THE VOLOKH BRIEFS: DRAWING THE LINE AGAINST COMPELLED SPEECH IN PUBLIC ACCOMMODATIONS

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In six cases over the span of a decade,[1] Professor Eugene Volokh has sketched a constitutional argument that can be summed up as follows: The right to speak includes the right not to speak. The right not to speak includes the right not to be forced to create speech. The right not to be forced to create speech extends to people who provide customized and expressive goods

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1. Brief for the Cato Institute by Eugene Volokh and Dale Carpenter as Amicus Curiae Supporting Petitioner, Elane Photography LLC v. Willock, 572 U.S. 1046 (2013) (No. 13-585) [hereinafter *Elane Photography* brief]; Brief for the Cato Institute as Amicus Curiae Supporting Appellee, Lexington-Fayette Urb. Cnty. Hum. Rights Comm'n v. Hands On Originals, Inc., No. 2015-CA-000745-MR, 2017 WL 2211381 (Ky. Ct. App. May 12, 2017) (available at https://www.cato.org/sites/cato.org/files/wp-content/ uploads/ hands_on_originals_ky_ct_app.pdf) [hereinafter *Hands On Originals* brief]; Brief of American Unity Fund et al. as Amicus Curiae Supporting Respondents, Masterpiece Cakeshop, Inc. v. Colorado Civil Rights Comm'n, 584 U.S. 617, (2017) (No. 16-111) ("Masterpiece Cakeshop brief"); Brief of the Cato Institute and 11 Legal Scholars as Amicus Curiae Supporting Appellants, Telescope Media Group v. Swanson, 936 F.3d 740 (8th Cir. 2019) (No. 17-3352) [hereinafter *Telescope Media Group* brief]; Brief of the Cato Institute et al. as Amicus Curiae Supporting Brush & Nib, Brush & Nib Studio, LC v. Phoenix, 247 Ariz. 269, (2019) (No. CV-18-0176-PR) [hereinafter *Brush & Nib* brief]; Brief of the Cato Institute and Hamilton Lincoln Law Institute as Amicus Curiae Supporting Petitioner, 303 Creative LLC v. Elenis, 600 U.S. 570 (2023) (No. 21-476) [hereinafter *303 Creative* brief]. Note that in *Elane Photography*, Volokh filed a virtually identical brief before the New Mexico Supreme Court. *See* Brief for the Cato Institute by Eugene Volokh and Dale Carpenter as Amicus Curiae Supporting Petitioner, Elane Photography LLC v. Willock, 309 P.3d 53 (N.M. 2013).(available at https://www.cato.org/sites/cato.org/ files/pubs/pdf/Elane-Photog-filed-brief.pdf). Reference to the "Elane Photography brief" herein are to the pages in the certiorari brief filed in the U.S. Supreme Court after the New Mexico Supreme Court rejected the photographer's First Amendment free speech claim. Note that in *303 Creative*, Volokh and others also filed a brief supporting certiorari. Petition for a Writ of Certiorari, 303 Creative LLC v. Elenis, 600 U.S. 570 (2023) (No. 21-476). Reference to the "*303 Creative* brief" herein are to the amicus brief on the merits.

and services to the public in the commercial marketplace. Government violates that right when it forces the creation of such products, even via a law that facially requires only equal treatment of customers.

That last bit was especially fiercely contested before the Supreme Court decided *303 Creative v. Elenis*.[2] Prior to *303 Creative*, it had been commonly asserted that anti-discrimination laws applying to commercial services and goods should trigger no rigorous free-speech scrutiny. It was said that to do so risked eviscerating anti-discrimination laws. At any rate, it was argued, such laws did not require anyone to "create speech." Businesses were simply prohibited from discriminating against their customers. Whatever products they sold to white or male or straight customers, they must provide to black or female or gay customers. And once they offered their goods in the public marketplace they lost any meaningful speech protection. So, if a business owner could not comply in good conscience, she was free to pursue another calling. The law didn't compel anyone to create any goods, much less expressive ones.

Volokh responded that this was a fiction. The creation of some kinds of products (for example, customized wedding photographs and websites) involved a degree of originality and expressiveness that was unmistakable either because our legal tradition and history recognized them as such or because they included inherently expressive elements like creative writing and original graphics. However neutral the law might be on its face, forcing the creation of unwanted expression was a serious imposition on the individual freedom of mind protected by the First Amendment. The fact the business owner had the option to stop selling the speech to the public did not matter any more than the fact that the *New York Times* had the option to stop selling newspapers. If the objection was only to the customer's requested message—not the customer's status—the proper objective of anti-discrimination law was satisfied. Provided the principle against such speech compulsions was limited to customized and expressive products, the effect would be so narrow that securing market access for historically marginalized groups could be achieved. A line could be drawn.

2. 303 Creative LLC v. Elenis, 600 U.S. 570 (2023).

303 Creative changed the landscape in ways that Volokh anticipated, and no doubt contributed to. The Court held that the state could not force a designer to fashion custom websites incorporating the designer's customized text and graphics for the celebration of same-sex weddings. As Volokh and others urged, this holding applied even though the business was classified as a "public accommodation" under Colorado's anti-discrimination law, which protects customers from discrimination based on certain characteristics like race, sex, and sexual orientation.[3] The state unsurprisingly argued that refusing to create websites for same-sex weddings, while offering to create them for opposite-sex weddings, would be an *act* of discrimination based on sexual orientation. As Volokh had argued, the Court held that the website designer would instead be refusing only to produce certain *speech* (not discriminating based on a customer's status), which is her right under the First Amendment. For the first time, the Court recognized compelled-speech claims in the commercial context. Consistent with Volokh's view, the speech protection was limited to goods and services that were customized and expressive. Just as Volokh had maintained, the Court reassured skeptics that its holding would have no application to innumerable goods and services in the marketplace. Much of Volokh's reasoning echoed in Justice Gorsuch's majority opinion.

Although I generally support the result in *303 Creative*, my aim here is neither to fully explain nor to defend the decision.[4] That's a project for another day. Instead, in this symposium commemorating Professor Volokh's work, my aim is to outline the legal position he developed, which aligned with and may have influenced the decision. I'll focus on what I believe are the most important briefs in three key cases: *Elane Photography* (2013), *Masterpiece Cakeshop* (2018), and *303 Creative* (2023) itself. Collectively, I'll refer to these as "the Volokh briefs." While others contributed, Volokh and his First Amendment amicus clinic at UCLA took the laboring oar in conceiving the arguments, drafting the briefs, and providing citation support.[5] Volokh was the principal mastermind and workhorse.

3. Colo. Rev. Stat. Ann. § 24-34-301 (West).

4. I offered an initial reaction to the decision here: Dale Carpenter, *How to Read 303 Creative*, VOLOKH CONSPIRACY (Jul. 3, 2023, 2:11 PM), https://reason.com/volokh/ 2023/ 07/03/how-to-read-303-creative-v-elenis.

5. Also providing guidance were lawyers at Cato, the American United Fund (AUF), and the Hamilton Institute.

As part of tracing this intellectual journey, I will show how the Volokh briefs evolved and matured over time and how they were distinct from others taking the side of the objecting service providers. Volokh's view of compelled speech gave breathing room for individuals' vital speech interests while leaving plenty of space for government to protect people from discrimination based on status in most commercial transactions. Although the Supreme Court stopped short of fully adopting it, the methodology in the Volokh briefs provides a roadmap for drawing and navigating the lines necessary to preserve the core interests on both sides. I'll pause to consider arguments from critics who responded directly to the briefs.

