FREEDOM OF SPEECH: FREEDOM TO CREATIVELY DISCRIMINATE?

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INTRODUCTION[1]

The history of public accommodation law in the United States is a sordid one. The United States Supreme Court found the Civil Rights Act of 1875—requiring that public places be accessible to all United States citizens

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[1] Professor Lavelle would like to thank her research assistant, Amanda Covington, for her insightful conversation, splendid research, and attention to "footnote detail" while this article was being written.

regardless of race—unconstitutional just eight years after its passage.[2] From then on, only state laws addressed such discrimination, until the passage of the Civil Rights Act of 1964.[3] Although, immediately after its passage, the Act was challenged in the courts.[4]

In one well-known challenge, *Heart of Atlanta Motel, Inc. v. United States*,[5] the owner-operator of a motel wanted to continue to refuse lodging for Black travelers because of their race. The United States Supreme Court upheld the Act, holding it was constitutional under the Equal Protection Clause of the Fourteenth Amendment[6] as well as the Commerce Clause of the United States Constitution.[7] Additionally, the Court noted legislative history made it clear "the fundamental object of [the Act] was to vindicate 'the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.'"[8] The Senate Commerce Committee explained, "[d]iscrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public because of his race or color."[9]

Years later, *Masterpiece Cakeshop v. Colorado Civil Rights Commission*[10] addressed another public accommodation law. This time one

[2] Civil Rights Cases, 109 U.S. 3 (1883).

[3] 42 U.S.C. § 2000a (1964) (These early state laws focused on discrimination based on race and color with varied descriptions of "public accommodation"); An Act to Protect All Citizen in their Civil Rights, S.B. 161, 1885 Colo. Sess. Laws 132–133, 139 (The state of Colorado had such a law. Colorado's Assembly passed "An Act to Protect All Citizens in Their Civil Rights," in 1885, which guaranteed "full and equal enjoyment" of certain public facilities to "all citizens," "regardless of race, color or previous condition of servitude." Ten years later, the General Assembly expanded the requirement to apply to "all other places of public accommodation." An Act To Protect All Citizen in their Civil and Legal Rights, Fixing a Penalty for Violation of the Same, and to Repeal and Act Entitled "An Act To Protect All Citizen in their Civil Rights); Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1725 (2018).

[4] *Civil Rights Act (1964)*, NATIONAL ARCHIVES, https://www.archives.gov/milestone-documents/civil-rights-act (last visited Sept. 12, 2022) (The Civil Rights Act of 1964 was signed by President Lyndon B. Johnson on July 2, 1963). Shortly thereafter, owners and operators of a restaurant business in Birmingham, Alabama filed suit challenging the Act. McClung v. Katzenbach, 233 F. Supp. 815 (N.D. Ala. 1964). Motions to dismiss the case were heard by the court on September 1, 1964. *Id.* at 817. *See also* Heart of Atlanta Motel, Inc. v. U.S., 379 U.S. 241 (1964); Willis v. Pickrick Restaurant, 234 F. Supp. 179 (N.D. Ga. 1964); U.S. v. Guest, 246 F. Supp. 475 (M.D. Ga. 1964).

[5] *Heart of Atlanta Motel*, 379 U.S. at 241.

[6] U.S. Const. amend. XIV, § 1.

[7] U.S. Const. art. I, § 8, cl. 3.

[8] *Heart of Atlanta Motel*, 379 U.S. at 354.

[9] *Id.* at 290 (Goldberg, J., concurring); S. REP. NO. 88-872872, at 16 (1964), *as reprinted in* 1964 U.S.C.C.A.N. 2355.

[10] Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018) (Justice Kennedy authored the opinion, joined by Justices Roberts, Breyer, Alito, Kagan, and Gorsuch. Justice Kagan filed a concurring opinion, joined by Justice Breyer. Justice Gorsuch filed a concurring opinion,

passed by the state of Colorado—the Colorado Anti-Discrimination Act ("CADA").[11] In this 2018 Supreme Court case, a baker violated Colorado's nondiscrimination public accommodation law by refusing to sell a wedding cake to a same-sex couple based on the baker's religious belief about marriage.[12] The Court's decision in *Masterpiece Cakeshop* did not address the merits of the case, but instead held that the Colorado Civil Rights Commission did not comply with the Free Exercise Clause's requirement of religious neutrality when it ruled against the baker.[13] In so holding, Justice Anthony Kennedy counseled:

> 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 beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market.[14]

Many commentators believe the Court will provide further elaboration after hearing *303 Creative LLC v. Elenis*[15] in the upcoming 2022-2023 term.[16] While the Court may do so, it is important to understand both the similarities and differences between these two cases.

Masterpiece Cakeshop, Ltd. is owned and operated by Jack Phillips.[17] Phillips creates custom cakes in his shop located in Lakewood, Colorado.[18] He has created cakes since 1993.[19] Phillips refuses to create custom cakes for same-sex couples, based on his religious belief about marriage.[20] A webpage soliciting donations to support Phillips states, "Jack serves everyone, including people within the LGBT community. What he can't do

joined by Justice Alito. Justice Thomas filed an opinion concurring in part and concurring in the judgment, joined by Justice Gorsuch. Justice Ginsburg filed a dissenting opinion, joined by Justice Sotomayor).

[11] COLO. REV. STAT. § 24-34-601 *et seq.* (2022). CADA, discussed in further detail later in this article, does not allow public accommodation discrimination based on sexual orientation.

[12] *Masterpiece Cakeshop*, 138 S. Ct. at 1723.

[13] *Id.* at 1724.

[14] *Id.* at 1732.

[15] 303 Creative LLC v. Elenis, 6 F.4th 1160 (10th Cir. 2021), *cert. granted in part*, 142 S. Ct. 1106 (2022). Aubrey Elenis is the Director of the Colorado Civil Rights Division.

[16] *Docket Search*, SUPREME COURT, https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/21-476.html (last visited Sept. 12, 2022). The briefs of Respondents were filed on August 12, 2022, and oral arguments held on December 5, 2022.

[17] *Masterpiece Cakeshop*, CONTINUE TO GIVE, https://www.continuetogive.com/4821919?fbclid=IwAR0tWFMyn-Oeeu3Lnpgj_XZgg0lrcTgjXjcdShHO2SOM-xAT4thZQPNct1s (last visited on Aug. 14, 2022).

[18] *Id*.

[19] *Masterpiece Cakeshop*, http://masterpiececakes.com (last visited Nov. 22, 2022).

[20] CONTINUE TO GIVE, *supra* note 17.

is create cakes that express messages or celebrate events in conflict with his religious beliefs."[21]

303 Creative LLC is a Colorado company owned by a sole member, Lorie Smith.[22] Smith offers services, including graphic and website design.[23] Her company does not have a brick-and-mortar (physical) presence.[24] Smith has never offered marriage website design services, but would like to do so for opposite-sex couples.[25] She does not want to offer these services to same-sex couples, based on her religious belief about marriage.[26] Smith intends to post this statement on her website:

> I love weddings. Each wedding is a story in itself, the story of a couple and their special love for each other. I have the privilege of telling the story of your love and commitment by designing a stunning website that promotes your special day and communicates a unique story about your wedding—from the tale of the engagement, to the excitement of the wedding day, to the beautiful life you are building together. I firmly believe that God is calling me to this work. Why? I am personally convicted that He wants me—during these uncertain times for those who believe in biblical marriage—to shine His light and not stay silent. He is calling me to stand up for my faith, to explain His true story about marriage, and to use the talents and business He gave me to publicly proclaim and celebrate His design for marriage as a life-long union between one man and one woman. These same religious convictions that motivate me also prevent me from creating websites promoting and 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.[27]

Part I of this article conveys introductory legal background for this topic, including the development of public accommodation law, instruction regarding the Free Speech Clause, and relevant United States Supreme Court

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[21] *Id.*

[22] *Supreme Court Report: 303 Creative LLC v. Elenis, 21-476*, NATIONAL ASSOCIATION OF ATTORNEY GENERALS (Mar. 9, 2022), https://www.naag.org/attorney-general-journal/supreme-court-report-303-creative-llc-v-elenis-21-476/. Throughout this article, the names 303 Creative and Lorie Smith (and pronouns "her" and "they") are used interchangeably, as Smith is the only member-manager of the business. The two are sometimes referred to as "Appellants" in quoted material.

[23] 303 CREATIVE, http://303creative.com (last visited Aug. 14, 2022).

[24] *See id.*

[25] Petition for Writ of Certiorari for Petitioner at 159a-160a, 303 Creative LLC v. Elenis, 2021 WL 4459045.

[26] NATIONAL ASSOCIATION OF ATTORNEY GENERALS, *supra* note 22.

[27] Petition for Writ of Certiorari for Petitioner at 70a n.7, 303 Creative LLC v. Elenis, 2021 WL 4459045.

decisions. In Part II, the prior proceedings of *303 Creative LLC v. Elenis*[28] are explained, and the framing of the question the Court accepted on certiorari is articulated. In Part III, the major differences between *Masterpiece Cakeshop*[29] and *303 Creative*[30] are discussed: the procedural posture of the two cases; the virtual nature of the case currently under review, particularly with regard to nondiscrimination; and the challenges of personal jurisdiction this case might present. In Part IV, the article concludes by highlighting possible implications should the Court find that 303 Creative LLC may choose its customers based on its religious belief and arguing that identity and dignity compel a decision in favor of requiring adherence without religious exception to nondiscrimination laws.

I. BACKGROUND

A. Public Accommodation and CADA

The history of public accommodation in the law predates the formation of the United States, as shown by a nineteenth century judge from England who stated it this way:

> The innkeeper is not to select his guests[;] [h]e has no right to say to one, you shall come into my inn, and to another you shall not, as everyone coming and conducting himself in a proper manner has a right to be received; and for this purpose innkeepers are a sort of public servants.[31]

Public accommodation law in the United States had its genesis in the immediate aftermath of the Civil War, as shown in Sections 1 and 2 of the Civil Rights Act of 1875:

> Sec. 1. That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accomodations [*sic*], 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.
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> Sec. 2. That any person who shall violate the foregoing section by denying to any citizen, except for reasons by law applicable to citizens of every race and color, and regardless of any previous condition of servitude, the full

[28] 303 Creative LLC v. Elenis, 6 F.4th 1160 (10th Cir. 2021), *cert. granted in part*, 142 S. Ct. 1106 (2022).

[29] Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018).

[30] *303 Creative LLC*, 6 F.4th.

[31] Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston, 515 U.S. 557, 571, 1 (1995) (*quoting* Rex v. Ivens, 7 Car. & P. 213, 219, 173 Eng. Rep. 94, 96 (N. P.1835); M. KONVITZ & T. LESKES, A CENTURY OF CIVIL RIGHTS 160 (1961)).

> enjoyment of any of the accomodations [*sic*], advantages, facilities, or privileges in said section enumerated, or by aiding or inciting such denial, shall, for every such offense, forfeit and pay the sum of $500 to the person aggrieved thereby, to be recovered in an action of debt, with full costs; and shall, also, for every such offense, be deemed guity [*sic*] of a misdemeanor, and upon conviction thereof shall be fined not less than $500 nor more than $1,000, or shall be imprisoned not less than 30 days nor more than one year[.][32]

The Court found these sections of the Act to be unconstitutional, holding there was no ground under the Thirteenth or Fourteenth Amendments for the passage of the Act.[33]

The states filled this void. Nondiscrimination laws passed by states over the years vary in their description of a place of "public accommodation;" for example, the laws in some states have a detailed list of specific places where the law applies,[34] while those in other states have broad statements that

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[32] Civil Rights Cases, 109 U.S. 3, 9 (1883). These sections of the Act illustrate not only what was covered under the Act, but the severity of the punishment if the Act was violated. $500 in 1875 is reported to have a relative inflated worth of $13,992 today; a relative income worth of $104,094.12, $147,844.83 or $206,070.90 today; and a relative project worth of $1,508,181.15. *See* MEASURINGWORTH.COM, https://www.measuringworth.com/dollarvaluetoday/?amount=500&from=1875 (last visited Aug. 12, 2022). $500 was more than the annual wages of most salaries in 1875. *See* MEASURING WORTH.COM, https://libraryguides.missouri.edu/pricesandwages/1870-1879 (last visited Aug. 12, 2022).

