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UNDERSTANDING 303 CREATIVE LLC IN A POLYCENTRIC CONSTITUTIONAL WORLD

Meg Penrose*

“Goodness gracious me!” said Henny-Penny,
“[T]he sky’s a-going to fall; I must go and tell the King.”¹

INTRODUCTION: IS THE SKY ACTUALLY FALLING?

On June 30, 2023, the United States Supreme Court issued its much-anticipated decision in *303 Creative LLC v. Elenis*.² The case raised important issues relating to free speech, religious liberty, same-sex marriage, and modern non-discrimination laws. Depending on your perspective, the case was a victory for free speech or a stinging defeat for same-sex marriage. I would argue that neither is the case. Instead, *303 Creative LLC* is a natural, and arguably expected, extension of the Court’s jurisprudence establishing constitutionally recognized rights for same-sex couples: *Lawrence v. Texas*,³ *United States v. Windsor*,⁴ and *Obergefell v. Hodges*.⁵

In *Obergefell*, the case establishing a constitutional right to same-sex marriage, Justice Kennedy’s majority opinion was careful to leave space for religious objections to this newly established legal right.⁶ The Court assured:

[I]t must be emphasized that religions, and those that adhere to religious doctrines, may continue to advocate with the utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered.⁷

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¹ FLORA ANNIE STEEL, *THE STORY OF HENNY PENNY* (1918).

² 600 U.S. 570 (2023).

³ 539 U.S. 558, 562 (2003) (decriminalizing same-sex sodomy).

⁴ 570 U.S. 744, 749 (2013) (striking down, as unconstitutional, the Defense of Marriage Act’s definition of marriage as a legal union between one man and one woman).

⁵ 576 U.S. 644, 681 (2015) (finding that same-sex couples have a constitutional right to marry).

⁶ *Obergefell* offered a contentious and fractured opinion. *Id.* at 686 (Roberts, C.J., dissenting); *id.* at 713 (Scalia, J., dissenting); *id.* at 720 (Thomas, J., dissenting); *id.* at 736 (Alito, J., dissenting).

⁷ *Id.* at 679–80.

This language laid the foundation for some form of protection for those asserting religious liberty objections to same-sex marriage. Chief Justice Roberts, however, was not assured. He responded to the Court's majority with a dissent:

Respect for sincere religious conviction has led voters and legislators in every State that has adopted same-sex marriage democratically to include accommodations for religious practice. The majority's decision imposing same-sex marriage cannot, of course, create any such accommodations. The majority graciously suggests that religious believers may continue to "advocate" and "teach" their views of marriage. The First Amendment guarantees, however, the freedom to "*exercise*" religion. Ominously, that is not a word the majority uses.

Hard questions arise when people of faith exercise religion in ways that may be seen to conflict with the new right to same-sex marriage—when, for example, a religious college provides married student housing only to opposite-sex married couples, or a religious adoption agency declines to place children with same-sex married couples. Indeed, the Solicitor General candidly acknowledged that the tax exemptions of some religious institutions would be in question if they opposed same-sex marriage. There is little doubt that these and similar questions will soon be before this Court.⁸

Chief Justice Roberts's pointed dissent, and the loss of Justices Kennedy⁹ and Ginsburg¹⁰ who had both joined the *Obergefell* majority, ensured that future litigants

⁸ *Id.* at 711–12 (Roberts, C.J., dissenting) (emphasis in original).

⁹ Justice Kennedy retired from the Supreme Court on July 31, 2018. See Letter from Anthony Kennedy, Assoc. J. of the Sup. Ct., to Donald J. Trump, President of the United States (June 27, 2018), https://www.supremecourt.gov/publicinfo/press/letter_to_the_president_june27.pdf [<https://perma.cc/6YSB-KSC5>]. Justice Kennedy was replaced by President Donald J. Trump's nominee, Justice Brett Kavanaugh, on October 6, 2018. *Supreme Court Nominations (1789–Present)*, U.S. SENATE, <https://www.senate.gov/legislative/nominations/SupremeCourtNominations1789present.htm> [<https://perma.cc/GS5N-N87W>] (last visited Apr. 30, 2024).

¹⁰ Justice Ginsburg died on September 18, 2020. Victoria Macchi, *In Memoriam: Justice Ruth Bader Ginsburg (1933–2020)*, NAT'L ARCHIVES NEWS (Sept. 21, 2020), <https://www.archives.gov/news/articles/justice-ginsburg-obituary> [<https://perma.cc/3TT6-KLQ3>].

President Trump nominated Amy Coney Barrett to replace Justice Ginsburg. Justice Barrett took her seat on October 27, 2020. *The Current Court: Justice Amy Coney Barrett*, SUP. CT. HIST. SOC'Y, <https://supremecourthistory.org/supreme-court-justices/associate-justice-amy-coney-barrett/> [<https://perma.cc/53ZK-Y3LC>] (last visited Apr. 30, 2024).

would heed the call for bringing religious liberty challenges before the Court.¹¹ Thus, it is not surprising that the Supreme Court is continually called on to refine the parameters of same-sex marriage and its attendant rights.

Since *Obergefell*, individuals (and entities) with sincerely held religious beliefs have sought to avoid giving support or recognition to same-sex marriages. Those cases have had mixed results. In the private marketplace, wedding vendors ranging from bakers,¹² florists,¹³ stationers,¹⁴ photographers,¹⁵ and—most recently—a web designer, have raised objections grounded in the First Amendment’s religious liberty and free speech provisions.

