Shopping While Queer: Public Accommodations Law After *Masterpiece Cakeshop* and *303 Creative*[*]

Joseph William Singer[**]

"[T]he state will force her to convey messages inconsistent with her belief that marriage should be reserved to unions between one man and one woman."[1]

"For the 'promise of freedom' is an empty one if the Government is 'powerless to assure that a dollar in the hands of [one person] will purchase the same thing as a dollar in the hands of a[nother].'"[2]

I. IS THE MARKET OPEN TO QUEER PEOPLE?

Ally Waggy and Jessica Robinson wanted to get married in the Barn at Grace Hill, in Newton, Kansas. They began arrangements to do so when the venue owner, Amanda Balzer, wrote them an e-mail. Balzer wanted them to know that she was willing to rent the place to them for their wedding, but Balzer also wanted them to "know who we are and where our heart is" in the spirit of having "an open and honest line of communication."[3] What Balzer wanted them to know is this:

> While our deeply held religious belief keeps us from celebrating anything but marriage between a man and woman, we desire to serve everyone equally and do not want to keep anyone from using our building who would like to. Our hearts are to serve, regardless of race, creed, color, origin, sexual orientation, gender or marital status, while maintaining our convictions and beliefs as well.[4]

[**] Bussey Professor of Law, Harvard Law School. Thanks and affection go to Martha Minow, Mira Singer, Grace Caffrey, Chris Carey, Rashmi Dyal-Chand, Kent Greenfield, Randall Johnson, John Lovett, Jim Oleske, Pranati Parish, Robert Post, Liz Sepper, and Tim Mulvaney. I also thank the participants in the 17th Progressive Property Conference held in May 2024 for their comments on this article, including Greg Alexander, Jane Baron, Nick Blomley, Debbie Becher, Avihay Dorfman, Rashmi Dyal-Chand, Alexandra Flynn, John Lovett, Chris Serkin, Nadav Shoked, Laura Underkuffler, and Rachael Walsh. I am also grateful to Harvard Law School for research support for this project.

1. 303 Creative LLC v. Elenis, 600 U.S. 570, 580 (2023).

2. *Id.* at 640 (Sotomayor, J., dissenting).

3. Carrie Rengers, *'Heart-Crushing' Wedding Venue E-mail Leads to Outpouring of Support for Gay Couple*, WICHITA EAGLE (Feb. 6, 2024), https://www.kansas.com/news/business/biz-columns-blogs/carrie-rengers/article284021103.html [perma.cc/6YMP-SFLY].

4. *Id.*

Because no law requires the venue to provide services to Waggy and Robinson, Balzer could have simply refused service. She was (and is) free to let them know why. And while she may have thought her message was loving and honest—and compatible with having a "heart[] . . . to serve"—that did not stop her customer from breaking down in tears after being told that her marriage was not something to celebrate, but rather something to condemn.[5]

Luckily for Balzer, federal law does not prohibit sex or sexual orientation discrimination in public accommodations.[6] Luckily for her, as well, Kansas state law allows discrimination based on sexual orientation.[7] Otherwise, Balzer's willingness to "serve" would not have protected her from a charge of denying "full and equal enjoyment" of her services.[8] What to Balzer was an honest communication was, to her customers, an insult, an affront to their dignity.

In states like Kansas, queer people never know when they enter the marketplace if shopkeepers will exclude them, deny them service, or insult them as they try to buy the goods and services available to others in the community.[9] Because sexual orientation discrimination is not against the law in Kansas, Ally and Jessica must either go ahead and rent the venue, knowing that the owner finds their wedding contrary to her "deeply held religious belief," or they must go elsewhere, hoping to find a venue owner who will not exclude them or insult them.

If, in contrast, the law in Kansas had prohibited discrimination because of sexual orientation, Balzer's statement—though "open and honest"—would violate the statutory obligation to provide "full and equal enjoyment" of the services sold by a public accommodation.[10] First Amendment freedom of speech rights do not protect your right to insult people as you serve them; public accommodations law guarantees the *same* services as provided to others, not service with a put-down. Nor does the First Amendment right to free exercise of religion protect store owners who seek to convert their customers as they serve them; that would discourage patronage by customers of a different religion and would therefore deny equal access to customers because of religion. Or have the Supreme Court's decisions in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*[11] and *303 Creative, LLC v. Elenis*[12] changed all this? Does the First Amendment give public accommodation owners the freedom to deny service or

5. *See id.* (reporting Waggy's response to Balzer's post).

6. *See* 42 U.S.C. § 2000a(a) (setting forth protected categories for federal public accommodations law).

7. *See* KAN. STAT. ANN. § 44-1001 (2024).

8. *See, e.g.*, 42 U.S.C. § 2000a(a) (entitling all persons to "full and equal enjoyment"); CAL. CIV. CODE § 51(b) (West 2024) (entitling all persons in California to "full and equal accommodations").

9. *But see* Kelly Catherine Chapman, Note, *Gay Rights, the Bible, and Public Accommodations: An Empirical Approach to Religious Exemptions for Holdout States*, 100 GEO. L.J. 1783, 1820-23 (2012) (arguing market competition may go far in protecting gay people from denial of service).

10. *See* Rengers, *supra* note 3 (providing Balzer's goal); 42 U.S.C. § 2000a(a) (guaranteeing "full and equal enjoyment of the . . . services . . . of any place of public accommodation").

11. 584 U.S. 617 (2018).

12. 600 U.S. 570 (2023).

to provide service with insults or expressions of disapproval to customers just because they are queer?

Queer people have long faced rejection by religious leaders and discrimination in daily life. It is only in recent years that some religious traditions have evolved to recognize the dignity and worth of their LGBTQ parishioners.[13] But of course, other religious groups continue to condemn both homosexuality and same-sex marriage.[14] That condemnation has long found expression in law. At the same time, the queer rights movement has had remarkable success in recent years in changing both attitudes and laws.[15] That success, however, is uneven. While about half the states prohibit discrimination because of sexual orientation and gender identity in public accommodations,[16] the other half deny queer people equal access to the marketplace.[17] The Supreme Court has interpreted federal law to prohibit discrimination based on sexual orientation in employment[18] (and likely in housing as well),[19] but there is no general federal statute ensuring equal access to stores or other public accommodations without regard to sex or sexual

13. *See* Benjamin Hollenbach, *Being LGBTQ+ in U.S. Protestant Churches*, SAPIENS (Jan. 3, 2024), https://www.sapiens.org/culture/queer-affirming-churches/ [https://perma.cc/2R54-DLTJ] (discussing progressive shift in some Christian denominations).

14. *See, e.g.*, Kayla Jimenez, *Historic Methodist Rift Is Part of Larger Christian Split Over LGBTQ Issues*, USA TODAY (Jan. 19, 2024), https://www.usatoday.com/story/news/nation/2024/01/19/united-methodist-christian-split-lgbtq/72208440007/ [https://perma.cc/J42V-L7JW] (discussing ideological split among religious groups regarding homosexuality and same-sex marriage).

15. *See, e.g.*, Obergefell v. Hodges, 576 U.S. 644, 675 (2015) (holding Fourteenth Amendment prohibits states from depriving marriage right to same-sex couples); Bostock v. Clayton Cnty., 590 U.S. 644, 680 (2020) (holding employers cannot fire employees "on the basis of homosexuality or transgender status").

16. *See generally* CAL. CIV. CODE § 51 (West 2024); COLO. REV. STAT. § 24-34-601 (2024); CONN. GEN. STAT. §§ 46a-63, 46a-64, 46a-81d (2023); DEL. CODE ANN. tit. 6, § 4504 (2023); D.C. CODE § 2-1402.31 (2024); HAW. REV. STAT. § 489-3 (2024); 775 ILL. COMP. STAT. 5/1-102-03 (2024); IOWA CODE § 216.7 (2024); ME. STAT. tit. 5, §§ 4552, 4591 (2024); MD. CODE ANN., STATE GOV'T, § 20-304 (West 2024); MASS. GEN. LAWS ch. 272, § 98 (2024); MICH. COMP. LAWS § 37.2302 (2024); MINN. STAT. § 363A.11 (2023); NEV. REV. STAT. §§ 651.050, 651.070 (2023); N.H. REV. STAT. ANN. §§ 354-A:16-17 (2019); N.J. STAT. ANN. §§ 10:5-12 (West 2021); N.M. STAT. ANN. § 28-1-7F (2024); N.Y. CIV. RIGHTS LAW § 40-C (Consol. 2019); OR. REV. STAT. §§ 659A.400, 659A.403 (2024); 43 PA. CONS. STAT. §§ 953-54 (2024); 11 R.I. GEN. LAWS §§ 11-24-2, 11-24-2.2 (2024); VT. STAT. ANN. tit. 9, §§ 4501-02 (2024); VA. CODE ANN. §§ 2.2-3900-02, 2.2-3904 (2024); WASH. REV. CODE § 49.60.215 (2024); WIS. STAT. § 106.52 (2016).

17. *See generally* ALASKA STAT. § 18.80.230 (2024); ARIZ. REV. STAT. § 41-1442 (2010); ARK. CODE ANN. § 16-123-107 (2017); FLA. STAT. § 760.08 (2015); IDAHO CODE § 67-5909 (2024); IND. CODE § 22-9-1-2 (2014); KAN. STAT. ANN. § 44-1001 (2024); KY. REV. STAT. ANN. §§ 344.120, 344.145 (West 1992); LA. STAT. ANN. § 51:2247 (1993); MISS. CODE ANN. § 97-23-17 (2024); MO. REV. STAT. § 213.065 (2017); MONT. CODE ANN. § 49-2-304 (2023); NEB. REV. STAT. § 20-134 (2021); N.D. CENT. CODE § 14-02.4-14 (2023); OHIO REV. CODE ANN. § 4112.02 (West 2023); OKLA. STAT. tit. 25, § 1402 (2011); S.C. CODE ANN. § 45-9-10 (2024); S.D. CODIFIED LAWS § 20-13-23 (2024); TENN. CODE ANN. § 4-21-501 (2024); UTAH CODE ANN. § 13-7-3 (West 2024); W. VA. CODE § 16B-17-9 (2024); WYO. STAT. ANN. § 6-9-101 (2024). States with no public accommodation laws include Alabama, Georgia, North Carolina, and Texas. A Mississippi statute affirmatively permits places of public accommodation to deny service for any reason. *See* MISS. CODE ANN. § 97-23-17 (2024).

18. *See Bostock*, 590 U.S. at 683 (holding firing employees based on sexuality violates Title VII).

19. Because the Court in *Bostock* interpreted the word "sex" in a way that effectively includes sexual orientation, it is likely to interpret the Fair Housing Act's reference to "sex" accordingly. *See* 42 U.S.C. §§ 3601-19.

orientation. That leaves queer people to the vagaries of state law, and in half the states, queer people have no legal protection when they enter the marketplace to buy goods and services; they can be denied service solely because of their sexual orientation, gender identity, or gender expression.[20]

While half the states allow discrimination against queer people, there has been a movement to extend that privilege to the "equal access" states, where it is unlawful. Public accommodation owners have argued that the First Amendment grants them the right to deny services to queer customers either because providing government-compelled service violates their religious liberty, or because providing service forces them to speak in favor of homosexuality or "gay marriage," contrary to their settled—generally religious—convictions. While such claims have often failed,[21] they have succeeded in some lower court decisions[22] and, importantly, in two recent Supreme Court decisions.[23]

The first such Supreme Court case was *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, in which the Supreme Court held that baker Jack Phillips could not be required to design a wedding cake for a same-sex couple (Charlie Craig and Dave Mullins) because one member of the Colorado Civil Rights Commission (CCRC) voiced the opinion that discrimination, slavery, and even the Holocaust have all historically been justified on religious grounds.[24] According to the Supreme Court, that statement demonstrated "impermissible hostility toward the sincere religious beliefs that motivated [the baker's] objection" to designing a wedding cake for a same-sex couple.[25] Because no commissioner objected to the statement, nor was it repudiated by any reviewing court, that meant that the Commission itself and the State of Colorado violated the baker's right to "a neutral decisionmaker who would give full and fair consideration to his religious objection" to serving a same-sex couple.[26] For that reason, the Supreme Court reversed the lower court's finding that Phillips had violated Colorado's public accommodation law.[27]

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20. *See supra* note 17 and accompanying text (listing state statutes denying queer people equal access to marketplace).

21. *See generally* Elane Photography, LLC v. Willock, 309 P.3d 53 (N.M. 2013) (denying wedding photographer's compelled speech, free exercise, and state religious freedom claims), *cert. denied*, 134 S. Ct. 1787 (2014); State v. Arlene's Flowers, Inc., 441 P.3d 1203 (Wash. 2019) (en banc) (holding florist's arrangements unprotected conduct), *cert. denied*, 141 S. Ct. 2884 (2021).

22. *See* Telescope Media Grp. v. Lucero, 936 F.3d 740, 752-53 (8th Cir. 2019) (holding right from compelled speech protected videographers); Chelsey Nelson Photography, LLC v. Louisville/Jefferson Cnty. Metro Gov't, 624 F. Supp. 3d 761, 793 (W.D. Ky. 2022) (finding city ordinance compelling photographer not narrowly tailored); Brush & Nib Studios, LC v. City of Phoenix, 448 P.3d 890, 908, 926 (Ariz. 2019) (holding custom wedding invitation designers' pure speech protected and ordinance substantially burdens free exercise right).

23. *See* Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n, 584 U.S. 617 (2018); 303 Creative LLC v. Elenis, 600 U.S. 570 (2023).

24. *See Masterpiece*, 584 U.S. at 635.

25. *See id.* at 634.

26. *See id.* at 640.

27. *See id*.

Oddly, the Supreme Court found that the state's hostility to the store owner's religious beliefs meant that the state was disempowered from enforcing its public accommodation law. Instead of remanding for the lower court to apply the law in a "neutral" manner, the Court simply reversed, meaning that the baker suffered no legal penalty for denying service to his customers, Charlie and Dave. That is odd because it meant that the state's action denied any remedy for the customers who were concededly denied service because of their sexual orientation.[28] The state's violation of the baker's right to religious liberty empowered the baker to *violate the rights of innocent third parties* who were in no way responsible for the state's expression of hostility to the baker's religious beliefs. If the state violated the baker's rights, then the baker should have a civil rights claim against the state, or the Court should have remanded the case to apply the law in a correct manner. Why should the state's violation of Phillips's rights entitle him to violate the civil rights of Charlie and Dave?

The *Masterpiece* Court also held that the state failed to act "neutrally" with respect to religion when it granted "conscience-based objections" to some bakers but not to others.[29] In a series of cases called the *Jack Cases*, the CCRC ruled that bakers did not discriminate against a customer because of the customer's religion when those bakers refused to write religiously based antigay messages on cakes.[30] In contrast, the CCRC found Jack Phillips liable for sexual orientation discrimination when he refused to "celebrate [the] wedding" of a same-sex couple by designing a wedding cake for them.[31]

This neutrality argument presents several conundrums. First, the Supreme Court assumed that there is no difference between being asked to write words on a cake and selling a cake without words. But is that right? Justices Kennedy and Gorsuch thought they were the same thing.[32] Justices Kagan and Breyer, alternatively, thought they were completely different.[33]

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28. *See Masterpiece*, 584 U.S. at 626, 629 (noting Charlie and Dave informed regarding Masterpiece Cakeshop policy against supplying cakes for same-sex weddings); *id.* at 645-46 (identifying Phillips's testimony of his refusal to supply cakes for same-sex weddings).

29. *See* Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n, 584 U.S. 617, 637 (2018) (discussing disparity between cases).

30. *See id.* at 633-36 (summarizing facts and holdings from *Jack* cases).

31. *See id.* at 645-46 (highlighting CCRC found Phillips violated Colorado public accommodations law).

32. *See id.* at 636 ("Another indication of hostility is the difference in treatment between Phillips' case and the cases of other bakers who objected to a requested cake on the basis of conscience and prevailed before the Commission"); *id.* at 644 (Gorsuch, J., concurring) ("[T]he Colorado Civil Rights Commission failed to act neutrally toward Jack Phillips's religious faith. Maybe most notably, the Commission allowed three other bakers to refuse a customer's request that would have required them to violate their secular commitments. Yet it denied the same accommodation to Mr. Phillips when he refused a customer's request that would have required him to violate his religious beliefs").

33. Justice Kagan explained this distinction:

> Jack [of the *Jack Cases*] requested them to make a cake (one denigrating gay people and same-sex marriage) that they would not have made for any customer. . . . [T]he bakers did not single out Jack

Justice Kagan argued that Jack Phillips would have designed and sold the *exact same cake* for the customers had one of them been a woman rather than a man, while the bakers in the *Jack Cases* would not have written those words for any customer, regardless of their religion, sex, or sexual orientation.[34] If a wedding cake without words conveys a message, as the majority assumed, does the message change just because the identity of the customer changed? Or does a product change its meaning because the customer is going to use it for purposes that the store owner rejects? Can a store refuse to sell a suit to a child just because the suit is going to be used in a Bar Mitzvah ceremony and such a ceremony does not acknowledge the divinity of Christ? Could the baker refuse to sell a birthday cake to a mixed-race child because the baker's religion opposes interracial marriage?

Justice Kennedy, writing for the majority, assumed that the courts should defer to the store owner's belief that designing a good for a client conveys a message or constitutes complicity in the customer's lifestyle or religion.[35] Otherwise, Justice Kennedy would have had to agree with Justice Kagan that it is discriminatory to refuse to design a good for a man that you would have designed for a woman. You cannot, in general, refuse to sell a good because of the identity of the customer or because you object to the customer's religious practices.[36] If selling the cake to a male couple is not different from selling it to a male-female couple, there would have been no inconsistency between *Masterpiece* and the *Jack Cases*. Yet Jack Phillips claimed that designing a wedding cake for his customers would have forced him to "celebrate their wedding"[37] in violation of his religious beliefs, even though he would have designed the same cake for the customers if one of them were of a different sex.[38] Taken to the extreme, this would mean that public accommodation owners could deny service *whenever they think providing service compromises their own religious beliefs.* That

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> because of his religion, but instead treated him in the same way they would have treated anyone else—just as CADA requires. By contrast, the same-sex couple in this case requested a wedding cake that Phillips would have made for an opposite-sex couple.