The gentle reader should know that I am neither a disinterested nor a dispassionate observer. It was my privilege to work with Eugene on the briefs.[6] At Eugene's invitation, I began contributing to his eponymous legal blog in 2005, first as a guest blogger making the "Traditionalist Case for Gay Marriage" and then as a full member of the Volokh Conspiracy.[7] I consider him both a friend and an intellectual role model. He is as good-natured and big-hearted, and yet as principled and rigorous, as any scholar I've known.

Eugene Volokh's premature and publicly underexplained decision to leave academia was a loss for viewpoint diversity in American law schools. It is partly in the service of such diversity that he has devoted an extraordinary body of work, including the small slice of it that I discuss here.

I. THE *ELANE PHOTOGRAPHY* BRIEF

The *Elane Photography* brief, which first outlined protection from compelled speech in commercial services, arose from one of the most controversial questions of the past half century in American law, politics, and culture. During the height of the debate over same-sex marriage (ca. 2003–15), one common argument raised by opponents centered on First Amendment rights. It was said that if same-sex couples were allowed to marry, they would be able to file anti-discrimination lawsuits against

6. I had no role in the *Hands on Originals* or *Telescope Media Group* briefs. My role in *Elane Photography* and *Brush & Nib* was modest. It was more significant in *Masterpiece Cakeshop* and *303 Creative*.

7. *See* https://volokh.com/posts/1130762468.shtml. My first appearance on the blog was October 31, 2005.

people declining to provide them services related to weddings.[8] Everyone from florists to cake bakers to photographers would suddenly face ruinous legal fees, fines, loss of business licenses, and perhaps jail time. The only way for them to avoid these pecuniary and professional consequences would be to sacrifice their rights to free speech and the free exercise of religion. There were many other reasons to oppose gay marriage, according to traditionalists, but potential loss of First Amendment freedom was one everybody should be concerned about.

A. THE FACTUAL AND PROCEDURAL BACKGROUND

As if to prove the truth of these warnings, in 2006 a lesbian couple in New Mexico filed a discrimination complaint against two Christian wedding photographers.[9] It was one the earliest and probably the most celebrated of the wedding-service refusals during the era. The very existence of the complaint was a fundraising boon for opponents of gay marriage. The fallout complicated the job of marriage-equality organizers on the ground.[10]

The facts and arguments in the New Mexico case would set a template for each of the legal confrontations to follow. It's worth devoting a bit a space to the elements of that template.

Vanessa Willock emailed photographers Johnathan and Elaine Huguenin requesting them to photograph her commitment ceremony to another woman (same-sex marriage was not yet permitted in the state).[11] The Huguenins declined the request, informing her that they only photographed "traditional weddings." Willock followed up by email asking if that meant Elane Photography did not offer its services to same-sex couples. The owners confirmed that they would not photograph same-sex ceremonies due to their personal religious beliefs.

8. *See* Maggie Gallagher, *Why Accommodate? Reflections on the Gay Marriage Culture Wars*, 5 NW. J. L. & SOC. POL'Y. 260 (2010).

9. Elane Photography, LLC v. Willock, 309 P.3d 53 (N.M. 2013).

10. I was one such organizer. In 2011–12, I served as the Treasurer of Minnesotans United for All Families, the group that successfully worked to defeat a state constitutional amendment prohibiting same-sex marriage. In 2013, I was a legal advisor for the effort to pass a same-sex marriage bill in Minnesota. "Attorneys of the Year: Nancy Haas and Dale Carpenter," *Minnesota Lawyer* (February 24, 2014) (available at https://minnlawyer.com/2014/02/24/attorneys-of-the-year-nancy-haas-and-dale-carpenter/).

11. *Elane Photography*, 309 P.3d 53 at 61.

Willock filed a complaint against Elane Photography for violation of the New Mexico Human Rights Act (NMHRA), which prohibits discrimination in places of public accommodation on the basis of, *inter alia*, sexual orientation.[12] The Human Rights Commission concluded that Elane Photography had indeed violated the NMHRA.

In the state district court, through its attorneys Alliance Defending Freedom (ADF), Elane Photography countered that it had not violated the NMHRA because it was not refusing service based on Willock's sexual orientation, but rather based on the message conveyed by photographing a same-sex ceremony. It further argued that applying the NMHRA in this instance would violate its freedom of speech and free exercise rights under the federal and state constitutions. It also argued that application of the public accommodations law would violate the state's Religious Freedom Restoration Act.

The district court granted summary judgment in favor of Willock. The New Mexico Court of Appeals affirmed. It held that Elane Photography was a "public accommodation" under the NMHRA and that Elane Photography discriminated against Willock based on her sexual orientation. The Court of Appeals also rejected Elane Photography's constitutional arguments

In its brief before the New Mexico Supreme Court, Elane Photography again argued that punishment for declining to photograph the lesbian commitment ceremony violated the First Amendment. It emphasized the artistic and expressive nature of its photographs.[13] The photographers described how their engagement pictures, portraits, and photos for other types of events, were shot using a "photojournalistic style"—a method used to tell a story through imagery. Their photography involved making decisions about what angles to shoot from, what subjects to capture, how to arrange other details included in the frame, and when to click the shutter. After taking photos of an event, they selected a fraction of thousands of photographs to edit, crop, and adjust in color. All these elements create a selection of photographs that "tells the story of the day." The Huguenins did

12. While the case worked its way through the commission and the state courts, Willock and her partner Misty Pascottini located a willing photographer and conducted their commitment ceremony on September 15, 2007.

13. Brief in Chief for Petitioner at 2–6, Elane Photography, LLC, 309 P. 3d 53 (N.M. 2012) (No. 33,687).

not want to create images that "tell a story" or "convey a message" that would violate their beliefs.[14]

The photographers insisted they did not discriminate based on a customer's sexual orientation and would have photographed Willcox in other contexts. But just as they would not create photographs of "heterosexual polygamous weddings," they would not photograph same-sex ceremonies.[15] In either case, the photographers merely objected to creating the *message* the customer requested—not to the *customers* themselves. This message status distinction would be stressed in every service-refusal case.

Given these facts, Elane Photography argued that the lower court decisions misunderstood the compelled-speech doctrine, letting the state require the photographers to create unwanted expression.[16] Its brief used *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*,[17] to suggest that states cannot compel speakers to host another's message in way that alters the content of their own speech. In *Hurley*, the Supreme Court held that Massachusetts could not force St. Patrick's Day parade organizers to include a group of gay, lesbian, and bisexual Irish people marching behind a banner identifying them as such. Like the parade organizes "speaking" through parades in *Hurley*, Elane Photography claimed it was speaking through photographs.[18] *Hurley* would become a linchpin of arguments favoring businesses in service-refusal cases.

In 2013, the same year the Supreme Court struck down the Defense of Marriage Act (DOMA) in *United States v. Windsor*,[19] New Mexico's highest court upheld the Commission's decision against the photographers.[20] First, the state supreme court held that discrimination against a same-sex couple (married or not) amounted to discrimination based on "sexual orientation"—which is prohibited by the NMHRA. The court reasoned that the conduct of having, for example, a same-sex commitment ceremony is closely

14. *Id*. at 2. Elane Photography's policies also prohibit the photographers from creating photographs that positively endorse abortions, pornography, the display of nudity, or scenes of blood or violence. *Id.* at 5.

