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CLEANING THE MESS OF *303 CREATIVE V. ELENIS*

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303 Creative v. Elenis is a mess. The Court itself confessed that "[i]t is difficult to read the dissent and conclude we are looking at the same case."[1] Where the Court saw "pure speech,"[2] the dissent saw "conduct, not speech."[3] Where the Court saw a clear reason to curb the reach of Colorado's antidiscrimination law, the dissent saw a clear reason for upholding it.

Upon closer inspection, it turns out that the mess goes beyond the diametrically opposed construals of the facts and the analysis by the Court and the dissent. In fact, each opinion generates its own mess. The Court's opinion fails to explain what marketplace behavior may constitute "pure speech" deserving of exemption from the reach of antidiscrimination law. Despite this glaring omission, Justice Gorsuch appears perplexed by the accusation that his opinion would inoculate many acts of discrimination from the reach of law by providing a path to dress them up as speech. Justice Gorsuch emphatically rejects this concern, but does not explain why. "Pure fiction" is his only retort.[4] The reader is left with questions, no answers—why did Justice Gorsuch not seize the opportunity to clarify the mess?

Matters do not become any clearer reading the dissent. Justice Sotomayor delivers a blazing defense of antidiscrimination laws, grounded in the long history of group-based market discrimination

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1 303 Creative LLC v. Elenis, 143 S. Ct. 2298, 2318 (2023).

2 *Id.*

3 *Id.* at 2322 (Sotomayor, J., dissenting).

4 *Id.* at 2319, 2318–22 (majority opinion).

and the persistent efforts to uproot it. Yet her opinion avoids the mention of a twin decision she joined fully only two years earlier—*Fulton v. City of Philadelphia*.[5] In that case, a unanimous court released a foster care agency of the duty to comply with Philadelphia's multiple antidiscrimination rules, generating virtually the same result as that of *303 Creative*.[6] While it is not impossible to distinguish the two cases with nuanced reasoning, Justice Sotomayor's sweeping opinion makes it quite hard. Tellingly, rather than meeting the challenge, Justice Sotomayor ignored *Fulton* completely. Again, the reader is left confused—what can possibly explain Justice Sotomayor's failure to mention *Fulton* and what doctrine does she leave us with as to the balance of religious liberty and gender equality?

No piece of academic writing can clean, by itself, the mess left by *303 Creative v. Elenis*. Only the Court can. This symposium piece can only offer analytical clarity on *303 Creative*, which can help to understand and organize the mess. I will proceed to do so in three steps. First, I point out the glaring omissions of the Court's opinion and criticize the dangerous consequences of the Court's inexplicable approach. Second, I discuss the inconsistency of the dissent and the truth it reveals about the unviability of its sweeping position. Finally, I argue that the only way to clean the mess—and avoid creating further mess in the future—is to exercise the Court's legal responsibility responsibly. This could be accomplished, first, by selecting cases with broad applicability and the ingredients necessary to advance the doctrine; at the second step, the Court must write clear opinions that set explicit tests for lower courts and for the public, and must not evade inconvenient precedents, counterarguments, and the resolution of apparent ambiguities. *303 Creative* failed on both grounds. First, the Court succumbed to the temptation to pick a seemingly easy case to achieve a normatively appealing outcome, despite the case's many idiosyncrasies and anomalies that make it highly problematic for doctrinal advancement. Second, the Court penned an opaque and evasive decision under the guise of "what's not to understand here?" and, as a result, muddied the doctrinal water further. The only way for the Court to clean its mess now is to use the next opportunity where an apt case presents itself to present a sensible and socially responsible doctrine. Meanwhile, lower courts should be aware of the problems of *303 Creative* and apply the decision carefully.

The remainder of this piece is organized as follows: Part I provides background on *303 Creative v. Elenis*. Part II analyzes the mess left by

5 141 S. Ct. 1868 (2021).

6 *Id.* at 1882.

the majority opinion. Part III does the same for the dissent. Part IV proposes a framework to clean and avoid further mess.

I. *303 CREATIVE V. ELENIS*

303 Creative is the business entity of Lorie Smith, a website designer from Colorado, who sought to enjoin the state from enforcing its antidiscrimination law against her commercial conduct.[7] Professor Robert Post summarized the gist of the case in the following words:

> When Lorie Smith contemplated going into the business of designing websites for weddings, she intended to offer her for-profit services to the general public. She was willing to work with all persons, regardless of their race, religion, gender, or sexual orientation. But she was also certain that as a Christian whose beliefs were central to her identity, she could not violate her religious commitments by creating websites promoting any conception of marriage other than that of marriage between a man and a woman. To make her stance explicit, she prepared an unambiguous statement that she intended to publish on her website.[8]

Ms. Smith sought to be able to refuse her design services to same-sex couples and to communicate this policy clearly on her website, without facing the legal consequences stipulated in Colorado Anti-Discrimination Act (CADA).[9] The parties agreed before the Court on a series of factual stipulations, among them that "Ms. Smith's websites promise to contain 'images, words, symbols, and other modes of expression'" and "that every website will be her 'original, customized' creation."[10]

Let us first acknowledge that *303 Creative* is a strange case. First, its factual record was extremely thin. Ms. Smith had never opened her business, had no real customers, no demonstrable, verifiable business practices, had not actually worked with a diverse clientele, and had not yet refused any client due to her Christian convictions.[11] As a result, no court—the Supreme Court or a lower one—had an opportunity to assess the actual practice of Smith's business, the implications of these practices, or Colorado's response to them.