On topics ranging from wedding services for same-sex marriages, to listing parents on birth certificates,¹⁶ the Court continues to grapple with establishing the parameters of rights attending to same-sex marriage.¹⁷

In addition to private employees, government employees, such as court clerks and justices of the peace, have sought to withhold marriage licenses and have

¹¹ Justice Scalia also died following *Obergefell*. He died on February 13, 2016. *Always Right*, THE ECONOMIST (Feb. 20, 2016), <https://www.economist.com/obituary/2016/02/20/always-right> [<https://perma.cc/T9FX-6WKE>]. President Trump selected his replacement, Neil Gorsuch, the following year on January 31, 2017. Neil Gorsuch was confirmed on April 7, 2017. *U.S. Supreme Court Nominations: Neil Gorsuch*, LIBR. CONG., <https://guides.loc.gov/supreme-court-nominations/neil-gorsuch> [<https://perma.cc/AXK9-QF5V>] (last visited Apr. 30, 2024).

¹² *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 584 U.S. 617 (2018) (finding that the baker’s religious objections to preparing a wedding cake for a same-sex marriage were not evaluated with neutrality toward religion).

¹³ *State v. Arlene’s Flowers, Inc.*, 441 P.3d 1203 (Wash. 2019) (requiring a florist to abide by non-discrimination laws despite religious objection to serving same-sex weddings), *cert. denied*, 141 S. Ct. 2884 (2021).

¹⁴ *Brush & Nib Studio, LC v. City of Phoenix*, 448 P.3d 890 (Ariz. 2019) (finding wedding stationary to be protected “pure speech,” placing it outside the government’s non-discrimination laws).

¹⁵ *See Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013) (finding that commercial photographer had to comply with New Mexico’s non-discrimination laws despite First Amendment challenges), *cert. denied*, 572 U.S. 1046 (2014). *But see Chelsey Nelson Photography, LLC v. Louisville/Jefferson Cnty.*, 624 F. Supp. 3d 761 (W.D. Ky. 2022) (entering a permanent injunction, on free speech grounds, stopping the government from enforcing its non-discrimination law (a/k/a “the Fairness Ordinance”) against photographer whose religious beliefs prevent her from participating in same-sex weddings), *appeal docketed*, No. 22-5912 (6th Cir. Oct. 13, 2022).

¹⁶ *Pavan v. Smith*, 582 U.S. 563 (2017) (requiring states to allow same-sex couples to have both same-sex parents listed on the birth certificate).

¹⁷ While not directly a same-sex marriage case, the Supreme Court recently found that gay and transgender employees are both covered under Title VII’s federal employment law. *See Bostock v. Clayton Cnty.*, 590 U.S. 644 (2020); *see also Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998) (holding that same-sex sexual harassment constitutes discrimination based on “sex” under Title VII).

refused to preside over same-sex marriage ceremonies.¹⁸ These government employees assert that religious liberty protects them from participating in the civil legal ceremonies relating to same-sex marriage. These challenges continue even today.

The evolution of rights following *Obergefell* is not over. *Creative 303 LLC* marked a new phase in the ongoing legal challenges over the rights and ceremonies attending same-sex marriage. This Essay addresses the anticipated limits of *303 Creative LLC*.

The Essay proceeds in three parts. First, how does *303 Creative LLC* impact government employees? What rights, if any, should government employees be able to raise in light of *303 Creative LLC*? Second, what does *303 Creative LLC* mean for private marketplace vendors engaging in expressive commerce? Vendors, particularly wedding vendors, often create unique items for weddings. Will the law focus on the unique nature of the product being sold, the unique nature of same-sex weddings,¹⁹ or simply the product being characterized as expressive commerce? And third, how far ranging will *303 Creative LLC*'s free speech protections truly be? Will those with deeply held racial or national origin convictions be permitted to raise similar objections under the First Amendment? Or is same-sex marriage *sui generis* such that society, and our courts, will accept same-sex couples being relegated to a second-class status in the public marketplace, particularly when it comes to same-sex weddings?

Unlike Henny-Penny, this author does not believe the sky is falling. *303 Creative LLC* does allow limited discrimination against same-sex couples in the marketplace. This discrimination is permitted despite being in violation of state anti-discrimination laws that increasingly protect sexual orientation and same-sex couples. But the decision will hopefully be narrowly drawn and equally applied. If a vendor selling

¹⁸ See *infra* Part II.

¹⁹ *Obergefell*'s language suggests that same-sex marriage is in fact unique. Unlike past religious objections to interracial marriage, the Supreme Court appears open to allowing those who object to same-sex marriage on religious grounds to raise legally enforceable objections. See *Obergefell v. Hodges*, 576 U.S. 644, 679–80 (2015). This is categorically distinct from the clarity of language set forth in *Loving v. Virginia*, where the Court rejected the trial judge's assertion that:

Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.

388 U.S. 1, 3 (1967). Although the trial judge in *Loving* did not specifically note a religious liberty objection, his argument that interracial marriage contravenes the will of God was the same litigatory strategy used by objectors to interracial marriage on religious liberty grounds. See generally Leora F. Eisenstadt, *Enemy and Ally: Religion in Loving v. Virginia and Beyond*, 86 FORDHAM L. REV. 2659 (2018); James M. Oleske, Jr., *The Evolution of Accommodation: Comparing the Unequal Treatment of Religious Objections to Interracial and Same-Sex Marriages*, 50 HARV. C.R.-C.L. L. REV. 99 (2015). Unlike same-sex marriage, individuals opposed to interracial marriage could not defeat a person's right to legal marriage based on religious objections that the races should not mix.

expressive commerce does not want to serve others, that rule must be equally applicable regardless of the race, gender, religion, or national origin of the person being denied service. The results could get messy. But the law—and the right of free speech to refuse to serve others—must be equally applied. And this mandate, the equal application requirement, will ultimately limit the reach of *303 Creative LLC* to ensure a narrow definition of expressive commerce. Society cannot afford to return to an era of segregated services.²⁰ Neither the Court nor Congress will allow that to happen.