Masterpiece, 584 U.S. at 641-42 (Kagan, J., concurring).

34. *See id*.

35. *See* Kent Greenfield, *Using the First Amendment to Save Race-Conscious College Admissions*, 4 Am. J.L. & Equal. 201, 226 (2024) (arguing *Boy Scouts of America v. Dale* held states must defer to person's "express values").

36. *See* 42 U.S.C. § 2000a(a) (entitling "[a]ll persons . . . to the full and equal enjoyment of the goods . . . without discrimination . . . on the ground of race, color, religion, or national origin").

37. *See* Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n, 584 U.S. 617, 645 (2018) (Gorsuch, J., concurring) (detailing facts of Phillips's case). Justice Gorsuch agreed that a wedding cake necessarily conveys a message of celebration. *See id.* at 650 ("Nor can anyone reasonably doubt that a wedding cake without words conveys a message. Words or not and whatever the exact design, it celebrates a wedding, and if the wedding cake is made for a same-sex couple it celebrates a same-sex wedding").

38. *See id.* at 625-26 (majority opinion) (introducing Masterpiece and highlighting bakery's production of custom cakes for weddings).

would mean, for example, that a restaurant could refuse to serve Black customers if doing so violates the owner's religiously based belief in racial segregation.[39]

That leads to a second problem. Public accommodation laws prohibit discrimination because of religion, meaning customers cannot be refused service because of their religion. If, however, the First Amendment protects the religious liberties of store owners by giving them the power to refuse service whenever—*in their view*—service "celebrates" views or practices against their own religion, then the Constitution would privilege the religious liberties of store owners over the religious liberties of customers. We would need to cross out the word "religion" in every public accommodation statute, whether state or federal.

Third, if the store owner viewed the customers as engaged in a religious practice he cannot celebrate, why doesn't his refusal to serve the customers discriminate against them based on *their* religious beliefs or practices? Customers do not have to view their marriage as a religious matter to be victims of religious discrimination. Jack Phillips viewed Charlie and Dave's marriage as sacrilegious. Does that not mean that Charlie and Dave could have claimed not just discrimination because of sexual orientation, but discrimination because of religion?[40] If store owners are owed deference when they claim an act is religious in nature, why are customers not entitled to the same deference? If Charlie and Dave had claimed to be victims of religious discrimination, the Supreme Court would have had to confront the question of what to do when religious liberty claims clash. Whose religious liberty claim prevails: the store owner's or the customer's?

Masterpiece arguably presented a conflict between the religious liberties of store owners and the religious liberties of customers. Yet one would not know this by reading *any* of the opinions in the case. Under the First Amendment, can states require stores to serve customers without regard to religion, even though doing so infringes on the religious liberties of store owners? What should we do when the store owner's religious liberties clash with those of the customer? The Supreme Court failed to see this issue, much less address it in a coherent manner.

In *303 Creative LLC v. Elenis*, the Supreme Court protected Lorie Smith—a prospective wedding website designer—from the obligation to provide services to same-sex couples because the services she would be providing were "pure speech" protected by the First Amendment.[41] In general, freedom of speech principles protect us from being compelled to speak, and requiring a website designer

39. *See* Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 402 n.5 (1968) (calling such arguments "patently frivolous").

40. *See* Craig Westergard, *LGBT Discrimination as Religious Discrimination*: *Ruse or Resolution?*, 26 BARRY L. REV. 45, 55 (2020) (arguing LGBT discrimination "cognizable as religious discrimination").

41. *See* 303 Creative LLC v. Elenis, 600 U.S. 570, 587 (2023) (identifying, among other stipulations, Smith's websites would include "'images, words, symbols and other modes of expression'"). There are significant differences between free speech exemptions in public accommodation laws and religious exercise exemptions. *See generally* Kenji Yoshino, *Rights of First Refusal*, 137 HARV. L. REV. 244 (2023) (noting ability to assert free speech exemptions by or against anyone regarding expressive behavior).

to design a website providing information about a customer's wedding that violates the designer's religious beliefs would, according to the Supreme Court, constitute "compelled speech" that "celebrates" that wedding.[42] In particular, the *303 Creative* Court noted application of the public accommodation law "will force [Smith] to convey messages inconsistent with her belief that marriage should be reserved to unions between one man and one woman."[43] At the same time, Justice Gorsuch was careful to explain that the *303 Creative* ruling was limited to cases of "pure speech," and that nothing in the opinion prevents states from "ensur[ing] the sale of goods or services on equal terms" without regard to the buyer's sexual orientation.[44]

Like *Masterpiece*, the case of *303 Creative* raises a host of issues. First, when does a good or service involve "pure speech" and/or "compelled speech"? While a wedding website does involve speech (including text, as well as artwork, pictures, and design), it *also* involves an important service, i.e., making Internet webpages accessible to the happy couple so they can tell their friends and loved ones the details of their ceremony and celebration. Would the case have been different if Lorie Smith provided only blank pages with headings like Wedding Date, Location, Hotels, Gift Registry, and Photos, with all information on those pages provided solely by the customer? Would that still be "pure speech" that would "compel" her to "celebrate" their wedding? Can stationers refuse to create wedding invitations for same-sex couples, or is that a service rather than the store owner's speech?

The second issue with *303 Creative* was that Justice Gorsuch relied on *stipulated facts*.[45] What would have happened if the State of Colorado had *not* conceded that the wedding websites Lorie Smith planned to create would "'express [her] message celebrating and promoting'" Smith's view of marriage?[46] The State unwisely conceded this point, probably because it believed that public accommodation laws regulate conduct rather than speech, and that any incidental effects on speech are justified by the compelling government interest in prohibiting discriminatory denials of access to businesses that serve the general public. Dissenting Justice Sotomayor agreed with the majority that Smith oversaw what services she would offer the public and that she could "offer only wedding websites with biblical quotations describing marriage as between one man and one woman."[47]

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42. *See 303 Creative*, 600 U.S. at 579-80 ("As she envisions it, her websites will provide couples with text, graphic arts, and videos to 'celebrate' . . . their 'unique love story'" (quoting App. to Petition for Writ of Certiorari at 182a, 187a & 198a, 303 Creative LLC v. Elenis, 600 U.S. 570 (2018) (No. 21-476))).

43. *Id.* at 580.

44. *See id.* at 578, 587 (highlighting Smith's websites constitute pure speech); *id.* at 590 (acknowledging states permitted to protect against sexual orientation discrimination in public accommodations).

45. *Id.* at 582-83 (providing nine stipulated facts).

46. *See 303 Creative*, 600 U.S. at 582.

47. *See* 303 Creative LLC v. Elenis, 600 U.S. 570, 628-29 (2023) (Sotomayor, J., dissenting).

So, what were the Justices fighting about in *303 Creative*? They seemed to agree that a website designer can create her own artwork and text expressing *her own views* and offer all that for sale to the general public.[48] They also seemed to agree that a company cannot engage in discrimination when it sells access to websites that customers use to fill in their own information.[49] What they disagreed about was how to interpret what the stipulated facts meant in regard to the services Smith was going to offer the public. Gorsuch thought Smith was offering, for a fee, to produce a creative nonfiction product, i.e., Smith's own artistic version of the couple's love story, as if she was hired to produce a caricature of the couple or a portrait of them.[50] Sotomayor thought that Smith was offering typical wedding website services with information provided by the customer but designed by Smith to look pretty, and to provide a tool to find things like the place of the wedding, the hotel, the gift registry, and funny baby pictures of the couple.[51]

In some respects, it does not matter who interpreted the facts correctly. What matters is figuring out what the holding of the case is and how it applies to public accommodations in the future. Does *303 Creative* confer a right to deny service to all same-sex couples when the product is (mostly? or entirely?) speech, even if the words are provided by the customer rather than the designer? Or does *303 Creative* protect only service providers who create *their own* artistic products like paintings, stories, or creative nonfiction works that *just happen* to be about a customer? How many wedding website companies are covered by the *303 Creative* ruling? All of them? A handful?

That brings us to yet another issue. Oddly, Lorie Smith's company may not have been a public accommodation at all. If she were offering to work as a freelance artist providing products to select customers she felt comfortable working with, then she would not be like a grocery store offering its wares to the general public. In that case, she would not be covered by the Colorado public accommodations law at all.[52] It would not apply to her because she is not offering her services to the general public. Rather, she would be an independent contractor deciding which customers to work with. Indeed, the current (as of October 16,

48. *See id.* at 594 (majority opinion) (explaining Smith does not lose First Amendment protection against compelled speech because she accepts pay); *id.* at 623 (Sotomayor, J., dissenting) ("[T]he business is free to include, or not to include, any lawful message it wants in its wedding websites").

49. *See id.* at 598 n.5 (majority opinion) (implying state antidiscrimination regulation applies to ordinary, non-expressive businesses); *id.* at 629, 633 n.11 (Sotomayor, J., dissenting) (arguing public accommodations can provide limited services but not select customers).

50. *See id.* at 579 (majority opinion) (relaying Smith's intent to share couples' "'unique love story'"); *id.* at 594 (calling Smith's websites "'customized and tailored'" and not ordinary commercial good).

51. *See 303 Creative*, 600 U.S. at 633 n.11 (Sotomayor, J., dissenting) (describing contents of Smith's mockup wedding website).

52. *See* COLO. REV. STAT. § 24-34-601 (2024) ("'[P]lace of public accommodation' means any place of business engaged in any sales to the public and any place offering services, facilities, privileges, advantages, or accommodations to the public . . . ").

2024) language on 303 Creative's website suggests as much.[53] And if she is not operating a public accommodation, then the conflict between antidiscrimination law and free speech does not even arise.

What is striking about *Masterpiece* and *303 Creative* is that the Justices seem to want to have their cake and eat it too. In both cases they strongly affirm the authority of the states to require equal access to public accommodations without regard to sexual orientation, even when the goods and services relate to weddings. On the other hand, both decisions *authorize that exact form of discrimination*. The states are disabled from doing the very thing the Supreme Court purports to empower them to do.

One can get whiplash from reading these decisions.[54] Can states protect queer people from discrimination in the marketplace or not? Are store owners free to deny service to queer people even in states where that is against the law merely by voicing their objections in the right way? Are states allowed to extend public accommodation laws to queer people only if they acknowledge that those business owners who have "sincere" religious objections to homosexuality or same-sex marriage deserve respect or that they are good people? What reasons for prohibiting sexual orientation discrimination can states give to avoid being deemed "hostile" to people who object to those laws?

Both *Masterpiece* and *303 Creative* focus on the supposedly unique facts of each case to justify limiting the state's power to enforce antidiscrimination

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53. *See Wedding Websites*, 303 CREATIVE, https://303creative.com/custom-wedding-websites/ [https://perma.cc/7C85-FML4]. Smith announces:

> I am a Christian—a believer of our Lord and Savior, Jesus Christ. The same deeply rooted convictions that motivate me to create messages for everyone also prevents me from designing messages that promote and celebrate ideas that violate my beliefs. As a result, I cannot design for same-sex weddings or any other wedding that contradicts God's design for marriage. Creating such messages would compromise my conscience and my Christian witness and tell a story about marriage that contradicts God's story of marriage—the very story He is calling me to promote. I'm not the best fit for every wedding, but the good news is that there are many talented graphic and website designers who would be.

Id. While this language suggests a purpose of "creat[ing] messages for everyone," it also indicates that Smith will only work for customers if they are a good "fit" with her, which suggests personal service rather than openness to serve whoever comes to her door. *See id.*

54. *See* Andrew Koppelman, *The Supreme Court's Gay Rights-Religious Liberty Contortions*, NW. PUB. L. RSCH. PAPER NO. 24-05 (2024), https://ssrn.com/abstract=4769457 [https://perma.cc/QPZ5-UV8X] (highlighting contradictions and ultimate incoherence of reasoning in these cases); *see also* Scott Altman, *Discrimination-Free Zones and Free-to-Discriminate Zones*: *Where Should Discrimination Laws Apply?*, U. S. CAL. L. LEGAL STUD. PAPER NO. 24-20 (2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4851672 [https://perma.cc/5V2-X-7BXW]; Luke A. Boso, *Expressive Conduct and the First Amendment Assault on Civil Rights*, 66 B.C. L. REV. (forthcoming 2025); Hila Keren, *Market Humiliation*, 56 LOY. L.A. L. REV. 565 (2023); Mark Satta, 303 Creative v. Elenis, Groff v. DeJoy *and the Difference a Sentence Can Make*, CANOPY F. (Oct. 26, 2023), https://canopyforum.org/2023/10/26/303-creative-v-elenis-groff-v-dejoy-and-the-difference-a-sentence-can-make/ [https://perma.cc/J7P6-2K26]; Andrew L. Seidel, *It Was Never About a Cake:* Masterpiece Cakeshop *and the Crusade to Weaponize Religious Freedom*, 54 LOY. U. CHI. L.J. 341 (2022).

laws.[55] This focus suggests that these cases represent limited exceptions to the basic rule of equal access. But how broad are those exceptions? Neither opinion gives us enough information to answer that question, and everything depends on what the answer is. Are these constitutional exemptions from state antidiscrimination laws going to be interpreted broadly or narrowly? Do they represent a fundamental threat to the states that seek to ensure equal access to the marketplace, or are they a minor setback that can be overcome by careful drafting and enforcement?

If *Masterpiece* and *303 Creative* are interpreted broadly, then queer people face the prospects of discrimination, not just in the states where it is already lawful, but in the states that have tried to protect their civil rights by outlawing discrimination against them in access to public accommodations.[56] By contrast, if the holdings of *Masterpiece* and *303 Creative* are interpreted narrowly, then protection from discrimination can remain the norm in most cases, at least in the states that have chosen to protect the civil rights of queer people in access to the marketplace.[57]

The Supreme Court has failed to resolve the clash between public accommodation laws and the religious and speech claims of store owners because doing so would require addressing the religious claims and civil rights of customers as well as store owners. There are three options here. First, the Supreme Court could privilege the First Amendment rights of store owners, thereby effectively invalidating or substantially limiting the enforceability of public accommodation laws. Second, the Court could restrict *Masterpiece* and *303 Creative* to their facts and leave religious and speech claims of store owners subordinate to the rights of the public under public accommodation laws. Third, the Court could search for and clarify one or more middle positions that vindicate the First Amendment rights the Court was focusing on in *Masterpiece* and *303 Creative* while ensuring that public accommodation laws have full force outside the limited context where the Constitution overrides the power of legislatures to ensure equal access to the marketplace.

Assuming *Masterpiece* and *303 Creative* remain good law and stand for something other than lip service to the free speech and religious rights of owners, my

55. *See* 303 Creative LLC v. Elenis, 600 U.S. 570, 593-94 (2023) (explaining why stipulated expressiveness of Smith's websites protects her from compulsion); Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n, 584 U.S. 617, 635-36 (2018) (focusing on statements by commissioners, not Phillips's actions).

56. For discussions concerning the effect of a broad holding in these cases, *see generally* Elizabeth Sepper, *The Return of* Boy Scouts of America v. Dale, 68 ST. LOUIS U. L.J. 803 (2024); Michael L. Smith, *Public Accommodations Laws, Free Speech Challenges, and Limiting Principles in the Wake of* 303 Creative, 84 LA. L. REV. 565 (2024); Yoshino, *supra* note 41.

57. For other efforts to read these cases narrowly, *see* David D. Cole, *"We Do No Such Thing"*: 303 Creative v. Elenis *and the Future of First Amendment Challenges to Public Accommodations Laws*, 133 YALE L.J.F. 499, 501-02 (2024); David S. Schwartz, *Making Sense of* 303 Creative: *A Free Speech Solution in Search of a Problem*, U. WIS. L. SCH. LEGAL STUD. RSCH. PAPER NO. 1792, 49 (2024), https://ssrn.com/abstract=4702932 [https://perma.cc/C9TP-YJN7].

goal here is to argue in favor of narrow readings of both *Masterpiece* and *303 Creative*. I do so from the standpoint of someone who has written extensively about public accommodations law.[58] I will not be applying existing First Amendment doctrine in a careful way. Instead, I will be reading these cases in light of the impact they may have on the ability of states to ensure nondiscriminatory access to the marketplace. States have compelling interests in ensuring equal access to the marketplace, and that remains so despite incidental effects on speech or the religious commitments of store owners.[59] Public accommodations are "public" because they are open to the public. They offer to serve anyone who steps in the door. If you do not want to serve the public, then do not operate a public accommodation. Queer people are people. They are part of the public, and they should not have to call ahead to see if a store that is open to the public is also open to them.

Part II below discusses *Masterpiece* and the claim that the First Amendment right to the free exercise of religion empowers stores to refuse service to queer people or same-sex couples.[60] Part III examines free speech claims and *303 Creative*.[61] Part IV argues that we can best reconcile the values of equality, religion, freedom of association, and free speech by reference to the core norms underlying property law.[62] Our antifeudal property tradition embraces a norm of equal opportunity to acquire and to enjoy property, widespread distribution of both ownership and opportunity, and a firm rejection of caste distinctions in who can be an owner and who has the right to purchase property.[63] We can embrace both free speech and nondiscriminatory access to public accommodations while recognizing and protecting the religious liberties of both business owners and customers. That, at any rate, is the goal.

58. *See, e.g.*, Joseph William Singer, *Religious Liberty and Public Accommodations: What Would Hohfeld Say?*, *in* WESLEY HOHFELD A CENTURY LATER: EDITED WORK, SELECT PERSONAL PAPERS, AND ORIGINAL COMMENTARIES 478 (Balganesh et. al, eds., 2022); Joseph William Singer, *Public Accommodations & Human Flourishing: Sexual Orientation & Religious Liberty (An Essay in Honor of Greg Alexander)*, 29 CORNELL J.L. & PUB. POL'Y 697 (2020); Joseph William Singer, *Property and Sovereignty Imbricated: Why Religion Is Not an Excuse to Discriminate in Public Accommodations*, 18 THEORETICAL INQUIRIES L. 519 (2017).

59. *See, e.g.*, Rumsfeld v. F. for Acad. & Institutional Rts., Inc., 547 U.S. 47 (2006) (holding coercing schools to host military recruiters not First Amendment violation).

60. *See infra* Part II.

61. *See infra* Part III.

62. *See infra* Part IV.