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7 *303 Creative*, 143 S. Ct. at 2308.

8 Robert Post, Public Accommodations and the First Amendment: *303 Creative* and "Pure Speech" 5 (Oct. 23, 2023) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4571189 [https://perma.cc/7SV6-F3ZX].

9 *303 Creative*, 143 S. Ct. at 2309.

10 *Id.* at 2312 (quoting Petition for a Writ of Certiorari at 181a, *303 Creative*, 143 S. Ct. 2298 (No. 21-476)).

11 *See id.* at 2308; Brief in Opposition at 13, *303 Creative*, 143 S. Ct. 2298 (No. 21-476)).

Second, *303 Creative* also deviates from previous wedding conflicts that pitted religious liberty against sexual orientation equality, like *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*,[12] *State v. Arlene's Flowers, Inc.* (*Arlene's Flowers III*),[13] and *Klein v. Oregon Bureau of Labor & Industries* (*Klein II*),[14] in that it was litigated as a conflict solely between Ms. Smith and the state, omitting the people whom Colorado was seeking to protect with its antidiscrimination law—Ms. Smith's (future) clients. In previous cases, even as cases advanced through the system and turned into conflicts between wedding vendors and their states, the record always included the original conflict between the vendor and the clients.[15]

Unsurprisingly, the question of Ms. Smith's standing to sue came up. The Court rightfully assessed that Ms. Smith faced a "credible threat" that Colorado would enforce its law against her, and thus she had standing to pursue her case.[16]

But the fact that Ms. Smith may have had standing to sue does not remedy the anomalies of her case. Absent real facts, the parties provided the Court a list of "stipulations" about the facts, many of which were phrased in future tense, none of which referred to things that had already happened.[17] Absent injured or offended customers, or a practice of nondiscriminatory service that Ms. Smith could show in her defense, the case was detached from the complex, wrenching dilemmas of the long line of cases it came to represent.

All in all, the fact that hers was a preenforcement challenge likely strengthened Ms. Smith's case: it allowed her to turn propositions into facts (i.e., the proposition that she is willing to work with all customers was presented as fact, though she did not actually establish a nondiscriminatory practice) and to focus the discussion on *her*, while abstracting away the people whose interests would have otherwise been weighed against her own. This point was made by Professor Alexander Gouzoules, who pointed out the strategic benefits of pressing preenforcement, rather than postenforcement challenges: "[A]ttorneys planning pre-enforcement challenges enjoy the opportunity to select their clients, control their suit's timing and forum, and shop for judges. And when challenging laws that protect beneficiaries from harms such as discrimination, pre-enforcement challengers likely benefit from the absence of identified victims in

12 138 S. Ct. 1719 (2018).

13 441 P.3d 1203 (Wash. 2019).

14 506 P.3d 1108 (Or. 2022).

15 *Masterpiece Cakeshop*, 138 S. Ct. at 1723; *Arlene's Flowers III*, 441 P.3d at 1210; *Klein II*, 506 P.3d at 1115.

16 *303 Creative*, 143 S. Ct. at 2318.

17 *Id.* at 2304, 2309–10.

speculative lawsuits."[18] As Gouzoules noted, ample research in social psychology showed, time and time again, that identified victims—even by name only—garner more sympathy, affection, and willingness to aid their cause than unidentified and abstract victims, a phenomenon termed "the identified victim effect."[19] By removing any client from the record, Ms. Smith successfully framed herself as the victim of Colorado's enforcement and turned her future-refused clients into unidentified victims at best.

Viewed from this perspective, Ms. Smith's case clearly contains several features making it a strong candidate for a decision in favor of the wedding vendor. First, the fact that no business activity was conducted prior to and during litigation allowed Smith and her lawyers complete freedom in crafting the factual stipulations describing Smith and her conduct. All of those stipulated facts were mere words, with no evidence of actual conduct to support them; having no actual record allowed Smith to "perfect" the facts in her favor.

Second, the "sterilization" of the case of any victims had two advantages: first, it neutralized the identified victim effect and masked the potential costs of deciding in favor of the vendor; second, it eliminated factual disagreements that could have been brought by real victims, disagreements that are part and parcel of real conflicts where each party typically has a different account of the case and where each party typically adds facts that change the interpretation of the other party's argument.[20]

Third, Ms. Smith herself is a perfect selection of a client to bring forth a challenge to a state antidiscrimination law. She is a designer, whose sole product is design, and a wordy one in particular. Unlike cakes, or flowers, or photographs—goods that were at the center of previous wedding conflicts[21]—wedding webpages are more prototypically expressive. While Jack Phillips clearly thought of

18 Alexander Gouzoules, *The Success of Pre-Enforcement Challenges to Antidiscrimination Laws*, 55 COLUM. HUM. RTS. L. REV. (forthcoming 2024) (manuscript at 1) (on file with author).