I. LEGAL OBLIGATIONS OF GOVERNMENTAL EMPLOYEES

The first group of individuals potentially impacted by *303 Creative LLC* are government employees. Following *Obergefell*, a handful of government employees objected to fulfilling their government job ensuring that same-sex couples have access to legal marriage licenses or access to civil marriage ceremonies. These government employees have rarely succeeded in their attempts to raise religious liberty objections to fulfilling their secular, civil law obligations.

Perhaps the most famous example is former Rowan County, Kentucky, clerk, Kim Davis.²¹ Davis, following the *Obergefell* decision, refused to issue any marriage licenses despite her job duty including the issuance of marriage licenses.²² Davis stopped issuing marriage licenses to ensure that, under her Christian Apostolic faith, she was not seen as supporting same-sex marriage.²³ No one questions the sincerity of Ms. Davis's religious beliefs.²⁴ Rather, the legal question is whether a government employee can—based on religious objection—withhold a secular, civil law service they provide to individuals that are lawfully entitled to receive that service.

²⁰ During the height of the Civil Rights Era, many businesses challenged public accommodations laws based on their sincerely held religious beliefs. These objections were rejected in the context of racial segregation. *See Katzenbach v. McClung*, 379 U.S. 294 (1964) (upholding the federal government's right to integrate restaurants under the Interstate Commerce Clause because much of the food that was ultimately served in restaurants traveled in interstate commerce); *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 403 n.5 (1968) (stating that respondent's religious objections to the law were so "patently frivolous that a denial of counsel fees to the petitioners would be manifestly inequitable"). These cases show that public accommodation laws targeting race discrimination were not displaced despite religious liberty objections. For more discussing of religious liberty objections to civil rights laws, see generally Eisenstadt, *supra* note 19; Oleske, *supra* note 19.

²¹ *Miller v. Davis*, 123 F. Supp. 3d 924, 929 (E.D. Ky. 2015), *vacated*, No. 15-44-DLB, 2016 WL 11695944 (E.D. Ky. Aug. 18, 2016).

²² *Id.* at 931.

²³ *Id.* at 932.

²⁴ Davis felt so strongly about her beliefs, she ended up in custody for committing contempt of court. Alan Blinder & Tamar Lewin, *Clerk in Kentucky Chooses Jail Over Deal on Same-Sex Marriage*, N.Y. TIMES (Sept. 3, 2015), <https://www.nytimes.com/2015/09/04/us/kim-davis-same-sex-marriage.html> [<https://perma.cc/GV82-M6PH>].

The *Davis* case suggests, including two unsuccessful applications to the Supreme Court,²⁵ that the answer is a resounding “no.”²⁶

Keeping *303 Creative LLC* in mind, it bears emphasizing that the federal district court found Davis’s free speech objection invalid because she was only being asked to certify that a couple has a legal right to marry under Kentucky law.²⁷ The clerk’s basic function is to approve the accuracy of information input into a state form. Further, even if a marriage license is speech, it is government speech and not individual speech attributable to Davis or any other governmental employee.²⁸ The government employee serves the government.

After years of unsuccessful litigation, Davis was ordered to pay \$260,000 in attorney’s fees²⁹ following a \$100,000 verdict³⁰ against her for refusing to provide a marriage license to a same-sex couple. Davis exemplifies what I believe will be the Court’s treatment of government employees.³¹ There is a legal right to same-sex marriage. If you serve in a governmental capacity, you cannot deny anyone access to their legal right to marry. Civil marriage, and its attendant state rights, cannot be withheld by government employees.

This theory is currently being tested in Texas where a justice of the peace has petitioned the Texas Supreme Court to apply *303 Creative LLC* to her disciplinary case before the State Commission on Judicial Conduct.³² Dianne Hensley, a Waco, Texas, justice of the peace, refuses to conduct same-sex weddings despite the lawfulness

²⁵ *Davis v. Miller*, 576 U.S. 1091 (2015) (mem.) (denying stay); *Davis v. Ermold*, 141 S. Ct. 3 (2020) (mem.) (denying cert.).

²⁶ *See Ermold v. Davis*, 855 F.3d 715, 717 (6th Cir. 2017).

²⁷ *Davis*, 123 F. Supp. 3d at 941.

²⁸ *Id.* at 941–42. This is a condensed version of the court’s analysis. Under the court’s entire free speech assessment, which is more complex than necessary for this Essay, Davis still lost.

²⁹ The attorney fees issue was decided against Davis in December 2023. *A Former Clerk Who Refused to Issue Marriage Licenses Must Pay \$260,000 in Fees and Costs, a Judge Rules*, ASSOCIATED PRESS (Jan. 2, 2024, 12:00 PM), <https://apnews.com/article/kim-davis-marriage-licenses-rowan-county-b99cdf7b93a1e144fdff2c3b24d96c2c> [<https://perma.cc/7Z2K-QAZA>].

³⁰ Damages were assessed by a federal jury. Laurel Wamsley, *Kim Davis Is Ordered to Pay \$100,000 to Same-Sex Couple She Denied Marriage License*, NPR (Sept. 14, 2023, 2:35 PM), <https://www.npr.org/2023/09/14/1199477637/kim-davis-same-sex-marriage-license-ordered-to-pay-damages> [<https://perma.cc/R9WB-NMZU>].