[33] *Civil Rights Cases*, 109 U.S. at 9. Justice Harlan disagreed: "If . . . . exemption from discrimination in respect of civil rights is a new constitutional right, secured by the grant of State citizenship to colored citizens of the United States—and I do not see how this can now be questioned—why may not the nation, by means of its own legislation of a primary direct character, guard, protect, and enforce that right?" *Id.* at 49 (Harlan, J., dissenting). Justice Harlan noted the "right" came from the nation, not the "States in which those colored citizens reside." *Id.*

[34] Illinois is such a state. Their law states places of public accommodation include (but are not limited to):

> (1) [A]n inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than 5 units for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor; (2) a restaurant, bar, or other establishment serving food or drink; (3) a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment; (4) an auditorium, convention center, lecture hall, or other place of public gathering; (5) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment; (6) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment; (7) public conveyances on air, water, or land; (8) a terminal, depot, or other station used for specified public transportation; (9) a museum, library, gallery, or other place of public display or collection; (10) a park, zoo, amusement park, or other place of recreation; (11) a non-sectarian nursery, day care center, elementary, secondary, undergraduate, or postgraduate school, or other place of education; (12) a senior citizen center, homeless shelter, food bank, non-sectarian adoption agency, or other social service center establishment; and (13) a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.

775 ILL. COMP. STAT. 5/5-101 (2022).

extend to public accommodation coverage.[35] The states also vary in what status of persons or what types of actions are covered under their laws.[36] With the passage of the Americans With Disabilities Act ("ADA") in 1990,[37] every state has passed a public accommodation ordinance covering disabled individuals; however, in five states, this is the extent of the public accommodation law—the law only covers disabled individuals.[38] Several states have amended their public accommodation laws to include sexual orientation and gender identity.[39] In 2022, nearly half of the fifty states—plus Washington, D.C.—prohibit discrimination based on sexual orientation and gender identity.[40] Colorado's public accommodation law addressing discrimination was first passed in 1885.[41] Today it defines a "place of public accommodation" as follows:

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[35] *See* CAL. CIV. CODE § 51(b) (2016) the California law (a version of which was first enacted in 1872), now known as the Unruh Civil Rights Act, which is very broad and currently reads as follows:

> All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.

Id.

[36] For example, it is a violation of the Connecticut public accommodation statute "for a place of public accommodation, resort or amusement to restrict or limit the right of a mother to breast-feed her child[.]" CONN. GEN. STAT. § 46a-64 (2022).

[37] Americans With Disabilities Act, 42 U.S.C. § 12101, et. seq. (1990). The Americans With Disabilities Act prohibits discrimination in public accommodations: "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. § 12182(a). Further, reasonable modifications are required under the law if "necessary to afford goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the public accommodation can demonstrate that making the modifications would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations." 28 C.F.R. § 36.302 (2022).

[38] The five states are Alabama, Georgia, Mississippi, North Carolina and Texas. *State Pub. Accommodation Laws*, NAT'L CONF. OF STATE LEGISLATURES (June 25, 2021), https://www.ncsl.org/research/civil-and-criminal-justice/state-public-accommodation-laws.aspx#:~:text=Five%20states%E2%80%94Alabama%2C%20Georgia%2C,%2C%20gender%2C%20ancestry%20and%20religion.

[39] The most recent example was in 2020, when Virginia passed the Virginia Human Rights Act, which reads:

> It is the policy of the Commonwealth to . . . . [s]afeguard all individuals within the Commonwealth from unlawful discrimination because of race, color, religion, national origin, sex, pregnancy, childbirth or related medical conditions, age, marital status, sexual orientation, gender identity, military status, or disability in places of public accommodation[.]

Va. Code § 2.2-3900 (2020).

[40] *State Pub. Accommodation Laws, supra* note 38.

[41] Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1725 (2018).

> . . . . [A]ny place of business engaged in any sales to the public and any place offering services, facilities, privileges, advantages, or accommodations to the public, including but not limited to any business offering wholesale or retail sales to the public; any place to eat, drink, sleep, or rest, or any combination thereof; any sporting or recreational area and facility; any public transportation facility; a barber shop, bathhouse, swimming pool, bath, steam or massage parlor, gymnasium, or other establishment conducted to serve the health, appearance, or physical condition of a person; a campsite or trailer camp; a dispensary, clinic, hospital, convalescent home, or other institution for the sick, ailing, aged, or infirm; a mortuary, undertaking parlor, or cemetery; an educational institution; or any public building, park, arena, theater, hall, auditorium, museum, library, exhibit, or public facility of any kind whether indoor or outdoor.[42]

A "church, synagogue, mosque, or other place that is principally used for religious purpose" is not considered a place of public accommodation.[43] CADA addresses both accommodation and communication:

> 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, gender identity, gender expression, 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 . . . .
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> 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, gender identity, gender expression, marital status, national origin, or ancestry.[44]

B. Freedom of Speech

The Free Speech Clause is found in the First Amendment to the United States Constitution (made applicable to the states through the Fourteenth Amendment): "Congress shall make no law respecting an establishment of

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[42] Colo. Rev. Stat. § 24–34–601(1)(2022).

[43] *Id.* The statute also creates an accommodation exception based on sex "if such restriction has a bona fide relationship to the goods, services, facilities, privileges, advantages, or accommodations of such place of public accommodation." Colo. Rev. Stat. § 24-34-601(3)(2022).

[44] Colo. Rev. Stat. § 24–34–601(2)(a)(2022). The statute was amended in 2021 to add gender identity and gender expression.

religion, or prohibiting the free exercise thereof; *or abridging the freedom of speech* or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[45]

"Freedom of speech . . . . [is a] fundamental civil right[] . . . . safeguarded to the individual by the due process clause of the Fourteenth Amendment."[46] The Free Speech Clause "does not end at the spoken or written word,"[47] and "includes both the right to speak freely and the right to refrain from speaking at all."[48] In *West Virginia State Board of Education v. Barnette*, the Supreme Court considered whether public school students could constitutionally refuse to salute the American flag under the Free Speech Clause.[49] In its discussion of the case, holding the students had such a right, the Court noted:

> The freedom asserted by these [students] does not bring them into collision with rights asserted by any other individual. It is such conflicts which most frequently require intervention of the State to determine where the rights of one end and those of another begin. But the refusal of these persons to participate in the ceremony does not interfere with or deny rights of others to do so. . . . The sole conflict is between authority and rights of the individual.[50]

In *Barnette*, the plaintiff students were Jehovah's Witnesses[51] who filed for themselves, and others similarly situated. The Court explained the right to free speech went beyond religion: "[n]or does the issue as we see it turn on one's possession of particular religious views" (or their sincerity); rather, "[w]hile religion supplies appellees' motive for enduring the discomforts of making the issue in this case, many citizens who do not share these religious views hold such a compulsory rite to infringe constitutional liberty of the individual."[52]

In addition to *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, the United States Supreme Court has addressed free speech in other public accommodation cases involving discrimination, including

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[45] Gitlow v. People of State of New York, 268 U.S. 652, 666(1925) (incorporating the First Amendment through the Fourteenth Amendment); U.S. Const. amend. I (emphasis added).

[46] Hague v. Comm. for Indus. Org., 101 F.2d 774, 782 (3rd Cir. 1939).

[47] Texas v. Johnson, 491 U.S. 397, 404 (1989). Compare with the discussion of the flag in State v. Kasnett, 283 N.E.2d 636 (Ohio Ct. App. 4th District), *rev'd*, 34 Ohio St. 2d 193 (1973) (the law firm of Lavelle & Yanity argued this case and won on appeal. Lavelle was the author's father).

[48] Wooley v. Maynard, 430 U.S. 705, 714 (1977).

[49] West Virginia v. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

[50] *Id.* at 630.

[51] "The Witnesses are an unincorporated body teaching that the obligation imposed by law of God is superior to that of laws enacted by temporal government." *Id.* at 629.

[52] *Id.* at 634.

Roberts v. U.S. Jaycees;[53] *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*;[54] and *Boy Scouts of America v. Dale*.[55] Additionally, the Court has addressed free speech in public institutions involving discrimination, including *Rumsfeld v. Forum for Academic and Institutional Rights*[56] and *Christian Legal Society v. Martinez*.[57] The following are summaries of these cases, with particular attention given to these issues now presented in *303 Creative LLC v. Elenis*.[58]

1. Roberts v. U.S. Jaycees

The case of *Roberts v. U.S. Jaycees* involved a conflict between the Minnesota Human Rights Act and the practice of a private organization, the United States Jaycees, a non-profit corporation formed in 1920.[59] The Act stated it was a discriminatory practice for a business[60] "to deny any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation because of race, color, creed, religion, disability, national origin or sex."[61] The bylaws made clear that the Jaycees was created to further "the growth and development of young men's civic organizations in the United States."[62] Indeed, by the time of trial in this case, there were "approximately 295,000 members in 7,400 local chapters affiliated with fifty-one state organizations" in the Jaycees.[63] There were also approximately 11,915 associate members.[64]

Women filed charges of discrimination with the Minnesota Department of Human Rights, asserting they were entitled to full membership in the Jaycees under the Act.[65] The Jaycees argued such a requirement would violate its rights of free speech and association under the United States

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[53] Roberts v. U.S. Jaycees, 468 U.S. 609 (1984).

[54] Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston, 515 U.S. 557 (1995).

[55] Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000).

[56] Rumsfeld v. Forum for Acad. & Institutional Rts., 547 U.S. 47 (2006).

[57] Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the L. v. Martinez, 561 U.S. 661(2010).

[58] 303 Creative LLC v. Elenis, 6 F.4th 1160 (2021), *cert. granted in part,* 142 S. Ct. 1106 (2022).

[59] Roberts v. U.S. Jaycees, 468 U.S. 609, 612 (1984).

[60] Specifically, the Act defined "place of public accommodation" as "a business, accommodation, refreshment, entertainment, recreation, or transportation facility of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages or accommodations are extended, offered, sold, or otherwise made available to the public." MINN. STAT. § 363A.03, subd. 35 (2022); *Roberts*, 468 U.S. at 615.

[61] MINN. STAT. § 363A.03, subd. 48 (2022). An "unfair discriminatory practice" is "any act described in sections 363A.08 to 363A.19 and 363A.28, subdivision 10."

[62] *Roberts*, 468 U.S. at 612.

[63] *Id.* at 613.

[64] *Id.*

[65] *Id.* at 615.

Constitution.[66] After the Minnesota Supreme Court determined by certification that the Jaycees was indeed a "place of public accommodation," the District Court found in favor of the Department.[67] The Eighth Circuit Court of Appeals reversed, noting because the Jaycees advocated "for political and public causes," its "right to select its members [was] protected by the freedom of association guaranteed by the First Amendment."[68] The Court of Appeals also held the organization was not "wholly public" and the state interest of anti-discrimination had been "asserted selectively."[69]

On appeal, the United States Supreme Court first discussed its doctrine related to "freedom of association."[70] One line of decisions it referenced referred to "a right to associate for the purpose of engaging in those activities protected by the First Amendment," such as freedom of speech, stating the "Constitution guarantees freedom of association of this kind as an indispensable means of preserving other individual liberties."[71] The Court, however, pointed out the nature and degree of these associational liberties "may vary depending on the extent to which one or the other aspect of the constitutionally protected liberty is at stake in a given case."[72] Factors determining "the limits of state authority over an individual's freedom to enter into a particular association . . . . include size, purpose, policies, selectivity, congeniality, and other characteristics that in a particular case may be pertinent."[73] The Court concluded the characteristics of the Jaycees chapters were lacking in this regard, and then addressed whether applying the Minnesota Act infringed upon the Jaycees' freedom of expressive association.[74]

Importantly, the Court explained implicit rights found in the First Amendment: "we have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends."[75] The Court categorized the form of infringement upon the associational freedom in *Jaycees* as one that "interfere[s] with the internal organization or affairs of the group."[76] The

66 *Id.*

67 *Id.* at 616.

68 *Id.* at 617.

69 *Id.* The Court of Appeals also held alternatively the statute was "vague as construed and applied and therefore unconstitutional under the Due Process Clause of the Fourteenth Amendment." *Id.*

70 *Id.*

71 *Id.* at 618.

72 *Id.* at 618.

73 *Id*. at 620.

74 *Id*.

75 *Id*. at 622.

76 *Id.* at 623.