15. *Id*. at 11.

16. *Id*. at 29–32.

17. 515 U.S. 557, 581 (1995).

18. *Id*. at 21–24.

19. U.S. v. Windsor, 570 U.S. 744, 774 (2013).

20. Elane Photography, LLC v. Willock, 309 P.3d 53, 59 (N.M. 2013).

tied to homosexuality. That conclusion seemed defensible, if not irresistible, as a matter of statutory interpretation.[21]

Second, the court held there is no free speech right to discriminate in providing services to the public. While the act of taking photographs might contain expression, the government mandates no message via the public accommodations law. The court wrote that the NMHRA does not regulate the content Elane Photography captures, but rather regulates "the act of discriminating against individuals. . . ." It concluded that antidiscrimination laws serve "important purposes" such as ensuring that goods and services are available to all customers and protecting individuals from "humiliation and dignitary harm." The NMHRA, the court stated, "does not require any affirmation of belief" by businesses. It merely requires the business to serve without regard to a customer's sexual orientation. Elane Photography's decision to offer its services to the public, the court declared, is a "business decision, not a decision about its freedom of speech." In rejecting Elane Photography's speech concerns, the court declined to make an exception for public accommodations that are "creative" and "expressive."

The Huguenins, the court concluded, had the choice not to be in the business of taking pictures at all. But if they offered services to the public, they must do so on the antidiscrimination terms mandated by the state. The court suggested that Elane Photography might be permitted to post a disclaimer on its website or to put up a sign in its studio declaring its opposition to same-sex marriage.[22] That would have to be enough.

21. Interpreting and applying the NMHRA was a decision left to the state's highest court, whose judgment would be considered authoritative on this matter of state law. But U.S. Supreme Court reasoning on these issues can be persuasive. Rejecting an attempt to distinguish homosexual conduct and status in *Christian Legal Society v. Martinez*, the Court held:

> Our decisions have declined to distinguish between status and conduct in this context. *See Lawrence v. Texas*, 539 U.S. 558, 575 (2003) ("When homosexual *conduct* is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual *persons* to discrimination." (emphasis added)); *id.*, at 583, 123 S.Ct. 2472 (O'Connor, J., concurring in judgment) ("While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, [the] law is targeted at more than conduct. It is instead directed toward gay persons as a class."); *cf. Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993) ("A tax on wearing yarmulkes is a tax on Jews.").

561 U.S. 661, 689 (2010). The Court has not specifically held that there is no distinction between homosexual status and same-sex weddings for federal constitutional purposes.

22. To minimize conflicts, one prominent gay-rights supporter has suggested such

On behalf of Elane Photography, ADF filed a petition for writ of certiorari, largely repeating the arguments it had made before the New Mexico Supreme Court.

B. THE BRIEF

When the case got to the United States Supreme Court in late 2013, Volokh and Cato Institute counsel Ilya Shapiro filed an amicus brief supporting Elane Photography's petition. The brief was filed on behalf of Volokh himself, Cato, and me. It described amici as "supporters of same-sex marriage who also believe that photographers, singers, writers, and other creators of expression have a First Amendment right to choose which expression they want to create."[23]

The brief started with the observation that the First Amendment prohibits speech compulsions as well as speech restrictions. This protection, it asserted, is part "of the broader concept of 'freedom of mind.'"[24] The brief relied heavily on *Wooley v. Maynard*,[25] in which the Maynards objected to displaying the state motto—"Live Free or Die"—on their government-issued license plates. They sought the right to obscure the motto[26] even though nobody would have understood the motto—printed by the government on a government-provided and government-mandated license plate—as the driver's own words or the driver's own sentiments. The Court nevertheless ruled for the Maynards.

Forcing drivers to display the state slogan, the *Wooley* court held, required them "to be an instrument for fostering public adherence to an ideological point of view [they] find[] unacceptable," which is unconstitutional. The Volokh brief argued that this reasoning applied "whether or not the compelled slogan has a great deal of ideological content."[27]

disclaimers are the best way of balancing the interests of religious business owners and their gay customers. Andrew Koppelman, *A Free Speech Response to the Gay Rights/Religious Liberty Conflict*, 110 NW. U. L. REV. 1125 (2016).

23. *Elane Photography* brief, *supra* note 1, at 1.

24. *Id.* at 4.

25. 430 U.S. 705, 713.

26. *Id.* at 707–08, 715.

27. *Elane Photography* brief, *supra* note 1, at 5 (citing Ortiz v. State, 1988-NMSC-008, 749 P.2d 80, 82 (stating that *Wooley* would allow drivers even to obscure the slogan "Land of Enchantment," which is nonideological)).

"Democracy and liberty," Volokh argued, "rely on citizens' ability to preserve their integrity as speakers, thinkers, and creators—their sense that their expression, and the expression that they 'foster' and for which they act as 'courier[s],' is consistent with what they actually believe." Even under a narrow conception of free speech as tied only to protecting public discourse and democratic self-government, the brief suggested, freedom from speech compulsions was important.

Himself an émigré from the Soviet Union, Volokh reminded the Court that "in the dark days of Soviet repression, Alexander Solzhenitsyn admonished his fellow Russians to "'live not by lies': to refuse to endorse speech that they believe to be false." Each person, Solzhenitsyn declared, must resolve to never "write, sign or print in any way a single phrase which in his opinion distorts the truth," to never "take into hand nor raise into the air a poster or slogan which he does not completely accept," to never "depict, foster or broadcast a single idea which he can see is false or a distortion of the truth, whether it be in painting, sculpture, photography, technical science or music."[28] That "uncompromising path is not for everyone," the brief advised, "[b]ut those whose consciences, whether religious or secular, require them to refuse to distribute expression 'which [they do] not completely accept,' are constitutionally protected in that refusal."[29] This was a siren call with historical echoes about the dangers of compelled speech.

But even if as a principle speech cannot generally be compelled, that didn't resolve the question in *Elane Photography* (just as the anti-compulsion principle wouldn't by itself resolve the later cases involving wedding cakes or websites). The Huguenins had not been required to display a state-prescribed motto or salute the rainbow flag. They were simply required to take pictures of a ceremony that potential customers asked them to photograph. The similarity to the dark days of Soviet repression was not immediately obvious.

The Volokh *amici* needed to address why taking pictures of a wedding mattered to the Constitution. Is photography speech? Even if it is, doesn't charging for the pictures alter their

28. *Id.* at 5–6 (quoting Alexander Solzhenitsyn, *"Live Not by Lies*," WASH. POST, Feb. 18, 1974, at A26.).

29. *Id.* at 6.

predominantly expressive quality because the photographers have entered commerce?

The brief offered direct answers to these questions based on both precedent and general free-speech principles about the "freedom of mind." Although the Court hadn't explicitly written that "photography is protected speech," it didn't need to. It had upheld free-speech claims involving photographs where the issue of protection for the medium did not even merit discussion. *United States v. Stevens*,[30] struck down a ban on the commercial creation of photographic depictions of animal cruelty. *Regan v. Time, Inc.,*[31] struck down a portion of a law that banned photographic reproductions of currency. Volokh noted that photography was merely "a special case of the broader proposition that visual expression is as protected as verbal expression."[32] And if commercially distributed video games are fully protected, as the Court held in *Brown v. Entertainment Merchants Ass'n*,[33] there is no reason in principle why still photographs sold for profit would not be. The fact that the video games were produced for commerce did not alter their expressive quality for purposes of free speech protection.