³¹ A Texas county found itself sued and settled for \$44,000 following a county clerk’s refusal to issue a marriage license. *Texas Gay Couple Settles Suit Over Marriage License Denial*, ASSOCIATED PRESS (Aug. 1, 2015, 7:28 PM), <https://apnews.com/36952d8b449c4c8aa41bd22d4a9ac44a/texas-gay-couple-settles-suit-over-marriage-license-denial> [<https://perma.cc/BJ6J-NCQF>].

³² Judge Dianne Hensley, a Waco, Texas, Justice of the Peace has refused to conduct same-sex weddings. Since August 2016, she has conducted opposite sex weddings but referred same-sex couples to other individuals that are willing to marry same-sex couples. Petitioner’s Brief on the Merits at 2–3, *Hensley v. State Comm’n on Jud. Conduct*, No. 03-21-00305 (Tex. appeal docketed Apr. 10, 2023) (No. 21-1145).

of these marriages.³³ Since 2016, she has continued to marry opposite sex couples exclusively.³⁴ The differential treatment resulted in a two-day disciplinary hearing before the State Commission on Judicial Conduct in October 2019.³⁵ The Commission found that Judge Hensley should receive a public warning because her actions cast doubt on her ability to act impartially toward persons appearing before her as a judge.³⁶ She did not appeal to the Commission but, instead, initiated a state lawsuit. The trial court found against her, and an intermediate Texas appellate court upheld the sanction.³⁷

Following *303 Creative LLC*, Judge Hensley sought review before the Texas Supreme Court.³⁸ The Texas Supreme Court heard oral argument in October 2023 but has not yet ruled. Its ruling should provide some idea of how state courts may seek to narrow, or expand, *303 Creative LLC*. The only real similarities between Judge Hensley's case and *303 Creative LLC* are the petitioners' sincerely held religious beliefs and their refusal, due to those beliefs, to sanction or otherwise support same-sex marriage. One case involves the private marketplace where vendors sell their unique, expressive commercial goods. The other involves the government, the place all Americans go to access a marriage license and civil law ceremony.

The pending Texas case presents a conflict between religious liberty for government employees and the right for those seeking public services to receive them without discrimination. Unlike *303 Creative LLC*, which involved an entitlement claim to the creative marketplace and a right to access expressive commerce, those seeking a civil marriage ceremony are legally entitled to be married by the State and its employees. The Texas case will answer whether a person with a job requiring them to perform civil services can opt out of serving everyone based on their sincerely held religious beliefs. Can a Catholic official refuse to perform civil marriages that are (a) not between two Catholics, or (b) a person's second marriage? If so, does this suggest state neutrality in the provision of basic governmental services? This author expects that when the Supreme Court finally weighs in—as it inevitably will—it will most likely find that government employees must perform their civil jobs. Failure to perform your governmental role in civil marriage should not find refuge in *303 Creative LLC*.

II. THE NEW CATEGORY OF SPEECH: EXPRESSIVE COMMERCE

Unlike government employees, *303 Creative LLC* gave clear First Amendment protection to vendors selling expressive commercial products and services.³⁹ Individuals

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at app. 68.

³⁶ *Id.* at 6.

³⁷ *Hensley v. State Comm'n on Jud. Conduct*, No. 03-21-00305-CV, 2022 WL 16640801, at *1 (Tex. App. Nov. 3, 2022).

³⁸ See Petitioner's Brief on the Merits, *supra* note 32.

³⁹ *303 Creative LLC v. Elenis*, 600 U.S. 570, 591–98 (2023).

and businesses, engaging in what I term “expressive commerce,” have a legal right to ignore public accommodations laws that require those businesses to serve the entire public. Those engaging in expressive commerce now have a legal right to discriminate against individuals they do not want to serve. Expressive commerce vendors can literally pick and choose their clients despite broadly worded public accommodations laws.⁴⁰ Your beliefs control your clientele.

303 Creative LLC, however, may be more narrowly construed or capable of a narrowing construction. Perhaps the only right created is a free speech right to refuse to sell expressive commercial items that could be used in a same-sex wedding ceremony. The heart of *303 Creative LLC* is expressive commerce as free speech. Non-expressive items, whatever those turn out to be, cannot be withheld in response to a public accommodations law by relying on the First Amendment’s free speech provision.⁴¹ Non-discrimination public accommodation laws seek to ensure that all individuals have equal access to the marketplace.⁴² *303 Creative LLC* carved out what I believe to be a currently small, but potentially significant, exception to these non-discrimination laws.⁴³ But even seemingly small harms, like being excluded from the marketplace or forced to find a “willing” vendor for your marriage ceremony, are significant harms to those excluded.⁴⁴

⁴⁰ *See id.* at 586–87. The Court did not define what constitutes expressive commerce. It did, however, isolate certain protected speech that it analogized to the modern wedding website—“from ‘pictures, films, paintings, drawings, and engravings,’ to ‘oral utterance and the printed word’” *Id.* at 587. This broad statement does not provide much help in refining the scope of expressive commerce. But it does give a few hints. Photographers and painters are probably protected under *303 Creative LLC*, but bakers and florists might not be.

⁴¹ *Id.* at 591–92 (“Colorado and other States are generally free to apply their public accommodations laws, including their provisions protecting gay persons, to a vast array of businesses.”).

