TAKE BACK THE COURT

The Supreme Court is Attacking LGBTQ+ Rights and Anti-discrimination Laws

As legislative attacks on trans people escalate and right-wing leaders and media deploy increasingly homophobic rhetoric, anti-LGBTQ+ groups are renewing their efforts to strike down anti-discrimination statutes — this time under the guise of free speech. In *303 Creative v. Elenis,* the Supreme Court could make it easier for businesses to discriminate against LGBTQ+ Americans. More broadly, it could pave the way to eliminating state-level anti-discrimination laws across the country that protect people from race-based, gender-based, or disability-based discrimination. An adverse ruling has the possibility of greenlighting just about any business in the country barring LGBTQ+ people by claiming that letting them in the door amounts to a government-compelled "expression" of support, and could snowball into a new wave of broader attacks on civil rights and civil liberties.

The Case Challenges Anti-Discrimination Statutes Under the Guise of Free Speech

303 Creative challenges the Colorado Anti-Discrimination Act (CADA), a public accommodations law that specifically extends protections to LGBTQ+ people in addition to other protected groups. CADA requires businesses that are open to the public to serve everyone, regardless of race, gender, sexual orientation, disability, and other classifications. At the core of public accommodations laws like CADA is the principle that the marketplace should be open to everyone, and that states have a compelling interest to ensure "equal access to publicly available goods and services."[1]

Lorie Smith, who operates 303 Creative, is the face of the suit challenging CADA. Smith asserts that one day, she would like to design wedding websites, and wants to publicly announce that due to religious convictions, her company "will not be able to create websites for same-sex marriages or any other marriage that is not between one man and one woman" and that doing so would "tell a story about marriage that contradicts God's true story of marriage…"[2] Refusing to transact with LGBTQ+ patrons violates CADA, and Smith seeks to invalidate CADA on the grounds that offering the same wedding websites to LGBTQ+ and heterosexual patrons is equivalent to government-compelled speech. The Tenth Circuit upheld CADA as appropriately tailored to achieve the goal of equal access to goods and services.[3]

The case is eerily similar to *Masterpiece Cakeshop v. Colorado Civil Rights Commission,* a 2018 case brought by the same right-wing law firm behind *303 Creative.* At the time of *Masterpiece*, the Court's composition was significantly different than it is today, with a 5-4 conservative majority and with Justice Kennedy occupying one of the five conservative seats. In *Masterpiece*, the Court delivered a narrow ruling in favor of a cake shop that refused to bake a reception cake for the wedding of a gay couple because of the baker's religious beliefs. While *Masterpiece* still dealt a blow to LGBTQ+ rights, the Court left in place Colorado's public accommodations laws that prevent businesses from discriminating against LGBTQ+ people, citing a 1960s ruling in

[1] *303 Creative LLC v. Elenis*, No. 19-1413 (10th Cir. Jul. 26, 2021).
[2] *Id.*
[3] *Id.*

Newman v. Piggie Park Enterprises, which held that denying interracial couples a service on religious grounds was "patently frivolous."[4]

But *303 Creative* is not a religious liberties case; the Supreme Court only took up the part of the suit concerning free speech in the marketplace — and the free speech question at play will be heard by a radically different Court than the one that decided *Masterpiece* just a few years ago. Justice Thomas' partial dissent in the *Masterpiece* ruling, which was co-signed by Justice Gorsuch, directly invited the free speech challenge now before the Court, stating that "Colorado's public-accommodations law alters the expressive content of [the business owner's] message" (internal quotations removed). Accordingly, Alliance Defending Freedom (ADF) mobilized to transform its religious crusade into an issue of a business owner's commercial speech.[5] Since then, Justice Ginsberg and Justice Kennedy have been replaced by radical right-wing justices on what is now a 6-3 ideological Court.

Oral arguments revealed that the right-wing justices are likely to side with anti-LGBTQ groups in this case — and will use racist and sexist rhetoric to do so. While hearing arguments in *303 Creative,* Justice Alito made several "jokes" about a hypothetical Black mall Santa being forced to take a picture with a child in a Ku Klux Klan outfit. One of ADF's lawyers drew an offensive parallel between Lorie Smith and the diverse cast of the musical *Hamilton*. Justice Alito further insinuated that Justice Kagan would be familiar with AshleyMadison.com, a dating site for people seeking extramarital affairs. And Justice Gorsuch referred to the compliance training for CADA as an Orwellian "reeducation training program." Beyond indicating that they will rule in favor of ADF, the right-wing justices also demonstrated that they relish and dismiss as jokes the discrimination, racism, and sexism faced by marginalized Americans — and will even taunt their own colleagues.

