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An Unholy Mess: Wedding Website Ruling Threatens Religious Liberty

By Jeffrey S. Trachtman
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Friday's Supreme Court ruling that a wedding website designer offering services to all had a free speech right to turn away same-sex couples is more than just a blow to LGBTQ rights. It opens a loophole that will hamper civil rights enforcement generally—and even threatens religious liberty.

The last assertion may seem odd: the *303 Creative* case, while presented as a free speech challenge, is part of an ongoing litigation campaign by religious conservatives seeking to frame LGBTQ rights as an assault on Christianity—and the decision is therefore being hailed in right-wing circles as a *victory* for religious liberty.

But this supposed inherent conflict between LGBTQ rights and religion was always false: much of mainstream religion (including, for example, the Episcopal Church, the Evangelical Lutheran Church and Conservative Judaism) embraces equality for LGBTQ individuals and families, many of who, of course, are themselves people of faith.

Diverse religious stakeholders have therefore filed amicus briefs in most every major LGBTQ rights case (including *303 Creative*) to demonstrate support for equality and to explain that favoring anti-LGBTQ religious views would, in fact, be an attack on *their* religious values.

These briefs (including several filed by my law firm) have argued that religious freedom is best protected by maintaining a traditional distinction: Religious actors have near-total liberty within their institutions to define and enforce their religious values, but assume different obligations when they choose to participate in the commercial marketplace.

(Courtesy photo)

Jeffrey S. Trachtman of Kramer Levin Naftalis & Frankel.

Where a business operates as a public accommodation offering goods and services to all, it must provide access to those in protected classes even if that conflicts with private religious (or social or political) views. As the Supreme Court explained in applying the Civil Rights Act of 1964, personal disapproval of integrated dining, even on religious grounds, did not entitle restaurant owners to exclude Black customers. And until now, the court had never held that private

views about LGBTQ people created an exception from statutes protecting *their* equal access to good and services.

To carve out such an exception, the *303 Creative c*ourt relies on earlier cases upholding the right of private parade organizers or private associations to exclude LGBTQ people based on free speech or freedom of association claims. None of these prior cases, however, recognized a right to opt out of public accommodation laws.

Friday's decision, in contrast, does precisely that, blowing a gaping hole in civil rights enforcement. Many will read it as inviting *any* business that claims to engage in "expression" to deny access based on disapproval of a customer's "message," even if that message is basically just the customer's identity as a member of a protected group. While the court did not necessarily intend such a broad exemption, nothing in the decision appears to bar denial of wedding website services to an interracial or interfaith couple (or, for that matter, a Black or Jewish couple), if the vendor disapproves of the "message" sent by celebrating such unions.

And establishing this right as a matter of free speech rather than free exercise of religion relieves the vendor of having to demonstrate any actual burden on religious practice. Mere personal disapproval of the "message" of celebrating *any* marriage would seem to trigger the constitutional right to refuse service, at least for vendors whose services are sufficiently "expressive." Outright bigotry, including religious bigotry, now appears to be protected. Some victory for religious liberty!

Of course, how far this slippery slope extends will be hotly litigated. Do artistically designed cakes or flower arrangements constitute "speech" when created to celebrate the marriage of a same-sex or other disfavored couple? How about a printer who declines to create business cards for women he feels should be home with their children? Or a graduation photographer who refuses to photograph immigrants or students of color?

Certainly not every asserted right to an expressive exemption from a public accommodation law will prevail, but last week's decision invites a tidal wave of claims that will disrupt and complicate civil rights enforcement for years to come.

The court was not required to open this can of worms simply because the service of creating a wedding website involves expression. Common sense suggests that offering to write words for any customer who walks through the door—whether on a website or a cake—results in expression *by the customer who pays for it*, not the vendor. This understanding has eased society toward reducing discrimination as attitudes evolve, permitting vendors who might have private reservations to follow the law and provide equal access without fear of being seen as "speaking" in favor of a customer's "message."

303 Creative upsets this longtime understanding and raises the disturbing possibility that those previously content to provide equal access to goods or services despite their private beliefs may feel compelled to start turning away customers, lest the "message" conveyed by the customer's equal access be attributed to them. At least in the wedding services context, where religious objections appear to be the main issue, the decision seems likely only to foment *more* religious conflict and spur *more* unnecessary and divisive litigation.

Whether viewed as an unintended consequence of seeking to carve out an exemption to protect religious conscience, or the intended result of a campaign by Christian fundamentalists seeking to block LGBTQ rights at every turn, the court has created an unholy mess.

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