19 *See id.* (manuscript at 34); *see also* Netta Barak-Corren & Daphna Lewinsohn-Zamir, *What's in a Name? The Disparate Effects of Identifiability on Offenders and Victims of Sexual Harassment*, 16 J. EMPIRICAL LEGAL STUD. 955, 958–62, 964–67 (2019) (surveying the vast literature on the effect and presenting original empirical findings in the context of the legal evaluation of sexual harassment claims).

20 See, for example, the conflict between the parties in *Masterpiece Cakeshop* about whether the baker suggested to sell the couple goods other than a personalized wedding cake. *Compare Masterpiece Cakeshop*, 138 St. Ct. at 1735, *with id.* at 1749 n.2 (Ginsburg J., dissenting).

21 *See id.* at 1723; State v. Arlene's Flowers, Inc., 441 P.3d 1203, 1210 (Wash. 2019); Elane Photography, LLC v. Willock, 309 P.3d 53, 59 (N.M. 2013).

himself as an artist, his creation was ultimately a cake. For Alliance Defending Freedom, the impact litigation group that represented the vendor in all of these cases,[22] choosing Ms. Smith to push the envelope further likely reflects the learning from the lessons of the uneven success of previous *actual* conflicts that involved tangible and less clearly expressive products and, as mentioned earlier, more challenging factual settings.

II. THE MAJORITY OPINION AND ITS OMISSIONS

> Instead of addressing the parties' stipulations about the case actually before us, the dissent spends much of its time adrift on a sea of hypotheticals about photographers, stationers, and others, asking if they too provide expressive services covered by the First Amendment. But those cases are not *this* case. Doubtless, determining what qualifies as expressive activity protected by the First Amendment can sometimes raise difficult questions. But this case presents no complication of that kind. The parties have *stipulated* that Ms. Smith seeks to engage in expressive activity. And the Tenth Circuit has recognized her services involve "pure speech." Nothing the dissent says can alter this—nor can it displace the First Amendment protections that follow.[23]

Justice Gorsuch, writing for the Court, makes it clear that *303 Creative* does not represent the broad category of religion v. equality conflicts it emerged from, *and* that these differences are what makes the business particularly entitled to the protection of the First Amendment. Note that Justice Gorsuch lists the stipulation of facts as a weighty validation of Ms. Smith's claims; emphasizes the "purely" expressive nature of her services; and makes no reference to the act of refusing service to clients that Ms. Smith seeks to inoculate from the reach of Colorado's law, something that would entail the existence of victims—people other than Ms. Smith who stand to lose or gain in this litigation.

The gist of Justice Gorsuch's thesis is that *303 Creative* is a case without "complication" because it involves "pure speech."[24] In "pure speech" cases, proclaimed Justice Gorsuch, the government is

22 *See Arlene's Flowers v. State of Washington*, ALL. DEFENDING FREEDOM, https://adflegal.org/case/arlenes-flowers-v-state-washington [https://perma.cc/3CCM-6877]; *Elane Photography v. Willock*, ALL. DEFENDING FREEDOM, https://adflegal.org/case/elane-photography-v-willock [https://perma.cc/U6XJ-H2P8]; *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, ALL. DEFENDING FREEDOM, https://adflegal.org/case/masterpiece-cakeshop-v-colorado-civil-rights-commission [https://perma.cc/3CVT-P6TH].

23 303 Creative LLC v. Elenis, 143 S. Ct. 2298, 2319 (2023) (citations omitted) (quoting 303 Creative v. Elenis, 6 F.4th 1160, 1175 (10th Cir. 2021)).

24 *Id.*

categorically forbidden from "forc[ing] an individual to 'utter what is not in [her] mind' about a question of political and religious significance."[25] Significantly, Justice Gorsuch omits any application of strict scrutiny or any other type of balancing, thereby dodging any discussion of the significance of the compelling interest in preventing market discrimination that underlies Colorado's antidiscrimination law. Under Justice Gorsuch's thesis, under no circumstances or set of reasons may the government curtail "pure speech."

The entire decision depends, then, on the definition of "pure speech." If met, any and all government actions compelling it would fall. If unmet, another form of scrutiny applies. What, then, is "pure speech"?

