Sotomayor’s dissent is a stern warning to the public: The future of these laws is grim. While that might be of no concern to free speech absolutists, they too will be affected by the decision. Instead of providing a resolution to the conflict that existed between the gay community and the religious community, *303 Creative* only amplified and expanded that conflict, creating a wide range of uncertainties.

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INTRODUCTION

In June 2015, the U.S. Supreme Court held same-sex couples had a constitutional right to marry.¹ Justice Thomas wrote a dissent, in which he warned that the Court’s decision would “inevitabl[y] . . . come into conflict” with religious liberty, “as individuals . . . are confronted with demands to participate in and endorse civil marriages between same-sex couples.”² In June 2018, the Court in *Masterpiece Cakeshop* could have resolved that conflict, but the case was decided on narrow grounds, which required lawyers to find a new plaintiff.³ Eventually, another case reached the Court, and in June 2023, the Court sided with the First Amendment and Lorie Smith—a website designer who believes that “God is calling her ‘to explain His true story about marriage’” through Smith’s for-profit business.⁴ Although she markets her services to the general public, she would not provide services to a same-sex couple seeking a wedding website because Smith believes that same-sex marriages are “false” and that creating such a website “would be expressing a message . . . that [she] believe[s] is contrary to God’s design.”⁵ The Court held that, under the First Amendment, Colorado could not enforce its public accommodations statute and force Smith to make a website for a same-sex wedding.⁶

The decision was celebrated by First Amendment supporters, who applauded Justice Gorsuch and his majority opinion, in which he wrote that the ruling was consistent with “the Constitution’s commitment to the freedom of speech.”⁷ However, the decision was not unanimous. People who disagreed echoed Justice Sotomayor’s 38-page dissent, in which she explained why “[t]oday is a sad day in American constitutional law and in the lives of LGBT people.”⁸ The effects of the decision were felt immediately. Just days after the Court handed down its decision, multiple news stories broke out. A hair salon in a small Michigan town posted a sign stating that the salon would not serve people identifying “as anything other than a man/woman” and

¹ *Obergefell v. Hodges*, 576 U.S. 644, 681 (2015).

² *Id.* at 734 (Thomas, J., dissenting).

³ *See generally* *Masterpiece Cakeshop, Ltd. v. Col. C.R. Comm’n*, 584 U.S. 617 (2018).

⁴ *303 Creative LLC v. Elenis*, 600 U.S. 570, 624 (2023) (Sotomayor, J., dissenting).

⁵ *Id.* at 624 (alteration in original).

⁶ *Id.* at 601–603 (majority opinion).

⁷ *Id.* at 601.

⁸ *Id.* at 636 (Sotomayor, J., dissenting).

further providing the following explanation: “[t]his is America; free speech. This small business has the right to refuse services.”⁹ A Texas state judge, who was previously publicly reprimanded for refusing to officiate same-sex marriages, filed a brief with the Supreme Court of Texas, in which the judge argued that in light of *303 Creative*, Texas no longer had a “compelling interest” to force her “to officiate same-sex weddings on the same terms that she officiates opposite-sex weddings” because of “her sincere religious objections to homosexual behavior and same-sex marriage.”¹⁰

The news headlines paint a grim picture of the future of gay rights. First Amendment supporters should rightfully celebrate *303 Creative*; however, neither they nor anyone else should interpret the decision as a resolution of the conflict that Thomas discussed in his *Obergefell* dissent.¹¹ By treating Smith’s services as worthy of First Amendment protections, Gorsuch opened a Pandora’s box of uncertainties, with no person unaffected.¹² Instead of resolving the conflict, Gorsuch’s majority opinion has expanded it beyond just gay people and religious people. *303 Creative* will inevitably force the Court to not only revisit the conflict between these two groups, but it will also require the Court to reexamine the principles upon which the entire body of public accommodations laws was built.

In Part I, the Article begins with a history of federal public accommodations laws. This Part examines the purposes of these laws, revealing the role public accommodations laws play in society. Part II discusses public accommodations laws in Colorado with an emphasis on the Colorado Anti-Discrimination Act (CADA). Part III delves into the *Masterpiece Cakeshop* case, focusing on the disagreements among the Justices. After every written opinion is analyzed in detail to show major points of contention, each opinion is critiqued, and the remaining issues and unanswered questions are emphasized. Part IV discusses *303 Creative*, drawing attention to the arguments made by the majority and the dissent. This Part similarly provides a critique of written opinions, explaining major disagreements over the framing of the case. Part V draws on social science literature to explore the real-world implications of *303 Creative*, and what the decision means for gay people and other groups protected by public

⁹ Jodi Miesen & Jacob Johnson, *Traverse City Hair Salon No Longer Servicing Certain LGBTQ Members*, 9 AND 10 NEWS (July 10, 2023, 6:52 PM), <https://www.9and10news.com/2023/07/11/traverse-city-hair-salon-no-longer-servicing-lgbtq-members> [https://perma.cc/7RXB-AELD].

¹⁰ Rebecca Schneid, *Texas Judge Who Doesn’t Want to Perform Gay Marriage Ceremonies Hopes Web Designer’s Supreme Court Case Helps Her Fight*, TEXAS TRIBUNE (July 13, 2023), <https://www.texastribune.org/2023/07/12/texas-judge-gay-weddings-supreme-court> [https://perma.cc/5WLW-YKUC].

¹¹ See generally *Obergefell v. Hodges*, 576 U.S. 644, 734 (2015) (Thomas, J., dissenting).

¹² See generally *303 Creative LLC v. Elenis*, 600 U.S. 570 (2023).

accommodations laws. Finally, the Conclusion discusses the future of the conflict and other potential issues presented by *303 Creative*.

I. HISTORY OF FEDERAL PUBLIC ACCOMMODATIONS LAWS

Laws prohibiting discrimination in places of public accommodation have been present in America since the 1860s. Shortly after the Civil War, on May 16, 1865, Massachusetts became the first state to pass a public accommodations law prohibiting discrimination based on race “in any licensed inn, in any public place of amusement, public conveyance or public meeting.”¹³ In 1870, Massachusetts Senator Charles Sumner advocated for a federal bill to address ongoing racial discrimination.¹⁴ At that time, he argued that “[v]ery few measures of equal importance have ever been presented.”¹⁵ Sumner subsequently died in 1874 without being able to see whether his bill would become law.¹⁶ On March 1, 1875, after numerous debates, President Ulysses S. Grant signed the bill into law.¹⁷ The law, known as the Civil Rights Act of 1875, was one of the first major federal public accommodations laws, providing the following:

That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.¹⁸

The law further stated that people who were denied access to the mentioned places because of their race would be entitled to compensation.¹⁹ On October 15, 1883, the U.S. Supreme Court declared the law unconstitutional and void, holding that Congress lacked the power to enact such a broad piece of legislation prohibiting discrimination by private

¹³ Act Forbidding Unjust Discrimination on Account of Color or Race, MASS. GEN. LAWS ch. 277, § 1 (1865).

¹⁴ ENCYCLOPEDIA OF THE RECONSTRUCTION ERA 242 (Richard Zuczek ed., 2006).

¹⁵ WALTER G. SHOTWELL, LIFE OF CHARLES SUMNER 678 (1910).

¹⁶ DAVID DONALD, CHARLES SUMNER AND THE COMING OF THE CIVIL WAR 279 (2009).

¹⁷ ALAN FRIEDLANDER & RICHARD ALLAN GERBER, WELCOMING RUIN: THE CIVIL RIGHTS ACT OF 1875 3 (2018).

¹⁸ Civil Rights Act of 1875, ch. 114, 18 Stat. 335, 335–36 (1875), *invalidated by* The Civil Rights Cases, 109 U.S. 3 (1883).

¹⁹ Civil Rights Act of 1875, ch. 114, 18 Stat. 335, 336 (1875).

parties.²⁰ Another similar major piece of legislation did not come to fruition until the 1960s.

On January 20, 1961, John F. Kennedy took office as the 35th President of the United States.²¹ Kennedy strongly supported civil rights measures, which he voiced during his televised address on June 11, 1963:

It ought to be possible for American consumers of any color to receive equal service in places of public accommodation, such as hotels and restaurants and theaters and retail stores, without being forced to resort to demonstrations in the street, and it ought to be possible for American citizens of any color to register to vote in a free election without interference or fear of reprisal.²²

Kennedy subsequently submitted a civil rights bill to Congress on June 19, 1963.²³ He did not live long enough to sign the bill into law because he was assassinated on November 22, 1963.²⁴ On the same day, Lyndon B. Johnson was sworn in.²⁵ On November 27, 1963, Johnson addressed a joint session of Congress, urging passage of the civil rights measure: “No memorial oration or eulogy could more eloquently honor President Kennedy’s memory than the earliest possible passage of the [c]ivil [r]ights bill for which he fought.”²⁶ On July 2, 1964, Johnson signed the bill into law.²⁷ The Civil Rights Act of 1964 had 11 titles. Title II addressed discrimination in places of public accommodation with section 201(a) stating the following:

All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, and privileges, advantages, and accommodations of any place of public

²⁰ The Civil Rights Cases, 109 U.S. 3, 25 (1883).

²¹ 1 ENCYCLOPEDIA OF UNITED STATES NATIONAL SECURITY 66 (Richard J. Samuels ed., 2006).

²² President John F. Kennedy, Radio and Television Report to the American People on Civil Rights (June 11, 1963), <https://www.jfklibrary.org/archives/other-resources/john-f-kennedy-speeches/civil-rights-radio-and-television-report-19630611> [<https://perma.cc/PE83-DLLF>]

²³ SEAN J. SAVAGE, JFK, LBJ, AND THE DEMOCRATIC PARTY 110–11 (2004).

²⁴ 1 ENCYCLOPEDIA OF POLITICS: THE LEFT AND THE RIGHT: VOLUME 1: THE LEFT 260 (Rodney P. Carlisle ed., 2005).

²⁵ ROBERT A. CARO, THE PASSAGE OF POWER: THE YEARS OF LYNDON JOHNSON IV 324 (2012).

²⁶ President Lyndon B. Johnson, Address to a Joint Session of Congress, NAT’L ARCHIVES (Nov. 27, 1963) <https://www.archives.gov/legislative/features/civil-rights-1964/lbj-address.html#:~:text=Johnson%20addressed%20a%20joint%20session,which%20he%20fo ught%20so%20long> [<https://perma.cc/3GDG-E893>].

²⁷ THE CIVIL RIGHTS ACT OF 1964: THE PASSAGE OF THE LAW THAT ENDED RACIAL SEGREGATION 49 (Robert D. Loevy ed., 1997).

accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.²⁸

The next Part discusses how the federal public accommodations laws mentioned above helped Colorado to pass similar measures addressing discrimination.

II. PUBLIC ACCOMMODATIONS LAWS IN COLORADO

Colorado, just like the federal government, has a long history of passing laws prohibiting discrimination in places of public accommodation. In 1885, Colorado passed such a law, which guaranteed “full and equal enjoyment” of certain public places to “all citizens . . . regardless of race, color or previous condition of servitude.”²⁹ In 1895, Colorado expanded the law to apply to “all other places of public accommodation.”³⁰ The next big reform took place in the 1950s.

On March 13, 1957, Colorado Governor Steve McNichols signed the Colorado Anti-Discrimination Act (CADA) into law making it illegal for employers in Colorado “to refuse to hire, to discharge, to promote or demote, or to discriminate in matters of compensation against, any person otherwise qualified, because of race, creed, color, national origin or ancestry.”³¹ CADA also established the Colorado Anti-Discrimination Commission, which, among other things, was tasked with investigating complaints alleging discrimination.³² On June 22, 1979, Colorado Governor Richard D. Lamma signed House Bill 1355 into law, which “reorganize[d] the laws concerning the Colorado [C]ivil [R]ights [C]ommission, procedures before the commission, and unfair or discriminatory practices in employment, housing, public accommodations, and advertising.”³³ The law replaced the Anti-Discrimination Commission with Civil Rights Commission and delegated the new Commission “a broad range of powers and duties directed towards the elimination of discriminatory practices based on handicap, race, creed, color, sex, marital status, and national origin or ancestry in the areas of employment,

²⁸ Civil Rights Act of 1964, 42 U.S.C. § 2000a (2023).

²⁹ An Act to Protect All Citizens in Their Civil Rights, 1885 Colo. Sess. Laws 132–33.

³⁰ An Act to Protect All Citizens in Their Civil and Legal Rights, 1895 Colo. Sess. Laws 139.

³¹ Colorado Anti-Discrimination Act of 1957 1957 Colo. Sess. Laws 492–93, 495.

³² See *Colorado Anti-Discrimination Comm'n v. Cont'l Air Lines, Inc.*, 372 U.S. 714, 716 (1963) (stating petitioner made a complaint to the Colorado Anti-Discrimination Commission to investigate race-based discrimination).

³³ COLO. LEGIS. DRAFTING OFF., DIGESTS OF BILLS ENACTED BY THE FIFTY-SECOND GENERAL ASSEMBLY 85–86 (1979), <https://leg.colorado.gov/sites/default/files/digest1979.pdf> [https://perma.cc/W56Y-FBGD].

housing, public accommodation, and advertising.”³⁴ However, sexual orientation was not included among other protected characteristics.

Following the Stonewall Riots in 1969, gay activists started mobilizing and educating the public on discrimination and other issues concerning the gay community.³⁵ Shortly thereafter, in 1971, Colorado repealed its sodomy statute criminalizing intimate conduct between two people of the same sex.³⁶ The next step was public accommodations laws. In 1973, the Boulder City mayor sponsored a local ordinance prohibiting discrimination based on sexual orientation.³⁷ However, following public backlash, the ordinance was subjected to a referendum which was held on May 7, 1974, after which the ordinance was voted down.³⁸ In 1987, Boulder residents were asked the same question again, and this time they approved an ordinance prohibiting discrimination based on sexual orientation.³⁹ Measures prohibiting discrimination against gay people continued to be passed. In 1989, Colorado Governor Roy Romer issued an executive order outlawing discrimination against AIDS patients.⁴⁰ In 1990, the Denver City Council sponsored an ordinance protecting gay people from discrimination, which was later upheld in a referendum by Denver voters.⁴¹ In July 1991, the Colorado Civil Rights Commission proposed adopting a new law prohibiting firing someone based on that person’s sexual orientation.⁴²

Even though most anti-discrimination laws were passed at the local and state levels, the national conversation about gay rights has been omnipresent since 1986, when the Court in *Bowers v. Hardwick* upheld a Georgia sodomy law that criminalized intimate acts between two people of the same sex.⁴³ Other rights, such as parenting and serving in the military were also widely

³⁴ Colorado C.R. Comm’n *ex ml.* Ramos v. The Regents of the Univ. of Colorado, 759 P.2d 726, 728 (Colo. 1988).

³⁵ ENCYCLOPEDIA OF RELIGIOUS CONTROVERSIES IN THE UNITED STATES 446 (Bill J. Leonard & Jill Y. Crainshaw eds., 2012).

³⁶ Act of June 2, 1971, ch. 121, 1971 Colo. Sess. Laws 423.

³⁷ WILLIAM N. ESKRIDGE JR. & CHRISTOPHER R. RIANO, MARRIAGE EQUALITY: FROM OUTLAWS TO IN-LAWS 38 (2020).

³⁸ *Id.*

³⁹ CHUCK STEWART, HOMOSEXUALITY AND THE LAW: A DICTIONARY 232 (2001).

⁴⁰ CHUCK STEWART, GAY AND LESBIAN ISSUES: A REFERENCE HANDBOOK 200 (2003).

⁴¹ CRAIG A. RIMMERMAN, FROM IDENTITY TO POLITICS: THE LESBIAN AND GAY MOVEMENTS IN THE UNITED STATES 142 (2002).

⁴² LISA KEEN & SUZANNE B. GOLDBERG, STRANGERS TO THE LAW: GAY PEOPLE ON TRIAL 7 (2000).

⁴³ See ELLEN ANN ANDERSEN, OUT OF THE CLOSETS AND INTO THE COURTS: LEGAL OPPORTUNITY STRUCTURE AND GAY RIGHTS LITIGATION 119 (2006) (discussing that “[i]n 1986, when the Supreme Court decided *Bowers*, the prevailing public conversation about same-sex sexuality concerned fears of AIDS contagion”).

discussed.⁴⁴ In 1994, a bipartisan compromise was reached to allow gay people to serve in the military as long as they did not disclose their sexual orientation.⁴⁵ The AIDS epidemic also contributed to the public visibility of the gay community.⁴⁶

In 1991, the City of Colorado Springs also attempted to adopt a law prohibiting discrimination based on sexual orientation.⁴⁷ However, the new measure attracted enough attention from the religious community, which held many protests leading to the measure's failure.⁴⁸ The continued advocacy for gay rights eventually mobilized the religious right, who formed Colorado for Family Values, a statewide organization that focused on repealing Romer's executive order and other anti-discrimination laws that had been passed.⁴⁹ The organization believed that "America has deteriorated because it has turned away from literal interpretations of the Bible, and fundamentalist church teachings must play a bigger role in government."⁵⁰ One of the goals of the organization was to reframe the issues presented by the gay rights movement. Instead of discussing anti-discrimination laws as measures that were meant to promote equality, the religious right phrased them as "special rights."⁵¹ Homosexuals were portrayed as people asking for special privileges with no clear limits.⁵² Soon there was enough support for a state-wide ballot initiative that would have prohibited any state agency from granting special rights to homosexuals.⁵³ Among the many groups that opposed such a measure was the Colorado Hispanic League, which disagreed with the measure and how it was framed: "If the civil rights, privacy, privileges and protections of citizens can be restricted because of sexual orientation, what protects Hispanics from similar initiatives based on equally

⁴⁴ DANIEL WINUNWE RIVERS, *RADICAL RELATIONS: LESBIAN MOTHERS, GAY FATHERS, AND THEIR CHILDREN IN THE UNITED STATES SINCE WORLD WAR II 195–96* (2013); RANDY SHILTS, *CONDUCT UNBECOMING: GAYS AND LESBIANS IN THE U.S. MILITARY 304–06* (2005).