63. *See* Joseph William Singer, *We Don't Serve Your Kind Here*: *Public Accommodations and the Mark of Sodom*, 95 B.U. L. REV. 929, 940 (2015) (labeling public accommodation discrimination inapposite in free and democratic societies).

II. PUBLIC ACCOMMODATIONS AND RELIGIOUS LIBERTY

A. The Conundrums of Masterpiece Cakeshop

1. How Can the State Avoid "Hostility to Religion" When It Regulates Owners Whose Religious Commitments Require Them to Engage in Discrimination?

Jack Phillips refused to design a wedding cake for Charlie Craig and Dave Mullins because he did not want to "celebrate" same-sex marriage.[64] In response, Charlie and Dave contacted the CCRC, which sued Phillips on their behalf for violating Colorado's statute prohibiting discrimination based on sexual orientation in public accommodations.[65] The Colorado Court of Appeals affirmed the CCRC's legal determination that Phillips violated Colorado law because Phillips would have designed and sold a wedding cake to them had one of them been a woman rather than a man.[66] Phillips's refusal to serve them constituted discrimination on the basis of sexual orientation because the conduct of marrying someone of the same sex is so closely connected to sexual orientation.[67]

In *Masterpiece*, the Supreme Court agreed that states have the power to give queer customers the right to shop without discrimination because of their sexual orientation, and that stores have a legal obligation to provide them the same goods and services they provide to non-queer customers.[68] But in a surprise move, the Court denied a remedy for Charlie and Dave because the state had not

64. *See* Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n, 584 U.S. 617, 645 (2018) (describing Phillips's belief about meaning of creating cake for same-sex couple).

65. *See id.* at 628-29 (discussing investigation and findings).

66. *See id.* at 629-30 (explaining appeal rejected arguments about free exercise and protection from compelled speech).

67. *See* Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272, 281 (Colo. App. 2015) (recognizing Supreme Court's acknowledgement act of same-sex marriage not separate from status), *cert. denied*, *sub nom.* Masterpiece Cakeshop, Inc. v. Colo. Civ. Rts. Comm'n, 2016 WL 1645027 (Colo. 2016), *rev'd on other grounds*, *sub nom.* Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n, 584 U.S. 617 (2018). In recognizing the connection between the conduct of marrying someone of the same sex and status as a member of the LGBTQ community, the Colorado Court of Appeals stated:

> [T]he Supreme Court recognized that, in some cases, conduct cannot be divorced from status. This is so when the conduct is so closely correlated with the status that it is engaged in exclusively or predominantly by persons who have that particular status. We conclude that the act of same-sex marriage constitutes such conduct because it is 'engaged in exclusively or predominantly' by gays, lesbians, and bisexuals. Masterpiece's distinction, therefore, is one without a difference. But for their sexual orientation, Craig and Mullins would not have sought to enter into a same-sex marriage, and but for their intent to do so, Masterpiece would not have denied them its services.

Id.

68. *See Masterpiece*, 584 U.S. at 631-32 (describing state power to protect groups targeted by discrimination through neutral and generally applicable laws) (citing Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 402 n.5 (1968); Hurley v. Irish-American Gay, Lesbian, and Bisexual Grp. of Bos., Inc., 515 U.S. 557, 572 (1995)).

acted neutrally with regard to religion.[69] Colorado had shown "hostility" to the baker's religion by denigrating his "religious viewpoint" and by being inconsistent in its treatment of "conscience-based objections" to complying with anti-discrimination laws.[70] For both those reasons, the State denied Phillips "the neutral and respectful consideration of his claims . . . to which [he] was entitled."[71]

Masterpiece begins by strongly affirming the state's power to enact public accommodation laws and to protect queer people from exclusion or discrimination when they enter the marketplace, even when store owners object to homosexuality or same-sex marriage on religious grounds. "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."[72] States have the power and responsibility to treat queer people as people. "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."[73] While "religious and philosophical objections to gay marriage are protected views and in some instances protected forms of expression," it is nevertheless "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."[74]

Despite this basic principle, the Supreme Court denied a remedy to Colorado on behalf of Charlie and Dave because the State had demonstrated "hostility toward the sincere religious beliefs that motivated [Phillips's] objection" to designing a wedding cake for them.[75] The State denied Phillips's "neutral and respectful consideration" of his religious objections to selling his goods and services

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69. *See id.* at 625 ("[T]he [CCRC]'s consideration of this case was inconsistent with the State's obligation of religious neutrality . . . ").

70. *See* Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n, 584 U.S. 617, 638 (2018) ("[T]he Commission's treatment of Phillips'[s] case violated the State's duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint"); *id.* at 636 ("Another indication of hostility is the difference in treatment between Phillips'[s] case and the cases of other bakers who objected to a requested cake on the basis of conscience and prevailed before the Commission").

71. *Id.* at 634.

72. *Id.* at 632.

73. *Id.* at 631.

74. *Masterpiece*, 584 U.S. at 631. The Court suggested how Colorado could have handled the case:

> [A]ny decision in favor of the baker would have to be sufficiently constrained, lest all purveyors of goods and services who object to gay marriages for moral and religious reasons in effect be allowed to 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.

Id. at 634.

75. *Id.* at 634.

because one of the commissioners on the CCRC stated that it is "despicable" to use religion to justify invidious discrimination.[76] The Supreme Court quoted the commissioner, who said:

> 'I would also like to reiterate what we said in the hearing or the last meeting. Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust, whether it be—I mean, we—we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others.'[77]

The Court further referenced two other statements that commissioners made an at earlier meeting. The commissioners expressed the view that "religious beliefs cannot legitimately be carried into the public sphere or commercial domain."[78] The Court stated this view "impl[ied] that religious beliefs and persons are less than fully welcome in Colorado's business community."[79] Another commissioner suggested Phillips can believe what he wants, but may not act on religious beliefs when conducting business in Colorado.[80] The commissioner reemphasized that "if a businessman wants to do business in the state and he's got an issue with the—the law's impacting his personal belief system, he needs to look at being able to compromise."[81] These latter comments, "[s]tanding alone . . . might mean simply that a business cannot refuse to provide services based on sexual orientation, regardless of the proprietor's personal views."[82] But the Court thought that these innocuous statements should be interpreted in light of the dramatic remark by one commissioner that "disparage[d]" Phillips's religion by characterizing it as both "despicable" and "insincere," and as mere "rhetoric."[83] This remark was inconsistent with "fair and neutral enforcement of Colorado's antidiscrimination law," which protects against discrimination based on both religion and sexual orientation.[84]

This raises the question: How can the state justify, defend, and enforce public accommodation laws without expressing "hostility" to religious beliefs that justify denial of service? Some mainstream religions in the United States continue

76. *See* Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n, 584 U.S. 617, 634-35 (2018).
77. *Id.* at 635.
78. *Id.* at 634.
79. *Id.*
80. *See Masterpiece*, 584 U.S. at 634.
81. *Id.* at 634-35.
82. Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n, 584 U.S. 617, 635 (2018).
83. *See id*.
84. *See id.* at 635-36.

to regard homosexuality as a sin and vehemently oppose same-sex marriage.[85] Can the state explain why discrimination against queer people is fundamentally wrong, immoral, and cruel without being hostile to religions that teach its sinfulness? Must the state affirm that people who reject queer people are not bigots while prohibiting them from acting on their beliefs? Must it praise religious objections to homosexuality and religious objections to providing service to queer people while outlawing those very practices? What statements in favor of the legislation will the Supreme Court accept, and which will it find "hostile to religion"?

Recall the ruling in *Newman v. Piggie Park Enterprises, Inc.*, where the Supreme Court stated that the restaurant owner's religious objections to serving Black and white customers together did not give him a right to defy the federal public accommodations law.[86] The Court dispensed with his religious liberty claim in a footnote with no analysis and called his argument "patently frivolous."[87] Does that mean the Supreme Court of the United States expressed "hostility to religion"? And does that mean *Newman* is no longer good law? Can restaurants now refuse to serve Black customers because the Supreme Court itself is hostile to sincere religious beliefs that favor racial segregation? If not, what exact words from state legislators, judges, or administrators are sufficient to constitute "hostility to religion" and therefore exempt a public accommodation from its obligation to refrain from discrimination?

Justification for public accommodation laws implicitly or explicitly condemns acts of discrimination that people like Jack Phillips and Lorie Smith claim are not only lawful, but required by their religious faith. How can the state regulate discrimination while eschewing hostility to religions and religious persons that support that very discrimination? How can the state explain why equality norms sometimes trump religious liberty norms without being hostile to religion?

2. Can the State Remedy a Violation of a Store Owner's Religious Liberty by Allowing the Owner to Violate the Civil Rights of Innocent Third Parties?

Masterpiece reversed the ruling of the Colorado state courts that held that Phillips violated the State public accommodation law.[88] It did so because the State had somehow forfeited the right to apply its laws by treating Phillips disrespectfully.[89] But that meant the state had no power to protect the customers from a discriminatory denial of service. Charlie and Dave were denied service because

85. *See* Obergefell v. Hodges, 576 U.S. 644, 711 (2015) (Roberts, C.J., dissenting) (noting "[m]any good and decent people oppose same-sex marriage as a tenet of faith"); Jimenez, *supra* note 14 (highlighting religious group opposing same-sex marriage).

86. *See* Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 402 n.5 (1968).

87. *See id*.

88. *See* Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n, 584 U.S. 617, 640 (2018).

89. *See id.* ("Phillips was entitled to a neutral decisionmaker who would give full and fair consideration to his religious objection . . . ").

of their sexual orientation, but the Supreme Court denied them a remedy for that violation of their civil rights. Why? Because the state had violated the civil rights of the store owner by expressing hostility to his religious beliefs. But how does the violation of one person's civil rights justify denying the civil rights of innocent third parties? The violation of baker Phillips's rights does not justify violating the rights of customers Charlie and Dave, does it?

If the State violated Phillips's right to the free exercise of religion, why not give him a civil rights claim against Colorado, such as a claim for damages or an order to the State to stop insulting his sincere religious beliefs? That would vindicate his rights without infringing on the civil rights of his customers. Why not protect *both* Phillips's constitutional right to the free exercise of religion *and* Charlie and Dave's right not to face discrimination in access to a public accommodation? Why reverse rather than remand the case to determine whether the state's interest in ensuring equal access to the marketplace justified the incidental effect on Phillips's free exercise of religion? Phillips's views could have been given "neutral" and "respectful" treatment on remand while *also* determining whether the state interest in enforcing its public accommodation law is sufficient to provide Charlie and Dave equal services in a bakery open to the general public.

Masterpiece wrongly assumed that one wrong justifies another. At least, it gives no reason why the civil rights of customers should evaporate just because the state infringed on the constitutional rights of the store owners.

3. How Does the Constitution Balance the Religious Liberties of Store Owners Against the Religious Liberties of Customers?

Let us recall that Charlie and Dave *got married.* They may have gotten married in a civil ceremony or a religious ceremony. Either way, there was a civil element to the marriage because they needed to get a marriage license from the state where the marriage was celebrated.[90] But baker Jack Phillips did not view marriage as a civil matter. To him, it was an inherently religious matter. We generally defer to individuals as to what their religion means to them.[91] But if marriage is a religious matter, and Phillips viewed the marriage of Charlie and Dave as a sin, doesn't that mean that he objected to "celebrating" what he viewed as *their* religious act? And doesn't that mean he denied them service because of *their* religious practices?

The Constitution protects the free exercise of religion, and public accommodation laws honor that norm by ensuring equal access to the marketplace without regard to religion. That means, however, that public accommodation statutes *privilege the religious liberties of customers over the religious liberties of store owners*. Store owners cannot refuse service to customers because those

90. *See, e.g.*, COLO. REV. STAT. § 14-2-104 (2024) (requiring license for valid marriage).

91. *See* United States v. Seeger, 380 U.S. 163, 166 (1965) (defining religious belief through belief's role in believer's life).

customers plan to use the goods being sold in a religious ceremony that the store owner objects to. If your religion prohibits you from engaging in commercial intercourse with people of a different religion, then your remedy is to refrain from operating a public accommodation that sells goods and services to the public.

But *Masterpiece* flips the board by focusing relentlessly on the religious liberties of the store owner rather than those of the customer. The Court finds the State to have shown hostility to Phillips's religious beliefs, but it shows no interest in the fact that the Supreme Court's *own* denial of a civil remedy for Charlie and Dave shows hostility to *their* religious liberties. It is as if a men's clothing store refused to tailor and sell a suit to a family who planned to have their son wear the suit at his Bar Mitzvah ceremony. It would not help the tailor to say that he is willing to sell clothes to Jews, just not clothes that will be used in a ceremony that denies the divinity of Christ. The fact that Phillips was willing to sell cookies to gay customers does not justify his refusing to sell a cake just because they planned to use it in what Phillips viewed as a religious ceremony.

What would have happened if Charlie and Dave had made a claim of religious discrimination as well as (or instead of) sexual orientation discrimination? They could have argued that the store owner cannot refuse service to them because the owner objects to their marriage ceremony on religious grounds. Imagine a store owner that refuses to sell wedding cakes to anyone other than Christian couples. Wouldn't that discriminate against Jewish and Muslim couples, not to mention atheists? A cakeshop has the right to sell only religiously themed objects; it could, for example, sell only baked goods with Christian religious symbols on them. But a bakery cannot rely on religious convictions to deny service to a customer because the customer seeks to use the goods in a religious ceremony to which the owner objects. That would constitute discrimination against the customer because of the *customer's* religion.

Of course, Phillips would deny that he is discriminating against his customers because of their religion. He is only exercising *his own* religious liberties. But that defense is nonsensical. His own motivations may be religious, but that does not change the fact that he is refusing service to customers because of the religious uses that they plan for his cake. Phillips exercised his religious liberties by refusing commercial services to a customer that he would have granted had the customer planned to use his services in a religious ceremony that Phillips approved of. Why isn't that discrimination against the customer "because of religion"? And hasn't the Supreme Court held that states have the power to prevent discrimination against customers, including discrimination against customers' religions?[92]

92. *See* 42 U.S.C. § 2000a(a) (prohibiting discrimination in certain public accommodations "on the ground of . . . religion"); *Masterpiece*, 584 U.S. at 636 (noting Colorado public accommodation law "protects against

The Supreme Court gives a nod to the religious liberties of customers by discussing the *Jack Cases*, where the customer claimed discrimination because of religion when bakers refused to write antigay religious messages on cakes.[93] But nowhere does the Court confront the problem of balancing the religious liberties of store owners against the religious liberties of customers. Nor does it wrestle with the question of whether the state interest in promoting equal access to the marketplace is sufficient to justify infringements on the religious liberties of the store owner.

The problem is exacerbated by the state action doctrine.[94] If a store owner excluded someone from the store, the Supreme Court would likely say there is no "state action." It might persist in that view even if the customer refused to leave and was arrested for criminal trespass.[95] But if the state passes a public accommodation law and punishes an owner for refusing service to a customer, that statute would be seen as state action, and thus that action must be tested to see if it complies with constitutional rights under the Fourteenth Amendment. That distinction suggests that the Constitution protects the religious liberty of store owners from infringement by public accommodation laws, but it does not protect the rights of customers to access public accommodations without regard to their exercise of their religion. But that is contrary to our settled practices with regard to public accommodation law.

Newman v. Piggie Park holds that states can ensure equal access to the marketplace without regard to invidious discrimination, even if ensuring equal access infringes on the sincere religious beliefs of restaurant owners or other public accommodation.[96] A claim by the restaurant owner in *Newman* that it "contravenes the will of God" for Black and white customers to eat together was dismissed by the Supreme Court, in a footnote, as "so patently frivolous that a denial of counsel fees [for the excluded customer] would be manifestly inequitable."[97]

Public accommodation laws not only prohibit racial discrimination but also religious discrimination.[98] That means states are entitled to protect people from being denied service because of their religion, even if this limits the free exercise of religion of store owners. That is because the state has a strong—and I would say compelling—interest in eradicating discriminatory exclusion from the

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discrimination on the basis of religion as well as sexual orientation" with no suggestion such protection unconstitutional).

93. *See Masterpiece*, 584 U.S. at 636.

94. *See* The Civil Rights Cases, 109 U.S. 3, 11 (1883) (holding Fourteenth Amendment only applies to "State action," not "regulation of private rights").

95. *See, e.g.*, Bell v. Maryland, 378 U.S. 226 (1964) (refusing to decide whether enforcement of criminal trespass laws against Black customers who refused to leave restaurant denying them service constitutes state action under Fourteenth Amendment).

96. *See* Newman v. Piggie Park Enters., Inc., 390 U.S. 400 (1968).

97. *See id.* at 402 n.5.

98. *See* 42 U.S.C. § 2000a(a) (prohibiting discrimination based on race and religion in public accommodations).

marketplace.[99] And if that is true, then the *Masterpiece* Court went seriously awry by not considering the religious liberties of Charlie and Dave, or the fact that disabling Colorado from enforcing its public accommodation law against Phillips meant that his customers were denied service because Phillips objected to his customers' religious practices.

My own position is that the state action doctrine is incoherent since the question is whether one of the rights that goes along with ownership of a public accommodation is the right to deny service for discriminatory reasons. The common law (or statutes) will answer that question, and that answer—the decision about whether something is a valid property right in a free and democratic society—will constitute state action. There is simply no way to decide whether a property interest is a recognizable "estate in land" in a nonfeudal society without some form of state action crafting a common law or statutory rule that recognizes or voids particular property rights.[100] Common law is law, and as the Supreme Court explained in *Shelley v. Kraemer*:[101] "[T]he power of the State to create and enforce property interests must be exercised within the boundaries defined by the Fourteenth Amendment."[102] Further: "[T]he action of state courts in enforcing a substantive common-law rule formulated by those courts . . . may result in the denial of rights guaranteed by the Fourteenth Amendment."[103] That suggests that the state has no choice but to craft a property law rule that either empowers the store owner to exclude the customer or a rule that empowers the customer to demand and obtain equal access to the store's goods and services. Either choice will be an example of state action. There is no way for the state *not to act* when it is defining and allocating a property entitlement to one person or the other.