⁴² *See, e.g., Roberts v. United States Jaycees*, 486 U.S. 609, 625 (1984). *Roberts* traced public accommodations law back to the late 1800s. In explaining the importance of these laws, the Court wrote:

These laws provided the primary means for protecting the civil rights of historically disadvantaged groups until the Federal Government reentered the field in 1957. . . . Like many other States, Minnesota has progressively broadened the scope of its public accommodations law in the years since it was first enacted, both with respect to the number and type of covered facilities and with respect to the groups against whom discrimination is forbidden.

Id. at 624; *see also* *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 251 (1964); *Katzenbach v. McClung*, 379 U.S. 294, 300 (1964).

⁴³ The harm suffered by same-sex couples being refused services in the public marketplace creates a significant dignity harm. This is the harm that Justice Kennedy’s majority opinion in *Obergefell* accepted, appreciated, and acted on. In contrast, the current version of the Roberts Court seems more attuned to the harm suffered by those whose religious liberty rights prevent them from supporting or providing services to same-sex marriage ceremonies.

⁴⁴ *See Roberts*, 486 U.S. at 625.

Whether *303 Creative LLC*'s impact is minimal or imposing will depend on how lower courts apply the case and how, ultimately, the Supreme Court defines expressive commerce. *303 Creative LLC* gives little guidance. In July 2021, the Supreme Court denied certiorari on a case involving a florist, Barronelle Stutzman, who objected to selling floral arrangements for use in a same-sex wedding ceremony.⁴⁵ The customer was a long-time client at the store and, per Stutzman, a friend. He had not previously been denied service. But when Stutzman learned the purpose of this particular order, she declined to sell the product based on her sincerely held religious beliefs. The Washington Supreme Court twice denied her relief. After nearly a decade of litigation, Stutzman ultimately settled with the couple for \$5,000.⁴⁶ She then retired.⁴⁷

It is noteworthy that three justices dissented from the Arlene's Flowers cert denial. Justices Thomas, Alito, and Gorsuch announced their dissent.⁴⁸ In September 2021, Arlene's Flowers filed a petition for rehearing with the Court following the 10th Circuit's decision in *303 Creative LLC*.⁴⁹ However, Arlene's Flowers ultimately dropped its petition and settled the case. One can only wonder whether the Court would have accepted the petition for rehearing and, if so, whether flowers would be deemed "expressive commerce." For now, this remains an unanswered question.

⁴⁵ *State v. Arlene's Flowers, Inc.*, 441 P.3d 1203 (Wash. 2019) (requiring a florist to abide by non-discrimination laws despite religious objection to serving same-sex weddings), *cert. denied*, 141 S. Ct. 2884 (2021).

⁴⁶ Ellie Nakamoto-White, *Almost Nine-Year Legal Battle With Arlene's Flowers in Richland Ends With a 5K Settlement*, APPLE VALLEY NEWS NOW (Nov. 19, 2021), https://www.applevalleynewsnow.com/news/local-news/almost-nine-year-legal-battle-with-arlene-s-flowers-in-richland-ends-with-a-5k/article_89c01887-50e3-55b5-a706-1ef049cc3e0b.html [<https://perma.cc/5J8R-8BY6>].

⁴⁷ Kevin J. Jones, *Washington Florist Who Declined to Serve Same-Sex Wedding Will Pay Settlement, Retire*, CATH. NEWS AGENCY (Nov. 18, 2021, 8:05 PM), <https://www.catholicnewsagency.com/news/249645/christian-florist-barronelle-stutzman-to-pay-a-settlement-and-retire-rather-than-appealing-to-the-supreme-court-after-being-sued-for-declining-to-create-flower-arrangements-for-a-same-sex-wedding> [<https://perma.cc/48AW-HV79>]. Ironically, the new Arlene's owners openly embrace the LGBTQ+ community. Dan Hanson, *Flowers Shop That Denied to Serve Gay Customers Changing the Narrative With New, LGBTQ+ Accepting Owner*, NBC RIGHT NOW (June 19, 2023), https://www.nbcrightnow.com/news/flowers-shop-that-denied-to-serve-gay-customers-changing-the-narrative-with-new-lgbt-accepting/article_f4dda65a-0f00-11ee-afd5-a3935effd073.html [<https://perma.cc/9QL6-62NG>].

⁴⁸ *Arlene's Flowers, Inc. v. Washington*, 141 S. Ct. 2884 (2021) (mem.). Justice Thomas and Justice Alito also dissented from the Supreme Court's 2020 cert. denial in the Kim Davis case. *See Davis v. Ermold*, 141 S. Ct. 3, 3 (2020) (mem.). In *Davis*, Justice Thomas drafted a four-page dissent asserting that "Davis may have been one of the first victims of this Court's cavalier treatment of religion in its *Obergefell* decision, but she will not be the last." *Id.* It is clear there are at least three, perhaps more, votes on the current Court that seek to limit *Obergefell*'s impact on others' religious beliefs.

⁴⁹ *303 Creative LLC v. Elenis*, 6 F.4th 1160 (2021) (upholding Colorado's non-discrimination law despite *303 Creative LLC*'s First Amendment challenges), *rev'd*, 600 U.S. 570 (2023).

At this moment, we do not yet know whether stationers, photographers, hairstylists,⁵⁰ bakers, or others will be deemed participants in “expressive commerce.” We do know that Jack Phillips, the owner of Masterpiece Cakeshop, continues to assert his First Amendment right to deny services to those whose product requests he disagrees with.⁵¹

The first Masterpiece Cakeshop case involved Phillips’s objection to baking a wedding cake for a same-sex marriage.⁵² Following an administrative finding that the bakery violated the Colorado anti-discrimination law, Phillips appealed. The Colorado Court of Appeals upheld the finding that the bakery’s denial of service to a same-sex couple violated the Colorado anti-discrimination law.⁵³ Phillips petitioned the Supreme Court to take his case. It did.⁵⁴ The case was overturned on narrow grounds based on a lack of neutrality toward religion expressed during the state proceedings.⁵⁵ That litigation continues today.⁵⁶ Importantly, the first Masterpiece Cakeshop case did not decide whether wedding cakes are expressive commerce. Following *303 Creative LLC*, the question is more pressing. Are baked goods—or at least *certain* baked goods—“expressive commerce”?