⁴⁵ DON'T ASK, DON'T TELL: *DEBATING THE GAY BAN IN THE MILITARY 69* (Aaron Belkin & Geoffrey Bateman eds., 2003).

⁴⁶ LESBIAN, GAY, AND BISEXUAL IDENTITIES OVER THE LIFESPAN: *PSYCHOLOGICAL PERSPECTIVES 350* (Anthony R. D'Augelli & Charlotte J. Patterson eds., 1995).

⁴⁷ MICHAEL J. KLARMAN, *FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE 68* (2013).

⁴⁸ JOYCE MURDOCH & DEB PRICE, *COURTING JUSTICE: GAY MEN AND LESBIANS V. THE SUPREME COURT 452* (2001).

⁴⁹ *PROUD HERITAGE: PEOPLE, ISSUES, AND DOCUMENTS OF THE LGBT EXPERIENCE 292* (Chuck Stewart ed., 2014).

⁵⁰ CHRISTOPHER J. EBERLE, *RELIGIOUS CONVICTION IN LIBERAL POLITICS 4* (2002).

⁵¹ MICHAEL COBB, *THE RHETORIC OF RELIGIOUS VIOLENCE: GOD HATES FAGS 41* (2006).

⁵² KEEN & GOLDBERG, *supra* note 42, at 11.

⁵³ JOSEPH MELLO, *THE COURTS, THE BALLOT BOX, AND GAY RIGHTS: HOW OUR GOVERNING INSTITUTIONS SHAPE THE SAME-SEX MARRIAGE DEBATE 35–36* (2016).

arbitrary reasons?”⁵⁴ Another line of pushback came from the non-religious community that noticed that the rhetoric surrounding the statewide initiative was principally rooted in religious beliefs and thus was framed by the opposition as a violation of the separation of church and state.⁵⁵ The religious right argued that the measure prohibiting discrimination based on sexual orientation violated their ability to exercise their religion, and the opposition argued that allowing the religious right to discriminate against people effectively demoted homosexuals to second-class citizens and made religion the supreme law of the land.

The religious right ultimately prevailed in its efforts. Instead of pursuing the traditional legislative path of passing a bill, the supporters of the measure strategically picked a different route of going directly to the voters instead of trying to lobby selected Colorado lawmakers. Passing a bill meant that the new lawmakers could quickly repeal the measure. Tony Marco, the co-founder of Colorado for Family Values, gave the following explanation for the chosen strategy:

The legislature is very vulnerable to all kinds of lobbying and other activity without citizens’ direct representation on that activity—lobbying for which I discovered gay militants were very, very well equipped and were very well experienced. And so the only way to insure that this kind of activity would stop would be through passage of [a] constitutional amendment.⁵⁶

On November 3, 1992, the voters of the State of Colorado, by a vote of 53% to 47%, passed a measure that would have amended the Colorado Constitution.⁵⁷ The measure would have prevented any town, city, or other state agency from taking any action to recognize homosexuals as a protected class.⁵⁸ The measure was subsequently challenged, and eventually, on May 20, 1996, the U.S. Supreme Court held that the measure was unconstitutional.⁵⁹ However, the gay rights activists were not able to enjoy their win for too long. On May 26, 2000, Governor Bill Owens signed House Bill 00-1249 into law, which defined marriage as “only between one man and one woman.”⁶⁰ In 2003 and 2004, state legislators proposed a bill that would have allowed same-sex couples to enter into civil unions, but the bill died in committees both

⁵⁴ KEEN & GOLDBERG, *supra* note 42, at 12.

⁵⁵ See, e.g., John Gallagher, *Keeping the Faith*, *ADVOCATE*, July 22, 1997, at 40.

⁵⁶ KEEN & GOLDBERG, *supra* note 42, at 109 (alteration in original).

⁵⁷ DAVID A. J. RICHARDS, *IDENTITY AND THE CASE FOR GAY RIGHTS: RACE, GENDER, RELIGION AS ANALOGIES* 110 (1999).

⁵⁸ *Id.*

⁵⁹ *Romer v. Evans*, 517 U.S. 620, 635 (1996).

⁶⁰ H.B. 00-1249, 66th Gen. Assemb., 2d Reg. Sess. (Colo. 2000).

times.⁶¹ In 2005, a bill was passed that would have provided employment discrimination protections for gay people, but Governor Owens vetoed it.⁶²

Things took a different turn with a new administration. On January 9, 2007, Bill Ritter took office as the new governor.⁶³ On May 25, 2007, Ritter signed into law Senate Bill 07-025, which prohibited employment discrimination based on sexual orientation.⁶⁴ On May 29, 2008, Ritter signed Senate Bill 08-200 into law, which expanded the State's anti-discrimination laws in places of public accommodation to include sexual orientation.⁶⁵ The new law stated the following:

It is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry, the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation or, directly or indirectly, to publish, circulate, issue, display, post, or mail any written, electronic, or printed communication, notice, or advertisement that indicates that the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation will be refused, withheld from, or denied an individual or that an individual's patronage or presence at a place of public accommodation is unwelcome, objectionable, unacceptable, or undesirable because of disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry.⁶⁶

The statute has two important clauses. The first part is known as the Accommodation Clause, which prohibits the very act of discrimination in

⁶¹ Michael Brewer, *Colorado's Battle over Domestic Partnerships and Marriage Equality in 2006*, 4 J. GLBT FAM. STUD. 117, 117–18 (2008).

⁶² Mark P. Couch, *Owens Vetoes Bill for Gays on the Job*, DENVER POST (May 27, 2005, 4:44 PM), <https://www.denverpost.com/2005/05/27/owens-vetoes-bill-for-gays-on-the-job> [https://perma.cc/U9S5-RQB8].

⁶³ Mike McPhee, *Ritter Becomes 41st Governor*, DENVER POST (May 8, 2016, 1:16 AM), <https://www.denverpost.com/2007/01/09/ritter-becomes-41st-governor> [https://perma.cc/HDM2-K76Z].

⁶⁴ Associated Press, *Ritter Signs Bill to Protect Gays from Discrimination*, DENVER POST (May 25, 2007, 11:22 AM), <https://www.denverpost.com/2007/05/25/ritter-signs-bill-to-protect-gays-from-discrimination> [https://perma.cc/6UPF-W8KV].

⁶⁵ John Ingold, *Ritter Signs Controversial Anti-Discrimination Bill*, DENVER POST (May 29, 2008, 12:10 PM), <https://www.denverpost.com/2008/05/29/ritter-signs-controversial-anti-discrimination-bill> [https://perma.cc/N5TM-WFQC].

⁶⁶ S.B. 08-200, 66th Gen. Assemb., 2d Reg. Session (Colo. 2008).

places of public accommodation. The second part is known as the Communication Clause, which prohibits posting or otherwise advertising the intent to commit an act of discrimination. Both of these Clauses were subsequently challenged in the following case.

III. *MASTERPIECE CAKESHOP, LTD. V. COLORADO CIVIL RIGHTS COMMISSION*

Masterpiece Cakeshop, Inc., was a bakery that was owned by Jack C. Phillips in Lakewood, Colorado.⁶⁷ Phillips was a baker who operated his shop for over 24 years.⁶⁸ His bakery offered a wide variety of baked goods, including custom-designed cakes.⁶⁹ However, Phillips would not make custom-designed wedding cakes for same-sex couples because his “religious convictions compel him to create cakes celebrating only marriages that are consistent with his understanding of God’s design.”⁷⁰

In July 2012, Dave Mullins and Charlie Craig, a same-sex couple, entered Phillips’s bakery and requested a cake for their upcoming same-sex wedding.⁷¹ Phillips told the couple that because of his religious beliefs, he could not make that cake.⁷² However, he offered to sell some other baked goods.⁷³ The design of the cake was not discussed, and the couple left.⁷⁴

Under CADA, any complaints of discrimination first have to be addressed to the Colorado Civil Rights Division.⁷⁵ If the Division finds probable cause that the complainant’s rights had been violated under CADA, the Division will refer the case to the Colorado Civil Rights Commission.⁷⁶ Then, the Commission would decide on whether a formal hearing is warranted.⁷⁷ The hearing would be presided over by a state Administrative Law Judge (ALJ) who would then issue a decision.⁷⁸ The losing party would be able to appeal the ALJ’s decision to the Full Commission, which consists

⁶⁷ Brief for Petitioners at 51, *Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n*, 584 U.S. 617 (2018) (No. 16-111), 2017 WL 3913762, at *5.

⁶⁸ *Id.*

⁶⁹ Brief for Respondent at 1, *Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n*, 584 U.S. 617 (2018), 2017 WL 4838416, at *10.

⁷⁰ Petition for Writ of Certiorari at 3, *Masterpiece Cakeshop, Inc. v. Colorado C.R. Comm'n*, No. 15SC738, 2016 WL 1645027 (Colo. 2016) (No. 15SC738).

⁷¹ Brief for Petitioners, *supra* note 67, at 9.

⁷² *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 276 (Colo. App. 2015).

⁷³ Brief for Petitioners, *supra* note 67, at 10.

⁷⁴ *Id.*

⁷⁵ *Masterpiece Cakeshop, Ltd.*, 584 U.S. at 628.

⁷⁶ *Id.*

⁷⁷ See COLO. REV. STAT. §§ 24-34-306, 24-4-105 (2023).

⁷⁸ See *id.*

of seven members.⁷⁹ The Commission has the power to impose statutory penalties and pursue other measures.⁸⁰ Some of these penalties include issuing cease-and-desist orders and publishing public notices.⁸¹

A. Litigation and Legal Arguments

In September 2012, Mullins and Craig filed a complaint, alleging that the bakery had denied them full and equal service based on their sexual orientation.⁸² Phillips argued that requiring him to make a cake for a same-sex wedding violated his rights of free exercise of religion and freedom of speech.⁸³

An investigation was opened, and the Civil Rights Division found probable cause that Phillips had refused to make a custom cake for same-sex weddings on multiple occasions.⁸⁴ The Division also found that Phillips had declined to sell cupcakes to another same-sex couple for a commitment celebration because Phillips had a policy “of not selling baked goods to same-sex couples for this type of event.”⁸⁵ The Division found probable cause, and the case was referred to the Colorado Civil Rights Commission, which decided to hold a formal hearing before a State ALJ.⁸⁶ The ALJ ruled for the same-sex couple, holding that the Colorado public accommodations law applied to the bakery and that Phillips’s refusal to make the wedding cake constituted discrimination based on sexual orientation.⁸⁷ The decision was affirmed by the Commission, and Phillips was ordered to cease his discriminatory practices, to engage in staff training, and to file compliance reports.⁸⁸

On August 13, 2015, the Colorado Court of Appeals affirmed the Commission’s decision.⁸⁹ Phillips argued that he did not refuse to serve customers based on their sexual orientation and that his refusal to make the cake for Mullins and Craig was not because of his opposition to their sexual

⁷⁹ *Masterpiece Cakeshop, Ltd.*, 584 U.S. at 628.

⁸⁰ See COLO. REV. STAT. § 24–34–306(2023).

⁸¹ *Id.*

⁸² *Masterpiece Cakeshop, Ltd.*, 584 U.S. at 628.

⁸³ *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 277 (Colo. App. 2015).

⁸⁴ *Id.*

⁸⁵ Brief for Respondent Colorado Civil Rights Commission at 12, *Masterpiece Cakeshop, Inc. v. Colorado C.R. Comm'n*, No. 15SC738, 2016 WL 1645027 (Colo. Apr. 25, 2016).

⁸⁶ Brief in Opposition to Petition for Writ of Certiorari at 2, *Masterpiece Cakeshop, Inc. v. Colorado C.R. Comm'n*, No. 15SC738, 2016 WL 1645027 (Colo. Apr. 25, 2016).

⁸⁷ *Masterpiece Cakeshop, Ltd.* 584 U.S. 617, 629–30 (2018).

⁸⁸ Petition for a Writ of Certiorari, *supra* note 70, at 6–7.

⁸⁹ *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 295 (Colo. App. 2015).

orientation, but because of his opposition to same-sex marriage.⁹⁰ The court held that but for their sexual orientation, the two gay men would not have decided to get married, and but for their intent to get married, Phillips would not have refused to make them a cake.⁹¹ The court stated that “discrimination on the basis of one’s opposition to same-sex marriage is discrimination on the basis of sexual orientation.”⁹² Further, the court wrote that Phillips’s compliance with CADA in other respects, such as selling baked goods to all customers, did not matter.⁹³ Moreover, Phillips argued that the Commission’s order to stop his discriminatory practices was compelled speech because it required him to design cakes for same-sex weddings.⁹⁴ He argued that such cakes symbolized a message of celebration about same-sex marriage which was against his religious beliefs.⁹⁵ The court disagreed, stating that the Commission’s order simply required Phillips not to engage in discrimination against customers and that such conduct did not warrant First Amendment protections because it was insufficiently expressive.⁹⁶ The court stated that the compelled conduct in question was the State’s requirement that Phillips comply with CADA by not discriminating against customers based on their sexual orientation.⁹⁷ The court wrote that selling a wedding cake to all customers did not convey a message of celebration about same-sex weddings and, further, that any message about celebration would be attributed to the customer and not Phillips himself.⁹⁸ The court emphasized that Phillips could post a disclaimer on the Internet or in the store stating that CADA required Phillips to serve everyone and that his baked goods did not necessarily endorse the couples that were protected by CADA.⁹⁹ Next, the court held that CADA was a neutral law of general applicability and thus it did not violate the First Amendment.¹⁰⁰ The court stated that a law did not need to apply to every person to be generally applicable and that it was generally applicable as long as the law did not only regulate conduct that was religiously motivated.¹⁰¹ Next, the court wrote that CADA was neutral because it

⁹⁰ Appellants’ Opening Brief at 4, *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272 (Colo. App. 2015) (No. 14CA1351).

⁹¹ *Craig*, 370 P.3d at 281.

⁹² *Id.* at 282.

⁹³ *Id.*

⁹⁴ Appellants’ Opening Brief, *supra* note 90, at *11.

⁹⁵ *Id.* at *20.

⁹⁶ *Masterpiece Cakeshop v. Craig*, 370 P.3d 272, 283 (Colo. App. 2015), *rev’d sub nom. Masterpiece Cakeshop v. Colo. C.R. Comm’n*, 584 U.S. 617 (2018).

⁹⁷ *Id.* at 286.

⁹⁸ *Id.* at 283.

⁹⁹ *Id.* at 288.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 290.

forbade all discrimination on the basis of sexual orientation without the consideration of motivation.¹⁰² Finally, the court concluded that CADA met the rational basis test because it was rationally related to the State's interest in decreasing discrimination in establishments of public accommodation.¹⁰³ The court wrote that CADA created a friendly environment that helped to prevent situations where businesses would refuse to serve an entire class of people.¹⁰⁴ Thus, the Commissioner's order was affirmed.¹⁰⁵ On April 25, 2016, the Colorado Supreme Court declined to review the case.¹⁰⁶ The U.S. Supreme Court subsequently granted certiorari.¹⁰⁷

On June 4, 2018, the Court reversed.¹⁰⁸ The majority opinion was authored by Kennedy, who was joined by Roberts, Breyer, Alito, Kagan, and Gorsuch. At the outset, Kennedy recognized two competing principles: the state's goal to protect the dignity of gay people who may face discrimination when looking to participate in the market and the right of all citizens to exercise their First Amendment rights.¹⁰⁹ Next, Kennedy wrote that the case was complex because "the parties disagree as to the extent of the baker's refusal to provide service."¹¹⁰ He stated that there might be a difference between refusing to design a cake with specific images or words and refusing to design a cake at all.¹¹¹ Kennedy wrote that there were different types of services, and "these details might make a difference."¹¹² However, Kennedy could not evaluate the exact nature of service that Phillips had refused to provide because Phillips's "religious objection was not considered with the neutrality that the Free Exercise Clause requires."¹¹³ Kennedy wrote that "[t]he Free Exercise Clause bars even 'subtle departures from neutrality' on matters of religion" and that the State had a "duty under the First Amendment not to base laws or regulations on hostility to a religion or

¹⁰² *Masterpiece Cakeshop v. Craig*, 370 P.3d 272, 291 (Colo. App. 2015), *rev'd sub nom.* *Masterpiece Cakeshop v. Colo. C.R. Comm'n*, 584 U.S. 617 (2018).

¹⁰³ *Id.* at 293.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 295.

¹⁰⁶ *Masterpiece Cakeshop v. Colo. C.R. Comm'n*, No. 15SC738, 2016 WL 1645027, at *1 (Colo. Apr. 25, 2016).

¹⁰⁷ *Masterpiece Cakeshop v. Colo. C.R. Comm'n*, 582 U.S. 929, 929 (2017) (granting petition for writ of certiorari).

¹⁰⁸ *Masterpiece Cakeshop v. Colo. C.R. Comm'n*, 584 U.S. 617, 640 (2018).