Assuming the state action doctrine is alive and well, however, we must recognize that our legal tradition has accepted the legitimacy of placing an obligation on public accommodations to serve the public. That means that states can protect Jews and Muslims from being denied service in public accommodations because of their religion. It also means that states can ensure that Christians cannot be denied service because of their religion. This interest is so strong that it justifies limiting the religious liberties of store owners whose religious commitments are violated by required service.

Does *Masterpiece* indicate that we are now going to switch sides and begin protecting the religious liberties of store owners over the religious liberties of customers? If so, then adherents of disfavored religions would be confronted with a lack of access to the market if discrimination against members of that

99. *See infra* note 225 and accompanying text (describing state interest).

100. *See* Joseph William Singer & Isaac Saidel-Goley, *Things Invisible to See: State Action & Private Property*, 5 TEX. A&M L. REV. 439, 487-88 (2018) (framing proposition in context of public accommodations laws).

101. 334 U.S. 1 (1948).

102. *Id.* at 22.

103. *Id.* at 17.

religion were common. And if Christians are feeling like an embattled minority, they might want to begin worrying about being excluded from public accommodations themselves. If we privilege the religious liberties of store owners, we might eventually have segregated markets of the type I remember from my childhood, where many private clubs refused to admit Jews and where many public accommodations refused to serve African Americans. We would be empowering stores to refuse service to Muslims, Jews, and indeed Christians. Would that promote the free exercise of religion, or infringe on it?

4. Can the State Be "Neutral" with Respect to Religion While Giving Public Accommodations Editorial Control Over Goods They Produce?

Masterpiece does give one subtle nod to the customer's right to be free from religious discrimination. It does so only in the course of comparing Colorado's treatment of Phillips and its treatment of the bakers in the *Jack Cases.* In making that comparison, Justice Kennedy argued that Colorado had acted with "religious neutrality"[104] when it allowed the bakers in the *Jack Cases* to refuse service based on the bakers' "conscience-based objections"[105] to serving the customer, but the State had denied that same privilege to Phillips and Masterpiece Cakeshop.[106] Let us examine that argument more closely.

William Jack, a customer, brought the *Jack Cases* after asking three bakers to write antigay religious messages on cakes.[107] The bakers refused, and Jack sued them for violating the Colorado statute prohibiting discrimination in public accommodations because of religion. He lost. The CCRC found that the bakers did not deny service because of religion but because of the "'offensive' nature" of the messages the customer asked the bakers to write.[108] The requested messages "included 'wording and images [the baker[s]] deemed derogatory,'"[109] and the CCRC agreed that the messages were offensive and gave that reason to justify allowing the bakers to refuse to comply with the customer's requests.[110] By contrast, the state courts in *Masterpiece* thought that Phillips had no reason to object to selling a wedding cake either because it contained no message at all, or

104. *See* Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n, 584 U.S. 617, 625 (2018) ("When the [CCRC] considered this case, it did not do so with the religious neutrality that the Constitution requires").

105. *See id.* at 637.

106. *See id.* at 636. "[O]n at least three other occasions the Civil Rights Division considered the refusal of bakers to create cakes with images that conveyed disapproval of same-sex marriage, along with religious text." *Id.* "Another indication of hostility is the difference in treatment between Phillips'[s] case and the cases of other bakers who objected to a requested cake on the basis of conscience and prevailed before the Commission." *Id.*

107. *See* Jack v. Gateaux, Ltd., Charge No. P20140071X (Colo. Civ. Rts. Div. Mar. 24, 2015); Jack v. Le Bakery Sensual, Inc., Charge No. P20140070X (Colo. Civ. Rts. Div. Mar. 24, 2015); Jack v. Azucar Bakery, Charge No. P20140069X (Colo. Civ. Rts. Div. Mar. 24, 2015).

108. *See Masterpiece*, 584 U.S. at 637-38.

109. *Id.* at 636.

110. *See* Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n, 584 U.S. 617, 636-38 (2018); *supra* note 107; *but see Masterpiece*, 584 U.S. at 638 ("A principled rationale for the difference in treatment of these two instances cannot be based on the government's own assessment of offensiveness").

because designing a wedding cake does not suddenly mean something different just because one of the customers is a man rather than a woman.[111] Was the Supreme Court correct to find that this treatment was inconsistent and thus showed a lack of "neutrality" with respect to religion?

The first thing to notice is that it is not true that the State of Colorado gave an *exemption* to the bakers in the *Jack Cases* while refusing to give an exemption to Jack Phillips in the *Masterpiece* case. Rather, the state courts found *no violation of the statute* in the *Jack Cases.*[112]

Their finding was that the customer was *not* denied service because of his religion but because he was asking the bakers to do something they would not do for anyone, i.e., write messages the bakers viewed as "derogatory," "hateful," or "discriminatory."[113] If that is true, then *there was no need for an exemption at all*; the bakers in the *Jack Cases* had *not* engaged in discrimination in violation of the statute. In contrast, the same is not true of the baker in *Masterpiece.* There, baker Jack Phillips refused to sell a cake to Charlie and Dave that he would have sold to Charlie and Della; in other words, Phillips *did* engage in a discriminatory act in violation of the state statute.[114] If there was discrimination in violation of state law in one case and not the other, then the cases *are not analogous*, and it is wrong to suggest that the state showed a lack of "neutrality" with respect to religion to protect some bakers over others.

Second, for the Court's analogy to work, either both cases involved discrimination or neither case involved discrimination. It is not plausible to argue that *Masterpiece* did not involve discrimination because of sexual orientation. The sale would have happened if either Charlie or Dave had been a woman instead of a man; the only issue is whether the baker had a First Amendment privilege that made enforcement of the state law unconstitutional. But that means that the Court *assumed* that there *was* discrimination against the customer in the *Jack Cases*, and the only discrimination relevant there was discrimination because of religion. That should have prompted the Court to consider the clash of religious liberties between the store owners and the customers, as I argued above. What matters here is that the Court assumed that bakers that write words on cakes at the behest of the customer *have an obligation not to refuse service because they do not like the customer's message*, at least when that message is a *religious* one. But if that is true, and the *Jack Cases* are analogous to *Masterpiece*, then why didn't Charlie and Dave have a right to have Jack Phillips sell them a wedding

111. *See* Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272, 286-87 (Colo. App. 2015) (holding sale not particularized message and customers cannot know commercial baker's beliefs from sale alone), *cert. denied*, *sub nom.* Masterpiece Cakeshop, Inc. v. Colo. Civ. Rts. Comm'n, 2016 WL 1645027 (Colo. 2016), *rev'd on other grounds*, *sub nom.* Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n, 584 U.S. 617 (2018).

112. *See Masterpiece*, 584 U.S. at 636 ("Each time, the Division found that the baker acted lawfully in refusing service").

113. *See id.* (listing bakers' reasons for refusing service).

114. *See id.* at 626-27 (noting Phillips makes wedding cakes but said he would not for same-sex wedding).

cake when he would have sold it to customers who were having a religious ceremony he approved of? If it is religious discrimination to refuse to write a religious message the customer wants, why wasn't it religious discrimination to refuse to sell a wedding cake to Charlie and Dave?

The Court cannot have it both ways. It cannot be that the *customer's* religious liberties prevail in the *Jack Cases* but that the *baker's* religious liberties prevail in *Masterpiece*. That only works if we have a legitimate reason for the difference. Yet the Court nowhere gives a reason to treat the cases differently. Indeed, the entire "lack of neutrality" argument is premised on *the cases being the same*. Justices Kennedy and Gorsuch suggested that they were the same because wedding cakes necessarily contain messages, just as the cakes would have in the *Jack Cases*.[115] But Justices Ginsburg and Sotomayor took issue with this assumption. "Phillips submitted no evidence showing that an objective observer understands a wedding cake to convey a message, much less that the observer understands the message to be the baker's, rather than the marrying couple's."[116] Justices Kennedy and Gorsuch deferred to the baker in *Masterpiece* to determine whether the cake contained or conveyed a message of a religious nature.[117] But since Phillips would have sold the cake to a male-female couple, that means the meaning of a good (and its religious message) changes when the identity of the customer changes, or when the customer's proposed use of the good changes.

If all of this is so, then it seems to put bakers to a choice: Either write whatever religious words customers want (to avoid being charged with discrimination on the basis of religion) or do not write any customer messages at all. (It is no good just refusing to write religious messages but agreeing to write others. That would be religious discrimination as well). But that choice is not one that fits commercial or social culture in the United States. There are many businesses that produce goods with customer-chosen messages, symbols, and artwork. They include T-shirt companies, billboard companies, coffee mug sellers, and producers of corporate logos and objects impressed with those logos, like mousepads, pens, ties, and tote bags. All those companies retain some level of editorial discretion. They may refuse to write vulgarities, swastikas, burning crosses, or sexually derogatory images on their goods. Is there really no middle position that allows businesses to put customer messages on goods while retaining some editorial control, and, importantly, refraining from statutorily prohibited discrimination?

It would have been nice for the Supreme Court to address this question, but it did not. Instead, it *assumed* that William Jack was the victim of discrimination

115. *See id.* at 633 ("[Phillips's] refusal was limited to refusing to create and express a message in support of gay marriage"); *id.* at 650 (Gorsuch, J., concurring) (stating cakes with or without words convey messages).

116. Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n, 584 U.S. 617, 667 n.5 (2018) (Ginsburg, J., dissenting).

117. *See id.* at 632-33 (majority opinion) (noting baker perceived creating wedding cake involved expressing religious belief); *id.* at 644 (Gorsuch, J., concurring) (agreeing with majority's explanation of Phillips's motivation).

even though the state officials in Colorado found the exact opposite. But if William Jack had the right to have religious messages of his choice on cakes, then why didn't Charlie and Dave have the same right, given that Jack Phillips agreed that the wedding cake conveyed a religious message that his customers wanted him to produce for them? Once again, there seems to be a clash between the religious liberty of the customer and the religious liberty of the store owner.

The problem we are focusing on here, however, is what it means for the state to act with "religious neutrality." That seems to require us to determine whether it is discrimination on the basis of religion for a baker to refuse to write a religious message that the customer wants on the cake but that the baker finds offensive. That depends on whether the customer is being denied a service that the store offers or not. After all, the Israel Book Shop in Brookline, Massachusetts, has the right to sell only Jewish religious texts. It is not discriminatory for it to refuse to sell Christian or Muslim texts as well. If bakeries produce cakes with customer-chosen messages except for messages the bakers find offensive, then everyone is being provided the same service, and both Justice Kagan and the CCRC are correct that William Jack suffered no discrimination because of religion. But if the service being provided is cakes with customer-chosen messages, then Jack may well have suffered discrimination because of religion. After all, a baker that routinely produces cakes with crosses and Christian images who refuses to place a Star of David or a menorah on a cake may be discriminating against the customer because of religion.

Where does that leave us? First, businesses have strong interests in retaining editorial control over the messages they place on cakes, T-shirts, mugs, and mouse pads. There are some messages and symbols they will refuse to write no matter what the law is, and it is reasonable to think that they should have a fair amount of editorial discretion in this regard. Moreover, the First Amendment may even protect their power in this regard, as *303 Creative* suggests.[118]

Second, states have the power to prohibit discrimination because of religion in public accommodations.[119] That means that the religious liberties of store owners do not exempt them from statutes enacted subject to the states' police power to ensure equal access to the marketplace without regard to religion.

Third, antidiscrimination laws, including public accommodation laws, ensure access, not only to goods and services, but to "full and equal enjoyment" of those goods and services.[120] That means that public accommodations cannot insult people as they serve them.[121] They cannot agree to provide service but only on

118. *See* 303 Creative LLC v. Elenis, 600 U.S. 570, 592 (2023) (reiterating public accommodations retain right "'to choose the content of [their] own message[s]'").

119. *See Masterpiece*, 584 U.S. at 627 (acknowledging Colorado public accommodation statute protects against discrimination because of creed).

120. *See* 42 U.S.C. § 2000a(a).

121. *See infra* notes 193-197 and accompanying text (describing requirement of equal treatment during service); *see also infra* note 196 (explaining consistent insulting behavior still equal treatment).

the condition that they tell the customer they do not want to serve them or that they view them in a negative light.[122]

Fourth, *Masterpiece* holds that the state must act with a certain "neutrality" with respect to religion when it enacts, interprets, and enforces antidiscrimination laws.[123]

If those things are true, then neither the states nor public accommodations can accept the premise that businesses must refuse to write any messages at all to avoid discrimination on the basis of religion. There must be a way for a store to sell Jewish texts but not Christian ones, and there must be a way for businesses to have editorial discretion *while also protecting customers from discrimination because of religion*. It seems a nonstarter to require businesses to write no customer messages at all or to write whatever messages customers want no matter how vulgar, hateful, or offensive. But it also seems a nonstarter to allow businesses to provide services to Christians but to deny *the same services* to Jews. It would be quite odd for a clothing store to have a First Amendment right to refuse to sell a suit to a boy who plans to wear it at his Bar Mitzvah service because the store owner sees that sale as "celebrating" a religion that denies the divinity of Christ. It is a harder question whether a baker can refuse to write Jewish or Muslim symbols on cakes while routinely writing Christian ones. But that question is hard, I believe, not because of First Amendment religious liberty rights, but because of First Amendment free speech rights. We will turn to that issue when we discuss *303 Creative* below.

5. Summary

Where does that leave us? First, the state must choose between the religious liberties of the seller and the religious liberties of the buyer. Protecting one arguably limits the rights of the other. Either stores get to refuse service when they deem service contrary to their religion, or customers have a right to service without regard to their religion and other factors such as race, sex, and disability. Our tradition, exemplified in *Newman v. Piggie Park* and *Heart of Atlanta Motel v. United States*,[124] empowers the states and the federal government to protect customers from discrimination, even if compelled service violates the store owner's religion.[125] Public accommodations serve the public, and it is part of our legal tradition to have laws compelling service so that the public can attain what it needs on an equal basis from businesses that hold themselves out as ready to

122. *See infra* note 193 and accompanying text (stating use of insults and slurs based on customers' identities violates "full and equal enjoyment").

123. *See* Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n, 584 U.S. 617, 625 (2018) (explaining CCRC did not exercise religious neutrality when considering complaint against Phillips).

124. 379 U.S. 241 (1964).

125. *See, e.g.*, Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 402 n.5 (1968) (holding owner's religious beliefs do not exempt them from public accommodations law); *Heart of Atlanta Motel*, 379 U.S. at 243-44, 261 (upholding constitutionality of federal public accommodations law).

serve the public. Government interests in equal dignity justify limitations on the freedom of individuals to assert religious justifications for denying the equal rights of customers to contract and to purchase property.[126] If store owners have *carte blanche* to assert religious interests in denying service, then public accommodation laws are defunct.

Second, public accommodation laws necessarily take a position on religion when they outlaw acts of discrimination that are religiously required by some owners. If that shows "hostility" to religions that demand shunning other people or refusing to deal commercially with them, then that is *not* the kind of hostility that *Masterpiece* outlawed.

Third, the states cannot ensure "full and equal enjoyment" of the services of a public accommodation without prohibiting stores from denigrating or insulting customers, even if the store owner's religion requires or urges them to do so.

Fourth, if we want businesses to retain some amount of editorial control over customer messages they will place on their goods while protecting customers from invidious discrimination because of religion, we need to create a dividing line that determines when a business must write customer words (to avoid discriminating because of religion) and when a business need not write those words (to protect the business owners' free speech and free exercise of religious rights). If we are not willing or able to draw such a line, then the religious liberty of either the store owner or the customer will be curtailed, and the question is which one's religious liberties should give way to those of the other person. That may require us to determine when the services the store owner offers involve their speech such that the religious liberties of the customer are outweighed by the free speech rights of the store owner.

B. Broad Holdings: How Religion Could Undermine Equality

1. Legal Protection for Queer People Necessarily Shows Hostility to Religion and So Cannot Stand

Masterpiece holds that states cannot express "hostility" to anyone's "sincere religious beliefs" when they pass or enforce antidiscrimination laws.[127] If a person's religious convictions reject homosexuality and same-sex marriage as sinful and against God's plan for the world, *and* if that person views the act of providing goods or services to queer people as a "celebration"[128] of homosexuality or same-sex marriage, then laws that prohibit public accommodations from engaging in

126. *See* Civil Rights Act of 1866, 42 U.S.C. §§ 1981-82 (codifying right to make and enforce contracts, and to transfer and hold property).

127. *See Masterpiece*, 584 U.S. at 634 (rejecting hostility towards religious beliefs).

128. *See id.* at 650 (Gorsuch, J., concurring) ("Nor can anyone reasonably doubt that a wedding cake without words conveys a message. Words or not and whatever the exact design, it celebrates a wedding, and if the wedding cake is made for a same-sex couple it celebrates a same-sex wedding").

discrimination against customers because of sexual orientation are "hostile" to those beliefs.[129]

While few people today claim that their religion embraces racism and racial segregation in public accommodations, many people adhere to religions that reject homosexuality and same-sex marriage.[130] Their views are "sincere," and the people who hold those beliefs do not consider themselves "bigots" or bad people.[131] Rather, they are living in accordance with the word of God. These views are widespread in the United States.[132] A statute that prohibits sexual orientation discrimination in businesses open to the public, even if justified by secular arguments about rights to participate in the marketplace without regard to a store owner's religious objections to service, *inevitably* expresses hostility to religions that counsel the duty to shun queer people.

How can one avoid hostility to religion while making a religious practice illegal? How can the state mandate that businesses treat queer people respectfully and "serve" them on an equal basis without being hostile or showing hostility to the beliefs of people that such service celebrates sin? Does the state have to affirm, as Justice Kennedy repeatedly did, that public accommodation owners like Jack Phillips have "sincere religious beliefs and convictions" before imposing penalties on them for acting on those beliefs and convictions?[133] Does the legislature have to say in the preamble to an antidiscrimination law that "there are good people on both sides, but on balance, commercial interests in shopping outweigh the legitimate, sincere religious views of people who know that homosexuality is against God's plan"? Can they say, as the State of Washington does, that discriminatory exclusion from the marketplace "menaces the institutions and foundation of a free democratic state" without expressing hostility to religions that require people to refuse to serve people whose conduct they reject?[134]

There is a tension—or even a contradiction—within the *Masterpiece* opinion. On one hand, the case strongly reaffirms the power of the states to prohibit sexual orientation discrimination in public accommodations. Justice Kennedy affirms that "[i]t 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."[135] But on the other hand, the case holds that the state may

129. *See* Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n, 584 U.S. 617, 638 (2018) (majority opinion) (concluding government cannot impose regulations hostile to religious beliefs).