Strangely enough, Justice Gorsuch does not cite any definition or test for this key term in his decision. In the past, "pure speech" has been understood as speech devoid of conduct.[26] This is not easily the case of Ms. Smith, as her speech is entangled in the conduct of a commercial transaction—the sale of a product, the website, to a client. This does not mean her activity is not expressive in kind—only that it is not "pure" speech. In any event, Justice Gorsuch could have told us what "pure speech" means, but he did not. A plausible move is to reconstruct the specific meaning of "pure speech" for Justice Gorsuch from the facts of the case that he emphasized in reaching this conclusion. To this end, Justice Gorsuch writes that Ms. Smith's websites "promise to contain 'images, words, symbols, and other modes of expression.' . . . [E]very website will be her 'original, customized' creation. . . . Ms. Smith will create these websites to communicate ideas. . . . [T]he wedding websites Ms. Smith seeks to create involve *her* speech."[27]

Justice Gorsuch does not present this series of stipulations as conditions, nor does he explain how they must relate to each other to constitute "pure speech." Are they illustrative or necessary? Are they cumulative or is any of them sufficient on its own? Can other conditions come in their place? How do they relate to the classic distinction of speech/conduct? This is a crucial juncture where the decision begins to emerge as messier than the simple and clean holding that Justice Gorsuch declared it to be.

Robert Post offers a (charitable?) construction of Justice Gorsuch's opinion. He suggests that we read this set of facts as a

25 *Id.* at 2318 (second alteration in original) (quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 634 (1943)).

26 *See, e.g.*, Edward J. Eberle, *The Architecture of First Amendment Free Speech*, 2011 MICH. ST. L. REV. 1191, 1216.

27 *303 Creative,* 143 S. Ct. at 2312–13 (quoting Petition for a Writ of Certiorari at 181a, *303 Creative*, 143 S. Ct. 2298 (No. 21-476)).

cumulative set of conditions, all of which are necessary and, together, sufficient to constitute "pure speech."[28] However, Post shows that even if one follows this path and reads into the decision what is not articulated in it, the outcome does not follow—as the conditions are not fully met.[29] That is the case because commercial wedding websites—while containing "images, words, symbols, and other modes of expression" and being "original, customized" creations that "communicate ideas"[30]—are not Ms. Smith's *own* speech under Free Exercise jurisprudence.[31] The test requires that a "reasonable observer would understand Smith's websites to be communicating ideas that Smith herself wishes to share, as distinct from the ideas that only her clients desire to communicate."[32] The fact that the websites bear the signature "Designed by 303Creative.com" is insufficient.[33] As Post writes, "this stipulation establishes only that a reasonable third party would know that the websites were made by Smith, not that the words on the website express Smith's own ideas."[34] Indeed, the vast majority of visitors to a wedding website would attribute its messages to the happy couple, unlike, for example, Smith's own blog or website.

But even if "pure speech" was established under the seeming four-part construct that Justice Gorsuch alludes to in the decision, the outcome would not be categorical as Justice Gorsuch posits. Post points out that the notion that the government is always prohibited from compelling or prohibiting free speech is "flatly false."[35]

> Government routinely requires persons to engage in pure speech in ways that the First Amendment has never been thought to prohibit. Every year virtually every adult American is required by law to file a tax return, which is a bespoke document containing a person's own speech in words and numbers. There are countless analogous contexts in which most would agree that government ought to be able to compel pure speech.[36]

Among these contexts are mandatory disclosures, professional speech, and commercial speech in general, whether it is "pure speech" or not.[37]

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28 *See* Post, *supra* note 8, at 20.

29 *See id.* at 21.

30 *303 Creative*, 143 S. Ct. at 2312 (quoting Petition for a Writ of Certiorari at 181a, *303 Creative*, 143 S. Ct. 2298 (No. 21-476)).

31 *See* Post, *supra* note 8, at 21–23.

32 *Id.* at 21.

33 *Id.* at 22.

34 *Id.* (emphasis omitted).

35 *Id.* at 24.

36 *Id.* (emphasis omitted).

37 *Id.* at 29, 35.

This is not to say that there are no cases where the Court protected "pure speech." Of course there are. But the argument that once an activity has been found to be "pure speech" that means the judicial inquiry arrives at a full stop mischaracterizes the law. That much is evident in the very cases that Gorsuch cites in support of his opinion. For example, in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*,[38] which Justice Gorsuch cites as supporting authority,[39] the Court found that the activity in question—a march—was a protected expressive activity (notably, the term "pure speech" is not used or defined in that case).[40] The Court did not stop the analysis after reaching that conclusion, but proceeded to examine whether Massachusetts public accommodation law was rightfully applied to this expressive activity. In finding it was not, the Court emphasized that the march was "noncommercial speech"[41] and that the Council organizing the march provided no service to anyone.[42] This reasoning clarifies that expressive activity *can* be regulated by the state if it is commercial and involves the provision of services.

This analysis exposes the vast tension between what Justice Gorsuch presents the case to be—simple—and the decision to be—narrow—and where his reasoning actually leads. The decision, analyzed charitably, creates a concept of "pure speech" that can be applied to a very large number of activities and is certainly not restricted to artistic speech. Furthermore, by assigning sweeping legal implications to this category, Gorsuch inoculates an unknowingly broad span of activities from the reach of the law, whereas under previous decisions they were not inoculated from scrutiny. The only option to make sense of the decision's claim for narrowness is to *not* take seriously its legal reasoning. And that means that the decision is, well, a mess.