Court ultimately held "that Minnesota's compelling interest in eradicating discrimination against its female citizens justifies the impact that application of the statute to the Jaycees may have on the male members' associational freedoms."[77] The Court explained: "[T]he Act reflects the State's strong historical commitment to eliminating discrimination and assuring its citizens equal access to publicly available goods and services. . . . That goal, which is unrelated to the suppression of expression, plainly serves compelling state interests of the highest order."[78]

Referencing "archaic and overbroad assumptions about the relative needs and capacities of the sexes" that led to "stereotypical notions" that bore "no relationship to their actual abilities," the Court stated concerns that the exclusion of these members deprived them of their individual dignity and denied society the benefit of their participation.[79] The Court said these concerns were "strongly implicated with respect to gender discrimination in the allocation of publicly available goods and services."[80] As to arguments that admitting women as members in the Jaycees would implicate First Amendment protections, the Court responded that there was no basis in the record to show "that admission of women as full voting members [would] impede the organization's ability to engage in [constitutionally] protected activities or to disseminate its preferred views."[81] Finally, the Court stated the Act "respond[ed] precisely to the substantive problem which legitimately concern[ed] the State and abridge[d] no more speech or associational freedom than [was] necessary to accomplish that purpose."[82]

2. Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston

The defendants in *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston* were organizers of a parade held yearly in Boston celebrating St. Patrick's Day.[83] The City formally sponsored the parade until 1947.[84] Thereafter, the parade was organized by the South Boston Allied War Veterans Council ("Council"). However, the City provided funding and printing services and let the organizers use the City's official seal through

[77] *Id.* at 623.

[78] *Id.* at 624. The Court cited a brief history of public accommodation law in the United States, and specifically the Minnesota Act, noting it had been progressively broadened through the years in terms of persons covered (race and sex) as well as covered facilities. *Id.*

[79] *Id.* at 625.

[80] *Id.*

[81] *Id.* at 627.

[82] *Id.* at 629; *see also* Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987).

[83] Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston, 515 U.S. 557, 560 (1995).

[84] *Id.*

1992.[85] The parade "at times ha[d] included as many as twenty thousand marchers and drawn up to one million watchers."[86] In 1992, Irish members of the Gay, Lesbian and Bisexual Community of Boston ("GLIB") submitted an application to march in the parade.[87] Although denied by the Council, GLIB was able to march that year due to a state court order.[88] Denied again in 1993, GLIB filed a lawsuit in state court against the Council and the City of Boston alleging violations of the Massachusetts Constitution, the United States Constitution, and the state public accommodations law.[89] In pertinent part, this law prohibited "any distinction, discrimination or restriction on account of . . . . sexual orientation . . . . relative to the admission of any person to, or treatment in any place of public accommodation, resort or amusement."[90] The Council argued the parade was private, and they had a First Amendment right to expressive association.[91]

After first finding the parade met the statute's definition of a public accommodation, the Massachusetts trial court:

> [F]ound it impossible to discern any specific expressive purpose entitling the Parade to protection under the First Amendment. . . . It concluded the parade [was] "not an exercise of [the Council's] constitutionally protected right of expressive association," but instead "an open recreational event that is subject to the public accommodations law."[92]

The decision was affirmed by the Supreme Judicial Court of Massachusetts.[93]

On appeal, the United States Supreme Court held, "to admit a parade contingent expressing a message not of the private organizers' own choosing violates the First Amendment."[94] The Court surveyed the purpose behind parades, noting they are inherently expressive.[95] Speaking specifically to a "parade," the Court pointed out the word "parade" is used "to indicate marchers who are making some sort of collective point, not just to each other but to bystanders along the way."[96] According to the Court, GLIB

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[85] *Id.* at 560-61. Despite this, a legal argument regarding the city's continued involvement with the parade through 1992 (and possible state action) was apparently abandoned on appeal. *Id*. at 566.

[86] *Id.* at 561-62.

[87] *Id.*

[88] *Id.*

[89] *Id.*

[90] *Id.*; MASS. GEN. LAWS ch. 272 § 98 (2022).

[91] *Hurley*, 515 U.S. at 562-63.

[92] *Id.* at 563.

[93] *Id.*

[94] *Id.* at 566.

[95] *Id.* at 568.

[96] *Id.*

improperly wanted to express its own message as part of the Council's existing private parade.[97] The Court explained:

> Since every participating unit [in the parade] affects the message conveyed by the private organizers, the state courts' application of the [public accommodation] statute produced an order essentially requiring petitioners to alter the expressive content of their parade. . . . Under the [state court's] approach any contingent of protected individuals with a message would have the right to participate in petitioners' speech, so that the communication produced by the private organizers would be shaped by all those protected by the law who wished to join in with some expressive demonstration of their own. But this use of the State's power violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message.[98]

As part of its analysis, the Court discussed *Turner Broadcasting System, Inc. v. FCC*.[99] GLIB asserted the reasoning in *Turner Broadcasting* supported an argument that allowing GLIB to participate in the Council's parade would not be considered unconstitutional expression.[100] In *Turner Broadcasting*, which dealt with a cable operator, the Court found channels were "conduits," and "[g]iven cable's long history of serving as a conduit for broadcast signals, there appear[ed] little risk that cable viewers would assume that the broadcast stations carried on a cable system convey ideas or messages endorsed by the cable operator."[101] The *Turner Broadcasting* Court noted it was "common practice for broadcasters to disclaim any identity of viewpoint between the management and the speakers who use the broadcast facility."[102] The Court applied the threshold standard of review under the Free Speech Clause, requiring that, no matter what the level of scrutiny, "a challenged restriction on speech serve a compelling, or at least important, governmental object."[103]

Returning to the argument that GLIB should not be denied participation in the parade under Massachusetts' public accommodation law, the Court

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97 *Id.* at 572-73.

98 *Id.* The Court likened this message to a musical piece: "Rather like a composer, the Council selects the expressive units of the parade from potential participants, and though the score may not produce a particularized message, each contingent's expression in the Council's eyes comports with what merits celebration on that day." *Id.* at 574.

99 Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622 (1994).

100 *Hurley*, 515 U.S. at 575.

101 *Id.* at 576 (quoting *Turner Broad. Sys., Inc.,* 512 U.S. at 655). The *Hurley* Court noted a further distinction between *Turner Broadcasting* and *Hurley*: it was "not only a conduit for speech produced by others," but was "a franchised channel giving monopolistic opportunity to shut out some speakers. This power gives rise to the Government's interest in limiting monopolistic autonomy in order to allow for the survival of broadcasters who might otherwise be silenced and consequently destroyed." *Id.* at 577.

102 *Hurley*, 515 U.S. at 576 (quoting *Turner Broad. Sys., Inc.*, 512 U.S. at 684).

103 *Id.* at 577; *see Turner Broad. Sys., Inc.*, 512 U.S. at 662.

reiterated the parade took place on a public thoroughfare, and emphasized that for purposes of assembly, "[o]ur tradition of free speech commands that a speaker who takes to the street corner to express his views in this way should be free from interference by the State based on the content of what he says."[104] Finally, the Court compared *Hurley* to *PruneYard Shopping Center v. Robins*, a case where the Court held shopping mall owners could not turn away visitors soliciting signatures on political petitions.[105] The Court's reasoning was because:

> [T]he proprietors were running "a business establishment that [was] open to the public to come and go as they please," that the solicitations would "not likely be identified with those of the owner," and that the proprietors could "expressly disavow any connection with the message by simply posting signs in the area where the speakers or handbillers stand."[106]

3. Boy Scouts of America v. Dale

The conflict in *Boy Scouts of America v. Dale* was between the Boy Scouts of America ("BSA"), a private, not-for-profit organization, and James Dale.[107] BSA revoked Dale's adult membership when it learned Dale was gay.[108] Dale brought suit against BSA asserting a violation of New Jersey's public accommodation law.[109] The United States Supreme Court held the law did not require Dale to be admitted into BSA because this requirement was a violation of BSA's First Amendment right of expressive association.[110] The Court's analysis here was largely based on its reasoning in *Roberts v. United States Jaycees*.[111] Noting "the forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints[,]"[112] the Court went on to state this freedom is not absolute, and it could be overridden by laws adopted to serve compelling state interests.[113] The Court stated it first needed to determine whether BSA had engaged in expressive association; after an independent review of the record, the Court determined that it had.[114] Next, the Court

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104 *Hurley*, 515 U.S. at 579.

105 Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74 (1980).

106 *Hurley*, 515 U.S. at 580 (quoting *Pruneyard Shopping Ctr*., 447 U.S. at 87).

107 Boy Scouts of Am. v. Dale, 530 U.S. 640, 644 (2000).

108 *Id.*

109 *Id.* at 645.

110 *Id.*

111 *See id.;* Roberts v. U.S. Jaycees, 468 U.S. 609 (1984).

112 *Boy Scouts of Am.*, 530 U.S. at 648.

113 *Id.*

114 *Id.* at 648-50.

examined whether forcing BSA to admit Dale would significantly affect its "ability to advocate public or private viewpoints."[115] The Court found that BSA did "not want to promote homosexual conduct as a legitimate form of behavior," and did not believe "homosexuality and leadership in Scouting" were appropriate.[116] Analogizing Dale to GLIB in *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, the Court noted "the presence of Dale as an assistant scoutmaster would just as surely interfere with the Boy Scouts' choice not to propound a point of view contrary to its beliefs."[117]

The Court discussed the history of public accommodation law, its early application in traditional places such as inns and trains, and its evolution to cover such activities as summer camps and rooftop gardens.[118] Further, the Court noted with its application to BSA, the law in *Dale* was not tied to a physical location.[119] The Court opined, "[a]s the definition of 'public accommodation' has expanded from clearly commercial entities, such as restaurants, bars, and hotels, to membership organizations such as the Boy Scouts, the potential for conflict between state public accommodations laws and the First Amendment rights of organizations has increased."[120] The Court settled the conflict in *Dale* by finding the state interests sought in New Jersey's public accommodations law did "not justify such a severe intrusion on the Boy Scouts' rights to freedom of expressive association."[121]

4. Rumsfeld v. Forum for Academic and Institutional Rights

The 2006 case of *Rumsfeld v. Forum for Academic and Institutional Rights* addressed a conflict between the United States military and an association of law schools and faculty known as the Forum for Academic and Institutional Rights, Inc. ("FAIR").[122] At that time, the U.S. military operated under a policy known as, "Don't Ask, Don't Tell," which prohibited openly

[115] *Id.* at 650-53.

[116] *Id.* at 651-52.

[117] *Id.* at 654.

[118] *Id.* at 656-57.

[119] *Id*. at 657.

[120] *Id*. at 657.

[121] *Id.* at 659. In his dissent, joined by Justices Souter, Ginsburg, and Breyer, Justice Stevens argued the record did not support the 5-4 decision in *Dale*. First noting it was "difficult to discern any shared goals or common moral stance on homosexuality[,]" Justice Stevens then quoted part of a "non-publicly expressed" position paper in the record supporting his position: "5. Q. Should a professional or non-professional individual who openly declares himself to be a homosexual be terminated? A. Yes, *in the absence of any law to the contrary*. At the present time we are unaware of any statute or ordinance in the United States which prohibits discrimination against individual's employment upon the basis of homosexuality. *In the event that such a law was applicable, it would be necessary for the Boy Scouts of America to obey it[.]* . . . [i]t is our position, however, that homosexuality and professional or non-professional employment in Scouting are not appropriate." *Id*. at 670-71 (Stevens, J., dissenting).