130. *See* Smith, *supra* note 56, at 599-600 (discussing interest in preventing racial discrimination rather than LGBTQ discrimination).

131. *See* Mo. Dep't of Corr. v. Finney, 218 L. Ed. 2d 69 (U.S. 2024) (Alito, J., concurring in denial of certiorari) (alleging Americans who publicize traditional religious beliefs likely "'labeled as bigots and treated as such'").

132. *See* Yoshino, *supra* note 41, at 270-71 (describing religious groups' views on discrimination).

133. *See Masterpiece*, 584 U.S. at 633-34, 639-40 (framing Phillips's beliefs).

134. *See* WASH. REV. CODE § 49.60.010 (2024).

135. *See* Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n, 584 U.S. 617, 632 (2018).

not show "hostility" to the "sincere religious beliefs" of people who think that compelled service to queer people violates God's will.[136] But if it is impossible to enforce public accommodation laws without showing hostility to religions that oppose those service obligations, then the Supreme Court will have to choose between the holding and the exception. If the "hostility" exception prevails, then public accommodation owners cannot be forced to provide services that they believe "celebrate" sinful conduct or beliefs, and that would mean that protection for queer people against discrimination in public accommodations would be severely undermined. That is because the public assertion of a compelling government interest in compelled service cannot avoid showing hostility to religious beliefs that consider such service constituting complicity in, or celebration of, sin.

2. Store Owners Are Due Complete Deference When They Claim That Compelled Service Forces Them to "Celebrate" a Practice That Violates Their Religion

Because Justice Kennedy assumed that *Masterpiece* was analogous to the *Jack Cases*, that means that the First Amendment requires courts to defer to store owners when they believe that selling a good constitutes "celebration" of a religious event or a religious belief.[137] The majority in *Masterpiece* rejected Justice Kagan's argument that Jack Phillips refused to sell the same cake to Charlie and Dave that he would have sold to a male-female couple.[138] Instead, Justice Kennedy assumed that the design and sale of the cake would change its meaning when the services were provided for a same-sex couple rather than a male-female couple.[139] If we take that deference seriously, it would mean that it might violate the baker's free exercise of religion to force the baker to sell a wedding cake to a Jewish couple since that would force the baker to "celebrate" Judaism, and that would mean repudiation of the belief that Jesus is the Son of God.

While this would not necessarily mean that public accommodations would always have a constitutional exemption from antidiscrimination laws, it would mean that *every* refusal to sell a good or service to a customer would require the courts to determine whether the denial of service is justified by a sufficiently strong government interest such that the infringement on the free exercise of religion is constitutional. The *Masterpiece* Court assumed that designing a cake to

136. *See id.* at 634 (declaring Commission's treatment of Phillips's sincere religious beliefs impermissible).

137. *See id.* at 638 (refusing differentiation based on state's perception of offensiveness).

138. *See id.* at 641-42 (Kagan, J., concurring) (arguing Phillips violated Colorado law by refusing service on basis of customers' sexual orientation). The majority, by contrast, premised its disposition of the case on the lack of consideration given to Phillips's religious objection by the Commission and the lower courts. *See id.* at 638-40 (majority opinion) (reversing judgment of Colorado Court of Appeals).

139. *See Masterpiece*, 584 U.S. at 636-37 (suggesting distinction between refusals in *Jack Cases* and Phillips's refusal to bake for same-sex couple).

serve the customer's needs is different from selling premade cakes.[140] But if the rule is that we must defer to the store owner's views on what acts constitute "religious celebration," then *even routine sales of goods* might infringe on religious liberties if the store views such sales as complicity in a sinful, sacrilegious practice.

Professor Elizabeth Sepper has argued that stores generally send no message by providing equal service to customers.[141] No one thinks that Chick-Fil-A approves of homosexuality just because it sells its food to queer customers.[142] The mere fact of service or the sale of goods does not convey a publicly understood message of support for the customer's religion or lifestyle. On the other hand, refusing service *does* communicate messages that say something like: "you are not welcome," "you are engaged in sinful acts," "you are unworthy to associate with me."[143] Phillips disagreed with Professor Sepper's view. He thought service *did* send a message, whether or not a public one. It sent a message of "celebration." Conversely, perhaps Phillips intended to send a message *by refusing to serve*. Professor Mark Satta has argued that what at least some owners like Phillips want is the right to send a religious message *by the very act of publicly denying service* to someone whose views or conduct violate their religion.[144]

The problem is that it is difficult to reconcile the rule that states can prohibit discrimination in access to public accommodations with the rule that store owners cannot be compelled to "celebrate" beliefs or conduct that violates their "sincere religious beliefs." If a landlord, for example, thinks that renting an apartment to a same-sex couple or an unmarried male-female couple promotes and "celebrates" sin, and if we defer to the landlord as to what his religion requires, then the Fair Housing Act requires the landlord to engage in a religious act.[145] We know that Jews cannot be compelled to recite a Christian prayer in school,[146] and ministers cannot be compelled to officiate at a religious event.[147] But if that is so, and if the courts must defer to the beliefs of private market actors that their

140. *See id.* at 624 ("If a baker refused to design a special cake with words or images celebrating the marriage—for instance, a cake showing words with religious meaning—that might be different from a refusal to sell any cake at all").

141. *See* Elizabeth Sepper, *Free Speech and the "Unique Evils" of Public Accommodations Discrimination*, 2020 U. CHI. LEGAL F. 273, 290 (2020) (arguing providing services to customers does not mean business approves or endorses customer's views).

142. *See id.* (providing hypotheticals supporting assertion providing service not approval or endorsement).

143. *See id.* at 291-92 (explaining how refusing service conveys unspoken messages of hate and discrimination).

144. *See* Mark Satta, *Commercial Discrimination as Religious Messaging in* 303 Creative v. Elenis, 15(1) RELIGIONS 1, 11-12 (2023) (noting publication of statement of refusal to serve furthers owner's purpose of commercial discrimination).

145. *See* 42 U.S.C. § 3604(b) (describing prohibition on discrimination in provision of services).

146. *See* Engel v. Vitale, 370 U.S. 421, 424-25 (1962) (holding school prayer requirement violates First Amendment).

147. *See* Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n, 584 U.S. 617, 632 (2018).

conduct involves compelled religious celebration, then antidiscrimination laws cannot be enforced against them.

That cannot be the holding of *Masterpiece.*[148] Justice Kennedy explained:

> [A]ny decision in favor of the baker would have to be sufficiently constrained, lest all purveyors of goods and services who object to gay marriages for moral and religious reasons in effect be allowed to 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.[149]

Yet *Masterpiece* undermines this premise when it suggests that store owners should not have to provide any services that, *according to the store owner*, "celebrate" the customer's beliefs or conduct in violation of the owner's sincere religious convictions. If *Masterpiece* means that we defer to the public accommodation owner as to when service either sends a message or constitutes a forced religious act, then public accommodation laws cannot be enforced against *any* owner who claims that service constitutes compelled religious celebration.[150]

3. Because the State Cannot Regulate Religious Beliefs, It Cannot Provide Greater Protection Against Racial Discrimination than Sexual Orientation Discrimination

It seems that no one is questioning the holding of *Newman v. Piggie Park. Newman* rejected a claim that constitutional free exercise of religion entitles restaurants to operate racially segregated restaurants.[151] Yet, *Masterpiece* holds that the state cannot stop a public accommodation from engaging in what the legislature sees as wrongful discrimination, if its officials demonstrate hostility to religion in promulgating or enforcing the law. When the restaurant owner in *Newman* argued that it was against his religion for Black and white customers to break bread together, the Supreme Court of the United States called that argument "patently frivolous."[152] Doesn't that show "hostility" to the restaurant owner's "sincere religious beliefs"? *Newman* seems to deny that religion can be brought into the public sphere to justify an exemption from a valid regulatory law—one of the comments that Justice Kennedy mentioned to explain why the

148. *See id.* ("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").

149. *Id.* at 634.

150. On the effects of total deference to businesses as to whether compliance with law infringes on their religious exercise, *see* Sepper, *supra* note 56, at 821-26.

151. *See* Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 402 n.5 (1968) (calling respondent's argument "patently frivolous").

152. *See id.*

State of Colorado was hostile to religion.[153] And while the conduct in *Newman* may not rise to the level of tarnishing religion with "despicable" support for slavery or the Holocaust,[154] its holding certainly seems to suggest a certain "hostility." It does not appear that the Supreme Court wants to overrule *Newman.* But the reasoning of *Masterpiece* undermines that certainty.

Why is sexual orientation different from race? Why is it okay for the state to show hostility toward religious beliefs in racial inferiority or racial segregation but not for discriminatory treatment of queer people? Is there some view that racial bigotry has no rational or legitimate justification while opposition to homosexuality is rational, legitimate, and even admirable? Perhaps the answer is that the Constitution provides special protections against racial discrimination. But that answer does not work. The Constitution prohibits racial discrimination *by the state*, not by private parties.[155] Statutes that prohibit discrimination by private parties are passed under the states' police powers. What part of the Constitution defers to the states when they regulate racial discrimination but limits their police powers when they prohibit sexual orientation discrimination? How does the First Amendment empower the Supreme Court to announce that religious beliefs in racial inferiority are not deserving of First Amendment protection while religious condemnation of homosexuality is perfectly legitimate? How could that be when the Court seems to require courts to defer to individuals when they say something infringes on their religious commitments? What neutral, nonreligious norm justifies the distinction between race and sexual orientation when it comes to defining religious liberty?

While it makes sense to argue that race is different—and so the state interest in protecting people from racial discrimination in civil life is an extraordinarily strong one—it is not clear why the state is disempowered from determining that sex (and sexual orientation) discrimination are *also terrible social evils*. Are religious liberties greater when they involve nonracial forms of discrimination? Must state interests in equal access to the marketplace be placed on a sliding scale where the Constitution deems some of them "compelling" and others merely "significant"? Does the First Amendment take sides in religious disputes by deeming racial discrimination illegitimate but sexual orientation discrimination legitimate, or even praiseworthy?

The worry is that religious liberty claims to refuse service to queer people could boomerang back and entitle public accommodation owners to refuse

153. *See* Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n, 584 U.S. 617, 634 (2018) ("At several points during its meeting, commissioners endorsed the view that religious beliefs cannot legitimately be carried into the public sphere or commercial domain, implying that religious beliefs and persons are less than fully welcome in Colorado's business community").

154. *See id.* at 635 ("'Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust, whether it be—I mean, we—we can list hundreds of situations where freedom of religion has been used to justify discrimination'").

155. *See* U.S. CONST. amend. XIV, § 1 (outlawing states from interfering with constitutionally granted rights); Shelley v. Kraemer, 334 U.S. 1, 13 (1948) (describing state action doctrine).

service *because of race* when the reasons for refusal are premised on "sincere religious convictions." The Supreme Court certainly seemed hostile to the religious views of the owner of Piggie Park restaurant. If the language used by the state commissioner in *Masterpiece* is sufficient to show state hostility to religion, then perhaps state officials should be careful to be more respectful of racist religious beliefs, lest they be disempowered from combatting racial discrimination in restaurants. Be careful what you wish for. The logic of *Masterpiece*, if taken to the extreme, would result in overturning *Newman*, and we would be back to the Jim Crow era—racial segregation in public accommodations would be lawful because it could be justified by sincere religious beliefs.

4. Because the State Action Doctrine Applies to Antidiscrimination Laws but Not to the Common Law of Property, the Religious Liberties of Store Owners Must Prevail Over the Religious Liberties of Customers

Public accommodation laws, like all antidiscrimination laws, regulate conduct by compelling service to customers. They are a form of state action that must comply with the Bill of Rights and the Fourteenth Amendment. If the "free exercise of religion" includes the right to refuse compliance with antidiscrimination laws where service is understood by the store owner to constitute "celebration" of the customer's conduct, then store owners would no longer have to comply with antidiscrimination laws—including laws that protect *customers* from discrimination because of religion. Owners could simply identify "sincere religious beliefs" that prohibit involvement in the customer's life and that therefore require shunning them from market transactions that involve services of any kind. If, on the other hand, the state *refuses to act* (i.e., it does not require equal access to public accommodations), then, according to the state action doctrine, the state has not acted to interfere with the religious liberty of the store owner, and the state is not responsible for the store owner's own private discrimination against customers based on the customer's religious practices.

If all that is true, then the Constitution requires the state to preference the religious liberty of the public accommodation owner over the religious liberty of the customer. And if that is so, then we need to strike the word "religion" out of all our antidiscrimination laws, including those prohibiting discrimination because of religion in public accommodations, housing, and employment. In that world, the religious liberties of customers would have to give way to the religious liberties of store owners. Federal and state laws prohibiting religious discrimination in public accommodations would be unconstitutional if applied to a public accommodation owner who views the provision of service as a requirement that the owner engage in an act that "celebrates" beliefs or conduct contrary to the owner's "sincere religious beliefs." The Constitution would require the word "religion" to be stricken from the Federal Public Accommodations Act of 1964

and the statutes of more than forty states that contain similar language.[156] And more than that, it would also override protections against religious discrimination in housing and employment. The religious liberties of employers would prevail over the religious liberties of employees, the religious liberties of landlords would prevail over the religious liberties of tenants, and the whole project of ensuring equal access to the marketplace regardless of religion would be scrapped.

C. Narrow Holdings: How Equality and Religion Can Coexist

1. Masterpiece Has No Precedential Value

I have argued that it may be impossible to justify, pass, or enforce an antidiscrimination law without expressing "hostility" to "sincere religious beliefs" that require discriminatory conduct.[157] I have also argued that it is impossible to give free reign to the religious liberties of store owners without leaving customers vulnerable to discrimination on the basis of religion, as well as other factors, including race, sex, and sexual orientation.[158] Rather than parsing the language of *Masterpiece* carefully to determine which justifications for antidiscrimination laws can be offered that do not cross the boundary into "hostility," a perfectly sensible interpretation of *Masterpiece* is that Justice Kennedy wanted to end his career by affirming both his support for gay rights and his support for religious conservatives. He wanted to affirm that religious objections to homosexuality are legitimate moral or religious views, while still imposing obligations on businesses to serve the public despite those objections.[159] Justice Kennedy said as much when he noted that "whatever the outcome of some future controversy involving facts similar to these, the Commission's actions here violated the Free Exercise Clause; and its order must be set aside."[160] That language is reminiscent of *Bush v. Gore*,[161] where the Court suggested that the case was *sui generis* and that the ruling was "limited to the present circumstances."[162]

If that is correct, then *Masterpiece* affirms the power of states to prohibit discrimination because of sexual orientation in the sale of goods and services in businesses open to the public *even if* the store owner thinks such service "celebrates" a belief or practice contrary to the owner's "sincere religious beliefs." The sole purpose of the ruling in *Masterpiece* was to be a piece of performance

156. *See* 42 U.S.C. § 2000a(a); *supra* notes 16-17 (listing state public accommodations statutes).

157. *See supra* Section II.B.4 (noting antidiscrimination laws lose power when unable to prevent discrimination because of religion).

158. *See supra* Section II.B.1 (asserting equality undermined by generous protections for store owners).

159. *See* Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n, 584 U.S. 617, 633-36, 639-40 (2018) (discussing balance between respecting religious beliefs about homosexuality and obligations on businesses to serve public).

160. *See id.* at 625.

161. 531 U.S. 98 (2000).

162. *See id.* at 109.

art, the goal of which was to show respect for religious objections to the gay marriage ruling in *Obergefell v. Hodges*.[163] David S. Schwartz argued that this was the purpose of *303 Creative*, a ruling he called "legal performance art," and his argument equally applies to *Masterpiece.*[164] The reason to think of it this way is the logical contradiction between affirming the power of states to prohibit sexual orientation discrimination and the injunction not to show hostility to people whose religious beliefs require that very discrimination. Perhaps *Masterpiece*, like *Bush v. Gore*, is "limited to the present circumstances" and not a precedent that can or will shape public accommodations or free exercise of religion law in the future. If that is true, then working hard to come up with a narrow holding is not worth the effort. States can protect queer people from discrimination even if this shows hostility to religions that promote, require, or counsel shunning of queer customers.

2. States Can Prohibit Discrimination as Long as They Do Not Show "Hostility" to "Sincere Religious Beliefs"

If we assume that the Supreme Court regrets *Bush v. Gore*'s suggestion that the case is not treated as precedent for the future, then we must give *some* force to the reasons why *Masterpiece* gave Jack Phillips an exemption from the statutory duty to serve Charlie and Dave without regard to their sexual orientation. One way to do that might be to require states to justify antidiscrimination laws by reference to norms and values that identify legitimate government interests that are *neutral*—or as neutral as possible—*with respect to religion*, such as liberty, equality, dignity, and the right to acquire property. Alternatively, states may be justified in choosing to protect the religious liberties of customers over the religious liberties of store owners. The *only* thing the state cannot do is

163. *See* Obergefell v. Hodges, 576 U.S. 644, 675 (2015) (holding "same-sex couples may exercise the fundamental right to marry").

164. *See* Schwartz, *supra* note 57, at 36-37 (explaining reasoning for Court taking on *303 Creative*). Justice Alito, in particular, has complained that the advent of same-sex marriage may make proponents of "traditional marriage" be seen, and treated, as bigots:

> In this case, the court below reasoned that a person who still holds traditional religious views on questions of sexual morality is presumptively unfit to serve on a jury in a case involving a party who is a lesbian. That holding exemplifies the danger that I anticipated in *Obergefell v. Hodges*, . . . namely, that Americans who do not hide their adherence to traditional religious beliefs about homosexual conduct will be 'labeled as bigots and treated as such' by the government. . . . The opinion of the Court in that case made it clear that the decision should not be used in that way, but I am afraid that this admonition is not being heeded by our society.

Mo. Dep't of Corr. v. Finney, 218 L. Ed. 2d 69, 69 (U.S. 2024) (Alito, J., concurring in denial of certiorari). *Compare Obergefell*, 576 U.S. at 741-42 (Alito, J., dissenting) (predicting vilification of individuals who hold views against homosexuality based on religion after *Obergefell*), *with id.* at 672 (majority opinion) ("Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here").

express outright *hostility to religion* when it designs, drafts, passes, and enforces a law against discrimination.