The baked goods issue becomes complicated because Masterpiece Cakeshop has again been sued following its refusal to create a “custom cake.” The request was for a pink cake with blue frosting (no words or other items were sought on the cake) to

⁵⁰ A Michigan hairstylist posted the following message on Facebook following *303 Creative LLC*: “If a human identifies as anything other than a man/woman please seek services at a local pet groomer. You are not welcome at this salon. Period. Should you request a particular pronoun used please note we may simply refer to you as ‘hey you.’” Paul Egan, *Traverse City Salon Charged With Discrimination Over Anti-Trans Facebook Post*, DETROIT FREE PRESS (Nov. 16, 2023, 9:08 AM), <https://www.freep.com/story/news/local/michigan/2023/11/15/traverse-city-salon-transgender-studio-8-hair-lab/71591347007/> [<https://perma.cc/MQ7W-NUZG>]. This post, which appears to be pure speech, may in fact be protected under *303 Creative LLC*. Nonetheless, the salon has been sued by Michigan for potential violation of its non-discrimination laws. See *Charge of Discrimination*, Mich. Dept. of C.R. v. Studio 8 Hair Lab, LLC (Nov. 2023) (MDCR 626419, 636781, 636783), <https://www.michigan.gov/mdcr/-/media/Project/Websites/mdcr/MDCR-Charges/FINAL-MDCR-636419-636781-636783-Charge.pdf> [<https://perma.cc/5NUH-NAE4>].

⁵¹ *Scardina v. Masterpiece Cakeshop, Inc.*, 528 P.3d 926 (Colo. App. 2023). The Colorado Supreme Court has accepted Masterpiece Cakeshop’s Petition for Certiorari on October 3, 2023. *Masterpiece Cakeshop, Inc. v. Scardina*, No. 23SC116, 2023 WL 6542667, at *1 (Colo. Oct. 3, 2023). So, just as we await the Texas Supreme Court’s decision as to whether a justice of the peace may decline to conduct civil same-sex marriage ceremonies, we await the Colorado Supreme Court’s decision as to whether baking a pink cake with blue frosting and no other message constitutes “expressive commerce.”

⁵² *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Com’n*, 584 U.S. 617 (2018).

⁵³ *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 276 (Colo. App. 2015).

⁵⁴ *Masterpiece Cakeshop*, 584 U.S. 617.

⁵⁵ *Id.* at 626.

⁵⁶ See *Masterpiece Cakeshop Inc. v. Elenis*, 445 F. Supp. 3d 1226, 1232–33 (D. Colo. 2019); *Masterpiece Cakeshop, Inc.*, 2023 WL 6542667, at *1.

celebrate a transgender birthday of an individual transitioning from male to female.⁵⁷ Phillips refused, citing his religious liberty and free speech rights.⁵⁸ The Colorado Court of Appeals denied his case in January 2023, noting that Phillips himself had testified that there is nothing inherently expressive about a pink cake with blue icing and that—unlike a wedding cake—observers would not assign any meaning to such cake without context.⁵⁹ Ironically, this case possibly fortifies the wedding cake as “expressive commerce” argument. A wedding cake is unique and expressive. A pink cake with blue frosting, even if the purchaser ascribes meaning to it, is not inherently expressive. The Colorado Supreme Court accepted the case for review in October 2023. Its decision will hopefully shed light on what state courts believe is *303 Creative LLC*’s reach.

For better or worse, the question of what constitutes expressive commerce will ultimately be decided incrementally. A wedding website is expressive speech—thus, it is expressive commerce.⁶⁰ A person need not create a wedding website for individuals that the designer does not want to work with or for. But what other products will receive expressive protection? That is going to be a heavily litigated question among the lower courts. The Supreme Court did not give much guidance other than to emphasize that individuals in the business of expressive commerce, such as speech writers, documentary filmmakers, and website designers all engage in expressive commerce.⁶¹ Will food products like cakes be considered expressive commerce? Will hairstyling, which has long been a source of individual fashion and identity, be considered expressive commerce? Is the case limited to “artistry” or will “artistry” be in the eyes of the beholding seller?

303 Creative LLC will span a new era of individual rights. Those engaging in expressive commerce will be permitted to turn away clientele that other sellers cannot. Expressive commerce will receive heightened protection that ordinary commerce—whatever that turns out to be—will not. *303 Creative LLC* is the first step in a new and evolving legal doctrine. We have entered the First Amendment era of expressive commerce.

III. WILL THERE BE LIMITS ON *303 CREATIVE LLC*’S SPEECH RIGHTS?

How far ranging will *303 Creative LLC*’s speech rights ultimately reach? Should we fear the parade of horrors set out by the dissenting justices?⁶² Will *303 Creative*

⁵⁷ Scardina v. Masterpiece Cakeshop, Inc., 528 P.3d 926, 930–31 (Colo. App. 2023).

⁵⁸ *Id.* at 930.

⁵⁹ *See id.* at 931.

⁶⁰ *See* *303 Creative LLC v. Elenis*, 600 U.S. 570, 593–94 (2023).