[122] Rumsfeld v. F. for Acad. & Institutional Rts., Inc., 547 U.S. 47 (2006).

gay people from serving in the military.[123] The policy was a result of a determination by Congress that a "prohibition against homosexual conduct is a long-standing element of military law that continues to be necessary in the unique circumstances of military service."[124]

FAIR's mission was "to promote academic freedom, support educational institutions in opposing discrimination and vindicate the rights of institutions of higher education."[125] To this end, FAIR had adopted a policy opposing discrimination based on sexual orientation.[126] As a result of this policy, FAIR's law schools stopped allowing the U.S. military to recruit at their institutions.[127] In response, Congress passed the Solomon Amendment, which specified "if any part of an institution of higher education denies military recruiters access equal to that provided other recruiters, the entire institution would lose certain federal funds."[128] FAIR sued to enjoin enforcement of the Solomon Amendment, alleging violation of their First Amendment rights of freedom of speech and association.[129]

The Supreme Court construed the wording of the Solomon Amendment and found it did not "focus on the *content* of a school's recruiting policy," but rather, the "access . . . . provided" to military recruiters; therefore, the Court found military recruiters must be "given access to students at least equal to that '*provided* to any other employer.'"[130] The Court noted that "[i]t is clear that a funding condition cannot be unconstitutional if it could be constitutionally imposed directly."[131] The Court went on to explain that "[b]ecause the First Amendment would not prevent Congress from directly imposing the Solomon Amendment's access requirement, the statute [did] not place an unconstitutional condition on the receipt of federal funds."[132]

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123 Three findings would lead to the dismissal of service members: 1. if "the service member engaged or attempted to engage in homosexual acts;" 2. if "the service member married or attempted to marry a person of the same sex;" or 3. if "the service member 'stated that he or she is a homosexual . . . . unless there is a further finding . . . . that the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.'" Thomasson v. Perry, 80 F.3d 915, 920 (4th Cir. 1996); *see generally* Witt v. U.S. Dep't of Air Force, 739 F. Supp. 2d 1308 (W.D. Wash. 2010).

124 10 U.S.C. § 654(a)(13) (1993) (repealed 2010); *Thomasson*, 80 F.3d at 920. Congress also found that members of the military that demonstrated a "propensity or intent to engage in homosexual acts [ ] create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability." 10 U.S.C. § 654(a)(15) (1993) (repealed 2010); *Thomasson*, 80 F.3d at 920.

125 *Rumsfeld*, 547 U.S. at 52.

126 *Id.*

127 *Id.*

128 *Id.*

129 *Id.* at 53.

130 *Id.* at 57.

131 *Id.* at 59-60; *see also* Speiser v. Randall, 357 U.S. 513, 526 (1958).

132 *Rumsfeld*, 547 U.S. at 59-60.

The Court addressed FAIR's First Amendment arguments, stating the Solomon Amendment did not limit what the law schools could say, or require them to say anything.[133] The Court explained, "[t]he Solomon Amendment regulates conduct, not speech. It affects what law schools must *do*—afford equal access to military recruiters—not what they may or may not *say*."[134]

FAIR argued they were put in the untenable position of being denied their freedom of speech and being compelled to speak the military's message by sending out e-mails and posting flyers on their behalf, and by being required to allow the military's representatives to speak while they were on campus.[135] While the Court acknowledged these acts did include elements of speech, it explained they were "incidental to the Solomon Amendment's regulation of conduct. . . ."[136] The Court also contrasted this case with previous decisions:

> In this case, accommodating the military's message does not affect the law schools' speech, because the schools are not speaking when they host interviews and recruiting receptions. Unlike a parade organizer's choice of parade contingents, a law school's decision to allow recruiters on campus is not inherently expressive. Law schools facilitate recruiting to assist their students in obtaining jobs. A law school's recruiting services lack the expressive quality of a parade, a newsletter, or the editorial page of a newspaper; its accommodation of a military recruiter's message is not compelled speech because the accommodation does not sufficiently interfere with any message of the school.[137]

Still, FAIR argued that, by being required to accommodate both military and nonmilitary recruiters, they "could be viewed as sending the message that they see nothing wrong with the military's policies, when they do."[138] Rejecting this argument, the Court cited *PruneYard Shopping Center v. Robins*, explaining it previously:

> [U]pheld a state law requiring a shopping center owner to allow certain expressive activities by others on its property. We explained that there was little likelihood that the views of those engaging in the expressive activities would be identified with the owner, who remained free to disassociate

[133] *Id.* at 60.

[134] *Id.* "Law schools remain free under the statute to express whatever views they may have on the military's congressionally mandated employment policy, all the while retaining eligibility for federal funds." *Id.* The Solicitor General stated the law schools "could put signs on the bulletin board next to the door, they could engage in speech, they could help organize student protests." *Id.*

[135] *Id.* at 62.

[136] *Id.*

[137] *Id.* at 64.

[138] *Id.* at 65.

> himself from those views and who was "not . . . . being compelled to affirm [a] belief in any governmentally prescribed position or view."[139]

Finally, the Court stated that there was no violation of FAIR's freedom of expressive association. The Court noted the military recruiters were not part of FAIR's law schools, coming from outside of the law schools for the limited purpose of hiring students.[140] Their brief interactions with the FAIR law schools did not interfere with FAIR's "ability to express its message."[141]

5. Christian Legal Society v. Martinez

In *Christian Legal Society v. Martinez*, the Hastings College of the Law required all registered student organizations ("RSOs") to follow the law school's policy on nondiscrimination.[142] This created a conflict for the law school's Christian Legal Society ("CLS").[143] The policy required the following:

> [Hastings] is committed to a policy against legally impermissible, arbitrary or unreasonable discriminatory practices. All groups, including administration, faculty, student governments, [Hastings]-owned student residence facilities and programs sponsored by [Hastings], are governed by this policy of nondiscrimination. [Hastings'] policy on nondiscrimination is to comply fully with applicable law.
>
> [Hastings] shall not discriminate unlawfully on the basis of race, color, religion, national origin, ancestry, disability, age, sex or sexual orientation. This nondiscrimination policy covers admission, access and treatment in Hastings-sponsored programs and activities.[144]

An RSO at the law school was categorized as an officially recognized group and required adherence to certain conditions, such as complying with the nondiscrimination policy.[145] RSOs were able to seek funding from the law school, participate in the yearly student organization fair (a means of recruitment for groups), use law school facilities and the law school's name and logo, and advertise their events though the law school's newsletter and other means of communication.[146]

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[139] *Id.* at 65 (quoting PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 88 (1980)).

[140] *Id.* at 69.

[141] *Id.* at 68.

[142] Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the L. v. Martinez, 561 U.S. 661, 670 (2010).

[143] *Id.* at 672. "CLS–National, an association of Christian lawyers and law students, charters student chapters at law schools throughout the country." *Id*. at 671.

[144] *Id.* at 670.

[145] *Id.* at 669-70.

[146] *Id.*

The law school's interpretation of its nondiscrimination policy mandated that every RSO be open to every law student.[147] Specifically, the RSOs were required to "allow any student to participate, become a member, or seek leadership positions in the organization, regardless of [their] status or beliefs."[148] CLS challenged this policy, because its chapter members were required to sign a "Statement of Faith" that required they follow certain principles.[149] Included in these tenets was "the belief that sexual activity should not occur outside of marriage between a man and a woman; CLS thus interpret[ed] its bylaws to exclude from affiliation anyone who engage[d] in 'unrepentant homosexual conduct.'"[150]

When CLS informed the law school that it sought exemption from the nondiscrimination policy, Hastings responded by denying the request, noting that following the policy was required in order to be an RSO.[151] However, the law school made it clear to the group that it could still use law school facilities for meetings and activities and could post information on bulletin boards on the campus.[152]

As a result, CLS filed a lawsuit against Hastings under 42 U.S.C. § 1983, alleging the refusal to grant CLS RSO status violated its First and Fourteenth Amendment rights to free speech, expressive association, and free exercise of religion.[153] Hastings prevailed at the district and appellate level, and CSL appealed the case to the United States Supreme Court, which granted certiorari.[154]

The Court affirmed the judgment of the lower court.[155] In so holding, with regard to freedom of association, the Court noted "[i]n the context of public accommodations, we have subjected restrictions on that freedom to close scrutiny; such restrictions are permitted only if they serve 'compelling state interests' that are 'unrelated to the suppression of ideas'—interests that cannot be advanced 'through . . . . significantly less restrictive [means].'"[156] CLS argued that "who" spoke on their behalf colored what "concept" was conveyed.[157]

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147 *Id.* at 671.

148 *Id.*

149 *Id.* at 672.

150 *Id.*

151 *Id.* at 673.

152 *Id.*

153 *Id.*; 42 U.S.C. § 1983.

154 *Christian Legal Soc'y*, 561 U.S. at 673-74. The U.S. District Court for the Northern District of California and the Ninth Circuit Court of Appeals each ruled in favor of the law school. *Id.*

155 *Id.*

156 *Id.* at 680 (citing Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984); Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000)).

157 *Id.* at 680 (emphasis omitted).

In analyzing CLS's speech and association rights, the Court looked to limited-public-forum school precedents.[158] The Court found these precedents "adequately respect[ed] both CLS's speech and expressive-association rights, and fairly balance[d] those rights against Hastings' interests as property owner and educational institution."[159] The Court explained each precedent case relied on applying policies in the limited public forum context that were viewpoint neutral.[160] The Court reiterated that "[t]he State may not exclude speech where its distinction is not reasonable in light of the purpose served by the forum . . . . nor may it discriminate against speech on the basis of . . . . viewpoint."[161] The Court ultimately held the justifications given by the law school supported the all-comers requirement for RSOs at the institution; particularly because CLS still had a way to maintain a presence at Hastings (much like private groups): "when access barriers are viewpoint neutral, our decisions have counted it significant that other available avenues for the group to exercise its First Amendment rights lessen the burden created by those barriers."[162] Finally, in examining the policy to make sure it was viewpoint neutral, the Court stated, "[i]t is . . . . hard to imagine a more viewpoint-neutral policy than one requiring all student groups to accept all comers."[163]

II. PRIOR PROCEEDINGS OF 303 CREATIVE LLC V. ELENIS

According to her website, Lorie Smith, the owner of 303 Creative LLC, has worked for over a decade providing "marketing, advertising, graphic design, branding, strategy, and social media consultation services to businesses and organizations large and small."[164] Several years ago, she wanted to expand her services to include marriage website design, but only offer these to opposite-sex couples.[165] Colorado's public accommodation law, CADA, barred businesses from discriminating on the basis of a person's sexual orientation.[166] Therefore, on September 20, 2016, Smith sought a preliminary injunction in United States District Court in the District of

158 *Id.*

159 *Id.* at 683.

160 *Id.*

161 *Id.* at 685 (quoting Rosenberger v. Rector, 515 U.S. 819, 829 (1995)).

162 *Id.* at 690-91.

163 *Id.* at 694. In his concurrence, Justice Stevens notes "the policy may end up having greater consequence for religious groups—whether and to what extent it will is far from clear *ex ante*—inasmuch as they are more likely than their secular counterparts to wish to exclude students of particular faiths." *Id*. at 700 (Stevens, J., concurring).

164 303 CREATIVE, *supra* note 23.

165 Complaint, 303 Creative LLC et al v. Elenis et al, at 3,4, 1:16-cv-02372 (D. Colorado Sept. 20, 2016).

166 *Id.* at 29.

Colorado to enjoin the Colorado Civil Rights Commission's enforcement of CADA as applied to her proposed website.[167] The District Court denied the injunction and ultimately found the Commission was entitled to summary judgment.[168] The judgment was appealed to the United States Court of Appeals for the Tenth Circuit.[169]

Smith argued on appeal that the District Court erred in finding the Accommodation and Communication Clauses of CADA did not compel speech.[170] Beginning its discussion related to the Accommodation Clause, the Court of Appeals first noted that Smith's creation of a wedding website would be pure speech, similar to wedding videos and invitations which were found to be speech in other cases.[171] The Court of Appeals distinguished the speech in *303 Creative LLC v. Elenis* from the speech in *Rumsfeld.*[172] In *303 Creative*, the custom and unique services at issue were expressive speech; in *Rumsfeld*, the accommodation of military recruiters was not inherently expressive speech.[173] The Court of Appeals also compared the speech in *303 Creative* with that in *Hurley,* stating that the *303 Creative* speech was more expressive because, in *Hurley*, the parade organizer lacked a "particularized message" and the speech could be initially generated by the participants, not the organizer.[174] The Court of Appeals further stated that Smith's speech was not to be categorized as "commercial conduct" simply because she would be paid for her services.[175]

In sum, the Court of Appeals opined that the Accommodation Clause would compel Smith "to create speech that celebrates same-sex marriages."[176] Citing *Hurley*, the Court of Appeals stated, "[b]y compelling Appellants to serve customers they would otherwise refuse, Appellants are forced to create websites—and thus, speech—that they would otherwise refuse."[177] Referencing *Rumsfeld*, the Court of Appeals continued: "compelled speech may be found where 'the complaining speaker's own

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[167] *Id.* at 59 (Prayer for Relief, para. 1).

[168] 303 Creative LLC v. Elenis, 6 F.4th 1160 (10th Cir. 2021), *cert. granted in part*, 142 S. Ct. 1106 (2022).