¹⁰⁹ *Id.* at 623–24.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* at 639.

religious viewpoint.”¹¹⁴ That departure from neutrality was compromised when the Commission compared Phillips’s beliefs to the Holocaust and slavery.¹¹⁵ Further, in the past, some other bakers were asked to make a cake with a religious text disapproving of same-sex marriage, and the Division held that they acted lawfully when the bakers refused to make such a cake.¹¹⁶ Kennedy wrote that this different treatment “cannot be based on the government’s own assessment of offensiveness.”¹¹⁷ The Commission had to assess Phillips’s religious objections in a neutral manner using factors such as historical background, legislative history, and contemporaneous statements.¹¹⁸ Because Phillips’s religious objection was not considered with neutrality, the judgment of the Colorado Court of Appeals was reversed.¹¹⁹ Kennedy wrote that in the future, the Court will have to address the matter emphasizing the complexity that the case presents:

When it comes to weddings, it can be assumed that a member of the clergy who objects to gay marriage on moral and religious grounds could not be compelled to perform the ceremony without denial of his or her right to the free exercise of religion. This refusal would be well understood in our constitutional order as an exercise of religion, an exercise that gay persons could recognize and accept without serious diminishment to their own dignity and worth. Yet if that exception were not confined, then a long list of persons who provide goods and services for marriages and weddings might refuse to do so for gay persons, thus resulting in a community-wide stigma inconsistent with the history and dynamics of civil rights laws that ensure equal access to goods, services, and public accommodations.¹²⁰

. . .

The outcome of cases like this in other circumstances must await further elaboration in the courts, all in the context of recognizing that these disputes must be resolved with tolerance, without undue disrespect to sincere religious

¹¹⁴ *Masterpiece Cakeshop v. Colo. C.R. Comm’n*, 584 U.S. 617, 638 (2018).

¹¹⁵ *Id.* at 635.

¹¹⁶ *Id.* at 633.

¹¹⁷ *Id.* at 638.

¹¹⁸ *Id.* at 636.

¹¹⁹ *Id.* at 640.

¹²⁰ *Masterpiece Cakeshop, Ltd., v. Colo. C.R. Comm’n*, 584 U.S. 617, 632 (2018).

beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market.¹²¹

Kagan filed a concurrence, which was joined by Breyer. Kagan wrote that there was a difference between Phillips and the bakers who refused to design a cake disapproving of same-sex marriage.¹²² Kagan argued that the bakers had not violated CADA because the bakers would not make that cake for anyone and thus it did not matter that the request to make a cake with a religious text disapproving of same-sex marriage came from a religious person based on that person's religious beliefs.¹²³ On the other hand, Kagan argued that Phillips routinely designed wedding cakes for opposite-sex couples but would not design such cakes for same-sex couples.¹²⁴ Kagan wrote that the State could treat these cases differently.¹²⁵ She argued that the requested cake was "a wedding cake—one that (like other standard wedding cakes) is suitable for use at same-sex and opposite-sex weddings alike."¹²⁶ Thus, Kagan argued that when a baker sells wedding cakes to opposite-sex couples but not to same-sex couples, that baker engages in unlawful discrimination.¹²⁷

Gorsuch also filed a concurrence, which was joined by Alito. Gorsuch agreed with the majority that the Commission had not considered Phillips's case with the required level of neutrality.¹²⁸ However, Gorsuch argued that there was no salient difference between Phillips and the bakers who refused to make a cake with a religious text disapproving of same-sex marriage to a religious person.¹²⁹ He argued that in both cases, the service was refused to people who had a statutorily protected trait (sexual orientation or religious faith).¹³⁰ Further, Gorsuch argued that in both cases the requested item (a cake for a same-sex wedding or a cake with a religious text disapproving of same-sex marriage) would not be made to anyone and that it did not matter who had made the request.¹³¹ In Phillips's case, Craig's mother also called and personally asked if Phillips could make a cake for a same-sex wedding,

¹²¹ *Id.* at 640.

¹²² *Id.* at 641–42 (Kagan, J., concurring).

¹²³ *Id.*

¹²⁴ *Id.* at 642 n*.

¹²⁵ *Id.*

¹²⁶ *Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n*, 584 U.S. 617, 642 n* (2018).

¹²⁷ *Id.* at 643.

¹²⁸ *Id.* at 647 (Gorsuch, J., concurring).

¹²⁹ *Id.* at 646.

¹³⁰ *Id.*

¹³¹ *Id.*

and Phillips refused.¹³² Thus, Gorsuch argued that in both cases, “it was the kind of cake, not the kind of customer, that mattered to the bakers.”¹³³ He further wrote that it did not matter that Phillips refused to make the cake without discussing its design because “[i]t is no answer either simply to slide up a level of generality to redescribe Mr. Phillips’s case as involving only a wedding cake like any other.”¹³⁴ Gorsuch argued that a wedding cake, with or without words, conveyed a message, and a cake designed for a same-sex wedding celebrated that marriage.¹³⁵ Gorsuch further suggested that the Commission could implement a new “knowing” standard and evaluate cases under a neutral review.¹³⁶ He wrote that the Commission had to apply the same level of generality:

Suggesting that this case is only about “wedding cakes”—and not a wedding cake celebrating a same-sex wedding—actually points up the problem. At its most general level, the cake at issue in Mr. Phillips’s case was just a mixture of flour and eggs; at its most specific level, it was a cake celebrating the same-sex wedding of Mr. Craig and Mr. Mullins. We are told here, however, to apply a sort of Goldilocks rule: describing the cake by its ingredients is *too general*; understanding it as celebrating a same-sex wedding is *too specific*; but regarding it as a generic wedding cake is *just right*. The problem is, the Commission didn’t play with the level of generality in Mr. Jack’s case in this way.¹³⁷

Thomas, who was joined by Alito, concurred in part and concurred in the judgment. Thomas agreed that Phillips prevailed on his free-exercise claim, but Thomas wrote separately to discuss Phillips’s free-speech claim.¹³⁸ He argued that Phillips engaged in expressive conduct when he designed cakes for weddings and that such cakes were special: “[t]he cake’s purpose is to mark the beginning of a new marriage and to celebrate the couple.”¹³⁹ Because Phillips’s conduct was expressive, Thomas argued that CADA could not penalize Phillips unless CADA satisfied the strict scrutiny test.¹⁴⁰ While

¹³² *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n* 584 U.S. 617, 646 (2018) (Gorsuch, J., concurring).

¹³³ *Id.*

¹³⁴ *Id.* at 650.

¹³⁵ *Id.* at 650.

¹³⁶ *Id.* at 653.

¹³⁷ *Id.* at 651.

¹³⁸ *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n* 584 U.S. 617, 654 (2018) (Thomas, J., concurring in part and concurring in judgment).

¹³⁹ *Id.* at 659.

¹⁴⁰ *Id.* at 662–63.

he did not engage with the test, he wrote that states were not allowed to “punish protected speech because some group finds it offensive, hurtful, stigmatic, unreasonable, or undignified.”¹⁴¹ Thomas finally wrote that “in future cases, the freedom of speech could be essential to preventing *Obergefell* from being used to ‘stamp out every vestige of dissent’ and ‘vilify Americans who are unwilling to assent to the new orthodoxy.’”¹⁴²

Ginsburg filed a dissent, which was joined by Sotomayor. Ginsburg “strongly disagree[d]” with the majority’s conclusion.¹⁴³ She noted that the other bakers who were mentioned in the case routinely designed baked goods with religious motifs and rejected requests for designing baked goods with demeaning messages of people whose dignity was protected by CADA.¹⁴⁴ Ginsburg argued that the bakers who refused to design a cake with a religious text disapproving of same-sex marriage would not have made that cake for anyone.¹⁴⁵ On the other hand, Phillips would not design a cake for Craig and Mullins “for no reason other than their sexual orientation.”¹⁴⁶ She pointed to the fact that Phillips rarely, if ever, designed wedding cakes with words on them.¹⁴⁷ Thus, Ginsburg argued the Division made a correct distinction between a cake with demeaning text and a cake of unspecified design. She wrote that it is the distinction not between a cake without text and a cake with text, but “it is between a cake with a particular design and one whose form was never even discussed.”¹⁴⁸ Ginsburg argued that when two gay people contact a bakery to make a cake, they are seeking a cake to celebrate their wedding, not an opposite-sex wedding or same-sex wedding, and that cake was denied to Craig and Mullins.¹⁴⁹ The person who wanted a cake with a religious text disapproving of same-sex marriage was not denied service based on the person’s religious beliefs or other protected characteristics.¹⁵⁰ Ginsburg argued that Phillips refused to design a cake that he found offensive solely because it was requested by a same-sex couple.¹⁵¹ On the other hand, the bakers who refused to design a cake with a religious text disapproving of same-sex marriage refused to make a cake because they disagreed with “the

¹⁴¹ *Id.* at 664.

¹⁴² *Id.* at 667.

¹⁴³ *Id.* at 667–68 (Ginsburg, J. dissenting).

¹⁴⁴ *Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm’n*, 584 U.S. 617, 670 (2018) (Ginsburg, J. dissenting).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 671.

¹⁴⁷ *Id.* at 670–72.

¹⁴⁸ *Id.* at 672 n.5.

¹⁴⁹ *Id.* at 671.

¹⁵⁰ *Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm’n*, 584 U.S. 617, 671 (2018) (Ginsburg, J. dissenting).

¹⁵¹ *Id.*

demeaning message the requested product would literally display.”¹⁵² Ginsburg thus would have ruled that Phillips’s refusal to make the cake violated CADA.¹⁵³

B. Unanswered Questions

Some scholars were unsatisfied with the majority’s decision in *Masterpiece Cakeshop*, arguing that the Court simply kicked the can down the road.¹⁵⁴ Nonetheless, the majority’s opinion, along with other Justices’ reflections, provided a rich and insightful debate about the substantive issues at play. Several important points worth consideration and discussion were raised. First, the Justices clearly disagreed over the level of generalization that should have been used to describe the service that was denied. Was it a wedding cake designed for a couple who wanted to get married or was it a wedding cake designed for a same-sex couple who wanted to get married? Second, does it matter if the wedding cake looks like any other wedding cake? What if the cake has words on it, like “love” or “congratulations on your marriage”? What if the cake has words, such as “congratulations on your same-sex marriage, God Bless”? According to Kagan, if a cake has words disapproving of same-sex marriage along with a religious text, refusing to make such a cake would not violate CADA.¹⁵⁵ Could anyone be compelled to make such a cake? Or alternatively, could anyone be compelled to make a cake with words explicitly endorsing a marriage between two people of the same sex?

Further, it became evident that there might be a point at which compelling someone to provide a service or a good might become compelled speech. Perhaps a baker could be forced to sell a bottle of water to a same-sex couple. Similarly, perhaps a baker could also be required to sell a muffin. But what about a chocolate cake that had already been made? What about a wedding cake that had already been made? What if it is a white wedding cake with flowers that has already been made? Can a baker refuse to sell that cake? At what point does compelling the baker to sell an item implicate the baker’s First Amendment rights? Similarly, if a same-sex couple calls and asks for a simple chocolate cake that will be used for their wedding, can the baker refuse to make that cake? What if the cake was made from white chocolate? What if they asked the baker to make a white cake with flowers and with words “We Love Jesus”? Can a baker refuse to make that cake?

¹⁵² *Id.* at 672.

¹⁵³ *Id.* at 674.

¹⁵⁴ See, e.g., Eric Bihlear, *A Cake by Any Other Name: An Analysis of Masterpiece Cakeshop and the Delicate Balance Between Sexual Autonomy and Religious Freedom*, 19 RUTGERS J. L. & RELIGION 355, 382 (“The Supreme Court’s lack of decision is perplexing”); Leslie Kendrick & Micah Schwartzman, *The Etiquette of Animus*, 132 HARV. L. REV. 133, 170 (2018) (“Those demands of civility were not satisfied by the Supreme Court in *Masterpiece*, with uncertain implications for the future of civil rights law and the First Amendment.”).

¹⁵⁵ *Masterpiece Cakeshop, Ltd.*, 584 U.S. at 640–43 (2018).

It also seems clear that there are circumstances in which a baker cannot be compelled to make a cake. For example, probably all Justices would agree that a state could not compel a baker to make a cake that included a paragraph of words disparaging the baker's own character and family. Is there a point at which compelling a baker to write any word becomes compelled speech? Finally, what kind of services or goods can a person refuse to provide or sell? Can a religious person refuse to sell a bottle of water to a same-sex couple if that bottle of water will be used at their wedding? Can a gay person who owns a shop refuse to sell a bottle of water to a religious person if that bottle of water will be used at a religious ceremony? What if a same-sex couple celebrating their marriage goes to an extravagant restaurant where every meal is prepared individually and artistically and orders a meal to celebrate their wedding? Can the chef refuse to make that dinner based on certain religious beliefs? What about other things, like designing websites? Can a web designer refuse to make a website for a same-sex couple claiming that making such a website would violate her Christian faith? Five years later, the Court agreed to provide more guidance.

IV. 303 CREATIVE LLC V. ELENIS

Lorie Smith is a founder of 303 Creative, which is a company that provides graphic and website design services.¹⁵⁶ Smith claims that she is willing to provide these services to all people regardless of their sexual orientation.¹⁵⁷ However, Smith is a Christian, and thus she is not willing to create a website with a message that would violate her religious beliefs.¹⁵⁸ For example, Smith claims that she is willing to create a website about a birthday party for a straight person and a gay person because a website celebrating birthday parties does not violate her religious beliefs.¹⁵⁹ However, Smith is not willing to create a website about a same-sex marriage because doing so, she states, would violate her faith.¹⁶⁰ Finally, Smith states that she would not create a website on same-sex marriage for anyone whether the requester is straight or gay, and she would not do so even for a mock-up or a joke.¹⁶¹ On her website where Smith advertises and promotes her services, Smith intends to publish the following statement explaining her religious objections:

These same religious convictions that motivate me also prevent me from creating websites promoting and

¹⁵⁶ Petition for a Writ of Certiorari at 4, 303 Creative v. Elenis, 600 U.S. 570 (2023) (No. 21-476), 2021 WL 4459045, at *4.

¹⁵⁷ Appellants' Opening Brief at 5, 303 Creative LLC v. Elenis, 6 F.4th 1160 (10th Cir. 2021) (No. 1413), 2020 WL 417875, at *5.

¹⁵⁸ Brief for the Petitioners at 5, , 2022 WL 1786990, at *5.

¹⁵⁹ 303 Creative LLC v. Elenis, 6 F.4th 1160, 1172 (10th Cir. 2016).

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 1170.

celebrating ideas or messages that violate my beliefs. So I will not be able to create websites for same-sex marriages or any other marriage that is not between one man and one woman. Doing that would compromise my Christian witness and tell a story about marriage that contradicts God's true story of marriage--the very story He is calling me to promote.¹⁶²

Smith has not yet published the proposed statement and has not yet offered services to design wedding websites. However, fearing the potential penalties from Colorado, she decided to challenge CADA.

A. Litigation Strategy and Framing

On September 20, 2016, Smith filed a preliminary injunction in the United States District Court for the District of Colorado.¹⁶³ Smith argued that the Communication Clause violated several constitutional provisions, including the Free-Speech Clause, the Free-Press Clause, the Free-Exercise Clause, and the Due Process Clause. Smith also argued that the Accommodation Clause violated the Free-Speech Clause, the Free-Exercise Clause, the Equal Protection Clause, and the Due Process Clause. Both parties subsequently filed multiple motions.¹⁶⁴ On September 1, 2017, the district court ruled that Smith had standing only to challenge the Communication Clause that was connected with her proposed statement and that Smith lacked standing to challenge the Accommodation Clause.¹⁶⁵ However, the Court declined to rule on the merits because of the pendency of *Masterpiece Cakeshop*.¹⁶⁶ The district court stated that Smith would not be prejudiced by the delay because she had not yet offered to build wedding websites.¹⁶⁷

On May 17, 2019, after the *Masterpiece Cakeshop* decision had come down, the district court ruled against Smith.¹⁶⁸ The court only analyzed the challenges against the Communication Clause. Smith argued that the Commission applied the Communication Clause only to expressive business

¹⁶² Appellant's Opening Brief at *8, 303 Creative LLC v. Elenis, 746 Fed. Appx. 709 (10th Cir. 2018) (No. 17-1344).

¹⁶³ Plaintiff's Motion for Preliminary Injunction at *70, 303 Creative LLC v. Elenis, 746 Fed. Appx. 709 (10th Cir. 2018) (No. 17-1344).

¹⁶⁴ 303 Creative LLC v. Elenis, No. 16-CV-02372, 2017 WL 4331065, at *1 (D. Colo. Sept. 1, 2017).

¹⁶⁵ *Id.* at *6.

¹⁶⁶ *Id.* at *7.

¹⁶⁷ *Id.*

¹⁶⁸ 303 Creative LLC v. Elenis, 385 F. Supp. 3d 1147, 1164 (D. Colo. 2019).

owners like Smith who “disfavor messages promoting same-sex marriage.”¹⁶⁹ The court stated that Smith had not cited any other business owners who published a similar notice to the one Smith proposed.¹⁷⁰ Thus, the court wrote that she was not similarly situated to any other businesses, and she could not prevail on her Equal Protection claim.¹⁷¹ In addressing Smith’s Due Process arguments, the court was not persuaded by Smith’s argument that the Communication Clause used concepts that were “so ill-defined as to invite the risk of arbitrary and discriminatory enforcements.”¹⁷² The court also rejected Smith’s Substantive Due Process claim “invoking her right to operate an ‘expressive business’ constrained only by ‘the dictates of her own conscience.’”¹⁷³ Smith’s personal autonomy arguments were also rejected because “they duplicate[d] her other First Amendment challenges.”¹⁷⁴ Next, the court wrote that Smith’s proposed statement, if posted, would promote an illegal act.¹⁷⁵ The Commission thus did not target Smith for her beliefs about God, but instead it targeted Smith’s promise to engage in discrimination based on sexual orientation.¹⁷⁶ The court also dismissed her overbreadth challenge.¹⁷⁷ Moreover, the court wrote that the Communication Clause was directed at advertising and promotion and because Smith’s proposed statement occurred in the context of promoting a business, her speech rights, as an advertiser’s speech rights, had to yield to the state’s interests of reducing discrimination.¹⁷⁸ Finally, in addressing Smith’s free-exercise argument, the court held that the Communication Clause was a neutral law of general applicability.¹⁷⁹ The court wrote that there was no evidence that the law was enacted to suppress people’s free-exercise rights.¹⁸⁰ Further, the law was of general applicability because it regulated statements without considering the basis for the statements and without considering whether the statements were made because of someone’s religion or other beliefs:

¹⁶⁹ Memorandum of Law in Support of Plaintiff’s Motion for Preliminary Injunction at 1, 23, *303 Creative LLC*, 385 F. Supp. 3d 1147 (No. 1:16-cv-02372).

