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## Questions & Answers on Free Speech, Religious Liberty, and Discrimination

Can a fast food chain refuse to serve LGBTQ customers? Can a photographer refuse to take pictures at a Jewish wedding? Haven't businesses *always* been able to turn away certain customers or refuse to provide goods and services they oppose? This Q&A will address these questions and others, explaining the latest legal developments at the intersection of anti-discrimination law and the First Amendment.

Over the past several years, the United States Supreme Court has issued several opinions on when organizations, including for-profit companies, have a First Amendment right to refuse services to customers, namely same-sex couples. This briefing paper provides a concise overview of three recent cases and answers common questions about the scope of the decisions and their broader impact on the future of civil rights law.

Case	Facts	Supreme Court Opinion
<b>303 Creative LLC v. Elenis</b>  (2023)	<p>A Colorado web design company argued that it had a right, under the Free Speech Clause of the First Amendment, to refuse to create custom wedding websites for same-sex couples. The designer asserted that being required to do so would force her to promote a message that she opposes, given her belief that marriage should be limited to unions between one man and one woman.</p> <p>The company sought an exemption from a state civil rights law that prohibits businesses from discriminating on the basis of sexual orientation.</p>	<p>The Supreme Court ruled in favor of the company, holding that it had a Free Speech right to refuse to create wedding websites for same-sex couples, as the owner believed this would express support for same-sex marriage. According to the Court, to hold otherwise would empower the state to “compel speech.”</p>
<b>Fulton v. City of Philadelphia</b>  (2021)	<p>After being denied a city contract because it refused to certify same-sex couples as foster parents, a faith-based nonprofit child welfare agency argued that this denial amounted to religious discrimination in violation of the Free Exercise Clause of the First Amendment, which protects religious liberty.</p> <p>It sought an exemption from a provision of the city contract that prohibited contracting agencies from discriminating on the basis of sexual orientation.</p>	<p>The Supreme Court held that because Philadelphia's contract with the agency <i>already allowed</i> certain exceptions to anti-discrimination rules, it would violate the Free Exercise Clause for the city to deny a <i>religious</i> exemption.</p> <p>Notably, the existing exception from the anti-discrimination rules in the city contract pertained to the <i>placement</i> of children and could have allowed race-conscious placement of children with parents of the same race.</p>



Case	Facts	Supreme Court Opinion
<b>Fulton v. City of Philadelphia</b>  <i>(Continued)</i>	<i>See previous page.</i>	<p>However, the religious exemption granted by the Court related to the <i>screening</i> of parents, which is an entirely different part of the foster care process. Furthermore, in practice, the city had never previously granted any exceptions.</p> <p>The opinion did not determine whether nonprofits that contract with government agencies have a Free Exercise right to violate anti-discrimination rules when there are no already-existing exceptions to said rules.</p>
<b>Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission</b>  <b>(2018)</b>	<p>After being sued for discrimination, a Colorado bakery defended itself by arguing that it had a right under the Free Exercise Clause of the First Amendment to refuse to create custom wedding cakes for same-sex couples.</p> <p>It sought an exemption from a state civil rights law that prohibits businesses from discriminating on the basis of sexual orientation.</p>	<p>The Supreme Court held that the state Civil Rights Commission, which initially heard the bakery owner’s case, discriminated against him as a conservative Christian in violation of the Free Exercise Clause. This finding was primarily based on comments made by a commissioner that the Court deemed disparaging.</p> <p>The Court dismissed the suit against the baker without making a broader determination on whether the Free Exercise Clause grants a right to violate anti-discrimination laws.</p>



**After 303 Creative v. Elenis, what kinds of businesses now have a right to discriminate?**

In 303 Creative’s case, the Supreme Court held that an anti-discrimination law could not be applied to require a business to sell “original,” “customized,” and “tailored” creations against a business owner’s will, as that would amount to “compelled speech” and infringe on the owner’s First Amendment free speech rights. The Court’s ruling relied, in part, on the finding that 303 Creative’s business was “expressive” or “creative” in nature.

Going forward, it remains to be seen what types of businesses or products courts will determine to be “expressive,” and therefore protected by the First Amendment’s Free Speech Clause. Several businesses specifically mentioned in the 303 Creative opinion include speechwriters, filmmakers, and muralists. Undoubtedly, some business owners and lawyers will seek to stretch the ruling to encompass as many services as possible. Even prior to the ruling, there have been many lawsuits filed by, for example, bakers, florists, photographers, and calligraphers, arguing that they should have a free-speech right to refuse services to same-sex couples. Shortly after the decision was issued, a hair stylist made [national headlines](#) by declaring that, because of the Court’s opinion in 303 Creative, she would no longer provide services to trans and nonbinary customers.