If the government may not ban photographs, the brief contended, then *Wooley* meant that it may not compel their distribution or display, either. It would not have mattered if instead of requiring the state motto on license plates, New Hampshire had instead required visual depictions of Patrick Henry, who famously said, "Give me liberty or give me death." Neither could it require drivers to display a drawing or photograph of two women holding hands. The driver's claim would be just as strong as it was in *Wooley* if such *visual* displays had been compelled. The driving principle (one might mischievously say) remained true in either case: "Requiring the display of an image intrudes on the 'individual freedom of mind' as much as does requiring the display of a slogan."[34]

This conclusion about visual displays was demonstrated in the Court's very first compelled-speech case, *West Va. Bd. of Ed.*

30. 559 U.S. 460, 482 (2010).
31. 468 U.S. 641, 648 (1984).
32. *Elane Photography* brief, *supra* note 1, at 6.
33. 564 U.S. 786, 805 (2011).
34. *Elane Photography* brief, *supra* note 1, at 7.

v. Barnette,[35] which struck down both a state's verbal-speech requirement (recitation of the Pledge of Allegiance by schoolchildren) and its nonverbal-speech requirement (a flag salute). Similarly, in *Hurley* the Court held that St. Patrick's Day Parade organizers had a right to exclude marchers who wanted to carry a banner that read, "Irish American Gay, Lesbian and Bisexual Group of Boston."[36] The same reasoning would have applied, the Volokh brief argued, if the "marchers wanted to carry a large photograph depicting smiling same-sex couples at a commitment ceremony." Parade organizers would be equally entitled to exclude visual representations as they were to exclude written ones. *Hurley*, the brief noted, likened "the unquestionably shielded painting of Jackson Pollock" to verbal poetry for First Amendment purposes.[37]

Still, *Elane Photography* did not involve a compulsion to speak a specifically prescribed government message. It did not even require the photographers to disseminate or display a specific message created by someone else. Elaine Huguenin was not required to "use [her] private property as a 'mobile billboard' for a particular message."[38] The Huguenins' own decision to speak through their photography business triggered the non-discrimination obligation. That made the case distinguishable from *Wooley*.

But for Volokh, the compulsion to take the commitment ceremony photos involved something more insidious than a state-drafted script: it was a requirement to create the speech itself. Compelling the *creation* of speech would interfere both with the distribution of speech and with the "individual freedom of mind" at least as much as compelling the *dissemination* of speech. "If anything," the brief argued, "requiring someone to create speech is even more of an imposition on a person's 'intellect and spirit,' than is requiring the person to simply engage in 'the passive act of carrying the state motto on a license plate.'"[39]

Creating expression—whether verbal or nonverbal—involves numerous intellectual and sometimes artistic decisions.

35. 319 U.S. 624, 632 (1943).

36. 515 U.S at 570.

37. *Elane Photography* brief, *supra* note 1, at 9 (citing Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 569 (1995)).

38. *Id*. at 10 (citing Wooley v. Maynard, 430 U.S. 705, 715 (1977)).

39. *Id*. at 10 (quoting *Wooley*, 430 U.S. at 714).

Again invoking Solzhenitsyn, the brief argued "a person can rightfully insist that she should never 'depict, foster or broadcast a single idea which [she] can see is false or a distortion of the truth, whether it be in painting, sculpture, [or] photography,' just as she can rightfully insist that she should never 'take into hand nor raise into the air a poster or slogan which [she] does not completely accept.'"[40]

In a move that would become commonplace on both sides of the constitutional debate over expressive-service refusals, Volokh warned of the logical consequences that might flow from an adverse decision: "As interpreted by the state court, the law applies not just to photographers but also to other contractors, such as freelance writers, singers, and painters."[41] Political and religious events—not just marriages—could be swept into the reach of state compulsion.

> Thus, for instance, a freelance writer who thinks Scientology is a fraud would be violating New Mexico law (which bans religious as well as sexual-orientation discrimination) if he refused to write a press release announcing a Scientologist event. An actor would be violating the law if he refused to perform in a commercial for a religious organization of which he disapproves. And since the same rule would apply to state statutes that ban discrimination based on "political affiliation," a Democratic freelance writer in a jurisdiction that had such a statute would have to accept commissions to write press releases for Republicans (so long as he writes them for Democrats).[42]

All such requirements would interfere with the individual freedom of mind by forcing those writers, actors, painters, singers, and photographers to express sentiments they see as wrong. The brief emphasized that taking wedding photographs—like writing press releases or creating a theatrical performance—involves many hours of effort and a large range of expressive decisions about editing, lighting, selecting, and so forth.

The *Elane Photography* brief pointed to an additional indicator of the expressive nature of wedding photography: Customers pay a premium for the product. Professional

40. *Id*. at 10–11 (quoting Alexander Solzhenitsyn, "*Live Not by Lies*," WASH. POST, Feb. 18, 1974, at A26.).

41. *Id*. at 11.

42. *Id*. (citing, *e.g.*, D.C. Code § 2-1411.02 (2001); V.I. Code tit. 10, § 64(3) (2006); Seattle, Wash. Mun. Code §§ 14.06.020(L), .030(B)).

photographers could thus be distinguished from a person who, for example, merely uses a pocket camera to take snapshots of people strolling on the boardwalk. The expressiveness of wedding photography was evidenced by the "painstaking process of staging, selecting, and editing the hundreds of photographs that enter wedding albums."[43] There was no similarly expressive process for the casual photographer. Even for Volokh, not all photography would seem to merit protection.

Volokh maintained that the highly expressive quality of wedding photography distinguished the case from *Rumsfeld v. FAIR*,[44] which upheld a federal funding condition that required law schools to send scheduling emails on behalf of military recruiters. In *Rumsfeld*, the Court maintained that the law schools' claim "trivialized" the First Amendment's protection against compelled speech. "This distinction between the situation in *Rumsfeld* and the situations in *Barnette* and *Wooley*," the Volokh brief argued, "must have rested on the conclusion that requiring an institution to send scheduling e-mails does not interfere with anyone's 'individual freedom of mind.'"[45]

There was thus in Volokh's brief no simple on-or-off switch for First Amendment protection. No mere formula could capture the complexity of the analysis, especially where non-verbal expression was concerned. Context—the surrounding facts, the nature of the activity, the expressive significance commonly attributed to the activity—all mattered on the question of whether expression was occurring and whether that expression was sufficient to warrant First Amendment protection. This nuance and sensitivity to context would become a hallmark of the Volokh briefs.

Such attention to nuance is a virtue, but it can also be a weakness. It makes slippery slopes almost unavoidable. While one might agree that courts reached the right conclusion in one case (say, wedding photography) what principle would stop another court from reaching the wrong one in a future case (say, wedding

43. *Id*. at 13 (distinguishing State v. Chepilko, 965 A.2d 190, 199 (N.J. Super. Ct. App. Div. 2009)).

44. 547 U.S. 47 (2004).

45. *Elane Photography* brief, *supra* note 1, at 14. No doubt Solzhenitsyn would have objected to sending reminder notes about Communist Party meetings, but such an objection would not be rooted in the expressiveness of scheduling details. It would have arisen from a refusal to be a cog in the repressive Soviet regime in *any* way.

cakes)? This is a common dilemma in any argument for fact-bound standards over bright-line rules, but it is endemic in decisions about whether to protect expressive conduct under the First Amendment. There is no reason to think the dilemma is especially acute in this one.