¹⁷⁰ *303 Creative*, 385 F. Supp. 3d at 1155.

¹⁷¹ *Id.*

¹⁷² *Id.* at 1156.

¹⁷³ *Id.* at 1157.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 1156.

¹⁷⁶ *303 Creative LLC v. Elenis*, 385 F. Supp. 3d 1147, 1159, 1164 (D. Colo. 2019).

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 1161.

¹⁷⁹ *Id.* at 1162.

¹⁸⁰ *Id.*

The Communications Clause is equally applicable to sexual orientation discrimination that arises from purely secular prejudices – for example based on fears that homosexuals will transmit HIV/AIDS Such views can exist independently from any religious belief. Thus, a law that seeks to eradicate sexual orientation discrimination is not inherently a law that targets religious exercise; rather, it is a law of general applicability that only incidentally affects those whose opposition to same-sex marriage springs from religious, not merely secular, objections.¹⁸¹

The court found that the state had “an important (indeed, compelling)” interest in reducing discrimination based on protected characteristics and that the Communication Clause was rationally related to that interest.¹⁸²

On July 26, 2021, the Tenth Circuit also ruled against Smith, affirming the district court’s decision.¹⁸³ The court held that Smith’s creation of custom wedding websites was pure speech, writing that such wedding websites shared many similarities with custom-made wedding invitations and videos, which courts have found to be examples of speech.¹⁸⁴ The court wrote that designing such websites involved creative talents and was thus expressive.¹⁸⁵ By requiring Smith to create such a website, the Accommodation Clause compelled her to engage in speech that endorsed same-sex marriage.¹⁸⁶ The statute operated as a content-based restriction because Smith could not create custom wedding cakes for straight couples unless she also created custom wedding cakes for gay couples.¹⁸⁷ The court wrote that the Accommodation Clause, whether as a law imposing content-based restrictions or as a law compelling speech, had to satisfy the strict scrutiny test, under which the State had to show a compelling interest, and that the law was narrowly tailored to satisfy that compelling interest.¹⁸⁸

The court wrote that Colorado had shown that there was a compelling interest in protecting the dignity interests of gay people because of documented ongoing discrimination against gay people in Colorado.¹⁸⁹ The court found that the Accommodation Clause was not narrowly tailored to preventing those dignitary harms from occurring because Colorado could not

¹⁸¹ *Id.* at 1163.

¹⁸² 303 Creative LLC v. Elenis, 385 F. Supp. 3d 1147, 1163 (D. Colo. 2019).

¹⁸³ 303 Creative LLC v. Elenis, 6 F.4th 1160, 1190 (10th Cir. 2021).

¹⁸⁴ *Id.* at 1176.

¹⁸⁵ *Id.* at 1177.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 1178.

¹⁸⁸ *Id.*

¹⁸⁹ 303 Creative LLC v. Elenis, 6 F.4th 1160, 1178 (10th Cir. 2021).

limit offensive speech pursuant to the First Amendment that protected offensive speech.¹⁹⁰ However, the court found that the law was narrowly tailored to Colorado's compelling interest of "equal access to publicly available goods and services."¹⁹¹ The court wrote that Smith provided unique services, and allowing Smith to be excluded from CADA would have forced gay customers to go to different website designers who would not be able to provide the same quality of websites that Smith would provide.¹⁹² This would "relegate LGBT consumers to an inferior market because [Smith's] *unique* services are, by definition, unavailable elsewhere."¹⁹³ Thus, the court held that there were no less intrusive means of ensuring equal access to such services.¹⁹⁴ The court stated that Smith's services were unique and thus her services resembled a monopoly, where the product was not simply a custom-made wedding website, but instead a custom-made wedding website "of the same quality and nature" as those created by Smith.¹⁹⁵ The court emphasized that in deciding if an exception limited someone's market access depended upon how unique the service was and not on how sincere someone's religious beliefs were.¹⁹⁶ The court wrote that "unique goods and services are where public accommodation laws are most necessary to ensuring equal access."¹⁹⁷ Thus, the court held that enforcing CADA as to Smith's unique services was narrowly tailored to Colorado's compelling interest in "ensuring equal access to the commercial marketplace."¹⁹⁸

Further, the court held that the Communication Clause did not violate Smith's free speech rights.¹⁹⁹ The court wrote that the State could prohibit speech that promoted unlawful activity. Smith's proposed statement expressed an intent to discriminate based on sexual orientation which, the court stated, was an activity prohibited by the Accommodation Clause.²⁰⁰ Moreover, the court held that CADA was a neutral law of general applicability.²⁰¹ Laws that incidentally burden religion do not need to satisfy the strict scrutiny test if they are neutral and generally applicable.²⁰² CADA

¹⁹⁰ *Id.* at 1179.

¹⁹¹ *Id.* (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 624 (1984)).

¹⁹² *Id.* at 1180.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ 303 Creative LLC v. Elenis, 6 F.4th 1160, 1180 (10th Cir. 2021).

¹⁹⁶ *Id.* at 1181.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 1182.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ 303 Creative LLC v. Elenis, 6 F.4th 1160, 1183 (10th Cir. 2021).

²⁰² *Id.*

had to be enforced with religious neutrality, and there was no evidence that Colorado would not be able to do so in the present case unlike in the *Masterpiece Cakeshop* case, where Phillips’s objection was rejected as “one of the most despicable pieces of rhetoric that people can use.”²⁰³ There was no evidence that in this case Smith’s objection would not receive the religious neutrality that it required, and thus, the court held that CADA was a neutral law.²⁰⁴ The court also stated that there was no evidence that the State permitted secularly-motivated objections to serving gay people.²⁰⁵ The court wrote that Smith was not able to show that the State disfavored similarly situated religious speakers.²⁰⁶ The court also held that the Communication Clause was not unconstitutionally vague or overbroad.²⁰⁷ Finally, in affirming the district court’s decision, the court stated the following:

We agree with the Dissent that “the protection of minority viewpoints is not only essential to protecting speech and self-governance but also a good in and of itself.” Yet, we must also consider the grave harms caused when public accommodations discriminate on the basis of race, religion, sex, or sexual orientation. Combatting such discrimination is, like individual autonomy, “essential” to our democratic ideals. And we agree with the Dissent that a diversity of faiths and religious exercise, including Appellants’, “enriches” our society. Yet, a faith that enriches society in one way might also damage society in other, particularly when that faith would exclude others from unique goods or services.²⁰⁸

Timothy Tymkovich, the chief judge, filed a dissent, in which he wrote that “the majority takes the remarkable-and novel-stance that the government may force Ms. Smith to produce messages that violate her conscience” and that “the majority’s opinion endorses substantial government interference in matters of speech, religion, and conscience.”²⁰⁹ Tymkovich emphasized that Smith served all customers no matter their sexual orientation and that it was only specific messages that she would refuse to communicate based on her religious beliefs.²¹⁰ He further stated that

²⁰³ *Id.*

²⁰⁴ *Id.* at 1184.

²⁰⁵ *Id.* at 1186.

²⁰⁶ *Id.*

²⁰⁷ 303 Creative LLC v. Elenis, 6 F.4th 1160, 1189 (10th Cir. 2021).

²⁰⁸ *Id.* at 1190 (citations omitted).

²⁰⁹ *Id.* at 1191 (Tymkovich, C.J., dissenting).

²¹⁰ *Id.* at 1192.

CADA compelled expressive speech.²¹¹ Tymkovich argued that “this is an easier case than” cases involving wedding cakes, photographs, videos, floral arrangements, and custom invitations.²¹² Tymkovich wrote that CADA compelled expressive speech and also silenced speech because Smith “would like to post on her website an honest, straightforward message about why she will only make wedding websites for weddings involving one man and one woman.”²¹³ Moreover, Tymkovich wrote that CADA not only compelled speech, but it also restricted speech based on viewpoint and content.²¹⁴ As such, CADA had to satisfy the strict scrutiny test. Tymkovich argued that the statute was not able to withstand that test.²¹⁵ While he agreed that reducing discrimination was a compelling state interest, ensuring access to a specific person’s unique product, as suggested by the majority opinion, he argued, was not a compelling state interest.²¹⁶ Tymkovich stated that the law was not narrowly tailored in such a manner that would preserve speech protections.²¹⁷ He argued that the statute was overinclusive and there were other alternatives that the state could have implemented, such as excluding wedding businesses from CADA.²¹⁸

Moreover, Tymkovich argued that the statute violated Smith’s free exercise rights.²¹⁹ He argued that the Commission operated under an ad-hoc system, where it was the sole arbiter of the submitted complaints.²²⁰ Because the statute required the Commission to make case-by-case determinations of the complaints, Tymkovich argued that the enforcement had to satisfy the strict scrutiny test.²²¹ He pointed to the way the Commission evaluated claims discussed in *Masterpiece Cakeshop*, specifically how the Commission treated the complaints filed against Phillips and the complaints filed against other bakers who refused to bake products disparaging gay people. He argued that the Commission could not employ different standards for non-religious people and religious people.²²² Finally, Tymkovich argued that CADA was

²¹¹ *Id.* at 1196.

²¹² *Id.* at 1197.

²¹³ 303 Creative LLC v. Elenis, 6 F.4th 1160, 1200 (10th Cir. 2021) (Tymkovich, C.J., dissenting).

²¹⁴ *Id.* at 1201.

²¹⁵ *Id.* at 1202.

²¹⁶ *Id.* at 1203.

²¹⁷ *Id.*

²¹⁸ *Id.* at 1203–04.

²¹⁹ 303 Creative LLC v. Elenis, 6 F.4th 1160, 1207 (10th Cir. 2021) (Tymkovich, C.J., dissenting).

²²⁰ *Id.* at 1208.

²²¹ *Id.* at 1208–09.

²²² *Id.* at 1209.

overbroad and vague because it had “a breathtakingly broad and vague provision prohibiting ‘directly or indirectly’ speaking in such a way that makes a customer feel ‘unwelcome, objectionable, unacceptable, or undesirable’ because of a protected characteristic.”²²³ Tymkovich argued that the provision did not give citizens fair notice of what could and could not be said.²²⁴ He emphasized that there was no standard by which the Commission, businesses, or judges could interpret the provision and determine what actions would violate the statute.²²⁵ Tymkovich argued that “[w]ithout hints about how to apply these traditional methods of interpretation, the provision invites exactly the type of capricious enforcement prohibited by due process.”²²⁶

The U.S. Supreme Court subsequently granted certiorari.²²⁷ In her petition, Smith dropped her claims of free exercise, overbreadth, and vagueness and instead only focused on free speech.²²⁸ Both parties had framed the issue differently. Smith’s question was “[w]hether applying a public-accommodation law to compel an artist to speak or stay silent violates the Free Speech Clause.”²²⁹ Colorado’s question was “[whether] a public accommodations law violate[s] the Free Speech Clause when it requires a business to offer all customers its goods and services—including customized goods and services—regardless of those customers’ protected characteristics.”²³⁰ The differences in how both parties phrased the issues affected how both parties addressed their arguments.

Smith argued that by designing and creating her websites, she engaged in speech and that the Accommodation Clause affected that speech when it compelled Smith to communicate messages that violated her conscience.²³¹ She further argued that the speech in question was not incidental to conduct, such as forcing a person to make a statement of fact which was constitutional when it was incidental to a regulation of specific conduct.²³² Smith argued

²²³ *Id.* at 1212.

²²⁴ *Id.*

²²⁵ 303 Creative LLC v. Elenis, 6 F.4th 1160, 1215 (10th Cir. 2021) (Tymkovich, C.J., dissenting).

²²⁶ *Id.*

²²⁷ 303 Creative LLC v. Elenis, 600 U.S. 570, 584 (2023).

²²⁸ Petition for a Writ of Certiorari at *i, 303 Creative LLC, 600 U.S. 570 (No. 21–476), 2021 WL 4459045.

²²⁹ Brief for the Petitioners at *i, 303 Creative LLC, 600 U.S. 570 (No. 21–476), 2022 WL 1786990.

²³⁰ Brief on the Merits for Respondents at *1, 303 Creative LLC, 600 U.S. 570 (No. 21–476), 2022 WL 3597176.

²³¹ Brief for the Petitioners at *15, 303 Creative LLC v. Elenis, 600 U.S. 570 (2023) (No. 21–476), 2022 WL 1786990.

²³² *Id.* at *27.

that views on marriage were not just facts and thus were not incidental to conduct.²³³ Smith stated that if that were the case, then the doctrine would have no limits because states “would be able to rebrand all regulated speech as incidental to something.”²³⁴ Next, Smith argued that Colorado had to satisfy the strict scrutiny test.²³⁵ Smith argued that Colorado did not have a compelling state interest “to coerce or silence Smith’s expression” and that Colorado did have other less burdensome ways to achieve its interest, such as drafting an exception for artists who create messages about weddings.²³⁶

Colorado drafted its arguments around a different formulation of the main question. It argued that the Accommodation Clause did not allow discrimination by companies that chose to offer their services and goods to the general public.²³⁷ By reframing the issue, Colorado put the emphasis on Smith’s company and its actions instead of emphasizing Smith as an individual and her speech. According to Colorado, CADA required that once a company offered services and goods to the public, that company had to sell them to all customers.²³⁸ Further, the company was free to decide what services it wanted to provide even if they were websites that included specific messages about marriage.²³⁹ However, Colorado argued that companies had to sell those websites to all customers.²⁴⁰ Thus, Colorado argued that CADA regulated only sales and not speech.²⁴¹ Further, Colorado argued that routine business transactions were not expressive, and if in this case there was a dispute over whether the website was expressive, Colorado argued that the case was not ripe because it was not clear what kind of a same-sex wedding website would be requested.²⁴² Finally, even if CADA burdened expression, any such burden was incidental to the regulation which would require Colorado to satisfy, at most, intermediate scrutiny.²⁴³ Colorado argued that CADA satisfied strict scrutiny because Colorado had a compelling interest to ensure “equal access to publicly available goods and services” and that the State’s interest was narrowly tailored because it was aimed at specific conduct, which companies that engaged in discriminatory sales practiced.²⁴⁴

²³³ *Id.* at *34.

²³⁴ *Id.* at *28.

²³⁵ *Id.* at *35.

²³⁶ *Id.* at *14.

²³⁷ Brief on the Merits for Respondents, *supra* note 230, at *14.

²³⁸ *Id.* at *15–16.

²³⁹ *Id.* at *15.

²⁴⁰ *Id.* at *16.

²⁴¹ *Id.* at *25.

²⁴² *Id.* at *23.

²⁴³ Brief on the Merits for Respondents, *supra* note 230, at *25.

²⁴⁴ *Id.* at *10.

Both parties stipulated a number of facts. It was agreed that Smith was “willing to work with all people regardless of classifications such as race, creed, sexual orientation, and gender” and that she would create a website for any person regardless of that person’s sexual orientation.²⁴⁵ Smith would not create websites or other products that would “contradict[] biblical truth” for anyone and there were many other companies that would design a website.²⁴⁶ Her services were expressive in nature, and her beliefs about marriage were sincerely held religious convictions.²⁴⁷ Finally, people who viewed Smith’s websites would know that the websites were Smith’s original work.²⁴⁸

On June 30, 2023, the U.S. Supreme Court reversed.²⁴⁹ The majority opinion was authored by Gorsuch, who was joined by Roberts, Thomas, Alito, Kavanaugh, and Barrett. Gorsuch agreed with the Tenth Circuit’s conclusion that Smith’s proposed wedding websites would be pure speech and that the websites would be considered as Smith’s speech.²⁵⁰ Gorsuch wrote that Colorado forced Smith to make a choice between producing a message that Colorado demanded or facing penalties.²⁵¹ And he stated that this violated the First Amendment.²⁵² Holding otherwise would mean that Colorado would be permitted to force other artists to speak messages contrary to their beliefs, such as forcing a gay website designer to create a website condemning homosexuality or same-sex marriage.²⁵³ Gorsuch emphasized that public accommodations laws played an important role in society and states had a compelling interest in fighting discrimination, but these laws were not without limits, especially when they were too broad and implicated free speech protections.²⁵⁴ Gorsuch also wrote that every person’s voice was unique and so the Tenth Circuit’s argument in that regard was not convincing.²⁵⁵ Gorsuch stated that Smith did not lose her free speech protections just because she was communicating through her business or just because compensation for her services was available.²⁵⁶ He also emphasized that both parties stipulated that Smith would work with any customer no

²⁴⁵ 303 Creative LLC v. Elenis, 600 U.S. 570, 582 (2023).

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.* at 582–83.

²⁴⁹ *Id.* at 603.

²⁵⁰ *Id.* at 587.

²⁵¹ 303 Creative LLC v. Elenis, 600 U.S. 570, 589 (2023).

²⁵² *Id.*

²⁵³ *Id.* at 589–90.

²⁵⁴ *Id.* at 590.