Justice Gorsuch had an opportunity to salvage his opinion from this outcome, an opportunity thrown at him by the fiery opinion of Justice Sotomayor, who listed specific cases that she worried would be shielded from discrimination lawsuits under Justice Gorsuch's opinion: "The dissent even suggests that our decision today is akin to endorsing a 'separate but equal' regime that would allow law firms to refuse women admission into partnership, restaurants to deny service to Black Americans, or businesses seeking employees to post something like a 'White Applicants Only' sign."[43] Justice Gorsuch

38 515 U. S. 557 (1995).
39 303 Creative LLC v. Elenis, 143 S. Ct. 2298, 2304 (2023).
40 *Hurley,* 515 U.S. at 559.
41 *Id.* at 579.
42 *See id.* at 577–79.
43 *303 Creative,* 143 S. Ct. at 2319.

acknowledged the worry, but inexplicably evaded the opportunity to provide greater clarity on his framework and delineate his reasoning. He rejected the hypotheticals with a single sentence. "Pure fiction all," he wrote.[44] But he did not proceed to explain *why*. A plausible reading of Justice Gorsuch's analysis in *303 Creative* yields a conclusion that a law firm—a bespoke, customized practice of the written and oral word, which is wholly expressive, and communicates various ideas about values, normative standpoints, and factual reality—could avoid any application of antidiscrimination law as all of these characteristics, under Justice Gorsuch's theory of *303 Creative*, constitute "pure speech." If the work of 303 Creative passes as Ms. Smith's own speech simply because she signs her work, despite the fact that this work is made on behalf of her customers, there is no reason why a law firm's work on behalf of clients cannot pass as the firm's own speech. The argument that Justice Gorsuch's framework shields the law firm—and any other business that could frame their conduct, in whole or in part, as "pure speech"—cannot be brushed aside so decisively and dismissively as "pure fiction." But Gorsuch remains silent as to why 303 Creative must be exempted from antidiscrimination law whereas the law firm, or the restaurant, or the "White Applicants Only" businesses, must not.

Zooming out to observe the series of cases involving wedding vendors and same-sex couples, the Court's pattern of decisions, and Justice Gorsuch's own opinions in these cases,[45] give the impression that Justice Gorsuch has long waited for a case like *303 Creative* that would allow him to focus on the free speech component of wedding conflicts and potentially gather a broad coalition around the compelled speech reasoning. *303 Creative* might have seemed ideal at first sight because of all of the factors we noted above, specifically that the parties had agreed on the description of so many "facts" and that the Tenth Circuit declared them to constitute "pure speech."[46] However, as it turns out, *303 Creative* was not so simple to decide without creating ripples that affect the broader set of services that are at stake in religion v. equality conflicts. It is not enough that the Tenth Circuit declared Smith's conduct to be "pure speech" to make it truly "pure speech," nor is it enough for an activity to be "pure speech" to trigger an unequivocal outcome. *303 Creative* required more precision than the Court was willing to admit and the Court exacerbated the problem by refusing to delineate its reasoning.

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44 *Id.*

45 *See* Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1926–1931 (2021) (Gorsuch, J., concurring); Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1734–40 (2018) (Gorsuch, J., concurring).

46 *303 Creative*, 143 S. Ct. at 2309–10.

This is even more troubling given the empirical evidence that has accumulated in recent years following *Masterpiece Cakeshop*[47] and *Fulton v. City of Philadelphia*[48]—that Supreme Court decisions that grant de facto religious exemptions tend to expand the discrimination against same-sex couples in the pertinent markets. In two field experiments, one conducted among wedding vendors before and after *Masterpiece Cakeshop*, and the second conducted among foster care agencies before and after *Fulton*, I found that disparities between same-sex and opposite-sex couples increased. In the *Masterpiece* study this trend was particularly large among vendors located in religious environments.[49] In the *Fulton* study the trend was particularly large among agencies in regimes that did not already award religious exemptions[50]—but it affected not just religious agencies but also public agencies.[51] Each study also found results that were less consistent with the general trend in jurisdictions that enacted protections for both LGBT individuals *and* religious entities.[52] While much is yet to be discovered and researched with respect to the constitutional consequences of religious exemptions,[53] and of Supreme Court decisions in particular, the evidence we have amassed thus far shows that the ripples of such decisions exceed the jurisdictions to which they are directly applicable (namely, jurisdictions that enacted antidiscrimination laws and had not provided a mechanism for obtaining religious exemptions prior to the decision) and the types of entities to which they are principally restricted (namely, religious individuals or entities). Nonreligious for-profit vendors and non-for-profit agencies, in jurisdictions both subject to the decision and in which it has no direct legal relevance, responded to *Masterpiece Cakeshop* and *Fulton* by expanding discrepancies between same-sex and opposite-sex couples.[54]

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47 Netta Barak-Corren, *A License to Discriminate? The Market Response to* Masterpiece Cakeshop, 56 HARV. C.R.-C.L. L. REV. 315, 333–52 (2021); Netta Barak-Corren, *Religious Exemptions Increase Discrimination Toward Same-Sex Couples: Evidence from* Masterpiece Cakeshop, 50 J. LEGAL STUD. 75 (2021) [hereinafter *Religious Exemptions Increase Discrimination*].