[169] *Id.*

[170] *Id.* at 1170-71. Smith also challenged the District Court's judgment that she lacked standing to challenge the Accommodation Clause, and the District Court's rejection of her overbreadth and vagueness challenges to the Communication Clause.

[171] *Id.* at 1176 (citing Telescope Media Grp. v. Lucero, 936 F.3d 740, 751–52 (8th Cir. 2019) (wedding videographers engaged in speech); Brush & Nib Studio, LC v. City of Phx., 247 Ariz. 269 (2019) (custom wedding invitations are pure speech)).

[172] *303 Creative*, 6 F.4th at 1176.

[173] *Id.*

[174] *Id.* at 1177.

[175] *Id.*

[176] *Id.*

[177] *Id.*

message was affected by the speech it was forced to accommodate.'"[178] Therefore, the Court of Appeals concluded, "because the Accommodation Clause compels speech in this case, it also works as a content-based restriction."[179]

The Court of Appeals then turned to the applicable standard of review: strict scrutiny. The question at issue here was whether the speech was considered compelled speech or a content-based restriction.[180] To survive strict scrutiny, CADA's Accommodation Clause was required to be narrowly tailored in order to serve a compelling interest.[181] The Court of Appeals discussed these interests, writing:

> Here, Colorado has a compelling interest in protecting both the dignity interests of members of marginalized groups and their material interests in accessing the commercial marketplace. . . . Colorado's interest in preventing both dignitary and material harms to LGBT people is well documented. Colorado has a unique interest in remedying its own discrimination against LGBT people. . . . Even setting Colorado's history aside, Colorado, like many other states, has an interest in preventing ongoing discrimination against LGBT people.[182]

Having addressed the compelling interest, the Court of Appeals explained that CADA was also narrowly tailored to the state's interest of "equal access to publicly available goods and services."[183] The Court of Appeals continued: "[w]hen regulating commercial entities, like Appellants, public accommodations laws help ensure a free and open economy. Thus, although the commercial nature of Appellants' business does not diminish their speech interest, it does provide Colorado with a state interest absent when regulating non-commercial activity."[184]

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178 *Id.* at 1177-78.

179 *Id.* at 1178 (citing Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361 (2018) and Riley v. Nat'l Fed. of Blind of N.C., Inc., 487 U.S. 781 (1988)). The Court in *303 Creative* noted that an examination of CADA's purpose and history explain its content-based restriction, one based on "a long and invidious history of discrimination based on sexual orientation." *Id.*

180 *Id.*

181 *Id.*

182 *Id.* (citing Roberts v. U.S. Jaycees*,* 468 U.S. 609 (1984)).

183 *Id.* (quoting *Roberts*, 468 U.S. at 624).

184 *303 Creative*, 6 F.4th at 1179. The Court also compared *Roberts*, 468 U.S. at 626 (recognizing "the changing nature of the American economy and of the importance, both to the individual and to society, of removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups") with *Boy Scouts of Am. v. Dale,* 530 U.S. 640, 657 (2000) ("As the definition of 'public accommodation' has expanded from clearly commercial entities, such as restaurants, bars, and hotels, to membership organizations such as the Boy Scouts, the potential for conflict between state public accommodations laws and the First Amendment rights of organizations has increased.").

The Court of Appeals also discussed the United State Supreme Court's decision in *Heart of Atlanta Motel v. United States* and its reference to the "commercial consequences of public accommodation laws."[185] The Court of Appeals explained the effect that racial discrimination had on the economy discussed in *Heart of Atlanta Motel*, and that this "discouraged interstate commerce" by some travelers.[186] Further, the Court of Appeals noted Smith's specific "custom and unique services" would not be available elsewhere for same-sex couples, relegating same-sex couples to "an inferior market;" therefore, there was "no less intrusive means of providing equal access to those types of services."[187] Finally, the Court of Appeals emphasized it did not question Smith's sincere religious belief or good faith, but it failed to see how this should excuse the business from CADA: "[Smith's] intent has no bearing on whether, as a consequence, same-sex couples have limited access to goods or services."[188] The Court of Appeals concluded its discussion related to the Accommodation Clause by noting the Supreme Court's emphasis on the importance of public accommodation laws, even when facing a constitutional challenge.[189]

Turning to the Communication Clause, the Court of Appeals found it was not a violation of Smith's free speech rights to prohibit her from publishing a statement on her website indicating that service will be denied to same-sex couples.[190] Noting the "intertwined" nature of the two clauses, the Court of Appeals stated that, because it "concluded that the First Amendment [did] not protect Appellants' proposed denial of services," it also

185 *303 Creative*, 6 F.4th at 1179-80.

186 *Id* at 1180.

187 *Id.* The Court compared Smith's services to those of a monopoly, because only Smith existed in the market of "custom-made wedding websites of the same quality and nature as those made by Appellants." *Id.* The Court also rejected case comparisons to Brush & Nib Studio, LC v. City of Phx., 247 Ariz. 269 (2019) (the Arizona Supreme Court held exempting custom wedding invitations from a public accommodation law would not undermine the law's purpose). The *303 Creative* court agreed that custom products often implicated speech, but that it was "not difficult to imagine the problems created where a wide range of custom-made services are available to a favored group of people, and a disfavored group is relegated to a narrower selection of generic services. Thus, unique goods and services are where public accommodation laws are most necessary to ensuring equal access." *303 Creative*, 6 F.4th at 1181.

188 *303 Creative*, 6 F.4th at 1181.

189 *Id.* at 1182 (citing Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1728 (2018) ("It is unexceptional that Colorado law can protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public."); Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, 515 U.S. 557, 572 (1995) ("Provisions like these are well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general matter, violate the First or Fourteenth Amendments."); Heart of Atlanta Motel v. U.S., 379 U.S. 249, 260 (1964) ("[I]n a long line of cases this Court has rejected the claim that the prohibition of racial discrimination in public accommodations interferes with personal liberty.")).

190 *303 Creative*, 6 F.4th at 1182.

concluded "that the First Amendment [did] not protect the Proposed Statement."[191] After rejecting an argument that CADA violated the Free Exercise Clause, using the test laid out in the United States Supreme Court decision of *Employment Division Department of Human Resources of Oregon v. Smith,*[192] the Court of Appeals affirmed the judgment of the District Court.[193] Thereafter, Smith filed a petition for certiorari with the United States Supreme Court. The questions presented by Smith were the following:

> 1. Whether applying a public-accommodation law to compel an artist to speak or stay silent, contrary to the artist's sincerely held religious beliefs, violates the Free Speech or Free Exercise Clauses of the First Amendment.
> 2. Whether a public-accommodation law that authorizes secular but not religious exemptions is generally applicable under [*Employment Division Department of Human Resources of Oregon v. Smith*],[194] and if so, whether this Court should overrule *Smith*.[195]

The Court granted the petition on February 22, 2022, reworking and limiting the question granted on appeal to ask "[w]hether applying a public-accommodation law to compel an artist to speak or stay silent violates the Free Speech Clause of the First Amendment."[196] Therefore, the Court narrowed the original petition by excluding references to "sincerely held religious beliefs" and the Free Exercise Clause, as well as the question to consider overruling *Employment Division Department of Human Resources of Oregon v. Smith*.[197] The Court also rejected the reference in the original petition to "secular exemptions."[198]

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191 *Id.* at 1182-83.

192 *Id.* at 1205-206 (citing Emp. Div., Dep't. of Human Res. of Or. v. Smith, 494 U.S. 872, 878-79 (1990)).

193 *303 Creative*, 6 F.4th at 1183-90. In rejecting this claim, the Court reviewed whether CADA was a neutral law of general applicability.

194 *Id.*

195 *Brief On Petition for Writ of Certiorari for Petitioner at 2*, 303 Creative LLC v. Elenis, 2021 WL 4459045 (2021). In Fulton v. City of Phila., Pa., 141 S. Ct. 1868 (2021), the Court chose not to address the continued viability of *Emp't[t] Div*., despite the urging of Justices Alito, Thomas and Gorsuch. *Id.* at 1883 (Alito, J., concurring). In another concurrence, however, Justice Barrett (joined by Justices Kavanaugh and Breyer) concludes "I . . . . see no reason to decide in this case whether *Smith* should be overruled, much less what should replace it." *Id.* at 1883 (Barrett, J., concurring).

196 *Brief On Petition for Writ of Certiorari for Petitioner at i*, 303 Creative LLC v. Elenis, 2021 WL 4459045 (2021); *see also* 303 Creative LLC v. Elenis, 6 F.4th 1160 (10th Cir. 2021), *cert. granted in part*, 142 S. Ct. 1106 (2022).

197 *See id.*

198 *See id. See, e.g.,* Fraternal Order of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 363 (3d Cir. 1999) (authored by then-Judge Samuel Alito) (Holding that the "secular exceptions" principle has been adopted by some lower courts, but not the United States Supreme Court); *see also* Colin A.

III. COMPARING MASTERPIECE CAKESHOP AND 303 CREATIVE

Although the Supreme Court narrowly confined its holding in *Masterpiece Cakeshop v. Colorado Civil Rights Commission* to the facts, declining to create any law with regard to the constitutional issues presented in the case, the Court did provide "guidance for future cases involving conflicts between public accommodation anti-discrimination statutes and business owners' sincerely held religious beliefs[.]"[199] Justice Kennedy first clearly explained the constitutional conflict in these types of cases:

> Our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth. For that reason the laws and the Constitution can, and in some instances must, protect them in the exercise of their civil rights. The exercise of their freedom on terms equal to others must be given great weight and respect by the courts. At the same time, the religious and philosophical objections to gay marriage are protected views and in some instances protected forms of expression. . . . Nevertheless, while those religious and philosophical objections are protected, it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law.[200]

Justice Kennedy then explained it was understood that a member of the clergy could not be required to perform a marriage ceremony if he or she objected on moral or religious grounds.[201] However, Justice Kennedy expressed trepidation at taking this religious objection further:

> [If this] exception was 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.[202]

Devine, *A Critique of the Secular Exceptions Approach to Religious Exemptions*, 62 UCLA L. REV. 1348, 1351 (2015).

[199] Lydia E. Lavelle, *Saving Cake for Dessert: How Hearing the LGBTQ Title VII Cases First Can Inform LGBTQ Public Accommodation Cases*, 30 GEO. MASON U. C. R. L. J. 123, 124 (2020); *see also* Masterpiece Cakeshop, Ltd. v. Colo. C. R. Comm'n*,* 138 S. Ct. 1719 (2018).

[200] *Masterpiece Cakeshop*, 138 S. Ct. at 1727 (citing Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968)) (per curiam)). *Piggie Park* was a public accommodation case under Title II of the Civil Rights Act of 1964. *Piggie Park Enterprises*, 390 U.S. at 403 n. 5. In *Piggie Park*, a BBQ chain restaurant owner wanted to discriminate against Black customers based on religious objection. *Id.*

[201] *Masterpiece Cakeshop*, 138 S. Ct. at 1727 (Stating that "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.").

[202] *Id.*

In *Masterpiece Cakeshop*, however, the baker, Jack Phillips, argued that creating a cake for a wedding should be considered an expressive statement; that to do so, he had to use his artistic skills, which implicate the Freedom of Speech Clause.[203] In response to this argument, Justice Kennedy noted that a decision in favor of Phillips "would have to be sufficiently constrained;" otherwise, "all purveyors of goods and services who object to gay marriages for moral and religious reasons in effect [could] put up signs saying, 'no goods or services will be sold if they will be used for gay marriages,' something that would impose a serious stigma on gay persons."[204]

After discussing the hostility of the Colorado Civil Rights Commission toward Phillips, Justice Kennedy found this "was inconsistent with the First Amendment's guarantee that our laws be applied in a manner that is neutral toward religion."[205] He, therefore, set aside the decision in this case, and instead, concluded the opinion with advice to resolve future cases of this sort with tolerance, respect, and dignity.[206]

303 Creative is factually similar to *Masterpiece Cakeshop*.[207] Both cases arose in the state of Colorado, and thus test the reach of CADA.[208] Both cases involve business owners who have a religious objection to same-sex marriage,[209] describe themselves as artists,[210] and state they would provide services to gay and lesbian customers, but not services that recognize or celebrate same-sex weddings.[211] The business owners in these cases also both argue that, by providing services that recognize or celebrate same-sex weddings, their constitutional rights are compromised because they are being compelled to create speech with which they disagree.[212]

There are dissimilar facts as well. Phillips, the cake baker in *Masterpiece Cakeshop,* has run his shop since 1993[213] while Lorie Smith, the business owner in *303 Creative*, has not started her wedding website business yet.[214] Phillips was the defendant in *Masterpiece Cakeshop* while Smith is

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203 *Id.* at 1721, 1728.