⁶¹ *Id.* at 589–90.

⁶² *Id.* at 638–39 (Sotomayor, J., dissenting). Justice Sotomayor was joined in dissent by Justices Kagan and Jackson. *Id.* at 603. The dissent worries that the majority’s logic could be used to allow a stationer to “refuse to sell a birth announcement for a disabled couple

LLC spell the end of non-discrimination laws? These are not entirely unanswered questions. One would anticipate that *303 Creative LLC*, even under its broadest reading, is limited to the commercial marketplace and, even then, the expressive marketplace.⁶³ It is doubtful that a law professor working at a state university can refuse to teach cases the professor believes are wrong—morally or legally wrong—such as *Obergefell*, *Loving*, or *Dobbs*. That type of speech is governmental and falls outside the commercial marketplace. Government speech is more regulated, and limited, than individual expressive speech. As set forth above, it is likely that *303 Creative LLC* will be limited to the private sector. The Court’s decision should maintain *303 Creative LLC* within the buying and selling of expressive products and merchandise—or expressive commercial services such as photography and custom art.

The narrowest reading of *303 Creative LLC* would limit its protections specifically to weddings and not provide carte blanche to all forms of commercial transactions. But the Court’s language is not so limiting. Instead, the focus appears to be on expressive commerce as a new category of protected speech. If photography turns out to be expressive commerce, can a venue hiring out for Santa photos refuse to photograph certain races or couples with biracial children?⁶⁴ That was precisely one of the dissenting Justices’ concerns. Or will race be an impenetrable line? Could a web designer that does not believe in interracial marriage refuse to work with interracial couples? Can a Hispanic web designer refuse to work with non-Hispanics or a Catholic with non-Catholics? What is the depth and breadth of *303 Creative LLC*’s true application?

Like past cases breaking new ground, it is too early to assess *303 Creative LLC*’s reach. While same-sex marriage has been understood as requiring some balance for religious liberty issues (even if those are packaged as free speech issues), race is categorically different. The history providing civil rights protections via Constitutional Amendments⁶⁵ and federal public accommodations laws⁶⁶ demonstrate

because she opposes their having a child. A large retail store could reserve its family portraits services for ‘traditional’ families.” *Id.* at 638–39.

⁶³ *See id.* Even the dissent seems to characterize stationers and photographers as engaging in expressive commerce. But neither the majority nor dissent suggests that *303 Creative LLC* applies beyond the expressive commerce marketplace.

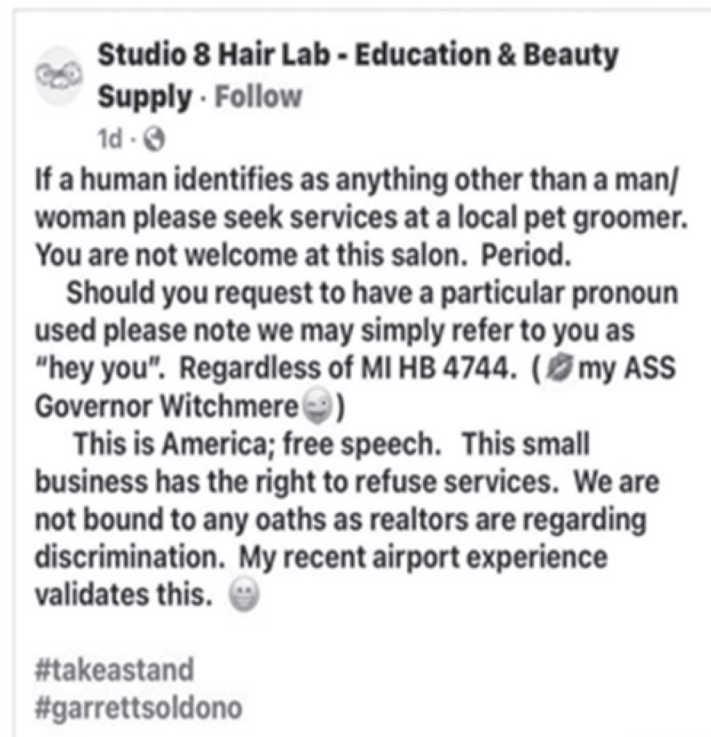
⁶⁴ *Id.*

⁶⁵ Outside the Bill of Rights, voting is the most common topic addressed by Constitutional Amendment. *See* U.S. CONST. amends. XII, XV, XVII, XIX, XXIII, XXIV, XXVI. Still, the Constitution expressly protects race more than any other immutable trait. *See* U.S. CONST. amends. XIII, XIV, XV. Gender is only explicitly protected once. Sexual orientation is not protected at all.

⁶⁶ *See, e.g.,* *Runyon v. McCrary*, 427 U.S. 160, 179 (1976) (prohibiting private schools from excluding students based on race and further finding that “Section 1981, as applied to the conduct at issue here, constitutes an exercise of federal legislative power under § 2 of the Thirteenth Amendment fully consistent with *Meyer*, *Pierce*, and the cases that followed in their wake.”).

a commitment to racial equality that does not yet exist for other categories, even those protected in modern state non-discrimination laws. If the commercial marketplace can say “I do not believe that ‘x’ and ‘y’ can marry because my views are ‘z’”—what is the natural stopping point?

Shortly after *303 Creative LLC*, a Michigan hairstylist put an admonishment on Facebook that anyone identifying as other than a man or woman is not welcome at her business. Her exact post was:



The stylist’s company, Studio 8 Hair Lab, has been sued by the Michigan Department of Civil Rights.⁶⁷ But she has not actually refused service to anyone. The studio deleted its Facebook page. And then the studio sued Traverse City and three people who filed complaints. Studio 8’s legal grounds? Religious liberty and free speech.