Still, suppose wedding photography counts as expression, does it matter for First Amendment purposes whether the business was selling this service? For Volokh, the answer was a resounding no. "The compelled-speech doctrine applies to commercial businesses, both newspapers, and non-media corporations," the *Elane Photography* brief observed.[46] "If making money from one's work meant surrendering one's First Amendment rights to choose what to create, then a great many speakers would be stripped of their constitutional rights, including this country's most popular entertainers, authors, and artists."[47] The profit motive of the speaker and the fact of commercial exchange between the speaker and purchasers was no barrier to constitutional protection.

Even if the expressiveness of photography is granted, the New Mexico Supreme Court noted that the state's public accommodations law gave customers a countervailing right not to suffer discrimination in obtaining good and services. *Barnette* was different, the New Mexico court insisted, because the schoolchildren's refusal to salute that flag or recite the Pledge did not interfere with the exercise of any other individual's rights.[48]

The Volokh brief quickly dispatched that distinction. *Tornillo* involved a state law granting politicians a right of reply to material in newspapers, but the Court upheld the newspapers' right to exclude such replies. *Hurley* involved a state law granting access to places of public accommodation on nondiscriminatory terms, but the Court upheld the parade organizers' right to exclude the LGB contingent. "In both cases," the brief noted, "the First Amendment prevailed over the assertions of contrary state law rights."[49] It's bedrock constitutional law—accepted across the spectrum of judicial

46. *Id*. at 14 (citing Miami Herald v. Tornillo, 418 U.S. 241 (1974) and Pacific Gas & Elec. Co. v. Public Util. Comm'n, 475 U.S. 1 (1986)).

47. *Id*. at 15.

48. Elane Photography, LLC v. Willock, 309 P.3d 53, 64 (N.M. 2013).

49. *Elane Photography* brief, *supra* note 1, at 16.

philosophies—that where a statute conflicts with the Constitution, the Constitution wins.

The *Elane Photography* brief thus laid out a powerful argument for protecting free expression. But it also pointed out that the protection against compelled speech was limited to actual expression. What at first appears to be a tautology needs some elaboration.

While photographers enjoyed speech protection, that protection did not extend to "caterers, hotels, and limousine companies" who "do not have such a right to refuse to deliver food, rent out rooms, or provide livery services, respectively, for use in same-sex commitment ceremonies."[50] That's because "the First Amendment does not extend to all human endeavors, but only to expression." Government may, for example, create a monopoly on catering, restrict the operation of dance halls, set up a medallion system to limit the number of limousine drivers, or require a license for businesses.[51]

It is a common function of courts to draw a line between expression (restrictions upon which draw First Amendment scrutiny) and nonexpressive behavior (restrictions upon which draw no First Amendment scrutiny) when evaluating the constitutionality of speech *regulation*.[52] The insight of the *Elane Photography* brief was that the same line can be drawn—and with no greater or lesser difficulty—when it comes to speech *compulsions*.[53]

Presaging Justice Gorsuch's passage in *303 Creative* about the limited application of the protection there upheld, Volokh maintained in the *Elane Photography* brief that only "a relatively narrow range of behavior" would be protected as speech: that which "involves the creation of constitutionally protected expression." If the behavior could be fully regulated or even

50. *Id*. at 17.

51. *Id*. at 17 (citing City of New Orleans v. Dukes, 427 U.S. 297 (1976) (upholding a ban on new pushcart vendors that allowed only a few old vendors to operate); Ferguson v. Skrupa, 372 U.S. 726 (1963) (upholding a ban on businesses that engage in "debt adjusting"); City of Dallas v. Stanglin, 490 U.S. 19 (1989) (upholding a law that barred dance halls that cater to 14-to-18-year-olds from letting in adult patrons).

52. Spence v. Washington, 418 U.S. 405 (1974) (non-verbal communications are protected when the conduct is "sufficiently imbued with elements of communication to fall within the scope of the First [. . .] Amendment"); *see also* Texas v. Johnson, 491 U.S. 397 (1998) (flag burning at political protest was protected speech).

53. *Elane Photography* brief, *supra* note 1, at 18.

banned, the person may be compelled to participate in events she disapproves without violating the First Amendment. But if the activity is protected by the First Amendment against a *ban*, for instance because it involves writing or photography, then it likewise may not be *compelled*.[54] Here, Volokh was beginning to sketch an argument that certain mediums (the activities of, for example, writing and photography) were at least presumptively protected by the First Amendment because they produce First Amendment protected expression (press releases and photographs, respectively).

A brief is not a law review article. The *Elane Photography* brief was necessarily a first cut at the question of where to draw the line. Harder questions would come. It could not be true, for example, that even all writing is constitutionally protected. Some writing is not very expressive, much less an intrusion on freedom of the mind. *Rumsfeld* involved composing and distributing scheduling emails on behalf of military recruiters. But law schools objected to their very presence on campus law schools because they disagreed with the military's exclusion of openly gay servicemembers. In *Rumsfeld*, law schools might have wanted to avoid sending the message that the military was a recruiter just like any other recruiter, just as the Huguenins presumably wanted to avoid sending the message that a lesbian couple was like any other couple. Yet the Court's response to the schools' free-speech claims was to say that no heightened First Amendment scrutiny applied because no protected expression was involved. In context, the law schools' writing was a form of conduct fully regulable by government. Why wasn't the Huguenins' photography also properly viewed as fully regulable conduct?

The *Elane Photography* brief made clear that the case for the wedding photographers, though, was not a matter of providing rote or mechanistic services devoid of expressive value akin to providing details of time and location. Their claim did not trivialize the First Amendment concern with freedom of the mind. For them, the expressive harm loomed large.

By contrast, the stakes for the potential customers who were denied the Christian photographers' services were not large. As a practical matter, "[a] photographer who views a same-sex commitment ceremony as immoral would be of little use to the

54. *Id.* at 18–19.

people engaging in the ceremony," the brief asserted.[55] What quality of service might a couple get from a resentful photographer who grudgingly shows up under threat of legal sanction?[56]

Volokh calculated there were more than a hundred wedding photographers in the Albuquerque area alone. Most of them, the brief speculated, "would likely be happy to take the money of anyone who comes to them."[57] In fact, the lesbian couple denied the Huguenins' services had secured a photographer for their commitment ceremony six years before the Volokh brief in *Elane Photography* was filed.

Without explicitly saying so, the *Elane Photography* brief was suggesting that the ready availability of alternatives might be relevant to the question of whether a state could satisfy strict judicial scrutiny. If no comparable alternative was available, after all, a speech compulsion might be tolerable on the ground that there was no other way to get the commercial service. Since New Mexico had not even bothered to argue about a lack of alternatives, however, there was no need to press the point.

Volokh understood that antidiscrimination laws serve multiple purposes, only one of which is to ensure that people have access to products in the marketplace. Another purpose is to avoid the constant insult they might face when denied services. He acknowledged couples would be personally offended by a denial of service. This is a kind of dignitary, rather than material, harm. The personal offense is real.

But the *Elane Photography* brief countered that helping people avoid offense is not a sufficient interest for regulating otherwise protected expression.[58] It asserted that discrimination by narrow categories of expressive commercial actors is much less damaging and restrictive than other forms of discrimination. By contrast, there were contexts where the harm of discrimination could be severe and even life-altering:

55. *Id*. at 19.