204 *Id.* at 1728-29.

205 *Id.* at 1732.

206 *Id.*

207 303 Creative LLC v. Elenis, 6 F.4th 1160 (10th Cir. 2021), *cert. granted in part*, 142 S. Ct. 1106 (2022).

208 *Id.* at 1168-69.

209 *Masterpiece Cakeshop,* 138 S. Ct. 1719, 1723 (2018); *see 303 Creative LLC*, 6 F.4th at 1170.

210 *See Masterpiece Cakeshop,* 138 S. Ct. 1719, 1726 (2018); *Brief on Petition for Writ of Certiorari for Petitioner at 2*, 303 Creative LLC v. Elenis, 2021 WL 4459045 (2021) ("Lorie Smith is an artist . . ."). *303 Creative LLC*, 6 F.4th at 1180 (The Court does not discuss whether Smith is an artist; rather, the Court notes CADA does not distinguish with regard to "artistic merit.").

211 *See Masterpiece Cakeshop*, 138 S. Ct. at 1724; *see 303 Creative LLC*, 6 F.4th at 1170.

212 *See Masterpiece Cakeshop*, 138 S. Ct. at 1724; *see 303 Creative LLC*, 6 F.4th at 1170.

213 *Masterpiece Cakeshop*, *supra* note 19.

214 *303 Creative LLC*, 6 F.4th at 1170.

the plaintiff in *303 Creative*.[215] This means that, while there were aggrieved customers who suffered actual indignity in *Masterpiece Cakeshop*, there were no such customers in *303 Creative*.[216]

Additionally, while Phillips in *Masterpiece Cakeshop* had a brick-and-mortar physical shop where he baked his cakes, the service being proposed by Smith in *303 Creative* is a website.[217] It is a virtual creation.[218] As proposed, Smith states when she is considering a potential project, she will "ask questions of the prospective client to assist in the vetting process of determining whether the requested project conflicts with her religious beliefs."[219] Given that this is an online business, it is unclear how or where this questioning would take place. While a business with a physical location would likely hold this conversation in person, an online business would likely converse with clients by phone, teleconference, or written conversation through the Internet.

As a Colorado company operating in-state, 303 Creative LLC is required to follow CADA.[220] However, as a business that creates a customer product that is in final form interactive and available on the Internet,[221] it stands to reason the business might seek to advertise and attract customers from across the country. The implications of a judicial decision in a case involving a virtual business that would allow an exemption from the requirements of CADA would span far beyond the state borders of Colorado.

On the one hand, if turned away virtually from an online business based on the business owner's religious belief, a prospective customer would not be walking into a shop and suffering the physical indignation of being refused service. As Smith suggests, a business owner who refused to serve a customer could "endeavor to refer the prospective client to a different

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215 *Masterpiece Cakeshop*, 138 S. Ct. 1719; *303 Creative LLC*, 6 F.4th 1160.

216 The issue of standing was addressed by both the district court and the appellate court. The Tenth Circuit affirmed the decision of the lower court, first stating Smith had shown an injury in fact and had "sufficiently demonstrated both an intent to provide graphic and web design services to the public in a manner that exposes [her] to CADA liability, and a credible threat that Colorado will prosecute [her] under that statute." *303 Creative LLC*, 6 F.4th at 1172. The Court next addressed the causation and redressability requirements of standing and found those were met as well. *Id.* at 1175. The same reasons supported a finding by the Court that the case was ripe. *Id.*

217 *303 Creative LLC*, 6 F.4th at 1169-70.

218 "Virtual" in this context means "being on or simulated on a computer or computer network: such as . . . . occurring or existing primarily online." *Virtual*, MERRIAM-WEBSTER DICTIONARY (11th ed. 2020).

219 Complaint at 17 (para. 116), 303 Creative LLC et al. v. Elenis et al., 1:16CV02372 (D. Colo. Sept. 20, 2016).

220 303 Creative LLC v. Elenis, 6 F.4th 1160 (10th Cir. 2021), *cert. granted in part*, 142 S. Ct. 1106 (2022).

221 The Internet is "an electronic communications network that connects computer networks and organizational computer facilities around the world." *Internet*, MERRIAM-WEBSTER DICTIONARY (11th ed. 2020).

company that [could] assist them."[222] This could be accomplished by listing referrals on a website. On the other hand, such a skirting of a public accommodation law might not only lead to the demise of brick-and-mortar services, but to a new type of commerce on the web—one that can openly discriminate.

The question of whether a public accommodation law applies to a website that is not connected with a brick-and-mortar location has been litigated recently in a slightly different context—in circumstances involving the ADA.[223] The ADA states, in pertinent part, "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation."[224] The ADA outlines ways discrimination could occur and how an entity could justify non-compliance:

> [D]iscrimination includes—
> (i) the imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability. . . . from fully and equally enjoying any goods, services, facilities, privileges, advantages, or accommodations, unless such criteria can be shown to be necessary for the provision of the goods, services, facilities, privileges, advantages, or accommodations being offered;
> (ii) a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations;
> (iii) a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden;
> (iv) a failure to remove architectural barriers, and communication barriers that are structural in nature, in existing facilities, and transportation barriers

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222 Complaint at 17 (para. 117), 303 Creative LLC, 1:16CV02372 (D. Colo. Sept. 20, 2016).

223 Americans With Disabilities Act, 42 U.S.C. § 12101, et seq. (1990). Recent examples include Robles v. Domino's Pizza, LLC, 913 F.3d 898 (9th Cir. 2019); Mejico v. Alba Web Designs, LLC, 515 F. Supp. 3d 424, 427 (W.D. Va. 2021); and Gil v. Winn-Dixie Stores, Inc., 993 F.3d 1266 (11th Cir.), *opinion vacated on reh'g*, 21 F.4th 775 (11th Cir. 2021).

224 42 U.S.C. § 12182(a) (1990).

> in existing vehicles and rail passenger cars used by an establishment for transporting individuals (not including barriers that can only be removed through the retrofitting of vehicles or rail passenger cars by the installation of a hydraulic or other lift), where such removal is readily achievable.[225]

There have been several cases in recent years where plaintiffs have brought public accommodation claims under the ADA for their inability to access websites.[226] One such illustrative case is *Robles v. Domino's Pizza.*[227] Robles alleged Domino's Pizza "failed to design, construct, maintain, and operate its website and mobile application ('app') to be fully accessible to him."[228] The District Court dismissed the complaint based on the primary jurisdiction doctrine;[229] Robles appealed to the Ninth Circuit Court of Appeals.[230] The Court of Appeals reviewed *de novo* the lower court's ruling regarding the application of the ADA to websites and apps.[231] The Court of Appeals reasoned that the ADA was implicated because the "website and app [impeded] access to the goods and services of its physical pizza franchises—which are places of public accommodation."[232] The Court of Appeals pointed to the nexus between these online services and the physical restaurant, stating this was a critical part of the analysis.[233] The Court of Appeals distinguished a case where it had considered another ADA public accommodation violation years earlier, *Weyer v. Twentieth Century Fox Film Corporation*.[234] The Court of Appeals noted in *Weyer*, such a nexus did not exist.[235] In *Weyer*, the

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225 42 U.S.C. § 12182(b)(2)(A)(i)-(iv) (1990). The Act also stated it was discriminatory "where an entity can demonstrate that the removal of a barrier under clause iv is not readily achievable, a failure to make such goods, services, facilities, privileges, advantages, or accommodations available through alternative methods if such methods are readily achievable." *Id.* at § 12182(b)(2)(A)(v).

226 Robles v. Domino's Pizza, LLC, 913 F.3d 898); Mejico v. Alba Web Designs, LLC, 515 F. Supp. 3d 424, 427; and Gil v. Winn-Dixie Stores, Inc., 993 F.3d 1266 (11th Cir.), *opinion vacated on reh'g*, 21 F.4th 775.

227 *Robles*, 913 F.3d 898.

228 *Id.* at 902. Robles also alleged a violation of California's Unruh Civil Rights Act (UCRA), CAL. CIV. CODE § 51 (West 2016).

229 The primary-jurisdiction doctrine is "[a] judicial doctrine whereby a court tends to favor allowing an agency an initial opportunity to decide an issue in a case in which the Court and the agency have concurrent jurisdiction." *Primary-Jurisdiction Doctrine*, BLACK'S LAW DICTIONARY (11th ed. 2019). The District Court in *Robles* reasoned the U.S. Department of Justice "regulations and technical assistance [were] necessary for the Court to determine what obligations a regulated individual or institution must abide by in order to comply with Title III. . . . [In] the district court's view, therefore, only the long-awaited regulations from DOJ could cure the due process concerns[.]" *Robles*, 913 F.3d at 903-04.

230 *Id*. at 904.

231 *Id.*

232 *Id*. at 905.

233 *Id*.

234 Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1104 (9th Cir. 2000).

235 In *Weyer*, the Court was considering whether an insurance company was a "place of public accommodation" when it issued an allegedly discriminatory employer-provided insurance policy. *Robles*,

Court of Appeals considered whether an insurance company was a "place of public accommodation" when it issued "an allegedly discriminatory employer-provided insurance policy."[236] The Court of Appeals in *Weyer* concluded it was not because the ADA only covered "actual, physical places where goods or services are open to the public, and places where the public gets those goods or services," and there had to be "some connection between the good or service complained of and an actual physical place."[237] The Court of Appeals in *Robles* further found imposing liability on Domino's did not create a due process violation because Domino's had fair notice of the requirements of the ADA, and the lack of specific regulations from the Department of Justice did not eliminate the obligation to comply with the Act.[238]

The ADA public accommodation "nexus" test is still the law today in several circuits.[239] It has been criticized by commentators, not only because of its reliance on pre-Internet case law and reasoning, but because of its inapplicability to living in a modern world where accessibility via public accommodation to Internet access is an essential part of daily life.[240] Many online businesses, such as Amazon and Netflix, would fail the outdated nexus test.[241] Clearly, this is not what Congress intended when it contemplated the purpose of the ADA:

> [T]he nexus test undermines the ADA's purpose, contradicts congressional intent, and imposes a requirement not evinced in the statute's text. First, critics argue that any test that excludes large segments of the American economy undermines the broad purpose of the ADA. The House Report in support of the Act, for instance, noted that "[i]t is critical to define places of public accommodations to include all places open to the public," and not simply the establishments included in the Civil Rights Act because

913 F.3d at 905 (citing *Weyer,* 198 F.3d at 1113-14). The Court concluded it was not. *Id.* The Court noted that the insurance policy at issue did not concern accessibility even though the insurance company had a physical office. *Id*. Of note, *Weyer* did not concern a website. *See id.*

[236] *Robles*, 913 F.3d at 905 (quoting *Weyer*, 198 F.3d at 1113).

[237] *Id.* (quoting *Weyer*, 198 F.3d at 1114). In these pre-website, insurance-type cases, while the Ninth Circuit (as well as the Third and Sixth) found a public accommodation must be a physical place, the First and Seventh Circuits did not impose such a requirement. Hannah R. Schwarz, *When the Facts Change: Interpreting Title III of the ADA in the Online Era*, 32 STAN. L. & POL'Y REV. 363, 382-83 (2021).

[238] *Robles*, 913 F.3d at 909. The Court cited other cases supporting this position. *See* Fortyune v. City of Lomita, 766 F.3d 1098 (9th Cir. 2014), and Kirola v. City & County of San Francisco, 860 F.3d 1164, 1180 (9th Cir. 2017). The Court also rejected the primary jurisdiction doctrine. *Robles*, 913 F.3d at 910-11.

[239] The Circuits are split on this issue today, many based on the prior insurance decisions: "In website accessibility cases, district courts have leaned on the holdings of courts of appeals' insurance cases without questioning their applicability, holding (in the Third, Sixth, and Ninth Circuits) that public accommodations are physical places." Schwarz, *supra* note 237, at 238.

[240] *Id.* at 376.

[241] *Id*. at 384.