²⁵⁵ *Id.* at 592.

²⁵⁶ *Id.* at 594.

matter that customer's sexual orientation and that it was the message that she would not be willing to speak regardless of who wanted her services.²⁵⁷ As such, according to Gorsuch, Smith did not object to any protected characteristic, such as sexual orientation.²⁵⁸ Gorsuch wrote that Colorado sought to compel Smith to speak "about a question of political and religious significance. And that . . . is something the First Amendment does not tolerate."²⁵⁹

Sotomayor filed a dissent, which was joined by Kagan and Jackson. Sotomayor stated that the majority's decision was "[p]rofoundly wrong."²⁶⁰ She wrote that CADA targeted conduct and further argued that the act of discrimination "has never constituted protected expression under the First Amendment."²⁶¹ Sotomayor emphasized that a public accommodations law served two purposes. It "ensures equal access to publicly available goods and services," and it "ensures equal dignity in the common market."²⁶²

Sotomayor wrote that preventing such discrimination was a compelling state interest "of the highest order."²⁶³ She argued that CADA was narrowly tailored to satisfy that interest. Sotomayor wrote that CADA, like many other public accommodations laws, only regulated companies that voluntarily entered the market and offered goods and services to the general public.²⁶⁴ As such, "if a business chooses to profit from the public market, which is established and maintained by the state, the state may require the business to abide by a legal norm of nondiscrimination."²⁶⁵ Sotomayor next discussed the history of public accommodations laws and how these laws helped to protect certain people from being treated as second-class citizens.²⁶⁶ She wrote that not too long ago, gay people were prohibited from government employment and military service, and private businesses were legally allowed to advertise that they did not serve homosexuals, which Sotomayor called "State-sponsored discrimination."²⁶⁷ And public accommodations laws, she wrote, was the response to that discrimination.²⁶⁸

²⁵⁷ 303 Creative LLC v. Elenis, 600 U.S. 570, 597–98 (2023).

²⁵⁸ *Id.* at 580.

²⁵⁹ *Id.* at 596 (citation omitted).

²⁶⁰ *Id.* at 604 (Sotomayor, J., dissenting).

²⁶¹ *Id.*

²⁶² *Id.* at 606–607

²⁶³ 303 Creative LLC v. Elenis, 600 U.S. 570, 608 (2023) (Sotomayor, J., dissenting).

²⁶⁴ *Id.*

²⁶⁵ *Id.* at 609.

²⁶⁶ *Id.* at 609–19

²⁶⁷ *Id.* at 616.

²⁶⁸ *Id.* at 618.

Sotomayor noted that there had been many businesses that sought to exclude people based on their race or sex using the First Amendment.²⁶⁹ However, she wrote that “refusal to deal with or to serve a class of people is not an expressive interest protected by the First Amendment.”²⁷⁰ Sotomayor noted that when the Civil Rights Act of 1964 was debated, Congress stated that Title II applied only to the businesses that were open to the general public, and, as shown in *Heart of Atlanta Motel*, “prohibition of racial discrimination in public accommodations’ did not “interfe[e] with personal liberty.”²⁷¹

Sotomayor argued that “[t]he Court’s decision, which conflates denial of service and protected expression, is a grave error.”²⁷² She wrote that the First Amendment did grant Smith an exemption from CADA that required Smith to serve all people.²⁷³ Sotomayor further stated that CADA did not regulate Smith’s speech and Smith could not be exempted from the law simply because Smith claimed “an expressive interest in discrimination.”²⁷⁴ The First Amendment, Sotomayor argued, did not prevent restrictions on commerce.²⁷⁵ For example, Congress had the power to prohibit employers from engaging in discrimination based on race.²⁷⁶ Sotomayor wrote that such a law “hardly means that the law should be analyzed as one regulating the employer’s speech rather than conduct.”²⁷⁷ She argued that “[t]he majority commits a fundamental error in suggesting that a law does not regulate conduct if it ever applies to expressive activities.”²⁷⁸

Smith conceded that she was not entitled to an exemption from the Communication Clause unless she was also granted an exemption from the Accommodation Clause.²⁷⁹ This concession, Sotomayor argued, “is all but fatal to [Smith’s] argument” because it illustrated “that even ‘pure speech’ may be burdened incident to a valid regulation of conduct.”²⁸⁰ Sotomayor stated that the Accommodation Clause was a valid regulation of conduct

²⁶⁹ 303 Creative LLC v. Elenis, 600 U.S. 570, 620 (2023) (Sotomayor, J., dissenting).

²⁷⁰ *Id.* at 619.

²⁷¹ *Id.* at 620 (quoting *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 260 (1964)).

²⁷² *Id.* at 623.

²⁷³ *Id.*

²⁷⁴ *Id.* at 625.

²⁷⁵ 303 Creative LLC v. Elenis, 600 U.S. 570, 625 (2023) (Sotomayor, J., dissenting).

²⁷⁶ *Id.*

²⁷⁷ *Id.* (quoting *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 62 (2006)).

²⁷⁸ *Id.* at 626 n.9.

²⁷⁹ *Id.* at 628.

²⁸⁰ *Id.* (alteration in original).

because the Clause focused on the act of discrimination.²⁸¹ Further, Sotomayor wrote that CADA did not dictate the content of Smith's speech and that the content was compelled to the extent Smith offered her services to the general public.²⁸² She argued that Smith was allowed to offer only websites with biblical quotes and that Smith was compelled to offer websites with quotes explicitly supporting same-sex marriage.²⁸³ However, Sotomayor argued that all of these websites had to be offered to everyone, without excluding a group based on any protected characteristic.²⁸⁴ Smith was also allowed to continue advocating her beliefs about same-sex marriage and even if Smith believed that "God is calling her to do so through her for-profit company," Sotomayor argued that "the company need not hold out its goods or services to the public at large."²⁸⁵ Even if Smith decided to offer the services to everyone, Smith was free to choose the content of her message.²⁸⁶ A photographer offering services to the public could not refuse services to multiracial children just because the photographer believed that taking a photo of the children would somehow create speech endorsing interracial families.²⁸⁷ Similarly, a business offering passport photos could not deny services to Mexican Americans just because the business did not support immigration from Mexico.²⁸⁸ Sotomayor argued that the same line of reasoning applied to sexual orientation: if a photographer offered photos with the words "Just Married," the photographer could not deny these services to newly married same-sex couples just because the photographer believed that same-sex marriage was inconsistent with biblical stories.²⁸⁹

Sotomayor argued that because any burden on Smith's speech was incidental to a neutral regulation of commercial activity, CADA had to satisfy the *O'Brien* standard.²⁹⁰ That standard, she argued, was "easily satisfied" because CADA "promotes a substantial government interest that would be achieved less effectively absent the regulation."²⁹¹ Sotomayor stated that the majority "reaches the wrong answer in this case because it asks the wrong questions."²⁹² She wrote that the question was not whether Smith's products

²⁸¹ 303 Creative LLC v. Elenis, 600 U.S. 570, 628 (2023) (Sotomayor, J., dissenting).

²⁸² *Id.*

²⁸³ *Id.* at 629.

²⁸⁴ *Id.*

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ 303 Creative LLC v. Elenis, 600 U.S. 570, 630 (2023) (Sotomayor, J., dissenting).

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ *Id.*

²⁹¹ *Id.* (quoting *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 67 (2006)).

²⁹² *Id.* at 631.

and services had elements of speech or whether CADA would compel Smith to create and sell speech.²⁹³ Instead, Sotomayor argued that “the proper focus is on the character of state action and its relationship to expression.”²⁹⁴ She emphasized the fact that Smith would refuse to sell any wedding website even if that website simply announced a time and place. In concluding remarks, Sotomayor stated the following:

“The truth is,” these “affronts and denials” “are intensely human and personal.” S. Rep. No. 872, at 15 (internal quotation marks omitted). Sometimes they may “harm the physical body, but always they strike at the root of the human spirit, at the very core of human dignity.” *Ibid.* To see how, imagine a same-sex couple browses the public market with their child. The market could be online or in a shopping mall. Some stores sell products that are customized and expressive. The family sees a notice announcing that services will be refused for same-sex weddings. What message does that send? It sends the message that we live in a society with social castes. It says to the child of the same-sex couple that their parents’ relationship is not equal to others’. And it reminds LGBT people of a painful feeling that they know all too well: There are some public places where they can be themselves, and some where they cannot. K. Yoshino, *Covering* 61–66 (2006). Ask any LGBT person, and you will learn just how often they are forced to navigate life in this way. They must ask themselves: If I reveal my identity to this co-worker, or to this shopkeeper, will they treat me the same way? If I hold the hand of my partner in this setting, will someone stare at me, harass me, or even hurt me? It is an awful way to live. Freedom from this way of life is the very object of a law that declares: All members of the public are entitled to inhabit public spaces on equal terms.²⁹⁵

Gorsuch addressed several points that Sotomayor made in her dissent. Gorsuch wrote that “[i]t is difficult to read the dissent and conclude we are looking at the same case.”²⁹⁶ He stated that the dissent “reimagines the facts of this case from top to bottom.”²⁹⁷ Gorsuch emphasized that both sides stipulated that Smith’s services were expressive and that Smith was willing to

²⁹³ 303 Creative LLC v. Elenis, 600 U.S. 570, 631–32 (2023) (Sotomayor, J., dissenting).

²⁹⁴ *Id.* at 631.

²⁹⁵ *Id.* at 637.

²⁹⁶ *Id.* at 597 (majority opinion).

²⁹⁷ *Id.*

work with anyone regardless of someone's sexual orientation.²⁹⁸ He stated that the dissent "spends much of its time adrift on a sea of hypotheticals about photographers," which, Gorsuch argued, were not relevant to the present case.²⁹⁹ Gorsuch summarized the dissent's argument in the following way: "Finally, the dissent comes out and says what it really means: Once Ms. Smith offers some speech, Colorado 'would require [her] to create and sell speech, notwithstanding [her] sincere objection to doing so'—and the dissent would force her to comply with that demand."³⁰⁰ Gorsuch argued that following this logic, gay website designers could be forced to design a website condemning homosexuality.³⁰¹ Gorsuch hypothesized that "[p]erhaps the dissent finds these possibilities untroubling because it trusts state governments to coerce only 'enlightened' speech."³⁰²

B. Gorsuch v. Sotomayor: A Lack of Clarity and More Uncertainty

Accepting Sotomayor's position means accepting her two guiding principles. She argued that "the business is free to include, or not to include, any lawful message it wants in its wedding websites."³⁰³ And the only thing the business could not do "is deny whatever websites it offers on the basis of sexual orientation," which is one of the protected characteristics in CADA.³⁰⁴ Disability, creed, race, sex, color, marital status, ancestry, and national origin are other protected characteristics listed in CADA.³⁰⁵ Sotomayor argued that the business "could, for example, offer only wedding websites with biblical quotations describing marriage as between one man and one woman," and the business could refuse to include specific phrases, but as long as these websites are provided equally to people with protected characteristics.³⁰⁶ Accepting Sotomayor's position also means that all protected characteristics are equally valuable. Thus, following Sotomayor's logic, Smith, a Christian, would be required to create a wedding website for a Muslim couple or any other couple based on that couple's creed, which is one of the protected characteristics in CADA. Similarly, a gay man who wishes to create websites for only gay people also could not refuse to provide services to a straight couple. Smith would be required to create that website for a Muslim couple, but she would be permitted to include a message stating that the only true marriage is a Christian marriage as long as that same message is included in

²⁹⁸ *Id.*

²⁹⁹ 303 *Creative LLC v. Elenis*, 600 U.S. 570, 599 (2023).

³⁰⁰ *Id.* at 601 (alteration in original).

³⁰¹ *Id.*

³⁰² *Id.*

³⁰³ *Id.* at 623 (Sotomayor, J., dissenting).

³⁰⁴ *Id.*

³⁰⁵ COLO. REV. STAT. § 24-34-601 (2023).

³⁰⁶ 303 *Creative LLC*, 600 U.S. at 629 (Sotomayor, J., dissenting).

every website. Similarly, the gay man would be permitted to include a message stating that same-sex marriages are superior to opposite-sex marriages as long as the gay man includes that message on every website he designs.

It is hard, if not impossible to craft a bullet-proof guiding principle. It can be too broad, it can be too narrow, or it can lack enough guidance for the future. For example, if Smith chose to also create a short film about the couple's love story, would she also be required to do the same for a gay couple? Similarly, would a gay man be required to go to Catholic services to take photos if he offered these services as part of his business? It seems that the answer to all of these questions, according to Sotomayor, is yes. It is not difficult to imagine that some people might find these hypotheticals less appealing than simply requiring Smith to create a wedding website for a gay couple. However, that is the guiding principle that is provided by Sotomayor.

While every category of people protected by CADA has had unique experiences, CADA treats all of the categories equally, and Sotomayor does not suggest that some characteristics are more practically important or that something else should be considered with one characteristic but not the other. However, it is not enough to simply state that they are different and argue that, for example, sexual orientation presents "a question of political and religious significance," whereas a disability status does not.³⁰⁷ That can be said about each protected characteristic: If forced to pick and rank them, different people would find some of them more controversial than others. However, that is of no relevance because CADA treats them equally. This also helps to understand why there is such a stark difference between how the case is presented by Gorsuch and Sotomayor.

Sotomayor wrote that "[t]oday is a sad day in American constitutional law and in the lives of LGBT people."³⁰⁸ Gorsuch's opinion does mean that Smith will not be penalized for refusing to create websites for same-sex weddings. While the dissent and many others disagree with such a decision, it must be noted that the decision applies to everyone. This means that a gay man who wishes to create websites for only same-sex couples will be allowed to refuse to create websites for opposite-sex couples and religious couples. Similarly, this means that a gay man will be allowed to post a sign saying that he does not serve opposite-sex couples or religious couples. Religion or creed, just like sexual orientation, is a protected characteristic that is included in many public accommodation statutes. Thus, if one were to assume that both groups are similarly situated groups, then one could also make a compelling argument that both gay people and religious people equally benefit from the decision.

³⁰⁷ *See id.* at 596 (majority opinion).

³⁰⁸ *Id.* at 636 (Sotomayor, J., dissenting).

However, even people who agree with the Court's decision and even people who agree that both sides equally benefit from the decision cannot ignore a few potential issues that Gorsuch's opinion presents. First, if creating websites can be protected under the First Amendment, then it is not clear what else can receive the same protections. Colorado argued that Smith's proposed wedding website was simply an ordinary commercial product and thus any burden was incidental.³⁰⁹ Gorsuch pointed out that both parties stipulated that Smith's services were expressive, and thus, Gorsuch wrote that Smith "does not seek to sell an ordinary commercial good but intends to create 'customized and tailored' speech for each couple."³¹⁰ However, it is not clear what an ordinary commercial product is. Similarly, it is not clear how a person can intentionally seek to create speech for a customer. Because it is conceivable that many website designers and developers do not treat the websites they design as their speech, it seems that the standard is purely subjective. All someone needs to do is declare that the website that person is designing is speech and thus it would become speech. A finding that something is an ordinary commercial product is critical because it means that any burden is incidental. Thus, it is important to have an objective standard of how one determines if something is an ordinary commercial product. Gorsuch emphasized that both parties stipulated Smith's services were expressive, but he did not explain what made some services expressive in nature. Every website can be said to be "customized and tailored," but it is conceivable that many website creators do not see their websites as something more than an ordinary commercial product. In addition, while stipulations play an important role in litigation, the parties are not free to stipulate just anything so as to fit a desired legal question. And even with existing stipulations, Gorsuch could have provided more guidance.

Moreover, Smith claims that she cannot create any wedding website for a same-sex couple because doing so would violate her beliefs. However, it is not clear what a wedding website is. What if a same-sex couple came to Smith and asked for a website that had one white blank page and nothing else? What if the couple just asked Smith to help the couple register a domain name? It seems that there might be a difference between creating a website that has one blank white page and a website that has multiple photos about the upcoming gay wedding. What if Smith, as part of her business, also sold note-taking pads in her office that had her logo? If Smith was allowed to refuse to create a simple website with one blank page, then would she also be permitted to refuse to sell those note-taking pads to same-sex couples by making the same argument? It is clear the line does exist somewhere. For example, the same argument would probably not work with medical services. Thus, if a pregnant woman went to the hospital to give birth with her wife, the provider would probably not be able to refuse services by claiming that doing so would

³⁰⁹ Brief on the Merits for Respondents, *supra* note 230, at *12.

³¹⁰ *303 Creative*, 600 U.S. at 593.

contradict some biblical truths and thus bring out First Amendment protections. Similarly, a state cannot simply order a random individual to write a book about a specific subject. The line exists somewhere between these two extremes. However, instead of clarifying where that line exists, Gorsuch's opinion allows people to make a compelling argument that flower arrangements, baked goods, or even custom-made notepads are expressive, just like wedding websites. The sky is the limit when a party has a skilled lawyer willing to make an argument. Gorsuch's opinion does not provide a clear answer to these questions. It is worth noting that perhaps he did not need to do that because it was stipulated that Smith's services were expressive; however, as shown above, even the very idea of what a wedding website is can be very subjective. Smith argued that her proposed wedding websites would communicate her endorsement of the couple. While many people, including six Justices, agree, it is important to note that the proposed standard is again purely subjective in nature. If Smith or anyone can simply announce that their product or service communicates ideas, then it seems that even a cook working at a local diner could also argue that making a meal that will be served for two gay men is endorsing their relationship. Sotomayor recognized the issue when she brought up a few hypotheticals. However, Gorsuch did not entertain them stating that "those cases are not *this* case."³¹¹ One could make a compelling argument that he did not have to address those hypotheticals because they were irrelevant or because it is inappropriate for the Court to address hypothetical cases as a general principle. However, the lack of guidance on how the decision applies to other products and services is still an important question, nonetheless.