56. It's theoretically possible, of course, that some customers might not be concerned as much with the quality of the photographs as with the opportunity to expand the worldview of the photographers. But if that is so, it could not properly be a basis for a speech compulsion.

57. *Elane Photography* brief, *supra* note 1, at 19.

58. *Id.* at 20 (citing Texas v. Johnson, 491 U.S. 397 (1989); Cohen v. California, 403 U.S. 15 (1971)).

> Employment discrimination can jeopardize a person's livelihood. Discrimination in education can affect a person's future, as can discrimination in housing—especially when housing is scarce in the safe parts of town with good schools.
>
> Discrimination in many places of public accommodation has been historically pervasive, to the point that mixed-race groups might have been unable to find any suitable hotel or restaurant. But protecting the First Amendment rights of writers, singers, and photographers would come at comparatively little cost to those denied such inherently expressive and personal services by specific providers.[59]

Although the brief did not explicitly say so, the implication of this argument is that discrimination in employment, education, and housing should not generally be considered expressive. Courts have mostly declined to hold that discrimination in these domains is protected by the freedom of speech, although in limited contexts it might be conduct protected as a matter of religious freedom. The Volokh briefs took no position on the religious-liberty claims pressed in these cases.

The New Mexico Supreme Court's retort that photographers were only being compelled to take photographs to the extent they took any photographs at all was no answer. "Creating expressive works such as photographs—unlike delivering food, driving limousines, or renting out ballrooms—is a constitutional right. States therefore cannot impose new burdens on creators as a result of their having exercised this right."[60] Offering them the choice to leave their vocations was not a constitutionally acceptable response to their dilemma.

The United States Supreme Court was evidently unmoved to decide Elane Photography's case. It denied certiorari without comment in April 2014. The free speech issue would linger for another decade.

C. CRITICAL RESPONSE TO THE *ELANE PHOTOGRAPHY* BRIEF

It's safe to say that gay-rights advocates were dismayed that lawyers and law professors supporting same-sex marriage would support a vendor claiming a right to deny service to gay couples. Among legal cognoscenti, support for gay marriage went hand-in-hand with opposition to wedding-vendor exemptions. Conversely,

59. *Id*. at 20.
60. *Id* at 21.

opposition to gay marriage tended to pair with support for such exemptions. Volokh and his co-author *amici* were challenging that connection. Instead, they were proposing a link between support for gay marriage and classical liberal support for pluralism and tolerance. And they were making the argument in constitutional terms.

One prominent early critic of the *Elane Photography* brief, Professor Andrew Koppelman, was dismissive of the free speech argument for wedding vendors like the Huguenins. "The real issue in the case, the question of how gay people and religious conservatives can live out their ideals," Koppelman wrote, "was obscured by weak free speech claims."[61] The litigation advanced to the Supreme Court only in "zombie" form, he archly observed, "still moving, but without its soul." [62]

Koppelman specifically criticized the *Elane Photography* brief on grounds of both First Amendment doctrine and theory. On the doctrine, Koppelman argued that "laws that make no reference to expression are not treated much better than religious liberty claims: they are deemed by the Court to be presumptively constitutional, even if they incidentally affect speech."[63] Indeed, in *United States v. O'Brien*, the Supreme Court held that laws restricting conduct and not facially restricting speech, were subject only to intermediate scrutiny if the government's interest was unrelated to the suppression of expression.[64] Such laws were deemed "content-neutral" even though they might inhibit some expressive conduct, and as such were not usually unconstitutional in application.

Quoting a passage from the New Mexico Supreme Court's opinion, Koppelman observed that free speech exemptions for wedding vendors would complicate the doctrine by requiring courts to make distinctions between expressive and non-expressive vendors and their products.[65] Floral arrangements and wedding cakes aren't necessarily expressive, but of course florists and bakers need artistic skill. How would anyone create a system

61. Andrew Koppelman, *Zombie in the Supreme Court: The* Elane Photography *Cert Denial*, 7 Ala. C.R. & C.L. L. Rev. 77, 77 (2015).

62. *Id.* at 78.

63. *Id*. at 83 (citing Rumsfeld v. Forum for Academic & Institutional Rights, 547 U.S. 47 (2006); Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288 (1984)).

64. 391 U.S. 367, 376-77 (1968).

65. Koppelman, *supra* note 61, at 84 (quoting Elane Photography v. Willcock, 309 P.3d 53, 71 (N.M. 2013)).

of selective exemptions? Besides, applying serious First Amendment scrutiny to public accommodations laws for the first time might jeopardize their efficacy.[66]

Purely as a matter of doctrine, Koppelman's critique had some merit. He was right that no case law had previously addressed whether and which commercial business services might merit a free speech exemption. The Volokh brief was arguing for an extension of the compelled-speech doctrine to a new field. By itself, that objection cannot be decisive. Changes in law and fact constantly demand application of old constitutional values to new settings. That's how twentieth century motion pictures got eighteenth century free speech protection.

It's also true, as Koppelman noted, that a bedrock conceptual distinction between content-based and content-neutral law drives much of free speech case law. The problem is that the doctrine itself is not uncomplicated. Koppelman's doctrinal position—like the New Mexico Supreme Court's—failed to deal with the impact of *Hurley*. The Massachusetts public accommodations law, like all such laws, was facially neutral. It made no reference specifically to speech. It compelled no recitation of a state-drafted script. Yet when confronted with a requirement that the parade organizers alter their expression through that "content-neutral" law, the Court did not consider the impact on speech "incidental," as the lower court had. It did not apply mere intermediate scrutiny, as the lower court had. It simply held the speech could not be compelled.

As a matter of free speech theory, Koppelman granted that the constitutional injunction against compelled speech is designed to prevent "the public humiliation and demoralization of being forced to say what one does not believe."[67] Individual freedom of mind, as Volokh termed it, was an important theoretical value of free speech. Koppelman also agreed that even if the state does not intend the humiliation and demoralization of the speaker, the harmful impact is nonetheless real. "The trouble with this logic is that it is not confined to speech," Koppelman argued. "It equally applies to any law that requires conduct that can reasonably be understood as having symbolic meaning that the person rejects."[68]

66. *Id.* at 83–84.
67. *Id.* at 84.
68. *Id.*

In a trivial sense, Koppelman's retort was clearly wrong. The logic of using the First Amendment to prevent humiliation of a speaker through compulsion to speak *can* be confined to speech, at least where "speech" is understood as the Court has understood it for most of the past century. It's not confined to oral pronouncements or written words. It includes symbols, music, paintings, and photographs, a point that the *Elane Photography* brief drove home. And it includes conduct that is expressive or symbolic.

But the deeper point is that not all communication, much less conduct, is protected expression. This is why, to take one hypothetical Koppelman offered, car manufacturers can't make a free speech objection to a federal mandate to install air bags in cars.[69] Free speech, as Koppelman explained, is a cultural construct. Few in our culture would reasonably understand Ford to be making a statement of support for the regulation merely when it complies with the law. It would be different if the government forbade Ford from publicly arguing, say, that airbags are neither effective nor worth the added cost. And more to the point here, it would be different if the government forced a manufacturer to conspicuously place on its cars the words, "We support the federal requirement to install air bags on our cars. We think airbags are very cost-effective."

The hypothetical script imposed on car manufacturers would obviously be compelled speech because the fact that a *message* rather than a *behavior* was forced is unmistakable. One could certainly argue that a government regulation taking the form of a compelled script was distinguishable from *Elane Photography* (where no explicit gay-supportive script was compelled), but that only takes us back to the content-neutrality argument that was undermined by *Hurley* and *Dale*.