Legislators can argue against a regulatory law on the ground that it is unfair to people whose religious beliefs or practices would make it difficult or impossible for them to obey that law. But they can also criticize the notion of deferring to those religious beliefs or practices if they do so by reference to *public values* that apply to any person regardless of their religion. The same is true of administrators of agencies empowered to enforce antidiscrimination laws. A member of a state civil rights commission can criticize acts of discrimination by reference to *legitimate state interests*. The only thing state actors cannot do is express a preference for one religion over another, or denigrate a particular religion or a particular person's religious beliefs.

The commissioners in *Masterpiece* who publicly criticized the use of religion to justify discrimination could have done so if they had simply said that religious convictions are overridden by compelling public interests in equal access to the marketplace. What went wrong in *Masterpiece* was state action that showed "hostility toward the sincere religious beliefs that motivated [the baker's] objection" to complying with state law.[165] In the eyes of the Supreme Court, state officials went overboard by suggesting that someone's "sincere religious beliefs" were "despicable," that religion has often justified atrocities, and that it is wrong for "religious beliefs [to be] carried into the public sphere or commercial domain."[166] All the commissioners needed to do to avoid showing "impermissible hostility" was say that sincere religious beliefs do not justify an exemption from an antidiscrimination law that furthers compelling state interests in equal access to the marketplace, which can only be achieved by uniform enforcement of public accommodations.[167]

In the end, *Masterpiece* requires legislators, administrators, and judges to eschew direct attacks on religion, and instead justify legislation and law application by reference to *public values*—which is easily done. Public values are neutral with respect to religion and they encompass widely shared norms such as freedom, equality, dignity, autonomy, and welfare.[168] Therefore, state actors can say that a store owner's religious convictions do not constitute a valid reason to deny equal access to the marketplace because of race, sex, sexual orientation, or religion.[169] All they cannot do is justify a law or its enforcement by criticizing the religious beliefs of the person subject to the law. Thus, the *Masterpiece* holding

165. *See* Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n, 584 U.S. 617, 634 (2018).

166. *See id.* at 634-35 (providing and commenting on commissioner's statement).

167. *See id.* (placing focus on commissioners' statements).

168. *See Obergefell*, 576 U.S. at 663 (discussing fundamental liberties including individual dignity, autonomy, personal identity, and beliefs).

169. *See Masterpiece*, 584 U.S. at 631 (explaining religious convictions superseded by public accommodations law).

is exceedingly narrow and in no way limits states' power to protect queer people when they go shopping.

3. States Can Protect Stores' Religious Liberties by Empowering Them to Choose What Goods and Services to Offer to the General Public

States can require public accommodations to provide full and equal enjoyment of goods and services, including wedding services, without regard to race, sex, disability, national origin, or religion, among other factors. But this does not mean that stores do not retain control over *what goods and services they offer*. Stores determine what goods and services they want to offer to the general public. They are not compelled by public accommodation laws to "celebrate" religious ceremonies against their will. A bookstore can choose to sell only Jewish books, an art gallery only Christian-themed religious art, and a baker nothing but Christian-themed baked goods.

Moreover, anyone can avoid the obligations of public accommodation law by *not operating a public accommodation.* One can do this by *not* offering goods and services *to the general public*, but rather, by operating as an independent contractor that does not offer to sell to anyone who seeks services, but who reserves the right to choose whom to work with on an individual, consultative basis. Of course, this latter way of avoiding public accommodation laws must itself be narrow. Otherwise, all services involving tailoring or individual consultations would become private entities with the power to discriminate. This way of avoiding public accommodation law is built into the structure of those laws. Specifically, it requires a business to be akin to a store that invites the public in and is ready to take your money in exchange for the goods on sale, even if those goods are sold with some tailoring or modification. Such laws, by their very nature, assume that there are commercial services that are *not* open to the general public. Recall that religious entities have both religious liberty and free association rights to provide services only to members of their own religion—because they are not public accommodations at all. For example, a klezmer band could offer to play its music in Jewish religious settings but not Christian ones. The same is true of speech writers or other independent contractors that do not offer goods and services indifferently to the general public—they also do not qualify as public accommodations.

Conversely, a store that sells baked goods to the general public—and thus is a public accommodation—cannot refuse to sell those goods just because the buyer is planning to use those goods in a religious ceremony that the store owner disapproves of. The owner may think that the sale "celebrates" sin or constitutes complicity in a customer's sinful way of life. That form of complicity, however, is too attenuated to constitute forced participation in a religious ceremony. If it were enough, then a clothing store could refuse to fit and sell a suit to a boy who intends to wear it at his Bar Mitzvah or a dress for a girl at her First Communion. A Staples store could refuse to sell a printer to a mosque or synagogue. In cases

like this, even if the owner thinks that the sale of a good is a religious act, stores that offer their wares to the general public can be required to refrain from discriminatory denials of full and equal service.

For public accommodation laws to work, store owners cannot have complete freedom to characterize the sale of goods or services as "celebrating" the customer's sinful practices. That means the legal system must limit what people can claim are exercises of religion. The sale of a suit to a gay man who plans to use it in his wedding ceremony is not a religious act like being the minister at the marriage ceremony. And even if it is, the state is empowered to protect customers from discrimination on the basis of sexual orientation or religion because of the compelling state interest in equal access to the marketplace.

The issue that arose with *Masterpiece* is that the owner wanted to have his cake and eat it too. He wanted to hold himself out to the public as a "cake shop." In other words, he wanted to operate a public accommodation that sold goods and services to the general public. Nevertheless, he also wanted to refuse service to a customer who planned to use his goods in a religious ceremony that he viewed as sinful. That violates the requirement that he provide full and equal enjoyment to customers regardless of religion and sexual orientation. The meaning of a good does not change just because the identity of the customer changes, and the customer's use of the good does not translate into forced complicity by the seller in that use.

Phillips could have held Masterpiece Cakeshop out as a bakery that designs and sells cakes and cookies for Christian religious ceremonies. That would make him like the Israel Book Shop. If he had done that, he would have been in full command of the goods he wanted to sell. But even if he did so, he would have had to sell the goods to customers regardless of their sexual orientation or religion. He could not, for example, refuse to sell to Catholics or members of The Church of Jesus Christ of Latter-day Saints. The problem is that Phillips failed to do that. He wanted to operate a generic bakeshop while *also* refusing service for religious reasons. The law does not allow Phillips to operate a generic or product-limited public accommodation *and* choose his customers in a discriminatory manner, even after *Masterpiece*.[170]

States have chosen to ensure equal access to customers without regard to religion. This limits the religious liberties of people who want to engage in commercial discrimination, like the owner of the Piggie Park restaurant. The design of a wedding cake is not a coerced religious act; if it were, then stores could refuse to design and sell wedding dresses to same-sex couples, and hotels could refuse to offer a food menu for the wedding reception in the hotel ballroom. Businesses open to the public—public accommodations—cannot be forced to

170. *See id.* at 642 n.* (Kagan, J., concurring) ("A vendor can choose the products he sells, but not the customers he serves—no matter the reason").

provide religious services, but they can be compelled to offer *whatever goods and services they choose to provide* in a nondiscriminatory manner.

Giving store owners *the freedom to decide what services to offer* while requiring them to *provide those services in a nondiscriminatory manner* is the best way to accommodate the seemingly conflicting goals of religious liberty and equality.[171] Proponents of religious liberty may see coerced service as a requirement that they "celebrate" the customer or the customer's religion, identity, or actions, but the power of stores to decide what services to offer, including their freedom to offer religious goods and services for sale, is the right way to protect religious liberty while ensuring nondiscriminatory access to the marketplace. This is especially true because public accommodation laws protect *customers* from discrimination because of religion. That would not be possible if the store owner can itself assert religious liberty as a reason to engage in religious discrimination against customers.

4. States Can Enforce Public Accommodation Laws Without Violating a Duty to Be "Neutral" with Respect to Religion

Masterpiece requires "neutrality" with respect to religion. That means the state cannot grant greater rights to some actors over others when doing so expresses a state preference for one religion over another, and thus "'depart[s] from neutrality' on matters of religion."[172] Departures from neutrality arguably show "hostility to religion" by championing one set of religious views over others.[173] But the neutrality issue becomes complicated when we recall that both store owners and customers have religious liberties.

We have just seen that stores cannot be compelled to participate in religious ceremonies. That interest is protected by ensuring that stores are in charge of choosing what goods and services to offer the public. On the other hand, stores cannot claim that every sale of a good or service constitutes complicity with the customer's uses of it, even if the store views those uses as sacrilegious. Part of the reason for that is that public accommodation laws protect the religious liberties of customers by prohibiting denial of service because of the customer's religion. A state choice to protect the rights of people to access goods and services without regard to religion may privilege the customer's religious liberty over that of the store owner, but there is no reason to believe that is a choice that is not neutral with respect to religion. As Justice Kennedy explained:

171. On the need to shape law to promote religious liberty and equality, *see* Martha Minow, *Walls or Bridges: Law's Role in Conflicts Over Religion and Equal Treatment*, 48 BYU L. REV. 1581 (2023).

172. *See* Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n, 584 U.S. 617, 638 (2018) (quoting Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 534 (1993)).

173. *See id.* at 636 ("Another indication of hostility is the difference in treatment between Phillips'[s] case and the cases of other bakers who objected to a requested cake on the basis of conscience and prevailed before the Commission").

> [A]ny decision in favor of the baker would have to be sufficiently constrained, lest all purveyors of goods and services who object to gay marriages for moral and religious reasons in effect be allowed to 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.[174]

The difficult issue is whether the state acts neutrally with respect to religion when it authorizes bakers to refuse to write religious antigay messages on cakes (as in the *Jack Cases*) but punishes a baker for refusing to "celebrate gay marriage" by creating a wedding cake for a same-sex couple. The Supreme Court majority thought these cases were analogous, but if that is so, then two other things must be true. First, there must have been discrimination in both cases, and second, both cases involved either compelled speech or "conscience-based" refusals of service.

On the first issue, recall that the Supreme Court interpreted *Masterpiece* and the *Jack Cases* to be analogous. For that to be true, the Court assumed that the bakers engaged in discrimination in both cases, i.e., sexual orientation discrimination in *Masterpiece* and religious discrimination in the *Jack Cases*. Importantly, that suggests that the bakers in the *Jack Cases* engaged in religious discrimination against the customer when they refused to write religious messages that customer asked for. For that to be discriminatory, the Court must have assumed that the bakers would have written *different* religious messages for other customers. That would be needed for the denial of service to William Jack to constitute religious discrimination. If that is so, then we have a problem.

The problem is that we do not want a rule that forces businesses to choose between not writing customer messages on goods at all or writing whatever messages the customers ask for. Neither of those rules fits our social customs, and either would be destructive of values we support, including First Amendment values of speech and conscience. We want to enable businesses that write customer messages on goods to exist, but we also want those businesses to have editorial discretion and the right to refuse to write offensive messages. So how can we give businesses editorial discretion while also protecting customers from religious discrimination?

Justice Kagan suggested we should give up that goal. She proposed the cleanest and most administrable rule, i.e., that stores have full editorial discretion. They cannot be forced to write *any* messages, religious or otherwise, that they find offensive. That arguably protects both the religious liberties and the free speech rights of the store owner, and eschews discrimination against the customer. As Justice Kagan argued, that would mean that the owner had treated the

174. *Id.* at 634.

customer "in the same way they would have treated anyone else."[175] The owner would not write those messages for any customer, so all customers are being treated the same. Writing those words is not a service the owner offers the public. The baker writes words customers choose unless the baker finds them offensive. That rule would mean, contrary to the assumptions made by Justice Kennedy, that the customer in the *Jack Cases* was *not* the victim of discrimination at all.

The Supreme Court assumed that William Jack *was* the victim of discrimination. Otherwise, no conscience-based exemption would have been needed. Indeed, if we look at it from Jack's point of view, the bakers refused to write Bible messages he chose when they would have agreed to write different Bible messages for other customers. Similarly, a Jewish customer might well feel singled out if a baker routinely puts crosses on cakes but refuses to put a Jewish star.

The problem, of course, is that the customer is not the only one with religious liberties. The store owner has religious reasons to refuse to write certain messages as well. Yet, we have just seen that even though the First Amendment protects people from being forced to celebrate religious ceremonies, that right does not extend to the sale of goods and services on an equal basis. That means the baker's claim is better posed as an issue of free speech rather than religion. Does the baker have a free speech claim that protects him from being forced to write words on the cake when those words are chosen by the customer but offensive to the baker? If the baker *does* have a free speech claim, then refusing to write the words is *not* an instance of religious discrimination because the First Amendment's free speech rights empower the owner to refuse that type of service. That would mean that the free speech rights of the owner take precedence over the religious liberties (or equality rights) of the customer.

That brings us to our second issue. Is designing a wedding cake for a customer a speech act? Does the meaning of the speech act change just because of the *identity* of the customers, such as when they are two men rather than a man and a woman? Does the speech act change its meaning because of the *use* the customer intends to put the good to, such as in a religious ceremony that the baker rejects? These questions matter because *Masterpiece* was analogous to the *Jack Cases only if* both cases involved compelled speech or compelled complicity in a religious ceremony.

The problem is that the Supreme Court failed to cleanly answer either of our questions. It suggested, but did not hold, that William Jack was the victim of religious discrimination, and it suggested, but did not hold, that designing a wedding cake is "speech" within the meaning of the First Amendment. Where does that leave us? How can the State of Colorado apply its public accommodation

175. *See id.* at 641-42 (Kagan, J., concurring) (endorsing stores declining service in *Jack Cases* based on requested message but not Phillips's discrimination). Kagan believed *Masterpiece* could have been answered without reference to the commissioners' reasoning—just by distinguishing the two cases. *See id.* at 643 ("The Court limits its analysis to the *reasoning* of the state agencies (and Court of Appeals)—'quite apart from whether the [Phillips and Jack] cases should ultimately be distinguished'").

laws in a manner that is neutral with respect to religion when both customers and store owners have religious liberties and store owners *also* have free speech rights?

Several options are on the table. First, the state could determine that *Masterpiece* and the *Jack Cases* are *not* analogous because the *Jack Cases* would have involved compelled speech and the wedding cake without words did *not* constitute speech. That result would seem warranted by *Masterpiece* because the state has the power to require stores to sell goods to people regardless of their sexual orientation or religion, but it does not have the power to require them to write messages they would not write for anyone. While the Supreme Court assumed that both *Masterpiece* and the *Jack Cases* involved exemptions from the public accommodation law, it did not hold that Charlie and Dave were not the victims of discrimination. Because the *Masterpiece* majority did not think this issue through, the state may act neutrally by giving bakers editorial discretion but not the power to refuse sales on equal terms without regard to religion or sexual orientation.

Second, the state could protect buyers from religious discrimination by requiring bakers either to write no words on cakes (or T-shirts or mugs, etc.) or to write whatever words the customer wants. This approach would deny editorial discretion entirely. The problem here is that we run into the compelled speech problem. To determine whether this would be constitutional, we need to address whether this rule would compel stores to engage in speech they find offensive; that is the subject of the next section on *303 Creative*.

Third, the state could determine that stores have absolute editorial discretion, and that exercising that discretion is not discriminatory. It does not involve discrimination because *the service they offer the public* is one of including customer messages on goods *unless* the owner finds them offensive. That is the solution Justice Kagan proposed. It means that all customers are treated alike because the service being provided does not include writing customer words, whatever they are. This solution may seem neutral with respect to religion, but by giving the store owner full discretion, it allows the owner to refuse service to customers in a manner that will be experienced by some customers as discrimination because of religion.

The fourth possibility is to give stores editorial discretion while reserving the possibility that *some* denials of service *could* constitute discrimination "because of religion." We do not want owners to be compelled to write words they find offensive, but we also want to protect customers from religious discrimination. This issue, it turns out, is better treated as a free speech issue than an issue of the free exercise of religion, and to that we now turn.

III. PUBLIC ACCOMMODATIONS AND FREE SPEECH

A. The Conundrums of 303 Creative

1. Do We Really Have the Same Rules for Political or Religious Speech as We Do for Commercial Speech?

In the 2023 case *303 Creative LLC v. Elenis*, the Supreme Court held that a wedding website designer can refuse to provide her services to same-sex couples when doing so would compel her to speak favorably about their marriages.[176] The state cannot put words in people's mouths or force them to say things they do not want to say.[177] Because the First Amendment protects people from "compelled speech,"[178] states cannot mandate services when those services involve "pure speech."[179] On the other hand, businesses *can* be required to provide full and equal enjoyment of any goods or services they offer the public without regard to sex, sexual orientation, or other factors when those services do not compel "pure speech."[180]

Is it true that the state can never compel speech? The answer is clearly "no," but you would not know that from reading Justice Gorsuch's opinion in *303 Creative*. Professor Robert Post explains that states *often* compel speech in the commercial world.[181] Both federal and state laws require disclosure of lead paint in old apartments when landlords rent them to tenants.[182] Securities laws require corporations to issue periodic disclosure statements about their finances, plans,

176. *See* 303 Creative LLC v. Elenis, 600 U.S. 570, 588-92 (2023) (discussing "impermissible abridgement" of First Amendment right to speak freely where state compels speech). According to the Court, the government cannot put words in anyone's mouth; thus, compelling website designer Lorie Smith to speak violates the First Amendment. *See id.* at 588-89 (explaining how Colorado specifically violated Smith's First Amendment rights). This proposition is doubtful; many laws compel speech. *See* Robert Post, *Public Accommodations and the First Amendment*: 303 Creative *and "Pure Speech"*, 2023 SUP. CT. REV. 251, 278-80 (2023) (distinguishing government regulation of public discourse and commercial speech).

177. *See 303 Creative*, 600 U.S. at 585-87 (explaining precedent cases held states cannot force viewpoints contrary to individuals' beliefs upon them).

178. *See id.* at 578-79 ("Colorado . . . seeks to use its law to compel an individual to create speech she does not believe"); Rumsfeld v. F. for Acad. & Institutional Rts., Inc., 547 U.S. 47, 61 (2006) (highlighting "principle that freedom of speech prohibits the government from telling people what they must say"); Boy Scouts of Am. v. Dale, 530 U.S. 640, 648 (2000) (prohibiting expression of views people or groups do not intend to express).