But the law is clear: the Court has repeatedly held that state anti-discrimination laws do not "as a general matter, violate the First or Fourteenth Amendments."[6] As recently as *Masterpiece,* the Court declared that "it is a general rule that [religious and philosophical] objections [to same-sex marriage] 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."[7]

The state cannot force someone to design wedding websites, but once someone decides to engage in commercial activity, regardless of whether the consumer good is expressive, it comes with the condition that they must offer that service to all customers. Lorie Smith can choose what types of websites she designs, including wedding websites with deeply homophobic or offensive messages — but once that template and service is offered, it must be available to all

[4] *Newman v. Piggie Park Enterprises,* 390 U.S. 400, 403 (1968).
[5] *Masterpiece Cakeshop v. Colorado Civil Rights Commission,* 584 U.S. __ (2018) (Thomas, J. concurring in part and dissenting in part).
[6] *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 572 (1995).
[7] *Masterpiece,* 584 U.S. __ (2018).

customers. Businesses should not be given free license to put up signs saying that certain groups of people are not welcome or engage in cruel, public attacks on groups of people reminiscent of the dehumanizing de jure racial segregation in the U.S. during the bulk of the 20th century.[8]

The Alleged Harms in the Case are Hypothetical and Fabricated by ADF

ADF is the law firm representing Lorie Smith and is designated as a hate group by Southern Poverty Law Center. ADF's current litigation profile includes suits defending practitioners of conversion therapy on minors and attempting to revoke the FDA's approval of mifepristone, a medication abortion pharmaceutical. ADF has supported recriminalizing sexual acts between consenting LGBTQ+ adults, defended sterilization of trans people abroad, and perpetrated harmful and false narratives about LGBTQ+ people, including that members of the community are more likely to engage in pedophilia.

After failing to enact its agenda through the *Masterpiece* suit, ADF constructed a new legal strategy to pursue its right-wing, Christian nationalist, and hateful objectives. ADF filed similar suits in eight states — Colorado, Arizona, Kentucky, Minnesota, Wisconsin, Ohio, New York, and Virginia — pitting businesses offering marriage services against LGBTQ+ people and perhaps aiming to fabricate a circuit split to more easily access the Supreme Court.[9]

Ultimately, the Court took up the Colorado suit. ADF crafted *303 Creative* to be deliberately abstract and faceless when it comes to the people who will be actively harmed if the Court strikes down CADA and opens the door to suits against other public accommodations laws. In *Masterpiece,* there was a concrete, real-life gay couple — Charlie Craig and Dave Mullins — who had been directly harmed by a cakeshop refusing to bake a cake for their wedding reception in front of one of their parents. But in *303 Creative*, the harms of siding with Smith are abstract — because none of the parties who will be injured by an adverse ruling have a voice and a human story present in this case. Instead, ADF has framed the case as a battle of bureaucracy against a local web artist in a narrative reeking of false victimization.[10]

But the reality could not be further from ADF's purported framing. Lorie Smith is not a wedding website designer, and she may never become one. Her injuries are entirely hypothetical and manufactured by ADF in order to further its anti-LGBTQ+ agenda. The objective is clear: strike down LGBTQ+ protections on a national stage, relegate LGBTQ+ consumers to an inferior market, and allow businesses to publicly announce that LGBTQ+ patrons are not welcome in the free and open marketplace.

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[8] *The Blockbuster Case That You Probably Haven't Heard About*, Amicus with Dahlia Lithwick (Dec. 3, 2022).
[9] Hila Keren, "The Alarming Legal Strategy Behind a SCOTUS Case That Could Undo Decades of Civil Rights Protections," *Slate* (Mar. 9, 2022).
[10] *Blockbuster Case,* Amicus with Dahlia Lithwick (2022).

An Adverse Ruling Will Have Devastating Consequences for LGBTQ+ and Civil Rights

Beyond the implicit economic harm of being denied free and equal participation in the marketplace, allowing businesses to display signs that indicate certain classes of people are not welcome inflicts dignitary harms on the excluded groups. LGBTQ+ people are likely to suffer extreme humiliation and dignitary harms from an adverse ruling. Stripping away LGBTQ+ protections in the marketplace may also signal that the Court will eventually take up the cases Justice Thomas invited in his concurrence in *Dobbs v. Jackson Women's Health:*[11] revisiting marriage equality guaranteed by 2015's landmark decision in *Obergefell v. Hodges* and bans on laws criminalizing consensual sexual activity between LGBTQ+ people in 2003's *Lawrence v. Texas*.[12]

Potentially denying that the state has a compelling interest to protect LGBTQ+ people from discrimination in the marketplace opens up a terrifying slippery slope that may include denying state interests in shielding people from racial and gender discrimination. Decades of civil rights protections are on the line. The Court may take us back to a time in which business owners were allowed to fill the marketplace with discriminatory signs, or when travelers had to carry the "Green Book" of hotels that would serve Black patrons. Protections against gender-based, disability-based, and race-based discrimination, especially in the realm of public accommodations, are at risk, as are the foundational civil rights that have protected Americans for more than 50 years.

This latest attack fits into the radical Court's larger pattern of ripping away our rights and freedoms in order to enact a regressive right-wing agenda. Specifically, *303 Creative* could mark the next step in the battle to evangelize the American legal system – a subversion of state by church. Christian fundamentalists are attempting to take a battering ram to the hard-won gains of LGBTQ+ people and discriminate with impunity — with the highest Court's blessing. If left unchecked, the Supreme Court has shown that it will strip us of our civil liberties, endanger LGBTQ+ people, and impose Christian nationalism from the bench. It cannot be allowed to do so with impunity. If we are to avoid living in a right-wing theocracy, we must rebalance and expand the Supreme Court.

[11] *Dobbs v. Jackson Women's Health Organization,* 597 U.S. __ (2022) (Thomas, J., concurring).
[12] *Obergefell v. Hodges,* 576 U.S. 644 (2015); *Lawrence v. Texas*, 539 U.S. 558 (2003).