> "discrimination against people with disabilities is not limited to specific categories of public accommodations." The House Report also said the examples within each category are to be "construed liberally."[242]

A strict nexus test affects the ability to enforce nondiscrimination laws against businesses that operate on the Internet.[243] For example, in response to complaints of racial discrimination, Meta (the parent company of Facebook and Instagram) recently began examining how Black and marginalized communities experience the company's online platforms.[244] Absent voluntary or self-initiated policies against discrimination, continued application of the nexus test would impede legal action against Internet companies that discriminate against prospective customers.

These challenges in the ADA public accommodation context are illustrative of challenges that could emerge when enforcing state and local public accommodation ordinances in the virtual world. In some instances, the violation of the nondiscrimination ordinance might be overt, as in *Masterpiece Cakeshop.*[245] However, in other instances, the ability of a customer to document and prove a virtual violation of a nondiscrimination law could be more difficult. A virtual business transaction provides little, if any, of the proximate interaction that a person-to-person transaction yields.

The operation of a completely virtual business also raises issues related to personal jurisdiction. Every business is subject to general jurisdiction in at least one state, a state where the business has such "continuous and systematic" contact with the state that the business can be sued for claims

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[242] *Id*. at 376-77; Carly Schiff, *Cracking the Code: Implementing Internet Accessibility Through the Americans with Disabilities Act*, 37 CARDOZO L. REV.2315, 2338-54, 2320 n. 25 (2016) (quoting H.R. REP. No. 101-485, at 35, 1990 U.S.C.C.A.N. 303, 317); Nikki D. Kessling, *Why the Target "Nexus Test" Leaves Disabled Americans Disconnected: A Better Approach to Determine Whether Private Commercial Websites are "Places of Public Accommodation*," 45 HOUS. L. REV. 991, 1006 (2008) (quoting H.R. REP. No.101-485, pt. 2, at 100 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 317).

[243] A commentator notes one instance of confusion that can ensue from the required use of the "nexus test" as applied to a website when investigating a public accommodation violation. *See* Kessling, *surpa* note 239 (discussing National Federation for the Blind v. Target Corp., 452 F. Supp. 2d 946, 952 (N.D. Cal. 2006), illustrating a conflict between the nexus test and how a court interprets a violation of Title III.).

[244] Shannon Bond, *Facebook Will Examine Whether It Treats Black Users Differently*, https://www.npr.org/2021/11/18/1056916140/facebook-to-study-black-users-experience (last visited August 8, 2022). Meta is trying to "understand how people's experiences on Facebook may differ by race[.]" In studying this, Meta has noted that gathering demographic data while balancing the privacy of customers is challenging. *Id.* The company has also been accused of "promoting discrimination by, for example, letting advertisers target users based on race." Shannon Bond, *Report Slams Facebook For 'Vexing And Heartbreaking Decisions' On Free Speech*, NPR (July 8, 2020), https://www.npr.org/sections/live-updates-protests-for-racial-justice/2020/07/08/888888476/report-slams-facebook-for-vexing-and-heartbreaking-decisions-on-political-speech.

[245] Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1723 (2018).

unrelated to any contacts with that state.[246] Additionally, settled case law instructs that, to be subject to personal jurisdiction under what is known as specific jurisdiction:

> Due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he has certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."[247]

As the doctrine of personal jurisdiction has developed over the last century, courts have recognized how evolving economies fit into this analysis of due process. One such Supreme Court case, *McGee v. International Life Insurance Company*,[248] addressed how mail solicitations from a business in one state to a prospective customer in another state could subject the business to personal jurisdiction in the customer's state:

> Today many commercial transactions touch two or more States and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.[249]

Always at the heart of a personal jurisdiction analysis based on specific jurisdiction is whether a defendant "purposely availed" itself of the privilege of doing business in the forum state.[250] One does not look at "[t]he unilateral activity of those who claim some relationship with a nonresident defendant" to establish contact with a state; rather, the application of the minimum contacts test "will vary with the quality and nature of the defendant's activity;" but it is necessary "that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."[251]

There are no United States Supreme Court cases addressing the issue of personal jurisdiction over a defendant that operates a business found only on

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[246] *See* Goodyear Dunlop Tires Operations, S.A. v. Brown*,* 564 U.S. 915, 925 (2011). To assert this type of personal jurisdiction, the defendant is said to be "at home" in the state. For a corporation, this is assumed to be the state or states where it is incorporated and the state where it has its principal place of business. *Id.* at 924.

[247] Int'l Shoe Co. v. State of Wash., Off. of Unemployment Comp. & Placement, 326 U.S. 310, 316 (1945); *see also* Milliken v. Meyer, 311 U.S. 457, 463 (1940).

[248] McGee v. Int'l Life Ins. Co., 355 U.S. 220 (1957).

[249] *Id.* at 222-23.

[250] Hanson v. Denckla, 357 U.S. 235, 253 (1958).

[251] *Id.* (citing *Int'l Shoe Co.*, 326 U.S. at 319).

the Internet.[252] However, in the 2018 decision of *South Dakota v. Wayfair*, the Court was faced with the question of the continuing viability of the "physical presence rule."[253] Following this rule, which had been established by case law, meant that, in order for a state to require a business to pay sales taxes to the state, the business had to have a physical presence in that state.[254]

In a five to four ruling, the Court in *South Dakota v. Wayfair* held that the "physical presence rule" was "an incorrect interpretation of the Commerce Clause."[255] Noting, "[e]ach year, the physical presence rule becomes further removed from economic reality[,]"[256] the Court discussed the parallels between the Due Process Clause and the Commerce Clause, affirming "[p]hysical presence is not necessary to create a substantial nexus."[257] Addressing an argument that this might create an undue burden on a retailer doing business in multiple jurisdictions, the Court explained, "the administrative costs of compliance, especially in the modern economy with its Internet technology, are largely unrelated to whether a company happens to have a physical presence in a State."[258]

The Court stated one of the regrettable effects of the physical presence rule was to produce "an incentive to avoid physical presence in multiple States."[259] Stating a rejection of "the physical presence rule [was] necessary to ensure that artificial competitive advantages [were] not created by this Court's precedents," the Court, surveying the history and purpose of the

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[252] In *Ford Motor Co. v. Mont. Eighth Judicial Dist. Court*, a case addressing personal jurisdiction, the Court noted "we do not here consider internet transactions, which may raise doctrinal questions of their own. gm example—of how specific jurisdiction works. 141 S. Ct. 1017, 1028 n.4 (2021); *see also* Walden v. Fiore, 571 U.S. 277, 290 n.9 (2014) ('[T]his case does not present the very different questions whether and how a defendant's virtual 'presence' and conduct translate into "contacts" with a particular State')." *Ford Motor Co.*, 141 S. Ct. at 1078 n.4.

[253] South Dakota v. Wayfair, Inc., 138 S. Ct. 2080 (2018). Wayfair was a merchant "with no employees or real estate in South Dakota. Wayfair, Inc., is a leading online retailer of home goods and furniture and had net revenues of over $4.7 billion last year." *Id.* at 2089. Overstock.com, Inc., and Newegg, Inc. were similarly situated and were also joined as defendants in this action. *Id.*

[254] *Id.* at 2087-88; s*ee also* Nat'l Bellas Hess, Inc. v. Dep't of Revenue, 386 U.S. 753 (1967), *overruled by* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080 (2018); Quill Corp. v. North Dakota, 504 U.S. 298 (1992), *overruled by* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080 (2018). The Wayfair majority stated because of the constitutional issues in this case, "[i]t is currently the Court, and not Congress, that is limiting the lawful prerogatives of the States" to address the underpinning of the physical presence rule. *Wayfair, Inc.*, 138 S. Ct. at 2097. Justice Roberts disagreed: "Any alteration to those rules with the potential to disrupt the development of such a critical segment of the economy should be undertaken by Congress." *Id.* at 2101 (Roberts, C.J., dissenting).

[255] *Id.* at 2092.

[256] *Id.* The Court noted the number of Americans with Internet access had increased from two percent in 1992 to eighty-nine percent in 2018, and that in 1992 the mail order economy totaled $180 billion, while in 2018, "e-commerce retail sales alone were estimated at $453.5 billion." *Id.*

[257] *Id*. at 2093.

[258] *Id.*

[259] *Id.* at 2094.

Commerce Clause throughout the opinion, emphasized its importance and relevance in this context.[260] In what could be forecasting a personal jurisdiction analysis, the Court noted the "'dramatic technological and social changes' of our 'increasingly interconnected economy' mean buyers are 'closer to most major retailers' than ever before—'regardless of how close or far the nearest storefront.'"[261] The Court continued: "[b]etween targeted advertising and instant access to most consumers via any internet-enabled device, 'a business may be present in a State in a meaningful way without' that presence 'being physical in the traditional sense of the term.'"[262]

Drawing a connection between the online retailer and the governments that seek to collect sales taxes, the Court first highlighted Wayfair's advertisements that proclaim "'[o]ne of the best things about buying through Wayfair is that we do not have to charge sales tax.'"[263] The Court then went on to chastise Wayfair, stating:

> What Wayfair ignores in its subtle offer to assist in tax evasion is that creating a dream home assumes solvent state and local governments. State taxes fund the police and fire departments that protect the homes containing their customers' furniture and ensure goods are safely delivered; maintain the public roads and municipal services that allow communication with and access to customers; support the "sound local banking institutions to support credit transactions [and] courts to ensure collection of the purchase price,". . . . ; and help create the "climate of consumer confidence" that facilitates sales.[264]

The Court concluded this point by stating "there is nothing unfair about requiring companies that avail themselves of the States' benefits to bear an equal share of the burden of tax collection."[265] This language around purposeful availment, combined with the Court's emphasis on modern interstate commerce and the rejection of the physical presence test, seems to further forecast how the Court might approach a personal jurisdiction analysis of a business owner of an online business.

Bringing this personal jurisdiction discussion full circle, imagine an online business is located in State X. It could be a retail store, or one that provides some other type of service to the public, such as website design. If that business owner chooses to be in violation of a nondiscrimination

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260 *Id.*

261 *Id.* at 2095 (quoting Direct Mktg. Ass'n v. Brohl, 575 U.S. 1, 17 (2015) (Kennedy, J., concurring)).

262 *Id.* (quoting *Direct Mktg. Ass'n*, 575 U.S. at 18).

263 *Id.* at 2096; Brief on Petition for Writ of Certiorari for Petitioner at 55, 303 Creative LLC v. Elenis, 2021 WL 4459045 (2021).

264 *Id.* (quoting Quill Corp. v. North Dakota, 504 U.S. 298 (1992) (opinion of White, J., concurring in part)).

265 *Id.*

ordinance, does the business owner open herself to possible lawsuits from prospective customers not only in State X where it is subject to general jurisdiction, but in State Y—and every other state—as well? This will depend on the personal jurisdiction analysis employed by the applicable court. Assume that the services available on the Internet site are available to anyone in the world, and that anyone can unilaterally reach out to the business owner; in that situation, personal jurisdiction would be unlikely. However, what if the business owner targets prospective customers by the use of digital marketing? This might include display advertising searches, such as banner ads; search engine marketing, which helps a company boost its visibility during searches; contextual advertising, which targets people based on their Internet behavior via their searches and websites they visit; geotargeting, a way of targeting a marketing campaign to a specific geographic area; and other modern means of seeking customers.[266] When does this type of activity create sufficient minimum contacts and meet the threshold of purposeful availment necessary to presume specific jurisdiction in other states?

As a resident of State X, the business owner is always subject to personal jurisdiction in her home state, and thus required to follow State X's nondiscrimination ordinance. But what if a prospective customer wants to sue the business owner in the state where the customer lives and there is also a nondiscrimination ordinance in the customer's state (State Y)? Is the business owner in violation of the nondiscrimination ordinance in State Y?

Clearly, there are challenges around enforcement of public accommodation laws when combined with jurisdictional issues. However, as the United States economy continues to evolve in a virtual manner, and the Internet becomes the new storefront for access to numerous and critical services, legislators or courts will have to address how best to provide accommodation in a fair and accessible way, discrimination-free, to everyone.

IV. IMPLICATIONS OF THE FORTHCOMING DECISION IN *303 CREATIVE LLC V. ELENIS*

303 Creative LLC v. Elenis was argued before the United States Supreme Court—with a decision to be announced—during the 2022-2023 term.[267] The Court could decide that 303 Creative LLC is required to follow CADA and is prohibited under the Constitution from refusing service to

[266] Advertising Terminology On The Internet, TECH TARGET, https://www.techtarget.com/whatis/reference/advertising-terminology-on-the-Internet (last visited Aug. 8, 2022).