179. *See 303 Creative*, 600 U.S. at 597 ("[A] State [cannot] force someone who provides her own expressive services to abandon her conscience and speak *its* preferred message instead").

180. *See id.* at 590 ("[W]e do not question the vital role public accommodations laws play in realizing the civil rights of Americans. . . . [G]overnments in this country have a 'compelling interest' in eliminating discrimination in places of public accommodation").

181. *See* Post, *supra* note 176, at 272-74 (discussing "myriad miscellaneous disclosure requirements imposed on commercial transactions").

182. *See, e.g.*, Residential Lead-Based Paint Hazard Reduction Act of 1992, 42 U.S.C. § 4852d(a) (requiring sellers and lessors to disclose lead-based paint hazards); 24 C.F.R. § 30.65 (2023) (imposing civil penalty against knowing violators of 42 U.S.C. § 4852d); 105 MASS. CODE REGS. 460.725 (2024) (obligating owners and managing agents in Massachusetts to disclose presence of lead paint).

and prospects.[183] Building contractors are required to post building permits on buildings.[184] Real estate sellers are compelled to explain all the costs associated with the closing under the Federal Real Estate Settlement Procedures Act.[185] Drug manufacturers are required to reveal side effects.[186] And, importantly, the Americans with Disabilities Act requires hotels to reveal whether they have facilities accessible to people with disabilities.[187] This latter example shows that compelled speech exists within the realm of antidiscrimination law, including public accommodation law.

The state's ability to compel speech applies to associational claims. Public accommodation laws require businesses to engage in commercial activity with particular categories of customers. Businesses act in the "public" world of the marketplace, not in the "private" world of the home, church, social club, political club, or family, where rights of intimate and political association empower people to choose their companions as they wish, even if their choices are "discriminatory." In that "private" or "political" world, exclusionary rights are ample, as the Supreme Court held in *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*[188] and *Boy Scouts of America v. Dale*.[189] Conversely, in the public world of the market, forced association is perfectly lawful because the state has compelling interests in ensuring equal rights to contract, and to purchase and enjoy property.[190] Forced association is constitutional even if it involves

183. *See, e.g.*, Securities Exchange Act of 1934, 15 U.S.C. § 78m (requiring companies to periodically disclose information important to investors); 17 C.F.R. §§ 227.201-.02 (2024) (listing initial and ongoing disclosure requirements for issuers offering or selling securities).

184. *See* 780 MASS. CODE REGS. §§ 105.1-.7 (2024) (requiring builders to obtain work permits before construction and post them on site).

185. *See* Real Estate Settlement Procedures Act, 12 U.S.C. §§ 2603-06 (explaining statutory disclosure requirements and related exemptions during home buying process).

186. *See, e.g.*, 21 C.F.R. § 202.1 (2024) (requiring clear and conspicuous side effects disclosure in prescription drug advertisements); 21 U.S.C. § 355 (detailing disclosure requirements for regulatory approval of new prescription drugs); Carlin v. Super. Ct., 920 P.2d 1347, 1348 (Cal. 1996) (concluding drug manufacturer strictly liable for failing to warn users of drug's dangerous side effects).

187. *See generally* 42 U.S.C. § 12182 (prohibiting discrimination on basis of disability by public accommodations); *see also* 42 U.S.C. § 12182(b)(1)(A)(ii) (prohibiting unequal benefits to individuals on basis of disability). Specifically, under federal regulation, public accommodations "that . . . operate[] a place of lodging shall . . . [i]dentify and describe accessible features in the hotels and guest rooms offered through its reservations service in enough detail to reasonably permit individuals with disabilities to assess independently whether a given hotel or guest room meets his or her accessibility needs." 28 C.F.R. § 36.302(e)(1)(ii) (2024).

188. *See* 515 U.S. 557, 573 (1995) (prohibiting state from mandating inclusion of different message in privately organized parade).

189. *See* 530 U.S. 640, 659 (2000) (allowing public accommodation to fire employee opposing institution's viewpoint).

190. *See, e.g.*, Rumsfeld v. F. for Acad. & Institutional Rts., Inc., 547 U.S. 47, 51, 56-57 (2006) (holding educational institutions denying military recruiters equal access to campuses constitutionally impermissible under First Amendment); Roberts v. U.S. Jaycees, 468 U.S. 609, 628-29 (1984) (holding all-male organization's freedom of association not infringed where women's membership compelled by statute); Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 402 n.5 (1968) (holding restaurant may not justify racial discrimination with religious beliefs); Heart of Atlanta Motel v. United States, 379 U.S. 241, 261-62 (1964) (explaining Congress may outlaw

compelled speech when we are talking about commercial services. Hotels cannot exclude customers based on race or religion, even if that conveys a message of respect for customers that the owner does not feel. Theatres cannot exclude Black customers, and trains cannot segregate their cars by race, even if doing so compels service providers to speak respectfully to customers and to engage in the speech necessary to provide those goods and services.

Nor is it the case that the state can never force people to be silent. Sexual harassment in the workplace is prohibited by employment discrimination laws, yet it works partly by controlling behavior and partly by controlling speech.[191] The same is true for fair housing law. Landlords cannot say things that amount to sexual harassment of tenants.[192] Because public accommodation laws require "full and equal enjoyment" of all the goods and services offered to the public, waiters in restaurants cannot insult customers as they serve them, cannot use racial epithets, and they cannot use language that conveys the message that customers are less welcome because of their race, sex, religion, disability, or (in some states) their sexual orientation or gender identity.[193]

For antidiscrimination law to function, some speech must be prohibited. For example, real estate brokers cannot "represent to any person . . . that any dwelling is not available for . . . sale . . . when such dwelling is in fact so available."[194] Nor can brokers "induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person . . . of a particular race . . . ."[195] Conversely, antidiscrimination laws also compel speech. Waiters must speak with restaurant customers to ask what they want to eat. And the requirement of "full and equal enjoyment" means that if the waiter would speak pleasantly to a white customer, they must do so with a Black customer, as well.[196] Brokers must show prospective home buyers

racial discrimination where negative impacts observed upon stream of commerce). *But cf.* Sepper, *supra* note 56, at 806-07 (describing ways associational claims may eviscerate antidiscrimination laws).

191. *See* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 77-78 (1998) (holding physical assault, verbal insults, and threats violated employment discrimination laws).

192. *See* Quigley v. Winter, 598 F.3d 938, 947 (8th Cir. 2010) (holding landlord liable for conduct and speech constituting sexual harassment).

193. *See* 42 U.S.C. § 2000a(a) ("All persons shall be entitled to the *full and equal enjoyment* of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation") (emphasis added); *see also* 42 U.S.C. § 1981(a)-(b) (stating right to "make and enforce contracts" includes "enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship").

194. *See* 42 U.S.C. § 3604(d) (prohibiting discrimination in property sales or rentals).

195. *See* 42 U.S.C. § 3604(e).

196. Equally insulting behavior, on the other hand, is not discriminatory. The now-defunct Durgin-Park, a Boston restaurant, was famous for its surly waitstaff who were impolite to every customer. But that treatment was not discriminatory since all customers were treated the same and the sassy comments did not make patrons feel unwelcome because of race or religion. *See* Danny McDonald & Kara Baskin, *Durgin-Park's Impending Closure Marks End of an Era*, BOS. GLOBE (Jan. 3, 2019), https://www.bostonglobe.com/metro/2019/01/03/durgin-park-landmark-boston-restaurant-close/wKUZken2o6ntpqoicZcDgM/story.html [https://perma.cc/HJT3-F-HN4].

houses that are available and give them information about those homes, and they cannot provide different information just because of the buyer's race.[197]

Justice Gorsuch quite rightly explained that the First Amendment prohibits the state from forcing anyone to say the Pledge of Allegiance.[198] Nor can the state require a student to recite a state-approved prayer in public school.[199] People are free to write what they like in books, articles, newspapers, and on the Internet. People are free to produce art of their own choosing, content, and design. But the rule against compelled speech cannot operate without limit when it comes to commercial transactions. The Supreme Court has never held that commercial speech cannot be regulated or even mandated to achieve equal access to the market. "Full and equal enjoyment" of the goods and services of a public accommodation can only be achieved by regulation of speech and by requiring service providers to speak with customers.

2. When Is a Public Accommodation Selling Its Own Speech and When Is It Providing Services to Customers?

Justice Gorsuch emphasized that the services 303 Creative wanted to provide were "pure speech." That meant that the words would be the words of owner Lorie Smith, and the ideas would be hers. Justice Gorsuch interpreted the parties' stipulations to mean that the wedding website business Smith contemplated establishing had a goal of communicating a particular message that would "celebrate and promote" the details of the couple's "unique love story" through Smith's original artwork.[200] Under that view of the facts, Smith was not offering to create wedding websites at all. She was, instead, offering to produce what is called "creative nonfiction,"[201] or her own artistic storytelling concerning facts related to the couple and their wedding. Stories are artistic creations even if they are about true events. According to Justice Gorsuch, Smith was creating original artwork like a Gilbert Stuart portrait of George Washington or a Robert Caro biography of Lyndon Baines Johnson. She is producing art that customers will want to buy and offering to make the subject matter of the art the customer's life

197. *See* 42 U.S.C. § 3604(b) (explaining "discriminat[ing] against any person in the terms, conditions, or privileges of sale . . . of a dwelling" illegal).

198. *See* 303 Creative LLC v. Elenis, 600 U.S. 570, 585 (2023) (rejecting act of compelling students to salute flag or recite pledge).

199. *See* Engel v. Vitale, 370 U.S. 421, 425 (1962) (holding forced prayer in school violation of constitutional wall separating church and state). *But cf.* Emilee Carpenter, LLC v. James, 107 F.4th 92, 104 (2d Cir. 2024) (excluding use of third-party content). The Second Circuit said, "[t]o state a compelled speech claim, it is not enough for a plaintiff to show that the service at issue involves a medium of expression." *Id.* "The plaintiff must also demonstrate that the expressive activity is *her own*—that is, she created the expressive content herself." *Id.* (emphasis added).

200. *See 303 Creative*, 600 U.S. at 587 (characterizing Smith's websites).

201. *See* Lee Gutkind, *What Is Creative Nonfiction?*, CREATIVE NONFICTION, https://creativenonfiction.org/-what-is-cnf/ [https://perma.cc/46T6-8W7S] (explaining characteristics of creative nonfiction genre and works).

story. It is as if she is doing a caricature for the customer who has agreed to purchase whatever she produces with perhaps some suggestions by the customer.

It turns out that it was a colossal mistake for Colorado to concede that the product being offered for sale was Smith's art and words. It did so presumably because it thought that the state's compelling interest in prohibiting discrimination in public accommodations justified limitations on commercial speech. After all, advertisements for stores constitute speech and expressive art. So do billboards, signs on grocery stores, and reservation pages on hotel websites. Colorado's choice may be understandable, but it led to losing the lawsuit because Justice Gorsuch believed that the State had conceded that the case involved nothing more than art or literature produced by Smith for sale to the public, i.e., pure speech.

What is confusing is that, if the case involved Smith's speech alone, dissenting Justices Sotomayor, Kagan, and Jackson would have *no problem* with protecting her from regulation by the state. Justice Sotomayor's dissenting opinion explained that public accommodation laws do "not directly regulate [petitioner Smith's] speech at all."[202]

Crucially, the law "does not dictate the content of speech at all, which is only 'compelled' if, and to the extent," that the company offers "such speech" to other customers. Colorado does not require the company to "speak [the State's] preferred message." Nor does it prohibit the company from speaking the company's preferred message. The company could, for example, offer only wedding websites with Biblical quotations describing marriage as between one man and one woman (just as it could offer only T-shirts with such quotations). The company could also refuse to include the words "Love is Love" if it would not provide those words to any customer. All the company has to do is offer its services without regard to customers' protected characteristics. "Any effect on the company's speech is therefore 'incidental' to the State's content-neutral regulation of conduct."[203]

If that is correct, then *there is no disagreement* between the Justices on this score. They are unanimous in finding that the state cannot dictate the services that Lorie Smith is going to offer the public. She can create Biblically oriented artwork that portrays and extols her understanding of God's plan for marriage. So why was there a dissent at all?

The dissent interpreted the stipulated facts differently, concluding that Lorie Smith was not simply producing *her own* artwork or creative nonfiction about the couple. She was providing what she said she was providing, which is "wedding websites." What are wedding websites? They involve *services* sold or

202. *See 303 Creative*, 600 U.S. at 625 (Sotomayor, J., dissenting).

203. *See id.* at 629. *Cf. Emilee Carpenter, LLC*, 107 F.4th at 104 ("To state a compelled speech claim, it is not enough for a plaintiff to show that the service at issue involves a medium of expression. The plaintiff must also demonstrate that the expressive activity is her own—that is, she created the expressive content herself").

given freely to the general public. Specifically, they allow customers to personalize webpages with *their own words* and information, before sharing them with family and friends to help plan and carry out their wedding celebrations. The wedding website provider would sell the customer access to a webpage or set of pages for the customer to use to post information that their friends and families need to know, such as the date of the wedding, the place, what hotels to use, what gift registries the couple wants people to use, and pictures and anecdotes about the happy couple. The services 303 Creative would provide would be to (1) make the website(s) available to the customer; (2) create templates the customer can choose from (and perhaps tweak by talking with Smith on the designs they want her to create); and (3) make the website available to third parties.

When Smith said she wanted to "tell the couple's story," the dissenting Justices did not understand that to mean that Smith would produce something like a newspaper article or a creative nonfiction work that would be Smith's artistic retelling of the story of their lives. That is because that activity is not a "wedding website" at all. There was a disconnect, or even a contradiction, between the services Smith said she would be providing to customers and the claim that it would be her work alone.

Justice Sotomayor assumed that the couple would be telling *their* story *in their own words* while placing those words in artistic fonts, with designs and/or pictures produced by 303 Creative. In other words, Justice Sotomayor envisioned Smith providing the customers with the services that couples usually want when they create wedding websites. They do not usually hire a writer to retell their story in a novelistic manner. And if that is so, then what Smith wanted to do was to provide generic wedding website services with her own designs that would provide information provided by the customer. The only words Smith would provide would be the words "designed by 303 Creative" at the bottom of every page.

Oddly, if that were the case, the majority would likely agree that Smith would have to provide these services to the couple without discrimination because of sex or sexual orientation. After all, the words "designed by 303 Creative" do not, by themselves, give the impression that the designer "celebrates" or "endorses" the customer, the customer's religion, or the customer's lifestyle. When advertising agencies design commercials or billboards for customers, no one thinks that means the ad agencies are voicing an opinion that the product is good. They are not Consumer Reports providing an evaluation; they just help the business get *the business's* message across to prospective customers.

That means that both the majority and the dissent in *303 Creative* agree that Smith can sell her own artwork, including Bible-themed and Christian-themed wedding webpages, to the public, and that she cannot refuse to serve customers based on their sex, sexual orientation, or religion. In other words, if Smith ever produces and sells wedding websites, we will then know whether she is producing generic informational websites or creative nonfiction. If she is producing

creative nonfiction for select customers, then she may not even be classified as a public accommodation at all. If she is offering *only* Christian-themed websites, then she is entitled to do that, just as the Israel Book Shop can sell only Jewish texts. But if she is offering generic websites with the caption "designed by 303 Creative," then she is operating a public accommodation and she cannot refuse service on the grounds that such service forces her to support conduct that violates her beliefs.

There is also the question of whether Smith can post an announcement that states her Christian views about marriage along with offering access to generic wedding websites. She wanted to do what Amanda Balzer did in the case of Ally Waggy and Jessica Robinson, discussed at the outset of this Article.[204] She wanted to serve them while making a public statement to them, and possibly to their friends and family as well, that she abhorred their marriage. She wanted, in other words, to insult them while serving them, but that is not consistent with public accommodations law. One cannot use racial epithets while serving customers in a restaurant. Public accommodations cannot deny customers full and equal enjoyment of goods and services, even if this limits their freedom of speech. Preventing public accommodations from denying customer enjoyment on such grounds enables customers to access goods and services offered to the public without invidious discrimination.

B. Broad Holdings: How Free Speech Could Undermine Equality

1. No Duty to Serve if Service Conveys a Message or Constitutes Forced Association

303 Creative appears to give businesses the power to assert that the services they are providing are an expression of their religious, political, or personal beliefs, and that the provision of those services necessarily conveys the message that the business celebrates the customer, the customer's beliefs, and the customer's lifestyle. If the service of providing websites for customers with information provided by those customers can magically be converted into the speech of the website designer, then all services, and perhaps goods like wedding cakes, can be deemed expressive. And if that is so, then businesses can argue that their free speech rights empower them to violate public accommodation laws when compliance with those laws would, *in their own minds*, express support for the customer's identity, practices, or beliefs. And if that is true, then a hotel can refuse to host a Jewish wedding, a landlord can refuse to rent to an interracial couple, a dress shop can refuse to sell a wedding dress to someone marrying another person of the same sex, and a Christian law professor can refuse to teach

204. *See* Rengers, *supra* note 3 and accompanying text (recounting Ally Waggy and Jessica Robinson's story).

Jewish students on the ground that doing so celebrates the belief that Jesus is not the Son of God.

Justice Gorsuch carefully confined the holding in *303 Creative* to cases involving "pure speech"—something that is separate and distinct from associational liberties.[205] Nonetheless, in making his argument, he relied heavily on the *Dale* and *Hurley* cases involving associational liberties and not just expressive ones. Both cases rest on the notion that *associating* with someone can convey a message of support for that person's views or lifestyle. The Boy Scouts were empowered by the First Amendment to refuse to hire a gay man as a Scout leader because doing so would "require the group to propound a point of view contrary to its beliefs."[206] The same was true of *Hurley*, which empowered a private parade organizer to refuse to allow participation by a queer Irish-American group that wanted to carry a banner.[207] Justice Gorsuch explained that *Hurley* stood for the proposition that "requiring the [parade organizers] to include voices they wished to exclude would impermissibly require them to 'alter the expressive content of their parade.'"[208]

Because *303 Creative* extended the *Dale*/*Hurley* rulings to for-profit businesses, a broad interpretation of *303 Creative* could overrule *Newman v. Piggie Park* by empowering restaurants to refuse service to Black customers, because forced inclusion would require the restaurant to "'alter [its] expressive content'" by forcing it to associate with people it considers to be inferior.[209] A broad holding for *303 Creative* would see many commercial services as expressing a message, and that could immunize commercial actors from being forced to associate with customers whose characteristics or life choices the owner rejects.