Interestingly, Koppelman himself conceded that what he called "the demoralization costs of compelled speech" would be "relevant in cases where a neutral law *was construed to require someone to express words* with which they disagree."[70] Koppelman gave the real-life example of Colorado baker who refused to decorate a cake with the words, "Homosexuality is a detestable sin. Leviticus 18:22." Koppelman agreed that Colorado could not compel the baker to write that on a cake.

69. *Id.* at 85.
70. *Id.* (emphasis added).

In a sense, that was Volokh's point in the *Elane Photography* brief (and later in the *303 Creative* brief). The content-neutral Colorado antidiscrimination law was being construed to require the Huguenins to express a message with which they disagreed (albeit through photographs, not words). Once we accept the principle that facially speech-neutral antidiscrimination laws as applied in specific cases can be subject to free-speech invalidation, the areas of disagreement narrow considerably. At that point, we are disagreeing only over what kind or quality of expression merits free-speech protection and perhaps over whether the restriction can meet strict judicial scrutiny. It's entirely fair to have that dispute, and reasonable people can reasonably disagree about outcomes in particular cases. But if you then maintain that free speech only protects written words, you lost the argument over the meaning of the First Amendment on both doctrinal and theoretical grounds at some point early in the last century.[71]

To be fair to Koppelman, Volokh had not yet fleshed out the line between protected and unprotected commercial goods and services in the *Elane Photography* brief. Volokh asserted, without really explaining, that there wouldn't be protection for the limousine driver, the hair stylist, the cook, or the tailor. How about the wedding cake baker or florist? Most importantly, how could such distinctions be made in any principled way? A fuller explanation would come soon.[72]

II. THE *MASTERPIECE CAKESHOP* BRIEF

By the time Volokh filed the next amicus brief in a service denial case, same-sex marriage was the law of the land.[73] Six months after the Supreme Court decided *Obergefell v. Hodges*, Volokh submitted an amicus brief as counsel for Cato in a case challenging the application of a county anti-discrimination ordinance. The litigation involved Hands On Originals, a small Kentucky printing shop owned by three people, which refused to

71. Stromberg v. California, 283 U.S. 359, 369–70 (1931) (reversing conviction under a state law criminalizing displaying "a red flag" in any public place as a "sign, symbol, or emblem of opposition to organized government").

72. For academic commentary on the *Elane Photography* brief's reliance on *Barnette* and the references to Solzhenitsyn, see Linda C. McClain, *Do Public Accommodations Law Compel "What Shall be Orthodox"? The Role of* Barnette *in* 303 Creative LLC v. Elenis, 68 SAINT LOUIS U. L.J., 20–21(2024), https://scholarship.law.bu.edu/cgi/viewcontent.cgi?article=4715&context=faculty_scholarship.

73. *See* Obergefell v. Hodges, 576 U.S. 644 (2015).

produce a T-shirt promoting the city's LGBT pride festival. In the state appeals court, Volokh argued that the refusal was based on an objection to the pride organization's message, not to the sexual orientation of any of its members. Citing *Hurley*, the brief argued that the printer had "a right not to participate in the creation (and thus the dissemination) of the 'Lexington Pride Festival' message."[74] A written message celebrating gay pride, Volokh argued, "is expressive in a way that a cake with no inscription is not."[75]

The latter example referred to litigation then winding its way through the Colorado courts involving a baker who refused to create a wedding cake for a same-sex marriage. This time, however, when the case ended up in the Supreme Court Volokh and Cato were in opposite corners, with Volokh taking the government's side against the objecting baker.[76] The *Masterpiece Cakeshop* brief rejected expansive free speech claims urging protection of all products that could be labeled "art" because they were beautiful or involved skilled craftsmanship. More significantly, for the first time the brief laid out a test for determining what should constitute expression in the commercial marketplace.

A. THE FACTUAL AND PROCEDURAL BACKGROUND

Masterpiece Cakeshop was a Colorado bakery owned and operated by Jack Phillips, a devout Christian. In July 2012, Charlie Craig and David Mullins visited the bakery because they wanted a cake for their same-sex wedding reception. However, Phillips declined to make the cake, citing his religious belief that marriages should be limited to one man and one woman.

Craig and Mullins filed a discrimination complaint against Masterpiece Cakeshop claiming that Phillips had discriminated against them based on sexual orientation in a place of public accommodation, violating CADA. An Administrative Law Judge (ALJ) agreed, rejecting Masterpiece Cakeshop's

74. *Hands On Originals* brief, *supra* note 1, at 7.

75. *Id.* at 10. The printer ultimately prevailed in the Kentucky Supreme Court. *See* Lexington-Fayette Urb. Cnty. Hum. Rts. Comm'n v. Hands On Originals, 592 S.W.3d 291, 298 (Ky. 2019).

76. Brief for the Cato Institute, et al. as Amici Curiae Supporting Petitioners, Masterpiece Cakeshop v. Colorado Civil Rights Comm'n, 584 U.S. 617 (2018) (No.16-111).

arguments that applying CADA in this manner infringed its rights under the First Amendment. Phillips appealed that decision to the Colorado Civil Rights Commission. The Commission affirmed the ALJ's ruling and ordered Masterpiece Cakeshop to take remedial measures, which included comprehensive staff training and altering company policies to comply with CADA.

Phillips then appealed the Commission's order to the Colorado Court of Appeals, which affirmed the Commission's order. Masterpiece Cakeshop's argument that CADA compelled it to convey a celebratory message was meritless, the appeals court concluded. The court also rejected Masterpiece Cakeshop's claim that applying CADA violated its right to free exercise of religion. The Colorado Supreme Court declined to hear a petition for review.

On behalf of Phillips, ADF then petitioned the United States Supreme Court for a writ of certiorari. In June 2017, the Supreme Court agreed to hear the case.

B. THE BRIEF

On October 26, 2017, Volokh and I filed an amicus brief supporting the Colorado Civil Rights Commission.[77] The brief was filed on behalf of the American Unity Fund,[78] Volokh himself, and me. Taking the other side, Cato filed a brief supporting the baker.[79]

There were obvious similarities between *Elane Photography* and *Masterpiece Cakeshop*. Both cases involved professionals with small shops offering services to the public within the wedding industry. Both involved providers who offered customized products. In both cases, same-sex couples sought services and were denied on the basis of the professionals' religious objections to same-sex marriage. In both cases, the customers then

77. *Masterpiece Cakeshop* brief, *supra* note 1, (available at https://www.scotusblog.com/wp-content/uploads/2017/11/16-111_bsac_american_unity_fund.pdf).

78. As described in the brief, AUF is a "nonprofit organization dedicated to advancing the cause of freedom for LGBTQ Americans by making the conservative case that freedom truly means freedom for everyone." *Id.* at 1. I am a Senior Policy Advisor to AUF.

79. Brief for the Cato Institute, Reason Foundation, and Individual Rights Foundation as *Amici Curiae* in Support of Petitioners, Masterpiece Cakeshop v. Colorado Civil Rights Comm'n, 584 U.S. 617 (2018) (No.16-111).

complained under the state public accommodations law. In both, the owners defended on grounds of free speech and free exercise of religion. Unlike the subsequent cases, these were not pre-enforcement actions in which the business owner claimed a credible fear of some *future* penalty. Violation of the state law had been found and enforcement action was pending. Unlike *303 Creative*, the cases were not litigated based on stipulations with the sort of clarity that rarely attends life.