[267] 303 Creative LLC v. Elenis, 142 S. Ct. 1106 (2022). Certiorari was granted on February 22, 2022. *Id.* The brief of Petitioner and the joint appendix were filed on May 26, 2022. *Docket Search*, *supra* note 16.

same-sex couples. Doing otherwise would discriminate against people on the basis of their sexual orientation. In so holding, the Court would reject 303 Creative LLC's freedom of speech argument. Business owners could still express their personal beliefs regarding religious matters, such as same-sex marriage, but to operate a business they would be required to serve all customers in the public square. This decision would reject the argument that a business owner who is an artist would have the choice to decide whether or not they will create art for customers when that art does not conform with the business owner's religious belief.

Alternatively, the Court could find that 303 Creative LLC is not required to follow CADA and may restrict its wedding website services to opposite-sex couples, because, to find otherwise would compel 303 Creative LLC to create speech that is against its religious belief. In so holding, the Court would adopt 303 Creative LLC's freedom of speech argument. Business owners who are artists would not have to create art for customers when the art does not conform with the business owner's religious beliefs.

If the Supreme Court decides the former, the result is bright-lined and clear. Unless there is an exception in the nondiscrimination ordinance (typically for religious entities), all business owners must adhere to the law. If the Supreme Court decides the latter, and 303 Creative LLC moves forward with the proposed marriage website available only to opposite-sex couples (rejecting customers based on their sexual orientation), a plethora of legal and practical issues would spring forth immediately, including potentially:

1. Who is an artist? Can anyone be an artist? What does it mean to be an artist?[268] For example, which of the following is an artist—dress designer, hair stylist, pedicurist, tailor, jeweler, photographer, flower arranger, or limousine driver?
2. When art is created for a customer, does the "speech" associated with that art logically belong to the client? If not, is the artist usurping the

[268] Some authors explored these questions in their writings. Oscar Wilde noted, "The only artists I have ever known who are personally delightful are bad artists. Good artists exist simply in what they make, and consequently are perfectly uninteresting in what they are." OSCAR WILDE, THE PICTURE OF DORIAN GRAY, https://www.gutenberg.org/files/174/174-h/174-h.htm (last updated Feb. 3, 2022). James Joyce observed, "The object of the artist is the creation of the beautiful. What the beautiful is is another question." JAMES JOYCE, A PORTRAIT OF THE ARTIST AS A YOUNG MAN, https://www.gutenberg.org/files/4217/4217-h/4217-h.htm (last updated: November 28, 2020). Toni Morrison spoke of the power of the artist: "This is the time for every artist in every genre to do what he or she does loudly and consistently." *Oprah's Book Club: Book Reviews*, OPRAH, https://www.oprah.com/omagazine/toni-morrison-talks-love/2 (last visited Aug. 14, 2022). Pope John Paul II wrote that everyone is an artist in some way: "Not all are called to be artists in the specific sense of the term. Yet, as Genesis has it, all men and women are entrusted with the task of crafting their own life: in a certain sense, they are to make of it a work of art, a masterpiece." *Letters to Artists*, VATICAN, https://www.vatican.va/content/john-paul-ii/en/letters/1999/documents/hf_jp-ii_let_23041999_artists.html (last visited Aug. 14, 2022).

speech from the customer? An artist can certainly create art that expresses her own speech—if that art is initiated freely by the artist, driven by the artist's own "speech."[269] But if an artist is hired to create something for another person, the "free speech" element of artistry becomes problematic.

3. What if a customer does not want to associate the service, product, or art they are purchasing from the business owner with the speech the business owner wants it to represent? For example, what if an opposite-sex couple wants to hire 303 Creative LLC to design their wedding website, but does not agree with 303 Creative LLC's message about same-sex marriages? Must the customer adopt the message of the business owner?
4. What if the artist's product or service was already created? What if the dress is already hanging in the shop; the suits can be chosen from several examples provided by the tailor; or the design for various flower arrangements or rings are already available? In these cases, is the artist compelled to create speech?
5. What does it mean for an action to be against a person's "religious belief"? Does the religious belief have to be found in or interpreted from some type of religious source, i.e., the Bible or the Qur'an? Does the person need to be a member of a religious institution, or identify with a particular religious doctrine, to legitimate a religious belief? Can a person decide what their religious beliefs are, even if they do not attend a religious institution or associate with one?
6. What if the customer's religious belief is that same-sex couples can marry, but the business owner's religious belief is that they cannot marry? In a conflict between competing religious beliefs, who prevails?
7. Can a straight person purchase a product or service to celebrate an event that might be against a business owner's religious belief? How does the business owner even know this? Do they ask every customer who comes into their shop who the product or service is intended to celebrate, and the sexual orientation of the celebrant?
8. What if the prospective customer presents a hybrid request? What if a married same-sex couple wants to purchase a cake to celebrate their child's first birthday? If the business owner objects to same-sex marriage, will they create a cake to celebrate the child of a union with which they disagree? What if a parent wants to purchase two necklaces as a surprise for her daughter and her daughter-in-law who are celebrating their five-year wedding anniversary? Would the business owner create the necklaces?

269 "Visual art is as wide ranging in its depiction of ideas, concepts and emotions as any book, treatise, pamphlet or other writing, and is similarly entitled to full First Amendment protection. . . . Visual artwork is as much an embodiment of the artist's expression as is a written text, and the two cannot always be readily distinguished." Bery v. City of N.Y., 97 F.3d 689, 695 (2d Cir. 1996).

The crux of many of these issues and questions is the underlying conflict in these types of cases: the identity of the gay or lesbian customer *cannot be separated* from the message of same-sex marriage. To be gay or lesbian is one's identity. This identity is central to the emphasis on dignity found in several Supreme Court cases discussing discrimination against the gay and lesbian community.[270]

Some say the "indignity" faced by gay and lesbian persons discriminated against based on a religious exception would be minimal, but this discrimination is nevertheless demeaning. Here is an example to illustrate this. "Jane Doe" is a person living in the United States. Jane pays taxes and is a law-abiding citizen. Jane married her spouse in 2014 and her marriage is legally recognized by her state, country, and church. Being married also gives Jane access to other rights and incidents of marriage. Jane is a Christian with religious beliefs. When Jane, a customer, goes to a business to inquire about a service they offer, she should not be turned away simply because of her identity as a lesbian. The business owner in the public sphere voluntarily chooses to participate in society. The business owner makes profits, pays taxes, and follows applicable local, state, and federal laws.

Using the argument in *303 Creative*, the business owner wants to be allowed to legally decline to provide certain services to Jane based on the owner's religious belief. The business owner states they will serve Jane—they do not discriminate against Jane—but they will not serve Jane if they do not agree with a message that is created by the service, good, or art they are asked to sell to her. The owner says they will bake Jane a cake celebrating her birthday, but will not bake a cake celebrating her marriage, because the owner does not agree with that "message." But Jane's marriage is *her* message, not theirs. This usurpation over Jane's message is disingenuous. In a free-market system, members of the general public readily understand when it comes to purchasing a custom good or service, any message is that of the customer, not the business—particularly for something as personal as one's own marriage.

The argument that the business owner does not discriminate against Jane, but instead discriminates against Jane's message, is even further disingenuous. Jane's identity and what the owner calls Jane's "message" cannot be separated. As a gay woman, Jane marries another woman.

Jane is legally entitled—free of discrimination—to the same services available to opposite-sex married couples.[271] In *Obergefell v. Hodges*, Justice

[270] Justice Anthony Kennedy refers to "dignity" in this context in Lawrence v. Texas, 539 U.S. 558, 567 (2003); United States v. Windsor, 570 U.S. 744, 746 (2013); Obergefell v. Hodges, 576 U.S. 644 (2015); and Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1727 (2018).

[271] *Obergefell*, 576 U.S. at 670.

Kennedy noted same-sex couples are entitled to the same "constellation of benefits" to which opposite-sex married couples are entitled.[272] A year later in *Pavan v. Smith*, the Supreme Court reiterated a State may not "exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples."[273] These cases further compel a result in favor of the customer.

CONCLUSION

This article highlights what the Supreme Court might consider as it contemplates a decision in *303 Creative LLC v. Elenis*, which was heard in the 2022-2023 term; presenting the question of whether applying a public accommodation law to compel an artist to speak or stay silent violates the Free Speech Clause of the First Amendment.[274] While the question the Court will address does not include the Free Exercise Clause, there is an element of religion to the case, as the artist disagrees with the message, she believes she is compelled to speak, based on her religious belief.[275]

In deciding this case, the Court will consider two bodies of law. One is public accommodation, the genesis of which can be found in the early law of England:

> If an innkeeper refuse to entertain a guest where his house is not full, an action will lie against him [ ], and so against a carrier, if his horses be not loaded, and he refuse to take a packet proper to be sent by a carrier. . . . And why should not an action lie against a post master here, if he should refuse to take in a letter, or any other thing proper to be sent by post? [A]nd doubtless an action would lie in that case. If the inn be full, or the carrier's horses laden, the action would not lie for such refusal; *but one that has made profession of a public employment, is bound to the utmost extent of that employment to serve the public.*[276]

Today, every state across the nation has public accommodation laws.[277] Many have broad coverage as to the places or businesses that fall under these laws, as well as the classifications of persons covered.[278] These laws

[272] *Id.*

[273] Pavan v. Smith, 137 S. Ct. 2075, 2078 (2017) (quoting *Obergefell*, 576 U.S. at 670).

[274] 303 Creative LLC v. Elenis, 142 S. Ct. 1106 (2022); *Docket Search*, *supra* note 16.

[275] 303 Creative LLC v. Elenis, 6 F.4th 1160, 1170 (10th Cir. 2021), *cert. granted in part,* 142 S. Ct. 1106 (2022).

[276] Lane v. Cotton [1701] 88 Eng. Rep 1378 – 1865 (emphasis added).

[277] *State Public Accommodation Law*, NCSL, (June 25, 2021), https://www.ncsl.org/research/civil-and-criminal-justice/state-public-accommodation-laws.aspx.

[278] *Id.*

essentially prohibit discriminating against a class of persons based on some characteristic outlined in the law.[279]

The other body of law the Court will consider relates to the Freedom of Speech Clause of the First Amendment to the Constitution.[280] Supreme Court cases have addressed the right to freedom of speech in situations where it has collided with other constitutional rights, including cases involving a conflict with a nondiscrimination ordinance, as discussed in this article.[281]

While many believe *303 Creative* is basically a reboot of the issues presented in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, there are many differences between the two cases, such as the virtual nature of the business in *303 Creative*.[282] Recent caselaw involving the Internet and public accommodation law—in the context of the ADA—presents a sobering view of how difficult it will be to monitor virtual discrimination violations.[283] Challenges may also arise when considering jurisdictional issues unique to running a business solely on the Internet. Finally, once a decision is issued in the case, there are a litany of questions that could result from a decision that is not bright-line, clear, or narrowly drawn.

During the time John Roberts has served as Chief Justice, the Court has ruled in favor of religion in its cases eighty-three percent of the time, more than any Court in the last seventy years.[284] Some think this indicates the likelihood of a reflexive bow to the business owner in *303 Creative*. Others, however, are hopeful the current Court will draw on the advice of Justice Kennedy in *Masterpiece Cakeshop* and issue an opinion that recognizes the dignity and worth of the prospective customers.

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279 *Id*.

280 U.S. CONST. amend. I.

281 Roberts v. U.S. Jaycees, 468 U.S. 609 (1984); Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston, 515 U.S. 557 (1995); Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000); Rumsfeld v. Forum for Acad. & Institutional Rights, 547 U.S. 47 (2006); Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the L. v. Martinez, 561 U.S. 661 (2010).

282 *303 Creative LLC v. Elenis*, 6 F.4th 1160, 1169-70 (10th Cir. 2021), *cert. granted in part*, 142 S. Ct. 1106 (2022).

283 *See* Robles v. Domino's Pizza, LLC, 913 F.3d 898 (9th Cir. 2019).

284 Ian Prasad Philbrick, *A Pro-Religion Court*, N.Y. TIMES (June 22, 2022), https://www.nytimes.com/2022/06/22/briefing/supreme-court-religion.html.