2. Service Without Full and Equal Enjoyment

If no one can be compelled to speak, then waiters in restaurants cannot be forced to provide service to customers, hotel clerks cannot be forced to check customers in or to help them make reservations for rooms, grocery store workers have no duty to answer questions about where to find the maple syrup, and real estate brokers would have no duty to tell Black customers about houses available for sale in the white part of town. Nor could waiters be required to be polite to customers if the state cannot compel speech in the commercial world. Taken to the extreme, neither states nor the federal government could ensure "full and

205. *See* 303 Creative LLC v. Elenis, 600 U.S. 570, 586 (2023) (acknowledging *Boy Scouts of America v. Dale* dealt with associational rights, not pure speech, under compelled speech framework).

206. *See* Boy Scouts of Am. v. Dale, 530 U.S. 640, 654 (2000) (concluding Boy Scouts can refuse hiring gay man if inconsistent with their beliefs).

207. *See* Hurley v. Irish-American Gay, Lesbian, and Bisexual Grp. of Bos., Inc., 515 U.S. 557, 581 (1995) (holding group can be excluded from parade).

208. *See 303 Creative*, 600 U.S. at 585 (explaining parade organizers' wishes).

209. *See id.* (quoting Hurley v. Irish-American Gay, Lesbian, and Bisexual Grp. of Bos., Inc., 515 U.S. 557, 572-73 (1995)).

equal enjoyment" of the services and goods of public accommodations. It is implausible to understand *303 Creative* as involving "pure speech" since it also involved the provision of services (access to webpages); if *303 Creative* did involve "pure speech," and if "pure speech" extends to expressive association, then public accommodation laws would lose much, if not all, of their force.

C. Narrow Holdings: How Equality and Free Speech Can Coexist

1. Public Accommodations Can Be Required to Sell Goods and Services Despite Incidental Limitations on Speech or Association

303 Creative rested on the conceit that Lorie Smith planned to produce creative nonfiction about her customers, and that the major purpose of the services she offered them was *for her* to retell their story *in her own way* and to celebrate it in religious terms.[210] Those websites either would not include any other information, or the Court assumed that the customer's information was inseparable from the designer's artistic creation. The dissenters focused on the purpose of wedding websites and acknowledged that they provide a host of services. They make websites available to customers; they enable customers (for a price) to convey that information to friends and family; they allow the couple to choose pictures, stories, and images to frame that information, even if the design is made beautiful and readable by someone skilled in webpage design.[211]

If a business offers beautiful websites for customers to place information about their upcoming wedding, then states *can* compel those businesses to provide those services without regard to religion or sexual orientation. That is a commercial service that only incidentally involves the designer's (or website provider's) speech.[212] The beautiful designs created by the designer are part of the service being offered. They do not indicate support for the customer's religion, sexual orientation, or political beliefs. Nor does the mere logo "website design by 303 Creative" constitute an endorsement of the customer's religion or sexuality that violates the designer's free speech rights.

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210. *See id.* at 588 (detailing Smith's plan for customers).

211. *See* 303 Creative LLC v. Elenis, 600 U.S. 570, 633 n.11 (2023) (Sotomayor, J., dissenting) ("The customization of these elements pursuant to a content-neutral regulation of conduct does not unconstitutionally intrude upon any protected expression of the website designer").

212. *See* Cole, *supra* note 57, at 501 (arguing *303 Creative* holds free speech clause creates limited exemption to public accommodation laws). Specifically, Cole reasons that commercial establishments are exempt from public accommodations laws *only* where: "(1) a business objects only to expressing a particular message *for anyone*, not where it objects to serving certain customers because of their identity; and (2) the state's interest in requiring the business to provide the service is the suppression of disfavored ideas." *Id.*

2. Artists and Writers Cannot Be Compelled to Produce Work or Told What to Say When They Are Creating Their Own Speech or Art for Sale

The converse of the previous holding is that the First Amendment protects the freedom of authors and artists to convey *their own messages* and to offer them for sale. Artists can create art and sell it in galleries. Authors can write books and sell them. Ministers and rabbis and imams can write their own sermons and speak them in appropriate religious settings, or on the Internet or in public parks. And web designers can design work that expresses their religious views of marriage. They can even collaborate with others, tell their story in a compelling and beautiful way, and keep control of their own artistic endeavors. But this does *not* mean that someone can offer to provide webpages to the general public, and then refuse service on grounds that violate state antidiscrimination laws just because the business owner is against racial integration or homosexuality.

Public accommodations are free to determine the nature of the services they offer. They can design and sell Christian-themed works of art, literature, or music, including Christian-themed wedding websites and online greeting cards. What they cannot do is refuse service because the customer is of the wrong religion, sex, or sexual orientation. Lorie Smith won because Justice Gorsuch thought that she was intending to offer *her own* words and ideas and art, *her own* celebration of the couple and their religious practices and personal life, and *her own* approval of their plans.[213] And if that were the case, the dissenters would not have dissented.[214]

3. The Right to "Full and Equal Enjoyment" of Public Accommodations

Public accommodations cannot insult customers as they serve them.[215] If Smith offers generic websites to customers, she cannot deny them full and equal enjoyment by inserting a message of disgust or disapproval of their race, religion, sex, or sexual orientation. States can require *equal services* when businesses offer their goods and services to the general public, even if that imposes incidental restrictions on speech.

4. Editorial but Not Discriminatory Control

We now reach the hard issue that we confronted toward the end of our discussion of *Masterpiece*. Do businesses have complete editorial control of messages they are willing to place on cakes, T-shirts, and mugs, or can their refusal to place a message sometimes constitute discrimination against the customer because of religion? We start from the presumption that the sale of goods generally does

213. *See 303 Creative*, 600 U.S. at 588 (emphasizing Smith's websites contain her own speech, artwork, and words).

214. *See id.* at 631 (Sotomayor, J., dissenting) (disagreeing with majority's characterization of issue).

215. *See supra* note 193 and accompanying text (outlining public accommodation full and equal enjoyment protections).

not constitute speech just because the customer intends to use those goods in a religious ceremony of which the owner disapproves.[216] That suggests that the wedding cake in *Masterpiece* does not constitute speech and the baker has no constitutional right to refuse to sell it to a customer just because of the identity of the customer (a man rather than a woman) or because the customer plans to use the cake in a religious (or nonreligious) ceremony of which the baker disapproves.

Purveyors of goods imprinted with consumer messages have the right to exercise editorial control over those messages. They can refuse to write messages they view as offensive. It does not matter whether that right is based on the First Amendment or because public accommodations providing these services do not offer them free of editorial control. Recall that stores have the power to determine the nature of the goods and services they offer.[217] So, bakers should not have to choose between writing no messages on cakes or writing whatever messages customers want. In general, companies should be free to refuse to write words on T-shirts, mugs, and other items when they find those words offensive. Justice Kagan is correct that this is not discriminatory because, in this case, service is not denied to a customer because of religion.[218]

That does not necessarily mean, however, that there cannot be unusual instances where the refusal to write a customer message *may* constitute discrimination because of religion. Recall that the Supreme Court assumed William Jack faced discrimination because of religion when the bakers would (presumably) agree to write some Bible verses, but not the ones he wanted.[219] And a Jewish customer might have a valid complaint if a baker refused to draw a menorah on a cake but would have drawn a Christmas tree. A stationer should not have the right to refuse to produce invitations to a Bat Mitzvah because, in her view, that constitutes speech that repudiates Christ. The First Amendment protects the stationer from being compelled to reject Jesus, but it does not deprive the states of the power to ensure that Jews—and queer people—have equal rights to commercial services that incidentally involve the customer's speech.

It would be nice if we could devise a clear rule that either protects businesses from discrimination claims when the business refuses to write a customer message, or a clear rule that requires the business to write whatever messages customers desire. Both of those approaches are "neutral with respect to religion" and protect the business from compelled speech. The latter does not involve

216. *See supra* Section II.A.3 (discussing Constitution's balancing of store owners' and customers' religious liberties).

217. *See* Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n, 584 U.S. 617, 642 n.* (2018) (Kagan, J., concurring) ("A vendor can choose the products he sells, but not the customers he serves—no matter the reason").

218. *See id.* at 645 (arguing bakers did not deny service due to religion).

219. *See id.* at 633-34 (majority opinion) (noting occasions where baker lawfully declined to make cakes demeaning gay people or marriages).

compelled speech because the business is simply being asked to treat all customers equally when the speech at issue is provided by the customer.

But it is not clear that either of these rules would be fair from the standpoint of both protecting free speech and ensuring equal access to goods and services. A hotel should not be able to refuse to host a same-sex wedding—or a Jewish wedding—because that would entail placing signs in the lobby letting people know what ballroom to go to. Compelled speech of that kind is only incidental to providing equal services at the hotel. A stationer should not be able to refuse to print wedding invitations just because the couple is Jewish, queer, or both. In my view, the bakers in the *Jack Cases* were not refusing to write Bible verses because of William Jack's religion; they were refusing to write what they considered to be hate speech.[220] But it might well constitute religious discrimination if the bakers refused to draw a cross on a cake when they would happily place a Star of David on it. That would seem to deny full and equal enjoyment of a place of public accommodation without regard to religion, and would not amount to compelled speech that forces the shop owner to affirm a message approved by the state.

Of course, we could avoid drawing hard lines by creating a holding that cleanly goes one way or the other. We could say, for example, that the First Amendment gives *absolute* editorial control to the public accommodation owner. And maybe that is the way we should go. It is the approach taken by the dissenters in both *Masterpiece* and *303 Creative*.[221]

The problem with a clean rule like that is that it may lead to unfortunate outcomes, such as the hotel that does not want to have a public notice of a same-sex (or Jewish) wedding[222] or a restaurant that does not want to be polite to Black patrons. Speech can be regulated to ensure equal access to public accommodations. The goal should be to confer editorial but not discriminatory control to the public accommodation.

While this line requires interpretation, I believe it is clearer than the rulings in either *Masterpiece* or *303 Creative*, which seem to both ensure equal access and to give absolute discretion to store owners on whether compelled service requires them to "celebrate" a message or religious act that they reject. It at least puts at the forefront of our thinking the goal of protecting *both* the free speech of store owners *and* the religious liberty of customers. Case law over time may be able to clarify the difference.

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220. *See id.* at 641 (Kagan, J., concurring) (describing state agencies finding message Jack requested "'offensive [in] nature'").

221. *See Masterpiece*, 584 U.S. at 671 (Ginsburg, J., dissenting) (distinguishing customers seeking cake celebrating wedding versus same-sex weddings); 303 Creative LLC v. Elenis, 600 U.S. 570, 629-30 (2023) (Sotomayor, J., dissenting) (explaining business may limit message unrelated to customer identity).

222. *Cf.* Rumsfeld v. F. for Acad. & Institutional Rts., Inc., 547 U.S. 47, 70 (2006) (holding requirement law schools host military recruiters whose organizations violate antidiscrimination policy not speech compulsion).

IV. RECONCILING EQUALITY, RELIGION, AND SPEECH THROUGH PROPERTY LAW

A. General Lessons from Public Accommodation Law

What general lessons can we learn from the complex relation between free speech, religious liberty, and public accommodation laws? First, we have multiple values. We care about free speech, religious liberty, and associational liberty. But we *also* care about equality. We especially care about ensuring that the marketplace is open to people equally and without regard to race, sex, religion, or other things that should not get in the way when we leave our homes to engage in commerce.

Second, shopping is not a minor social activity. The "right to shop" may not trip easily off the tongue as a constitutional or common law right, but all you have to do is to recall the horrible injustices and humiliations of Jim Crow laws with segregated hotels, restaurants, and theaters to understand what is involved here.

Third, we need to be honest about the clashes, tensions, and contradictions between competing values. That includes the clash between equality on the one hand and speech and religion on the other, as well as the clash between the right to control your own property and the right to enter the marketplace to acquire property. We should also remember that we may be dealing with a conflict between the religious liberties of the customer and the religious liberties of the store owner.

Fourth, we should recall that both speech and religion have long been subject to restrictions to ensure equal access to the marketplace.

Fifth, when judges cannot even agree on the facts, maybe they should remand the case to find out what they really are. When majority and minority opinions assume that different things happened, and when the facts relied on by the majority are hard to square with social practice, then it may be premature to define a rule of law that can help lower courts distinguish when someone does and does not have a particular obligation.

Sixth, the state action doctrine should not get in the way of our understanding of how common law rights, including property rights, involve state action to allocate authority and power to some while denying it to others. Property rights are *allocational*; giving one person a right over a resource necessarily *denies* control of that resource by others.

Seventh, there are well-established First Amendment protections for artists, writers, musicians, and other creative workers to make *their own* works, to state *their own* messages, to practice *their own* religions.[223] It is sometimes easy to

223. *See, e.g.*, Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501-02 (1952) (holding motion pictures and artistic creations protected by First Amendment); Wooley v. Maynard, 430 U.S. 705, 714 (1977) (protecting

forget that a store owner who makes speech or religious claims has ample alternative avenues to exercise First Amendment rights without violating the civil rights of third parties who ask only for equal access to the marketplace.

B. The Antifeudal Principle in Property Law

Public accommodation law is based on a core principle of property law: the American rejection of feudalism. A search for the word "feudal" in case law between 1776 and 1860 contained in Harvard Law School's Caselaw Access Project yields 690 opinions.[224] It was a mainstay of property law at the founding of the United States to excise or abolish all remnants of "feudal" property law. That is because we have no lords and commoners. After the Civil War, we have neither masters nor servants, nor high and low castes, nor enslavers and enslaved persons. Nor do we have an established religion, orthodoxy in opinion, or barriers to acquiring property because of one's race, national origin, sex, sexual orientation, disability, or religion. To ensure equal access to public accommodations, housing, and employment, states can regulate speech and religious conduct when they would clash with the goal of ensuring equal access to the marketplace. Because we have no hereditary lords and no established de jure racial caste system, laws must be in place to ensure that everyone can become an owner without regard to their race, religion, or sexual orientation.

I am not saying our system currently achieves all these goals; past discrimination makes equal access a goal rather than a reality. I am saying that ensuring the ability to become an owner on equal terms with those who are favored historically, socially, and legally is a key norm of our property system. That norm provides a *neutral* reason for requiring public accommodations to serve the public without regard to sexual orientation.

Justices Kennedy and Gorsuch admitted that states have compelling government interests in ensuring access to the marketplace without invidious discrimination.[225] Achieving that goal necessarily limits both speech and religion if a public accommodation owner wants to claim that their religious beliefs prevent

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individuals from having to express government-mandated messages and reinforcing right to convey one's own); Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 546-47 (1985) (recognizing importance of copyright law in protecting rights of creators to control original works); Hurley v. Irish-American Gay, Lesbian, and Bisexual Grp. of Bos., 515 U.S. 557, 572-73 (1995) (holding private individuals and organizations have right to shape content of their own expressive activities); Eldred v. Ashcroft, 537 U.S. 186, 219 (2003) (affirming copyright protection promotes creation, dissemination of original works, and safeguarding creative expression).

224. *See Caselaw Access Project*, HARV. L. SCH., https://case.law [https://perma.cc/5SV5-V65B] (creating free access to 360 years of case law in fifty states); *Advanced Case Law Search*, CT. LISTENER, https://www.courtlistener.com/?q=feudal&type=o&order_by=dateFiled%20asc&stat_Precedential=on&filed_after=01%2F01%2F01%2F1776&filed_before=12%2F31%2F1860 [https://perma.cc/K5FF-AU4R] (displaying 690 results of "feudal" precedent).

225. *See 303 Creative*, 600 U.S. at 590 (noting government interest and expansion of application of public accommodations laws); Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n, 584 U.S. 617, 631 (2018) (noting general rule against denying services to persons due to religious objections).

them from selling their services to a customer because of their sex, religion, or race. Speech and religion can be regulated when necessary to provide full and equal enjoyment of all public accommodation services. The compelling government interest in eliminating caste distinctions and treating every person as a human being endowed with inalienable dignity and worth can only be achieved by requiring equal services in businesses open to the public.

The Jewish tradition defines the sin of Sodom not as homosexuality, but as cruelty to strangers and the poor.[226] When Lot invited the strangers into his house, he sought to provide them what they needed, as the Bible repeatedly tells us we should do. The townspeople of Sodom demanded he send the strangers out into the street, not so they could be sexually intimate with them, but so they could rape them and punish them for coming to a place where they have no right to be served or treated as human beings. The strangers were actually angels—or messengers from God, in the Jewish tradition—but the townspeople of Sodom did not see them that way. They saw them as outcasts, as others, as unworthy of respect, even as objects to be used. Sodom was punished, not for homosexuality, but for cruelty to people, standing at the door, in need.[227]

I say this not because I think the law should adopt my interpretation of the Jewish view, but to remind us that religious liberty claims can be made, not just by one being asked to serve others, but by the human beings who need service. Public accommodation laws have historically ensured that customers can be served without regard to religion, race, and (recently) sex or sexual orientation. Such laws protect not only the rights of owners, but the rights of non-owners—those who seek to become owners by entering the marketplace to acquire property. They cannot be stopped at the door and deemed unworthy of commercial intercourse. Laws designed to protect liberties of speech and religion must keep that in mind.

226. *See* Singer, *supra* note 63, at 948-49 (detailing rabbinic story of destruction of Sodom); *see also 303 Creative*, 600 U.S. at 636 (Sotomayor, J., dissenting) (citing referenced article).

227. *See* Joseph William Singer, *Critical Normativity*, 20 LAW & CRITIQUE 27, 39 (2009) (recognizing refusal to help represents form of harm). Pastor Trocmé taught the villagers "'turning somebody away from one's door is not simply a refusal to help; it is an *act of harmdoing*.' He taught them that when strangers in dire straits come to your gate, you should let them in. And so they did. This explanation of their actions is majestic in its simplicity, stunning in its humility, and the image it evokes is arresting: *a human being in need standing before you*." *Id.*