Furthermore, since sexual orientation is just one of the many other protected characteristics, it is not clear how the holding of this case could not be applied to a future case where a website designer makes the same argument to refuse to make a wedding website to a disabled couple or a couple with another protected characteristic. As mentioned above, CADA treats all protected characteristics equally; thus, there is no practical difference between sexual orientation and any other protected characteristic as it pertains to CADA claims. Gorsuch did not provide enough guidance for how cases involving other protected characteristics should be handled. Can a website designer refuse to make a website for a biracial couple, claiming that it is the designer's sincerely held belief that marriage is a union between one white man and another white woman, and creating a website for a biracial couple would violate those beliefs? As explained earlier, it is not clear what a wedding website is and what other services and products could be covered by the decision. Thus, if the decision applies to other protected characteristics, then this means that other groups covered by CADA could be denied services. On the other hand, the decision only dealt with sexual orientation. Perhaps the court would treat the case differently if Smith's

³¹¹ *Id.* at 599.

beliefs involved a biracial couple. Gorsuch explains that this case involved same-sex marriage which was “a question of political and religious significance.”³¹² However, at what point does something become no longer political? Further, there are many Christian denominations that do support same-sex marriage. Any person can state that any matter is that person’s sincerely held belief since there is no objective standard of determining whether something is a sincerely held belief or if that matter is simply one of an unlimited number of views and opinions that each person has about every aspect of society.

Another important point worth discussing is the framing of the parties. Just like the Justices in *Masterpiece Cakeshop*, the Justices in *303 Creative* saw the same parties very differently.³¹³ Throughout his majority opinion, Gorsuch continued putting the focus on Smith as a person, whereas throughout her dissenting opinion, Sotomayor kept emphasizing the business.³¹⁴ In *303 Creative*, Smith was the owner of her business, and she claimed that any messages made by her business were attributable to her as a person.³¹⁵ This argument is persuasive when Smith is the only person working in her company.³¹⁶ However, it is not clear how persuasive such an argument would be if used by an owner of a large corporation with thousands of employees. Furthermore, Gorsuch states that Colorado sought to force Smith to speak, but what exactly is the standard for when a law, instead of regulating, turns into forcing or compelling?³¹⁷ One could argue that most, if not all, laws and regulations force and compel. Sotomayor explains that “[o]nce you look closely, ‘compelled speech’ (in the majority’s facile understanding of that concept) is everywhere.”³¹⁸ Gorsuch’s opinion does not provide enough guidance to answer these questions. However, the opinion does allow skilled lawyers to make many persuasive arguments using *303 Creative*.³¹⁹

Moreover, Gorsuch emphasized that “Smith ‘will gladly create custom graphics and websites for . . . gay, lesbian, or bisexual persons so long as the custom graphics and websites’ do not violate her beliefs.”³²⁰ People who side with Sotomayor would immediately point to *Katzenbach v. McClung*, in which

³¹² *Id.* at 596.

³¹³ Compare *Masterpiece Cakeshop, Ltd., v. Colo. C. R. Comm’n*, 584 U.S. 617 (2018) with *303 Creative LLC v. Elenis*, 600 U.S. 570, 593 (2023).

³¹⁴ Compare *303 Creative LLC v. Elenis*, 600 U.S. 570, 593 (2023) with *id.* at 606 (Sotomayor, J., dissenting).

³¹⁵ *Id.* at 579–80 (majority opinion).

³¹⁶ See *id.*

³¹⁷ *Id.* at 583.

³¹⁸ *Id.* at 639 n.16 (Sotomayor, J., dissenting).

³¹⁹ See generally *303 Creative LLC v. Elenis*, 600 U.S. 570, 608 (2023).

³²⁰ *Id.* at 594–95 (majority opinion).

the business owner argued that he would gladly provide services to black people so long as those services did not violate the owner's beliefs.³²¹ And providing table service violated those beliefs, whereas take-out services did not.³²² One could argue, just like Sotomayor does, that Smith's declaration that she would gladly provide services to gay people is meaningless because it is conditional, just like it was conditional in *Katzenbach*. At the same time, as compelling as the comparison is, it is worth noting that the *Katzenbach* case was based on the Commerce Clause and not on the First Amendment.³²³

Sotomayor's dissenting opinion, just like Gorsuch's majority opinion, is not without issues. Sotomayor states that CADA "regulates only businesses that choose to sell goods or services 'to the general public.'"³²⁴ And "if a business chooses to profit from the public market, . . . the state may require the business to abide by a legal norm of nondiscrimination."³²⁵ Sotomayor argued that since Smith chose to sell her services to the general public, her business was subject to CADA.³²⁶ Sotomayor also noted that "[m]any filmmakers, visual artists, and writers" never hold out their goods or services to "the general public" and that is why, for example, Spielberg or Banksy, Sotomayor argued, was not required "to make films or art for anyone who asks."³²⁷ However, what exactly is "the general public?" Anyone with enough resources can request Spielberg to make a film, just like anyone with enough resources can request Smith to make a website. Similarly, just like a person who does not have access to the Internet or does not have enough resources cannot hire Smith, a person who does not have enough resources cannot hire Spielberg. It is not clear when a business is open or not open to the general public. And some could argue that the Spielberg analogy is not that compelling because creating a custom-made website with carefully organized photos, fonts, and themes is not that far away from creating and executing a movie idea. Sotomayor does not provide enough guidance on when a business is open to the general public so as to be subjected to a public accommodations law.

Another point of contention is the Communication Clause. Sotomayor states that the majority's decision means that a business will be able to put a sign saying, "straight couples only."³²⁸ Gorsuch, on the other hand, explicitly

³²¹ See generally *Katzenbach v. McClung*, 379 U.S. 294 (1964).

³²² *303 Creative LLC v. Elenis*, 600 U.S. 570, 620 (2023) (Sotomayor, J., dissenting) (explaining *Katzenbach v. McClung*, 379 U.S. 294 (1964)).

³²³ *Katzenbach*, 379 U.S. at 301–02.

³²⁴ *303 Creative*, 600 U.S. at 608 (Sotomayor, J., dissenting).

³²⁵ *Id.* at 609.

³²⁶ See *id.* at 603.

³²⁷ *Id.* at 629.

³²⁸ *Id.* at 628 n.10.

disagrees, stating that the “decision today does not concern—much less endorse—anything like the ‘straight couples only’ notices the dissent conjures out of thin air.”³²⁹ However, it appears that both sides are arguing about semantics. If one were to visit Smith’s website, she states the following: “As a Christian who believes that God gave me the creative gifts that are expressed through this business, . . . I am always careful to avoid communicating ideas or messages, or promoting events, products, services, or organizations, that are inconsistent with my religious beliefs.”³³⁰ Any gay couple seeking wedding website services would immediately question whether Smith would be willing to create a wedding for a same-sex couple. Smith does not need to put up a sign saying, “straight couples only.” While some people might find such a sign jarring, the sign is no more offensive than the simple fact that Smith is a religious woman who does not want to create a wedding website for a same-sex couple. The exact language that she uses to communicate her beliefs is of no practical relevance. Her website, like many other similar religious websites, already communicates the “straight couples only” message. Thus, it seems that Sotomayor and Gorsuch are arguing about the exact language Smith should be permitted or not permitted to use. It is also not clear why Gorsuch explicitly states that the majority does not endorse a sign saying, “straight couples only” because such a sign is not practically different from the current statement that Smith has on her website regarding her beliefs.³³¹

303 Creative is treated as a landmark victory by First Amendment supporters. In his eloquent prose, Gorsuch wrote that “[t]he framers designed the Free Speech Clause of the First Amendment to protect the ‘freedom to think as you will and to speak as you think.’”³³² He further stated that “[b]y allowing all views to flourish, the framers understood, we may test and improve our own thinking both as individuals and as a Nation.”³³³ Gorsuch explained that Smith’s services, a hundred years ago, might have been provided using paper and pen and “[t]hose services are no less protected speech today because they are conveyed with a ‘voice that resonates farther than it could from any soapbox.’”³³⁴ By invoking the framers, Gorsuch made the decision sound as if it was what the framers would have wanted, thus making *303 Creative* a First Amendment decision. However, those who support Gorsuch’s opinion do not need to abandon that support to recognize

³²⁹ *Id.* at 598 n.5 (majority opinion).

³³⁰ *About*, 303 CREATIVE (2023) <https://303creative.com/about> [<https://perma.cc/NZ2Y-XTPQ>].

³³¹ *See generally id.* (stating that Ms. Smith avoids creating or promoting messages if they are not consistent with her religious beliefs).

³³² *303 Creative LLC v. Elenis*, 600 U.S. 570, 584 (2023) (quoting *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 660–61 (2000)).

³³³ *Id.*

³³⁴ *Id.* at 587 (quoting *Reno v. ACLU*, 521 U.S. 844, 870 (1997)).

that the framers have yet again been strategically used as pawns by those who are trying to use platitudes to convince others.

Gorsuch invoked the framers to suggest that they would have agreed with the majority decision, thus making the decision consistent with “abiding the Constitution’s commitment to the freedom of speech.”³³⁵ Gorsuch suggested that the framers would have agreed that a business that was open to the general public was able to refuse to sell a product to an entire group of people, even when that product was an Internet website.³³⁶ The framing of the case was at issue, but even under a different framing the proposition sounds similar: the framers would have agreed that a person who wanted to sell Internet websites to others was able to treat those websites as her own speech that was protected by the First Amendment. Either way, Gorsuch suggested that the framers would have agreed with the Court.³³⁷ Thomas was one of the Justices who joined Gorsuch, and thus one can assume that he agreed with Gorsuch’s opinion. However, in *Obergefell*, Thomas dissented, arguing that the framers would not have agreed with the majority opinion.³³⁸ In his *Obergefell* dissent, Thomas wrote that “the majority invokes our Constitution in the name of a ‘liberty’ that the framers would not have recognized, to the detriment of the liberty they sought to protect.”³³⁹ One does not need to have an opinion on the “correctness” of *Obergefell* or *303 Creative* to recognize that the Justices are free to bring out the framers in any opinion and simply declare that the framers would have agreed or disagreed with a particular decision. Both Thomas and Gorsuch presented arguments for their positions, but the arguments are still just arguments. It is impossible to know what the framers would have thought about *Obergefell* and *303 Creative*, and it seems pointless to argue that the framers would not have recognized that the right to same-sex marriage was protected by the Fourteenth Amendment, but that they would have recognized that the right to create and sell internet websites for profit was protected by the First Amendment. The U.S. Constitution says what the majority of the U.S. Supreme Court Justices say it says—there is no need to bring out and use the framers as pawns by those who already have the final say. The next Part discusses what the implications of that final say are to both gay people and religious people.

V. THE IMPACT ON THE GAY COMMUNITY

303 Creative has the potential to have widespread implications, and that potential is not unintentional. There appear to be a sizeable number of cases

³³⁵ *Id.* at 603.

³³⁶ *See id.*

³³⁷ *See id.*

³³⁸ *Obergefell v. Hodges*, 576 U.S. 644, 721 (2015) (Thomas, J., dissenting).

³³⁹ *Id.*

that present strikingly similar factual scenarios, legal arguments, and procedural history.³⁴⁰ Small businesses often run by one person who engages in creative work, such as taking wedding photos or creating flower arrangements, have been posting or intending to post statements on their websites indicating that they would not take photos of same-sex weddings or in some other way serve same-sex couples stating that doing so would violate their religious beliefs.³⁴¹ These businesses then challenge the public accommodations law making the same arguments that Smith made in *303 Creative*.³⁴² And many of these businesses are also represented by Alliance Defending Freedom (ADF).³⁴³ The ever-increasing number of these cases with such similar facts suggests that these cases could be a part of a large, organized effort. Law professor Hila Keren has labeled this type of litigation an “aggressive legal strategy . . . to deny full market participation of LGBTQ parties.”³⁴⁴ It would be difficult to ignore the many similarities that exist among the cases, especially when all of them seem to be represented by ADF. For example, in Minnesota, a small business owner suddenly decided that she was interested in potentially expanding her business to filming weddings.³⁴⁵ She then decided that she, based on her religious beliefs, would not be able to engage in filming weddings for same-sex couples.³⁴⁶ Then, she realized that there was a public accommodations law that would prohibit her from not serving same-sex couples and thus she was forced to challenge that law in federal court.³⁴⁷ After coincidentally hiring ADF, going through years of litigation in federal courts, and winning in the Eighth Circuit, she then promptly decided that she was no longer interested in pursuing filming weddings.³⁴⁸ The federal district court judge who had to enforce the injunction per the instructions of the Eighth Circuit wrote that the case “has likely been a smoke and mirrors case or controversy from the beginning, likely conjured up by Plaintiffs to establish binding First Amendment precedent rather than to allow them to craft wedding videos, of which they have made exactly two.”³⁴⁹ There are a number of similar cases and outcomes

³⁴⁰ Hila Keren, *Separating Church and Market: The Duty to Secure Market Citizenship for All*, 12 U.C. IRVINE L. REV. 911, 922–31 (2022).

³⁴¹ See *Who We Are: Religious Freedom*, ALLIANCE DEFENDING FREEDOM (2023), <https://adflegal.org/about-us/who-we-are#religious> [<https://perma.cc/82VU-GBQV>]

³⁴² *Id.*

³⁴³ *Id.*

³⁴⁴ Keren, *supra* note 340, at 913.

³⁴⁵ *Telescope Media Grp. v. Lindsey*, 271 F. Supp. 3d 1090, 1099 (D. Minn. 2017), *aff'd in part, rev'd in part and remanded sub nom.* *Telescope Media Grp. v. Lucero*, 936 F.3d 740 (8th Cir. 2019).

³⁴⁶ *Id.*

³⁴⁷ See *id.* at 1097.

³⁴⁸ *Telescope Media Grp. v. Lucero*, No. CV 16-4094, 2021 WL 2525412, at *3 (D. Minn. Apr. 21, 2021).

³⁴⁹ *Id.*

all across the country;³⁵⁰ however, it is not clear how organized this movement is, what the goal of this movement is, and whether the goal is, in fact, to “deny full market participation of LGBTQ parties,” as Hila Keren argues.³⁵¹

Political scientist Wendy Brown makes a similar argument. She argues that there is a movement toward traditional and religious values, which facilitates market evangelism, where people’s personal convictions and religious beliefs find their way into the marketplace.³⁵² This allows companies to “convert[] a religiously based legal exemption into a religious power enhanced and exercised by the corporate form.”³⁵³ Companies are thus able to use the law to advance their religious beliefs in society with much higher force.³⁵⁴ These religious beliefs are often consistent with traditional views of gender and sexuality.³⁵⁵ Moreover, Brown explains how this “neoliberalizing jurisprudence” is able to “transform[] civil liberties into capital rights for human and corporate capital alike.”³⁵⁶ Companies are able to share their traditional values with much higher force because they are shielded by law which allows companies to use their resources to not only grow and expand economically but also allows them to continue sharing their traditional values with more force. As a result, Brown writes that these companies eventually “become megapersons, difficult to wound and increasingly unlimited in their social, political, and economic influence.”³⁵⁷ As society becomes more capitalist, companies, through the market, are able to exert more influence. And when multiple companies share the same traditional views, they are able to unite and become even more powerful.

Hila Keren and Wendy Brown have a stark warning for America. When companies are allowed to advance their values and beliefs with more force, that affects everyone. Some companies might have religious beliefs about gender and sexuality that they want to push, and then some other companies might have anti-religious beliefs that they want to push on religious people and then some other companies might want to support other controversial initiatives.³⁵⁸ Keren argues that, if unstopped, the traditional-values

³⁵⁰ Keren, *supra* note 340.

³⁵¹ *Id.* at 913.

³⁵² Wendy Brown, *When Persons Become Firms and Firms Become Persons: Neoliberal Jurisprudence and Evangelical Christianity in Burwell v. Hobby Lobby Stores, Inc.*, in *LOOKING FOR LAW IN ALL THE WRONG PLACES: JUSTICE BEYOND AND BETWEEN* 169, 183–85 (Marianne Constable et al. eds., 2019).

³⁵³ *Id.* at 183.

³⁵⁴ *See id.* at 183–85.

³⁵⁵ *See id.*

³⁵⁶ *Id.* at 185.

³⁵⁷ *Id.*

³⁵⁸ *See generally* Brown, *supra* note 352.

movement might lead to having “to use a version of the notorious Green Book,” where gay people or other minorities would be required to use a navigation tool to know which businesses do not provide services to them.³⁵⁹ Brown argues that other initiatives could also lead to implicating everyone’s constitutional rights, such as the Fourth Amendment’s unreasonable searches and seizures and the Fifth Amendment’s self-incrimination.³⁶⁰ These warnings do not come without solutions. Brown argues that society should reexamine whether it wants companies to have so much power to be able to transform personhood into human capital which then allows civil rights to be “detach[ed] from citizenship and enhance the power of the powerful.”³⁶¹ Keren argues that “[m]oving high-profile debates from the streets to the commercial sphere elevates the market’s status,” which can lead to humiliation and market exclusion of gay people.³⁶² Thus, Keren argues that business owners should use their rights and engage in public debate about the issues they care about, making the debate among people and not between people and powerful companies.³⁶³

In addition to allowing companies to advance their religious beliefs through the market, *303 Creative* could also have other implications. While a refusal to create websites for same-sex weddings by one business would not affect same-sex couples in a major way, it is worth considering what kind of message such a permission would send to the general public. The next Part discusses how court decisions, such as *303 Creative*, could affect how gay people and gay rights are perceived in society.