**Do only *religious* businesses have a right to discriminate?**

No. Since *303 Creative* was decided based on the right to free speech rather than the right to free exercise of religion, the fact that the web designer was opposed to same-sex marriage on religious grounds was irrelevant to the opinion. She would have an equal right to refuse services if she had opposed same-sex marriage for political, philosophical, or other reasons.



**These cases all involve discrimination against same-sex couples. Will anyone else be impacted?**

Yes. The Supreme Court’s opinions do not have any language limiting their scope to discrimination against same-sex couples.

Notably, during oral argument for *303 Creative*, the attorney for the web design business admitted that she believed “expressive” businesses should be allowed to engage in race discrimination. Justice Ketanji Brown Jackson asked the attorney whether she thought a mall photographer taking 1950s-style photographs of children with Santa should be allowed to refuse to photograph non-white children. The attorney [responded](#) “this Court has protected vile, awful, reprehensible, violent speech in the past”—essentially admitting that she believed such discrimination was protected speech.

Additionally, several cases currently being litigated in lower courts involve institutions that have claimed a religious right to discriminate against religious minorities. These include state-funded child welfare agencies that [refuse to work with](#) prospective parents because they are [Jewish](#) or [Catholic](#).



**Haven’t businesses always had the right to decide who they will serve?**

Yes and no. Businesses have a broad right to turn away customers for *almost* any reason, big or frivolous. This is why it is not illegal for a store to hang a sign that says “No shirt, no shoes, no service” or for a fancy restaurant to reject diners who are dressed casually. Businesses can turn away customers for reasons we might consider legitimate—such as a pizza restaurant that only delivers within a particular service area—or absurd—such as a coffee shop that refuses to serve left-handed customers.

What civil rights law does is carve out a few narrow exceptions from the general rule that businesses may select their customers. Namely, anti-discrimination laws forbid businesses from refusing service to customers because of certain identity traits—most commonly race, religion, national origin, sex, sexual orientation, gender identity, and disability. Some cities or states have added additional identity traits that are protected from discrimination, such as age and status as a veteran. Civil rights laws were created in response to the pernicious history of widespread discrimination based on these traits.



In discussions around *303 Creative*, some commentators sought to compare turning away a same-sex couple to the right to turn away a member of the KKK. This is a false comparison, as membership in the KKK—unlike sexual orientation—is not an identity characteristic protected by civil rights law.



**Haven't businesses always had the right to decide what products to sell?**

Yes. There is no reason that a web designer would be obliged to design a wedding website for a same-sex couple if it does not generally design wedding websites at all. There is no legal right under anti-discrimination law to demand a product that a business does not generally offer.

However, once a business *does* sell a particular product, it usually cannot refuse to sell the same product to a customer because of their race, sex, religion, or other identity characteristics protected by anti-discrimination law. What the *303 Creative* opinion did was permit a business to offer "expressive" products to some customers but not others in a way that, prior to the decision, would have violated civil rights law.

In discussions around *303 Creative*, some commentators sought to compare turning away a same-sex couple that requests a wedding website to turning away a conservative Christian who requests a website featuring anti-LGBTQ hate speech. This is another false comparison: if a designer would not create a website with hate speech for *anyone*, they need not create one for a Christian. In contrast, if a designer would create a wedding website for a straight couple (or a Jewish couple), civil rights laws would—at least prior to the *303 Creative* opinion—have prohibited them from refusing to make a similar website for a same-sex couple (or a Christian couple).



**Are there other cases challenging civil rights laws on First Amendment grounds?**

Yes, many. Cases have been brought across the country arguing, for example, for a First Amendment right for teachers and school counselors to refuse to use trans students' requested pronouns, employers to discriminate against LGBTQ workers, and recipients of government funds to discriminate based on religion, sexual orientation, and gender identity. Cases have been brought relying on several different parts of the First Amendment, including the right to free speech, free exercise of religion, and freedom of association, which protects the rights of groups to pursue collective action.

For questions, contact the Law, Rights, and Religion Project at [LawRightsReligion@law.columbia.edu](mailto:LawRightsReligion@law.columbia.edu)