48 Netta Barak-Corren & Tamir Berkman, *Constitutional Consequences*, 99 N.Y.U. L. REV. 785, 791–92 (2024).

49 Barak-Corren, *Religious Exemptions Increase Discrimination, supra* note 47, at 78.

50 Barak-Corren & Berkman, *supra* note 48, at 792–93.

51 *Id.* at 26.

52 *See* Barak-Corren & Berkman, *supra* note 48, at 816; Barak-Corren, *Religious Exemptions Increase Discrimination, supra* note 47, at 106.

53 For a study of the effect of legislative exemptions on the welfare of sexual minorities, see Julia Raifman, Ellen Moscoe, Bryn Austin, Mark L. Hatzenbuehler & Sandro Galea, *Association of State Laws Permitting Denial of Services to Same-Sex Couples with Mental Distress in Sexual Minority Adults: A Difference-in-Difference-in-Differences Analysis*, 75 JAMA PSYCHIATRY 671 (2018).

54 *See supra* notes 45–51 and accompanying text.

While several mechanisms were found to moderate the effect of these decisions—among which are the religiosity of the business environment[55] and the socio-legal environment against which the decision is granted[56]—the clarity and consistency of the decision could also have a large impact on how the decision is perceived and applied in practice. First, lawyers and judges are sensitive to the undertones and overall message of the decision. In a study, Tamir Berkman and I found that all—100%—of *Fulton*-like cases were resolved post-*Fulton* in favor of the refusing religious agencies, even though the holding in *Fulton* has allowed all governments, including that of Philadelphia, to insist on applying their laws without exemptions.[57] We interviewed lawyers who represented clients in these cases, who said that *Fulton* twisted the law so thoroughly that they understood it to mean that the Court was determined to achieve the outcome at all costs; they realized that they better yield, even if the holding would seemingly allow them not to do so.[58] In other words, messy decisions could send a message that the outcome is what really mattered to the Court, thereby leading to very expansive applications.

Second, ambiguous, inconsistent, or unclear decisions are harder to explain to the public and can more easily be framed as expansive—because the limiting principles are not sufficiently articulated in the decision. In a recent study, Noam Shlomai-Kunitz and I[59] examined experimentally the effect of three types of exposure to *Fulton*: a narrow framing of the decision that portrays *Fulton*'s contractual focus as specific and narrow; a broad framing of the decision that focuses on its consensual outcome; and natural exposure—a group consisting of people who learned about the decision independently. A week after *Fulton*, Americans in all three exposure groups increased their support for religiously motivated service refusal to same-sex couples, compared with both their prior-*Fulton* selves and with participants who were not exposed to *Fulton* at all. Ten weeks after *Fulton*, the effect persisted only in the broad construal group and in the natural exposure group.[60] These findings highlight the importance of reasoning but also the challenges of controlling the narrative. On the one hand, we found that narrow framings of the decision can actually curb the potentially harmful long-term impact of Supreme Court opinions; on the other hand, we found that even narrow decisions (as many legal

55 Barak-Corren, *Religious Exemptions Increase Discrimination*, *supra* note 47, at 101–04.

56 *Id.* at 101–02; Barak-Corren & Berkman, *supra* note 48, at 815–17.

57 Barak-Corren & Berkman, *supra* note 48, at 822–26.

58 *Id.* at 34.

59 Netta Barak-Corren & Noam Shlomai-Kunitz, *Minimalism, Law, Ideology, and the Public Impact of the Supreme Court*, J.L. & EMPIRICAL ANALYSIS, July–Dec. 2024 at 1.

60 *Id.* (manuscript at 23 tbl.1).

commentators believed *Fulton* to be) are likely to be communicated and/or perceived as broad decisions by those who are exposed to them.[61] This means that the Court should work exceedingly hard to articulate, clearly and compellingly, the reasoning and scope of its decisions. Otherwise, even purportedly narrow decisions could fall prey to a media or partisan overstretch. Messy decisions are likely to create further mess.

III. THE MINORITY OPINION AND ITS INCONSISTENCIES

Justice Sotomayor opens her dissent with the following words:

> Five years ago, this Court recognized the "general rule" that religious and philosophical objections to gay 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." *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 584 U.S. —, —, 138 S.Ct. 1719, 1727, 201 L.Ed.2d 35 (2018). The Court also recognized the "serious stigma" that would result if "purveyors of goods and services who object to gay marriages for moral and religious reasons" were "allowed to put up signs saying 'no goods or services will be sold if they will be used for gay marriages.'" *Id.* at —, 138 S.Ct. at 1728–29.
>
> Today, the Court, for the first time in its history, grants a business open to the public a constitutional right to refuse to serve members of a protected class. . . .
>
> "What a difference five years makes." *Carson v. Makin*, 596 U.S. —, —, 142 S.Ct. 1987, 2014, 213 L.Ed.2d 286 (2022) (Sotomayor, J., dissenting). And not just at the Court. Around the country, there has been a backlash to the movement for liberty and equality for gender and sexual minorities. New forms of inclusion have been met with reactionary exclusion. This is heartbreaking. Sadly, it is also familiar. When the civil rights and women's rights movements sought equality in public life, some public establishments refused. Some even claimed, based on sincere religious beliefs, constitutional rights to discriminate. The brave Justices who once sat on this Court decisively rejected those claims.[62]