A. Messaging and Public Acceptance of Gay People

There have been many studies trying to understand how court decisions shape public behavior and attitudes. For example, a group of researchers examined how over a 12-year period same-sex marriage legislation affected people’s views on homosexuality, finding sharper decreasing rates of anti-gay bias after a state had passed legislation allowing same-sex couples to get married.³⁶⁴ Another group of researchers studied people’s reactions to *Obergefell v. Hodges*, in which the Court ruled that same-sex couples had a constitutional right to marry.³⁶⁵ The study found that court decisions were able to change perceptions of social norms and that people’s support of

³⁵⁹ Keren, *supra* note 337, at 948–49.

³⁶⁰ Brown, *supra* note 352, at 186.

³⁶¹ *Id.*

³⁶² Keren, *supra* note 340, at 945.

³⁶³ *See id.*

³⁶⁴ Eugene K. Ofofu et al., *Same-Sex Marriage Legalization Associated with Reduced Implicit and Explicit Antigay Bias*, 116 PROC. NAT’L ACAD. SCI. U.S.A. 8846, 8849 (2019).

³⁶⁵ *See* Margaret E. Tankard & Elizabeth Levy Paluck, *The Effect of a Supreme Court Decision Regarding Gay Marriage on Social Norms and Personal Attitudes*, 28 PSYCH. SCI. 1334, 1334 (2017).

same-sex marriage became more positive because of *Obergefell*.³⁶⁶ On the other hand, a different study examined how a court decision could also lead to less favorable outcomes for the gay community.³⁶⁷ Barak-Corren conducted an experiment to measure people's attitudes toward same-sex couples following *Masterpiece Cakeshop*.³⁶⁸ After examining wedding businesses' willingness to serve same-sex couples before and after the *Masterpiece Cakeshop* case, Barak-Corren concluded that *Masterpiece Cakeshop* reduced businesses' willingness to serve same-sex couples by 14.4%.³⁶⁹ However, it is important to note that every study has limitations, and it is impossible to truly measure how much court decisions or statutes affect people's attitudes toward same-sex marriage or other gay rights.

Barak-Corren argues that courts are, in fact, able to affect people's attitudes based on her study findings, which she calls the "*Masterpiece Cakeshop* effect."³⁷⁰ Religious people who before *Masterpiece Cakeshop* were more hesitant to refuse to provide wedding services for same-sex couples were less hesitant to do so after *Masterpiece Cakeshop*.³⁷¹ Barak-Corren further argues that her findings could be used by future courts in conducting the strict scrutiny test, under which a compelling state interest must be executed using the least restrictive means.³⁷² States have a compelling interest in fighting discrimination based on sexual orientation and having data that shows that religious exemptions undermine that goal, Barak-Corren argues, should aid the courts in helping to make a decision.³⁷³

In addition to conducting a study examining the negative effects of *Masterpiece Cakeshop*, Barak-Corren provides several potential reasons explaining the reduced willingness to provide wedding-related services to same-sex couples. She provides an expressive-law-type explanation, under which some scholars argue that statutes, court decisions, and other laws are able to change people's behavior by suggesting that they represent the attitudes and beliefs of the entire society.³⁷⁴ Thus, the decision to rule for Jack Phillips in *Masterpiece Cakeshop* could have potentially sent a signal to the public that religious freedom was important, especially in the context of

³⁶⁶ *Id.* at 1339.

³⁶⁷ See Netta Barak-Corren, *Religious Exemptions Increase Discrimination Toward Same-Sex Couples: Evidence from Masterpiece Cakeshop*, 50 J. LEGAL STUD. 77, 105 (2021).

³⁶⁸ *Id.* at 83–84.

³⁶⁹ *Id.* at 97.

³⁷⁰ Netta Barak-Corren, *A License to Discriminate? The Market Response to Masterpiece Cakeshop*, 56 HARV. C.R.-C.L. L. REV. 315, 366 (2021).

³⁷¹ *Id.* at 319.

³⁷² *Id.* at 325–26.

³⁷³ *Id.* at 362.

³⁷⁴ See, e.g., *id.* at 354; Richard H. McAdams, *An Attitudinal Theory of Expressive Law*, 79 OR. L. REV. 339, 340 (2000).

providing wedding services to same-sex couples in the marketplace. Even though the decision was very narrow, it was still considered a win by many religious organizations which continued to share and promote the decision as a win. By continuously sharing and amplifying the message, the message of *Masterpiece Cakeshop* kept receiving more attention, which led to people believing that the message and the Court decision are representative of what is the norm and what most people believe. It seems that this theory does provide some useful insights into how people think about the law. Some laws, especially laws prohibiting extremely violent behavior against other people, such as murder or rape, do represent a consensus among people that these acts are not acceptable. They also seem to send a clear message to society and all its members that these acts are not acceptable. However, it is not clear to which extent court decisions and even some statutes are able to send the same message. As explained above, *Masterpiece Cakeshop* was decided on narrow grounds, and the Court did not rule directly on the merits of the case. Further, laws that prohibit violent crimes do not have an element of religion; thus, there are some key differences. It is possible to frame the issues discussed in *Masterpiece Cakeshop* as a conversation about the rights of religious people and the rights of gay people and how to allow both groups to coexist in society. Another way of thinking about the issues in *Masterpiece Cakeshop* is by thinking about the denial of the rights of gay people to participate in the market. People might have a different understanding of what *Masterpiece Cakeshop* stands for depending on how the main issues are framed. This would then lead to a different interpretation of *Masterpiece Cakeshop* and whether it truly represents what most people think leading to different behavior pursuant to expressive theory of law.³⁷⁵

Another argument that comes from law and economics suggests that *Masterpiece Cakeshop* sent a signal to religious vendors that they should not worry about fines and penalties for refusing to provide services to same-sex couples.³⁷⁶ Some religious vendors might have been hesitantly providing services to same-sex couples before *Masterpiece Cakeshop* directly because they did not want to face penalties and fines; however, after *Masterpiece Cakeshop*, these same vendors might have decided that *Masterpiece Cakeshop* meant that there was a low likelihood that they would be penalized for refusing to provide services to same-sex couples. While the law-and-economics explanation provides some interesting insights, it is not clear how much of the decrease of the *Masterpiece Cakeshop* could be attributed to anticipated fines and penalties. The fines for not providing services to same-sex couples are very low. In addition, same-sex couples seeking wedding-related services might contact the vendor by phone or email and not know whether their request for services was denied because of their sexual orientation or because

³⁷⁵ See generally *id.* at 339–40, 353; Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2024–25 (1996).

³⁷⁶ See Barak-Corren, *supra* note 370, at 354; McAdams, *supra* note 374, at 353.

the vendor was busy. Even if a couple suspected that the request was denied based on the couple's sexual orientation, bringing a claim and going through the legal processes are not something that most couples, especially couples who are about to get married, want to pursue. The reality of how wedding businesses operate and how complaints are carried out in the legal system suggests that the law-and-economics explanation might not be able to explain the Masterpiece Cakeshop effect.

The results of Barak-Corren's experiment seem to be intrinsically linked to legal consciousness and legality. *Legal consciousness* refers to "all the ideas about the nature, function, and operation of law held by anyone in society at a given time"³⁷⁷ It helps to explain what people do and what they say about the law.³⁷⁸ *Legality* refers to "the meanings, sources of authority, and cultural practices that are commonly recognized as legal."³⁷⁹ After conducting interviews with 430 people about the law, Ewick and Silbey identified three types of legal consciousness that help to explain the relationship between people and the law.³⁸⁰ People discussed their relationship with the law as "before the law," "with the law;" and "against the law."³⁸¹ People "before the law" see the law as rational, authoritative, and ordered.³⁸² People "with the law" see the law as a tool that can be used for personal gain.³⁸³ People who stand "against the law" feel disempowered by it and look for ways to escape it.³⁸⁴ In the early 2000s, Kathleen Hull conducted interviews with 71 people who were in same-sex relationships.³⁸⁵ She wanted to understand their legal consciousness and legalization of same-sex marriage.³⁸⁶ She found that many same-sex couples engaged in public commitment rituals because same-sex marriage was not legal at the time.³⁸⁷ Hull argued that these rituals "represent an effort to construct a kind of legality in the absence of official law," which would allow these couples to "establish a quasi-legal normative order" and participate in society just like opposite-sex couples do.³⁸⁸ This behavior

³⁷⁷ David M. Trubek, *Where the Action Is: Critical Legal Studies and Empiricism*, 36 STAN. L. REV. 575, 592 (1984).

³⁷⁸ PATRICIA EWICK & SUSAN S. SILBEY, *THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE* 46 (1998).

³⁷⁹ *Id.* at 22.

³⁸⁰ *Id.* at 23.

³⁸¹ *Id.* at 47.

³⁸² *Id.*

³⁸³ *Id.* at 47–49.

³⁸⁴ EWICK & SILBEY. *supra* note 378, at 48–49.

³⁸⁵ See Kathleen E. Hull, *The Cultural Power of Law and the Cultural Enactment of Legality: The Case of Same-Sex Marriage*, 28 LAW & SOC. INQUIRY 629, 633 (2003).

³⁸⁶ *Id.*

³⁸⁷ *Id.* at 632.

³⁸⁸ *Id.* at 653.

further showed that people gravitate toward legality and that law often has “a cultural power that transcends its specific benefits and protections.”³⁸⁹ At that time, same-sex couples stood “against the law” because there was no nationwide recognition of same-sex marriage. Any union between two people of the same sex, even in a state that recognized same-sex marriage, still signaled inferiority and second-class citizenship of same-sex couples. Marriage grants a wide range of financial and legal benefits that were not available to committed same-sex couples in the same way that they were available to opposite-sex couples. Same-sex couples were legally excluded from the institution of marriage and the benefits that legally come with that institution, leaving same-sex couples standing “against the law.” From standing “against the law,” powerless same-sex couples soon started shifting to standing “before the law,” as they were able to mobilize and use the law as a tool to eventually legalize same-sex marriage in 2015. The shift in their positions illustrates that “[l]egal consciousness is not a permanent or essential aspect of a person’s identity” and that over time people’s expression of different types of legal consciousness can change.³⁹⁰

Understanding the different dynamics of legal consciousness sheds some light on the complexities that exist in *303 Creative*. While the right to same-sex marriage was controversial, it never had a direct effect on people who opposed it. On the other hand, *303 Creative* directly affects people who oppose same-sex marriage and goes beyond by implicating free exercise and free speech rights in some unique ways. *303 Creative* has identified a clash between the rights of gay people and the rights of people who want to exercise their free speech rights. This clash can be framed in several different ways in terms of legality and legal consciousness. This could be seen as a power imbalance between the two groups. Gay people could be seen as the minority group that wants to participate in the market just like everyone else with another group taking that right away. However, the opposite could be said as well: Religious people could be seen as the minority group that wants to exercise their free speech and exercise rights in a society that does not allow them to do so. Gay people are using public accommodations laws to pursue their goal, and religious people are using the First Amendment to pursue their goal. However, the true actors in this clash are not that apparent. *303 Creative*, and its owner Lorie Smith, are represented by Alliance Defending Freedom, which seems to be involved in a series of similar cases.³⁹¹ The other side is represented by state officials. Thus, both sides have enough resources to litigate the case. Further, it is not that clear which party is standing “against the law” in this case. Is it the business owner who feels disempowered because the law forces her to create a website against her free

³⁸⁹ *Id.* at 629.

³⁹⁰ EWICK & SILBEY, *supra* note 378, at 50.

³⁹¹ *See* Keren, *supra* note 340, at 913.

exercise and speech rights? Or is it the same-sex couple who feels disempowered because the law allows the couple to be discriminated against?

303 Creative is very different from *Obergefell*. Before *Obergefell*, same-sex marriage was not nationally recognized, and this made same-sex marriages de facto inferior to opposite-sex marriages. This marginalization made gay people feel like second-class citizens—gay couples, unlike straight couples, were not able to enjoy the many privileges marriage had to offer. The right to marriage is one of the integral rights in the fight for equality, one that is so important that, when achieved, it was able to elevate gay people from second-class citizens to first-class citizens in an important domain in society. *Obergefell* also did not result in another group's status demotion to second-class citizenship. *303 Creative* presents a conundrum because it requires a compromise if the two groups in the case wish to retain their first-class citizenship status. Without a compromise, one group will be demoted to second-class citizenship in the marketplace. Businesses would be able to weaponize their right to free speech or exercise to refuse to provide services to gay people, excluding them from the market and thus making them second-class citizens. On the other hand, gay people who insist on receiving specific services from religious people would be able to weaponize the public accommodations laws to force religious people to provide those services, which would undermine their religion and make them second-class citizens. The argument that gay people should be able to participate in the market as everyone else is compelling. But there are some obvious practical questions that should also be considered. For example, how many same-sex couples really want to receive website design services from Lori Smith, who is a devout Christian? Similarly, how many same-sex couples really want their wedding cake—an often-important symbol of marriage—to be made by someone who disapproves of their marriage? As explained above, *303 Creative* could mean that both gay people and religious people will equally benefit from the decision. However, for that argument to be compelling, one first needs to analyze any power imbalance between the two groups and what broader implications that imbalance has for public accommodations laws.

B. Power Imbalance and Symbolic Value of Law

Another important consideration that exists in this debate is the differences that exist between the two parties. As mentioned earlier, the true parties in *303 Creative* are not that clear. Is it the hypothetical same-sex couple and Lorie Smith? Is it the State of Colorado and Lorie Smith? Is it the state of Colorado and ADF? Some parties have more power than others. A line of studies examining rights consciousness in citizen-police interactions explains that some people are not aware of their rights.³⁹² Similarly, some people might

³⁹² See, e.g., Dorothy K. Kagehiro, *Perceived Voluntariness of Consent to Warrantless Police Searches*, 18 J. APPLIED SOC. PSYCH. 38 (1988); Kathyne M. Young & Christin L. Munsch, *Fact and*

not be aware that there are public accommodations laws that protect them from discrimination or that there are constitutional provisions that protect their free exercise and speech rights. The level of awareness could affect how parties engage with others in the market and whether they are able to assert their rights when it is feasible.

Max Weber explains that domination is synonymous with formal equality before the law because the formal structure reinforces the advantages of the most powerful.³⁹³ Marc Galanter explains how the legal system benefits the “haves” and disadvantages the “have-nots.”³⁹⁴ In his article, Galanter describes many ways in which the legal system limits and creates various possibilities of utilizing that system as “a means of redistributive (that is, systemically equalizing) change.”³⁹⁵ Galanter explains that some actors have more resources that help them to take advantage of the legal system, which some people with fewer resources are not able to do.³⁹⁶ He describes the parties who have only one encounter with the legal system as “one-shotters” and the parties in frequent litigation as “repeat players.”³⁹⁷ For example, a spouse in a divorce case would be a one-shotter, whereas an insurance company would be a repeat player. Galanter emphasizes that these definitions are oversimplified³⁹⁸ but they still shed some light on certain aspects of the legal system. He discusses how one-shotters tend to enter the system to achieve some tangible result.³⁹⁹ On the other hand, repeat players do not usually have high stakes in any given case and they generally have the necessary resources to engage in multiple cases.⁴⁰⁰ These resources also play another important role. Galanter explains that repeat players are able to strategize and settle cases that are more risky; repeat players are also able to pick and litigate certain cases that have the potential to be appealed and eventually lead to the production of new favorable decisions by appellate courts.⁴⁰¹ One-shotters do not generally enjoy the same options; instead, they

Fiction in Constitutional Criminal Procedure, 66 S.C. L. REV. 445 (2014); Kathryn M. Young, *Rights Consciousness in Criminal Procedure: A Theoretical and Empirical Inquiry*, 12 SOCIO. CRIME, L. DEVIANCE 67 (2009).

³⁹³ See MAX WEBER, MAX WEBER ON LAW IN ECONOMY AND SOCIETY 188–91 (Max Rheinstein trans., 1954).

³⁹⁴ Marc Galanter, *Why the “Haves” Come out Ahead: Speculations on the Limits of Legal Change*, 8 L. SOC’Y REV. 95, 103 (1974).

³⁹⁵ *Id.* at 95.

³⁹⁶ *Id.* at 97.

³⁹⁷ *Id.*

³⁹⁸ *Id.*

³⁹⁹ *Id.*

⁴⁰⁰ Marc Galanter, *Why the “Haves” Come out Ahead: Speculations on the Limits of Legal Change*, 8 L. SOC’Y REV. 95, 97 (1974).

⁴⁰¹ *Id.* at 101.

are in effect forced to accept a small victory over a chance to make a difference in law by further pursuing and appealing the decision.

Galanter emphasizes the distinction between the repeat players and the “haves” as well as the one-shotters and “have-nots.” He notes that “these categories overlap,” and exceptions exist.⁴⁰² For example, most repeat players tend to be large corporations with resources, but the repeat players could also be “alcoholic derelicts.”⁴⁰³ In addition, one-shotters can also be wealthy criminal defendants who have the necessary resources not only to get the best legal assistance but also to pursue appeals and potentially change existing law. Galanter explains the nuance in these categories to show how the “legal system . . . may perpetuate and augment the advantages” of the “haves.”⁴⁰⁴ He summarizes all the tools the “haves” use to succeed, including superior legal services that help them to use complex legal rules to achieve their goals.⁴⁰⁵ All of these advantages that the “haves” enjoy over the “have-nots” affect the rule-changing process and the beneficiaries of that process. Galanter explains that even though people are “equal before the law,” the “have-nots” do not enjoy the same access to litigation as the “haves” do.⁴⁰⁶ Thus, rule-changing through things like test cases is an option that one-shotters can rarely explore. And those who manage to do so face further challenges in the legal system, where courts tend to “give an all-or-none, once-and-for-all decision.”⁴⁰⁷ The power of the courts is often constrained by other rules that might make it difficult for a specific court to change the rules for the benefit of the “have-nots” even if that court would like to do so. And even if the “have-nots” are able to convince a court to change the rule, they may not have the means to “secure the penetration of” the new rule.⁴⁰⁸

One of the reforms that would help the “have-nots” is improving access to legal services. Galanter discusses how such access would reduce barriers to litigation which would then allow for more cases to be brought up which could then lead to more positive outcomes for the “have-nots.”⁴⁰⁹ Galanter touches on an important point—increasing access to legal services can plausibly lead to better outcomes for the “have-nots.” Another reform that Galanter discusses is uniting the “have-nots” and making them better

⁴⁰² *Id.* at 103.