This is precisely the type of case that will set the parameters of *303 Creative LLC*’s reach. Can a hair salon refuse service to a person that identifies as transgender based on free speech or religious liberty? Maybe. Maybe not. But after *303 Creative LLC*, businesses can likely post statements that certain people are not welcome as

⁶⁷ This post, which appears to be pure speech, may in fact be protected under *303 Creative LLC*. Nonetheless, the salon has been issued a charge of discrimination for potential violation of Michigan’s non-discrimination laws. *See* Charge of Discrimination, Mich. Dept. of C.R. v. Studio 8 Hair Lab, LLC (Nov. 2023) (MDCR 626419, 636781, 636783), <https://www.michigan.gov/mdcr/-/media/Project/Websites/mdcr/MDCR-Charges/FINAL-MDCR-636419-636781-636783-Charge.pdf> [<https://perma.cc/5NUH-NAE4>].

customers.⁶⁸ Such messages, however crass or clever, are the epitome of free speech.⁶⁹ Following *303 Creative LLC*, the Court seemed to put a great deal of emphasis on an individual's right to be free from compelled speech.⁷⁰ And saying a person is not welcome is not the same as denying services.

And that is where the Michigan case gets tricky. No one has been denied services. But can they be? Can a person who identifies as something other than male or female be excluded from the marketplace—or, more narrowly, from expressive commerce in the marketplace? And is getting a haircut or hair style expressive commerce?

303 Creative LLC is the starting place not the stopping point. It is hard to know what comes next. But it is clear that cases are already popping up on the horizon.

CONCLUSION: FINE-TUNING *303 CREATIVE LLC*'S IMPACT

The rights at issue in *303 Creative LLC* are highly personal. For same-sex couples wanting to hold a wedding ceremony, after having won the hard-fought right to legally marry, non-discrimination laws ensure their marriages will not become second-class marriages. For individuals and companies whose sincerely held religious beliefs form the core of their business practices, the Constitution provides refuge from being compelled to participate in ceremonies that contradict their religious faith. Both sides bring cherished rights to the table. Both sides feel the government, through the Constitution, owes them protection. In the most recent conflict of rights, individuals asserting their free speech rights to sell or produce expressive commerce were found to have primacy over those seeking protection under modern non-discrimination laws.

So, are same-sex marriages only second-class marriages, particularly when it comes to accessing wedding products? President Biden signed the Respect for Marriage Act in 2022 that codified some protection for same-sex and interracial marriages.⁷¹ The Supreme Court has also given increasing protection to same-sex couples when the rights are civil—or governmental—in nature. Same-sex couples have a legal right to have both parents listed on their children's birth certificates.⁷² Gay and transgender individuals now have protection under Title VII.⁷³ The few defeats suffered by same-sex couples have centered around expressive commerce or a lack

⁶⁸ *303 Creative LLC*, 600 U.S. at 623 (Sotomayor, J., dissenting).

⁶⁹ *See Cohen v. California*, 403 U.S. 15, 25 (1971) (“For, while the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man’s vulgarity is another’s lyric.”).

⁷⁰ *See id.* at 596 (majority opinion).

⁷¹ Respect for Marriage Act, Pub. L. No. 117-228 (2022) (to be codified at 1 U.S.C. § 7 and 28 U.S.C. § 1738C). The Respect for Marriage Act gives statutory protection to the recognition of interracial and same-sex marriages.

⁷² *Pavan v. Smith*, 582 U.S. 563, 564 (2017).

⁷³ *Bostock v. Clayton Cnty.*, 590 U.S. 644 (2020).

of neutrality toward religious liberty.⁷⁴ Those cases have prominently involved same-sex marriages or relationships.

Questions remain. Many questions. And one should expect that the Supreme Court will continue to refine the rights that all of us have in relation to same-sex marriage, free speech, religious liberty, and non-discrimination. Congress has the power to address the issue through its Commerce Clause powers.⁷⁵ But I would not rely on Congress to provide any additional support beyond that provided in the Respect for Marriage Act. Instead, the task of fine-tuning the clash of rights will likely again fall to the Supreme Court. And this will take time.

In the interim, it is premature to claim the sky is falling. *303 Creative LLC* has natural limits. It should be interpreted to apply only to private employees—not government employees. It should be limited only to those individuals and businesses that engage in expressive commerce, whatever the Supreme Court ultimately deems that to be. And it should not allow society to return to the pre-Civil Rights era where religious liberty claims sought to challenge racial integration.⁷⁶

303 Creative LLC establishes a new right. Certain vendors have the ability to avoid non-discrimination laws provided they make or trade in expressive commerce. The contours of that right are still unclear. But one thing is for certain: those contours will likely be determined by lower courts. It will be important to see how litigants, and judges, establish which activities and products qualify as expressive commerce and which do not. Until then, we wait. We wonder. And we write.

It has been a privilege to participate in this collection of Essays. Thanks to all those that participated in the AALS Annual Meeting’s Hot Topic Session discussing *303 Creative LLC*. This conversation is legally important. Here’s hoping that Henny-Penny is overreacting. The sky is not falling, at least not yet.

⁷⁴ See, e.g., *Fulton v. City of Philadelphia*, 593 U.S. 522 (2021).

⁷⁵ See generally *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400 (1968).

⁷⁶ *303 Creative LLC v. Elenis*, 600 U.S. 570, 591–92 (2023) (reminding that public accommodations laws generally apply to a “vast array of businesses”).