This opening statement gives the reader the impression that *303 Creative* is the first time that the Court has provided a business open to the public with the right to refuse service to a protected class. One might also get the impression that *Masterpiece Cakeshop* was a case in

61 *Id.*

62 303 Creative LLC v. Elenis, 143 S. Ct. 2298, 2322 (2023) (Sotomayor, J., dissenting)).

which the Court denied the vendor's request for an exemption from Colorado's antidiscrimination law. Both conclusions would be wrong. *Masterpiece Cakeshop,* despite the language cited by the Justice, was resolved in favor of the baker who refused to create a customized wedding cake for a same-sex couple. And while that decision was based on procedural grounds, *303 Creative* has not been the first decision to grant the right to refuse service. In 2021, a unanimous court, including Justice Sotomayor, did just that for a private entity open to the public in the case of *Fulton v. City of Philadelphia.*[63]

Readers of Justice Sotomayor's opinion would know none of these simple facts. *Masterpiece Cakeshop* is cited four times in her opinion, all four citations allude briefly to its inconsequential dicta, and none betray the actual holding.[64] *Fulton*, remarkably, is entirely omitted from Sotomayor's decision, as though the case was erased from the face of the earth.

Like Justice Gorsuch's decision to avoid defining or providing a test for "pure speech" and to not defend or delineate the concept, Justice Sotomayor's decision to ignore previous decisions is telling. One could have attempted to distinguish the three cases in various ways. *Masterpiece Cakeshop* was arguably about an unfair process that was imbued with hostility against religion; the Court shied away from establishing a right to refuse service. In *Fulton*, the Court argued that Philadelphia's public accommodation law did not apply to foster care agencies and that Philadelphia's contractual nondiscrimination provisions could be interpreted to mandate exemptions.[65] Notably, not only did the *Fulton* Court choose to narrow down the scope of Philadelphia's public accommodation law, it also ruled that Philadelphia's non-discrimination policy failed strict scrutiny as "the interest of the City in the equal treatment of prospective foster parents and foster children . . . cannot justify denying [Catholic Social Services] an exception for its religious exercise."[66] It is therefore hard to argue that *Fulton* is irrelevant for *303 Creative*, or that *303 Creative* is entirely novel.

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63 Notably, the record in *Fulton* did not contain any case in which Catholic Social Services (CSS) refused service to a same-sex couple; but the agency was not willing to comply with Philadelphia's demand that it do so, in the event that such couple would seek its services. Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1886 (2021). But unlike *303 Creative*, see *303 Creative*, 143 S. Ct. at 2318, *Fulton* was not a preenforcement challenge. CSS was operating for over fifty years before Philadelphia decided to cut its contract over this dispute. *Fulton*, 141 S. Ct. at 1875.

64 *See 303 Creative*, 143 S. Ct. at 2322, 2327, 2329, 2330 (Sotomayor, J., dissenting).

65 *Fulton*, 141 S. Ct. at 1880–81.

66 *Id.* at 1882.

Perhaps Justice Sotomayor joined the Court in *Fulton* for other reasons. She might have been persuaded by the fact that Catholic Social Services operated for more than a century and no complaint of discrimination was ever filed against it. Perhaps she gave weight to the fact that Catholic Social Services was willing to work with Philadelphia to ensure that no couple would be refused service. Whatever it was, Justice Sotomayor's reason to side with the Court in *Fulton* would have required her to articulate a more nuanced principle, and a less all-or-nothing theory, of the relationship between antidiscrimination law and religious exemptions. But Justice Sotomayor's choice to construe the issue in the broadest terms—as "a backlash to the movement for liberty and equality for gender and sexual minorities"—means that *any* distinction would be uneasy to make. After all, if the backlash consists of claims, "based on sincere religious beliefs, [for] constitutional rights to discriminate,"[67] then it is hard *not* to group together *Masterpiece*, *Fulton*, and *303 Creative*.

Justice Sotomayor wrote a long and reasoned dissent, but nowhere would a reader find answers to these questions that emerge already at the first paragraph of her decision. One cannot escape the conclusion that, perhaps similarly to Justice Gorsuch, Justice Sotomayor does not address what she cannot compellingly explain. The dissent, then, is yet another disappointment for those who hoped the Supreme Court would offer a sensible resolution to a decade-long conflict. More mess.