⁴⁰³ *Id.*

⁴⁰⁴ *Id.* at 103–04.

⁴⁰⁵ *Id.* at 125.

⁴⁰⁶ Marc Galanter, *Why the “Haves” Come out Ahead: Speculations on the Limits of Legal Change*, 8 L. SOC’Y REV. 95, 136 (1974).

⁴⁰⁷ *Id.* at 137.

⁴⁰⁸ *Id.* at 139.

⁴⁰⁹ *Id.* at 140.

equipped to face the “haves.”⁴¹⁰ Thus, organizing groups can not only achieve changing a specific rule but they can also make sure that the new rule gets implemented.⁴¹¹ This way, Galanter suggests, one-shotters “might be aggregated into” repeat players.⁴¹²

The distinction that Galanter draws between the “haves” and the “have-nots” helps to explain different parties in the legal system, and that distinction can help to explain some arguments that Nicholas Pedriana and Robin Stryker make in their 2017 article. They argue that different outcomes of housing, employment, and voting legislation can be best understood by using the group-centered effects framework.⁴¹³ For example, they argue that our focus should be on the consequences of discrimination, not on the discrimination intent.⁴¹⁴ They suggest that it is difficult to effectuate social change under a civil rights enforcement paradigm that focuses on individualism and proving intent.⁴¹⁵ Pedriana and Stryker explicitly agree with Galanter’s point that one-shotters should have more opportunities than repeat players have in the legal system.⁴¹⁶ They further point out that Galanter had astute observations about the “law’s capacity to produce social change.”⁴¹⁷ However, they also emphasize that when the “have-nots” have the required resources and political empowerment, they are able to achieve their desired social change.⁴¹⁸

Even though the legal system is open to everyone, people and organizations that have resources are better equipped in using the system to their own advantage than people with no resources. For example, a large bakery that has the backing of the ADF might be better aware of how to assert its rights and how to eventually bring a challenge than a single same-sex couple who came across that large bakery and was denied services. However, as mentioned earlier, that is not the case in every scenario, and it is not always clear which party has more power and resources. Still, Galanter’s explanation provides some important insights into how these power dynamics can affect people in the real world.

⁴¹⁰ *Id.* at 141.

⁴¹¹ *Id.* at 143.

⁴¹² Marc Galanter, *Why the “Haves” Come out Ahead: Speculations on the Limits of Legal Change*, 8 L. SOC’Y REV. 95, 141 (1974).

⁴¹³ Nicholas Pedriana & Robin Stryker, *From Legal Doctrine to Social Transformation? Comparing US Voting Rights, Equal Employment Opportunity and Fair Housing Legislation*, 123 AM. J. SOCIO. 86, 88 (2017).

⁴¹⁴ *See id.* at 127.

⁴¹⁵ *Id.*

⁴¹⁶ *Id.*

⁴¹⁷ *Id.* at 98.

⁴¹⁸ *Id.* at 99.

Another structural factor that helps to explain the role of legal consciousness is cultural capital. Pierre Bourdieu writes that cultural capital can present itself in three forms: the objectified state (in the form of material possessions, such as what someone owns), the embodied state (in the form of long-lasting dispositions, such as how someone talks or behaves), and the institutionalized state (in the form of socially recognized credentials, such as what education someone has).⁴¹⁹ Cultural capital with all of its forms manifests itself into social currency that shapes how different groups of people interact in society.⁴²⁰ A line of studies studying education outcomes has found that children from more affluent families are able to better take advantage of educational opportunities than children from less affluent families. For example, children from richer families are better socialized by their parents to navigate upper-class environments and seize various educational opportunities than children from poorer families.⁴²¹ Another study found that children from middle-class families are more likely to seek teacher assistance and interrupt teachers when they need help than children from working-class families.⁴²² Drawing on this literature, Kathryn Young and Katie Billings conducted a study to specifically analyze the connection between legal consciousness and cultural capital.⁴²³ In their study, people were presented with a set of vignettes that depicted scenarios about constitutional rights that were potentially implicated in encounters with law enforcement.⁴²⁴ Respondents were asked to answer open-ended questions.⁴²⁵ The authors found more cultural capital leads to higher self-efficacy in interactions between citizens and law enforcement.⁴²⁶ They also found that high cultural capital leads to a higher sense of entitlement and awareness of existing rights and laws that provide for those rights.⁴²⁷ These findings help to explain how differences in cultural capital can contribute to different outcomes in legal situations.⁴²⁸ Cultural capital further represents “an important constitutive source of social variation in legal consciousness” that

⁴¹⁹ JOHN G. RICHARDSON, HANDBOOK OF THEORY AND RESEARCH FOR THE SOCIOLOGY OF EDUCATION 17 (1986).

⁴²⁰ Kathryn M. Young & Katie R. Billings, *Legal Consciousness and Cultural Capital*, 54 L. SOC'Y REV. 33, 57 (2020).

⁴²¹ *Id.* at 38.

⁴²² Jessica McCrory Calarco, “I Need Help!” *Social Class and Children’s Help-Seeking in Elementary School*, 76 AM. SOCIO. REV. 862, 871 (2011).

⁴²³ Young & Billings, *supra* note 420, at 39–40.

⁴²⁴ *Id.* at 41–42.

⁴²⁵ *Id.* at 40.

⁴²⁶ *Id.* at 51.

⁴²⁷ *Id.*

⁴²⁸ *Id.* at 50.

exacerbates the differences that already exist between the written laws and how those laws are enforced.⁴²⁹

The discussion of cultural capital helps to understand legal consciousness as it pertains to *303 Creative* and other similar cases. As mentioned earlier, there are many similar cases where public accommodations laws have been invoked. It is probably safe to assume that for every complaint that has been brought by a same-sex couple, there are many more that have not been raised. Some same-sex couples do not even know if the service was denied because of their sexual orientation or because the business was, in fact, too busy. However, only the couples who have high cultural capital know and are able to bring a complaint. These couples must be aware of their rights, and they, further, must be aware of how to bring a complaint and what that will entail. Certainly, not every same-sex couple who is denied service knows about its rights and is willing to bring a complaint. However, the same can be said about business owners. They also must have high cultural capital to be aware of their rights. There are different considerations for both parties. If the same-sex couple raises a complaint, the business owner, depending on the state, might incur significant fines. Thus, the business owner must be aware of the owner's rights and must also understand what refusal to provide services might entail. However, the real world is not that simple. Both parties, as illustrated in *303 Creative*, can have the backing of larger institutions to defend them. This shows that while cultural capital can be an important consideration, it is not that clear how big of a role it plays in cases like *303 Creative* and, further, it is not clear which party has more cultural capital. Finally, it is not clear which parties are haves and have-nots as illustrated by Galanter because both seem to have the backing of larger organizations even if the ADF seems to be more organized and goal-oriented. In fact, the discussion of the role of cultural capital shows that in some circumstances, such as in *Masterpiece Cakeshop*, it is the same-sex couple who has high cultural capital and is able to initiate a lawsuit to further its goal, whereas it was the business owner in *303 Creative* who was high in cultural capital and was able to initiate a lawsuit to further her goal. The study conducted by Young and Billings provides useful insights into the connection between legal consciousness and cultural capital. The differences in cultural capital can contribute to different outcomes; however, it is not exactly clear how much these differences in cultural capital matter when there are larger organizations that are often the catalysts for litigation in the first place. Thus, as Galanter explains, it is perhaps the comparative advantage in resources and access to the legal system that one party has over the other party that makes the most difference in the end.⁴³⁰

⁴²⁹ Kathryn M. Young & Katie R. Billings, *Legal Consciousness and Cultural Capital*, 54 L. SOC'Y REV. 33, 57 (2020).

⁴³⁰ Galanter, *supra* note 412, at 149–50.

In her dissenting opinion, Sotomayor discusses a story of a Mississippi funeral home that agreed to take care of funeral-related services for an elderly man who had passed away recently.⁴³¹ After the funeral home learned that the deceased surviving spouse was another man, the funeral home refused to provide the services.⁴³² The surviving man had to seek services from another funeral home that was over 70 miles away.⁴³³ Sotomayor stated that “[t]his ostracism, this otherness, is among the most distressing feelings that can be felt by our social species.”⁴³⁴ It is not difficult to imagine that many people, even those who do not particularly favor same-sex marriage, would find the funeral home’s actions unacceptable. And there are many reasons for such a reaction. Sotomayor’s story is compelling because Mississippi does not have a public accommodations law that protects gay people from discrimination. However, in order for that story to support Sotomayor’s argument, one has to assume that the funeral home would have acted differently had there been a law prohibiting discrimination based on sexual orientation. And that is an assumption that should not be taken for granted. While questioning the very purpose of anti-discrimination laws and whether they really prevent discrimination, or how much they prevent discrimination, is nihilistic in nature, it is still a valid point, nonetheless.

That point was examined in more detail by Lauren B. Edelman. The Civil Rights Act of 1964 was seen as an optimistic landmark measure to deal with discrimination based on sex, race, color, national origin, or religion. At the time, the statute served as a symbol of fairness and equality in the workplace. In her book, Edelman questions whether the law, in fact, had just been a symbol.⁴³⁵ She argues that inequality and discrimination are still present today, where minorities are pressured to disguise their minority status and women are forced to comply with gender stereotypes. Edelman uses legal endogeneity theory to provide an explanation of why the civil rights legislation has not eradicated these inequalities in the workplace.

Edelman used qualitative and quantitative analyses of a dataset from interviews, surveys, court opinions, and other guideline materials to explain why there has not been more impactful fighting against various types of workplace bias. Edelman writes that legal endogeneity is “a process through which the meaning of law is shaped by widely accepted ideas within the social arena that law seeks to regulate.”⁴³⁶ She shows several ways that civil rights legislation is ambiguous and what that means to courts when they have to

⁴³¹ 303 Creative LLC v. Elenis, 600 U.S. 570, 607 (2023) (Sotomayor, J., dissenting).

⁴³² *Id.*

⁴³³ *Id.*

⁴³⁴ *Id.* at 608.

⁴³⁵ LAUREN B. EDELMAN, WORKING LAW: COURTS, CORPORATIONS, AND SYMBOLIC CIVIL RIGHTS 216 (2016).

⁴³⁶ *Id.* at 12.

interpret and apply this law in employment discrimination cases. For example, she points out that Title VII does not define the word discrimination, even though the law provides definitions of many other words.⁴³⁷ Edelman argues that the meaning of the word discrimination is crucial. Under a more limited construction, the word means “equality of treatment,” whereas under a more expansive construction, the word means “equality of outcome.”⁴³⁸ She argues that even though there is no consensus over which approach is the correct approach, courts, at least in employment discrimination cases, have been gradually leaning toward the more limited construction that ends up negatively affecting employees who raise Title VII complaints.⁴³⁹

Furthermore, Edelman shows how lawyers, risk management consultants, and insurance companies shape how business organizations think about diversity through “symbolic structures.”⁴⁴⁰ She argues that over time, companies have been increasingly focusing on “symbolic compliance” that manifested itself through various written anti-discrimination policies and procedures that were intended to stand for equal treatment and promotion of the ideals espoused by the original civil rights legislation.⁴⁴¹ The public would see these things as admirable efforts toward increasing equality in the workplace; however, Edelman argues that these efforts are largely symbolic. Companies that have these equality policies in place often do not enforce them or they create difficult grievance procedures that cannot be effectively used by employees who have complaints of employment discrimination.⁴⁴² And the complaints that manage to get through the bureaucratic structures are then dealt with through internal dispute resolution tactics that are often unfavorable to the employees.

Edelman then discusses how these symbolic structures serve “as indicia of EEO compliance” within the entire legal system.⁴⁴³ She argues that over time, people see the companies that have anti-discrimination policies and that engage in symbolic diversity campaigns as companies that, in fact, do not discriminate and treat their employees equally. Edelman calls this process the managerialization of legal consciousness.⁴⁴⁴ She argues that when people treat these symbolic structures as proof of compliance with anti-discrimination laws, they end up affecting the grievance processes and how complaints are

⁴³⁷ *Id.* at 43.

⁴³⁸ *Id.* at 43–44.

⁴³⁹ *Id.* at 44.

⁴⁴⁰ *Id.* at 107.

⁴⁴¹ LAUREN B. EDELMAN, *WORKING LAW: COURTS, CORPORATIONS, AND SYMBOLIC CIVIL RIGHTS* 107 (2016).

⁴⁴² *Id.* at 108.

⁴⁴³ *Id.* at 154.

⁴⁴⁴ *See id.* at 24.

handled.⁴⁴⁵ As complainants focus on their legal rights, company lawyers shift the focus to the symbolic structures, arguing that these structures satisfy the requirements of anti-discrimination laws. Edelman argues that complainants often fail to argue that the symbolic structures themselves are insufficient and often violate the ideals of the civil rights legislation. This results in perpetual support and enforcement of symbolic structures by all involved parties who end up carrying “the managerialization of law from organizational fields into legal fields.”⁴⁴⁶

Edelman’s discussion of the power imbalance that exists between an employee with a grievance and the employee’s company resembles Galanter’s discussion of the power imbalance that exists between repeat players and one-shot players. Repeat players, just like big business organizations, often have the resources and power to deal with cases in a manner that benefits them. One-shot players, just like employees with grievances, often do not have a choice but to use the process that was set by more powerful repeat players, and that process and its rules often disadvantage less-powerful players.

While Edelman projects a sense of skepticism over civil rights legislation, she certainly does not suggest that we should have no such legislation at all. The value of her research lies in important observations about the role large business organizations play in shaping anti-discrimination law in the American legal system. It is impossible to know what America would be today without the Civil Rights Act of 1964 and other anti-discrimination laws.

CONCLUSION

No matter how people feel about *Obergefell* and Thomas’s dissent, both sides should concede that Thomas was right about at least one thing. Back in 2015, he was correct that the Court’s decision to legalize same-sex marriage would “inevitabl[y] . . . come into conflict” with religious liberty.⁴⁴⁷ And eight years later, the Court was tasked with resolving that conflict.⁴⁴⁸ Even though religious people and First Amendment supporters have been celebrating *303 Creative*, the decision is not a resolution of the conflict that Thomas discussed.

Using the same level of generality, one could say that the decision equally applies to both groups. A religious website designer cannot be forced to create a website celebrating a same-sex wedding, and a gay website designer cannot be forced to create a website celebrating a religious wedding. However, while that might be the case, the decision has created multiple uncertainties which will inevitably cause both parties to come into conflict

⁴⁴⁵ *Id.* at 153.

⁴⁴⁶ *Id.*

⁴⁴⁷ *Obergefell v. Hodges*, 576 U.S. 644, 734 (2015) (Thomas, J., dissenting).

⁴⁴⁸ *See 303 Creative LLC v. Elenis*, 600 U.S. 570, 570 (2023).

again in the future. The point at which a product or service becomes expressive and thus becomes entitled to First Amendment protections is now murky water. Cause lawyers, likely from the Alliance Defending Freedom, will be able to effortlessly use *303 Creative* to make compelling arguments about many other products and services to test the limits. A wedding website is not that different from flower arrangements, edible arrangements, and wedding venues. And these are not that different from a gourmet-style dish at a restaurant or a single-order, hand-made piece of jewelry. Even then, one could still say that both groups would be treated equally by having the right to refuse to engage in those services. However, that argument eventually becomes progressively less compelling as it is taken to its logical extreme. For example, not many people would feel comfortable with a society of complete segregation of dining establishments that could refuse to provide services to a specific group of people just because of their sexual orientation or religious views.

Furthermore, just like the lawyers who will be able to make compelling arguments about different services and products, other lawyers will similarly be able to make persuasive arguments about other protected groups. Unlike Alito, who in *Dobbs* seemingly went out of his way to emphasize that *Dobbs* was not to be interpreted to question the validity of *Obergefell*,⁴⁴⁹ Gorsuch did not unequivocally state that *303 Creative* was not to be interpreted to apply to other protected characteristics listed in CADA, such as disability, race, or sex. If a web designer can refuse to make a website for a wedding between two people of the same sex, then it is hard, if not impossible, to make a compelling argument for why the web designer could not refuse to make a website for a wedding between two people who are disabled or two people who are of different race. Thus, *303 Creative*, as it stands today, has enough force to be used to directly challenge most public accommodations laws in the country, calling into question the future of these laws and whether they have any place in today's society.

There cannot be any resolution to the conflict that Thomas mentioned in his *Obergefell* dissent until the Court provides more guidance on the issues mentioned above. At best, *303 Creative* is just a starting point, under which both gay people and religious people, at least in theory, are put on the same playing field as equal groups who can refuse to perform specific services. And the solution to the conflict is to define the boundaries of that field.

⁴⁴⁹ See *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 295 (2022) ("Finally, the dissent suggests that our decision calls into question *Griswold*, *Eisenstadt*, *Lawrence*, and *Obergefell*. But we have stated unequivocally that "[n]othing in this opinion should be understood to cast doubt on precedents that do not concern abortion." (alteration in original) (citations omitted)).