IV. CLEANING A CONSTITUTIONAL MESS

In the previous sections, I discussed the features of *303 Creative* that make it both anomalous with respect to the universe of wedding conflicts and an attractive candidate for a decision in favor of the wedding vendor. I then showed how these features were utilized in the Court's opinion and how the opinion failed to set out a comprehensive and clear test from these features. I criticized the Court's omissions as irresponsible, as it opens the door to broad interpretations and dangerous consequences in line with the concerns levied by the dissent. I then discussed the inconsistency of the dissent, that it speaks passionately about the wrongs of discrimination but fails to grapple with the Court's own past. This inexplicable inconsistency deepens the mess that *303 Creative* creates.

Surveying the full picture of *303 Creative* once again, one is left wondering what to make of this case. We expect majority opinions to deliver a coherent doctrinal advancement and minority opinions to deliver honest criticism. Left with neither coherence nor honesty, *303*

67 *303 Creative*, 143 S. Ct. at 2322 (Sotomayor, J., dissenting).

Creative can still teach us important lessons about how (and how not) to exercise the Court's legal responsibility responsibly. The analysis I offered in this Essay suggests that this requires careful attention to two crucial steps: case selection and decisionmaking.

The first failure of *303 Creative* started with selecting this case for review. The Court should grant cert in cases that have broad applicability and the ingredients necessary to advance the doctrine; anomalous, idiosyncratic cases should not be picked up from the pile. Justice Gorsuch's insistence on staying within the highly specific and nonrepresentative stipulations of the parties in *303 Creative*, all while refraining to use them as a basis for advancing the doctrine, furthered the anomaly. The temptation to pick an idiosyncratic case to achieve a normatively appealing outcome will always be present, but a responsible Court must resist it.

The second failure of *303 Creative* is the decision itself. While *303 Creative* was anomalous and idiosyncratic, the Court could have still reached a clear decision in the case. To do that, the Court should have clarified, first, what the ingredients of "pure speech" are, distinguish *303 Creative* from the multitude of cases that compelled businesses and professionals to speak, and explained why the dissent's concerns that the decision opens the floodgates of discrimination are "pure fiction."[68] On the dissent's part, Justice Sotomayor should have represented the Court's recent precedents fully and honestly and should have explained why *303 Creative* should be singled out for a different treatment—and where the doctrinal line between *Fulton*, *Masterpiece*, and *303 Creative* should pass. In short, both the Court and the dissent *could have* produced consistent and clear opinions, but they ended up sowing confusion and unanswered questions that will muddle the application of antidiscrimination laws going forward. On both ends of the decision, justices focused on case outcome and forceful prose. They should have focused on writing clear opinions that set explicit tests to guide the behavior of lower courts[69] and the public. They should not have evaded inconvenient precedents and counterarguments and the resolution of apparent ambiguities.

The only way for the Court to clean its mess now is to use the next opportunity when an apt case presents itself to clarify a sensible and

68 *Id.* at 2319 (majority opinion).

69 Among other ambiguities, the Court never clarified whether lower courts should change their application of free speech doctrine from now on. The Tenth Circuit applied strict scrutiny in *303 Creative*—both the majority and the dissent did so. *See id.* at 2310. The Supreme Court never clarified in its opinion whether that was a mistake given its seeming conclusion that "pure speech" is always protected from any and all intervention. This part of the decision is particularly problematic for the doctrine and leaves lower courts much in the dark.

socially responsible doctrine. The Court could do that in a number of ways. It could create a clear distinction between vendors allowed to refuse service and those who are not; or between a physical public square and a virtual public square;[70] or it could clarify the ingredients of "pure speech" and distinguish the categorical consequences of this classification from other forms of speech, or nuance these consequences upon further reflection. All of these issues were veiled in ambiguity in the *303 Creative* decision.

Acting responsibly is especially important in our polarized era, when the court is already skewed, appointment-wise, to one side of the political spectrum; has already issued a controversial line of decisions in religion cases that can reasonably be perceived as leaning to a specific side of the ideological spectrum;[71] and already suffered a major blow to its public legitimacy and trust as a result of all of the above.[72] This backdrop highlights the importance of selecting cases carefully and issuing measured and precise decisions.

70 Post, *supra* note 8, at 7 & n.25.

71 *See, e.g.*, Barak-Corren & Berkman, *supra* note 48, at 791–92 & n.25.

72 *See Over Half of Americans Disapprove of Supreme Court as Trust Plummets*, ANNENBERG PUB. POL'Y CTR. (Oct. 10, 2022), https://www.asc.upenn.edu/news-events/news/over-half-americans-disapprove-supreme-court-trust-plummets [https://perma.cc/54KA-U5Z5]; Katy Lin & Carroll Doherty, *Favorable Views of Supreme Court Fall to Historic Low*, PEW RSCH. CTR. (July 21, 2023), https://www.pewresearch.org/short-reads/2023/07/21/favorable-views-of-supreme-court-fall-to-historic-low/ [https://perma.cc/STU7-87VV]; Jeffrey M. Jones, *Supreme Court Trust, Job Approval at Historical Lows*, GALLUP (Sept. 29, 2022), https://news.gallup.com/poll/402044/supreme-court-trust-job-approval-historical-lows.aspx [https://perma.cc/43EZ-PZMS].