Nevertheless, Volokh argued that there were *constitutionally* important expressive differences in the kind of work that bakers and photographers do and the kind of products they produce. There were also *factually* important differences in the actual denial of service to which the customers in the two cases had been subjected.

The basic principles were unchanged from the *Elane Photography* brief. Government cannot force people to speak or force them to create speech. It can't compel "photographers, videographers, graphic designers, printers, painters, or singers to record, celebrate, or promote events they disapprove of, including same-sex weddings."[80] For the category of "traditionally expressive media," Volokh agreed with Cato's amicus brief supporting Phillips that speech could not be mandated by government edict.

The problem was that "some actions cannot count as speech, even if they are 'expressive,' 'artistic,' or 'creative' in the broad sense of using a person's creativity and mental effort to produce something original, even something original and beautiful."[81] The law can generally compel behavior. Only a "small subset" of such compulsions violates the First Amendment.[82]

The government could not limit the number of newspapers, freelance writers, photographers, or singers even if the resulting burden on speech was "incidental" and the law had some protectionist economic purpose rather than an ideological one. Government could, however, limit the number of butchers, taxis, restaurants, or bakeries. How is the line drawn between these activities?

Here is where the *Masterpiece Cakeshop* brief began to lay out

80. *Masterpiece Cakeshop* brief, *supra* note 1, at 4 (citing Elane Photography, LLC v. Willock, 309 P.3d 53 (N.M. 2013) (photographer); Lexington Fayette Urban Cty. Human Rights Comm'n v. Hands on Originals, Inc., No. 2015-CA-000745-MR, 2017 WL 2211381 (Ky. Ct. App. May 12, 2017) (T-shirt printer)).

81. *Id.* at 4–5.

82. *Id*. at 4–5.

a more complete theory than the one in *Elane Photography*. Drawing upon *Texas* v. *Johnson*, *Hurley* v. *Irish-American Gay, Lesbian & Bisexual Grp. of Boston*, and *Rumsfeld* v. *FAIR*, 547 U.S. 47 (2006), the brief developed the relevant contours of constitutional speech protection for conduct.

Conduct is considered symbolic expression if one of two conditions is present:

> 1. "An intent to convey a particularized message was present, and . . . the likelihood was great that the message would be understood by those who viewed it," *Johnson*, 491 U.S. at 404 (quoting *Spence* v. *Washington*, 418 U.S. 405, 410-11 (1974)), so long as the message would be so understood based on the conduct alone and not on any accompanying speech, *Rumsfeld*, 547 U.S. at 66; or
>
> 2. The speech falls within a generally expressive medium, such as painting, music, poetry, parading, displaying flags, or wearing armbands, even when the particular speech is abstract and lacks a "particularized message," *Hurley*, 515 U.S. at 569.[83]

The first condition was not present "because baking a wedding cake *by itself* does not show an intent to convey a particularized message that would likely be understood by those who view it."[84] Baking a wedding cake (without accompanying words or other clear expression) could not meet the *Spence* test.

Yet satisfying *Spence* wasn't the only way conduct could be protected as speech. Could the second condition Volokh delineated be met because the medium of cake baking is "generally expressive"? Volokh acknowledged this required "a degree of judgment and line-drawing" for which "tradition, history, and common experience" should be consulted. Paintings are generally expressive mediums because they have long been understood to convey messages about subjects ranging from politics to religion to beauty, the brief noted. Courts should not be making the kind of aesthetic and interpretive judgments required to decide how much or what type of message a given painting conveys.[85] It's enough to confer constitutional protection that the medium of painting is "generally expressive" even if individual paintings do not convey any kind of readily discernible

83. *Id.* at 6.
84. *Id*. at 6 (emphasis original).
85. *Id* at 7.

message. That's why the Court avoids picking and choosing among Jackson Pollack paintings that deserve free speech protections.

By contrast, when the medium "mainly consists of items that do not convey a message (except perhaps insofar as words may be written on them), it is not protected by the First Amendment—even when the items may be designed with aesthetics in mind and even when the creator subjectively intends to 'express' something by the creation."[86] Landscaping and architectural plans can be artistic and "express" the designer's judgment, but they are not protected.[87] On this account, a painting of a house would be part of a generally expressive medium, but *painting a person's house* would not be a generally expressive medium.

Determining whether a given medium is generally expressive is often an easy call. The Court's decisions protect a medium if it "has historically and traditionally been recognized in the law as expressive."[88] Parades, as *Hurley* recognized, have been understood as expressive and conducting them has been part of citizens' privileges, immunities, and liberties from time out of mind.[89]

But the brief contended there is no constitutional tradition of treating cake-making, even cake-making for special occasions like weddings or birthdays, as an expressive medium. Wedding cakes have been around for a very long time, so the absence of supportive precedent can't be chalked up to novelty—unlike, Volokh was careful to note (perhaps anticipating *303 Creative*), "a paucity of cases dealing with website design." The lack of legal authority alone distinguished cake baking from activities like writing, singing, or photography, which enjoy substantial precedential support.[90]

This analysis introduced a historical element into the question whether a particular medium could be categorized as generally expressive. Consulting history and tradition has become a common way to try to resolve constitutional disputes, either to enlarge constitutional protection or to constrain it. The *Masterpiece Cakeshop* brief introduced it as principled way to

86. *Id*.
87. *Id*. at 7–8.
88. *Id*. at 8.
89. 515 U.S. 557, 579 (1995).
90. *Masterpiece Cakeshop* brief, *supra* note 1, at 9.

constrain the reach of the new protection from compulsion in the expressive-services arena.

The brief did not resolve every possible complexity with this proposed limitation. As with all historical claims, there are legitimate questions about the meaning and significance of the history. To begin with, how broadly or narrowly should one characterize the relevant medium of conduct for the purpose of triggering speech protection? In *Masterpiece Cakeshop*, was Philips' medium "preparing food," "making cakes," "making wedding cakes," "making custom wedding cakes," "making custom wedding cakes in a time when the meaning of marriage is fiercely contested"? Depending on the level of generality, the historical and legal materials might yield different results. Even if that issue could be settled in a sensible way, sometimes there are historical strands that point in different or even incompatible directions. Sometimes the history is vague. A similar uncertainty may plague the application of legal history. How much precedent is enough, especially if the precedent is not directly on point or comes from a jurisdiction or lower court that does not control the outcome?

Beyond the historical analysis, there was also a functional element in Volokh's approach regarding expressive mediums. Unlike parades, the brief asserted, cake baking is not an *inherently expressive* medium in the sense that it need not be accompanied by verbal or written communication to be regarded as expressive. The "dominant purposes" of cake-baking are non-expressive, Volokh asserted. For consumers, they provide calories and taste. For bakers, they provide income. The cakes don't chiefly convey complex meanings akin to those conveyed by words, music, and images. Even if used in important ceremonies like weddings, Volokh argued, "their significance is inextricably tied to their being eaten, not to any message they visually convey."[91]

There are reasonable grounds for disagreement with this analysis, even using Volokh's own historical and functional terms. In general, it may have underplayed the rich symbolic significance that wedding cakes have always had for couples and their celebrants. That significance may have been sharpened and intensified by the existence of the public controversy over same-sex marriage.

91. *Id.* at 10.

The *Masterpiece Cakeshop* brief also did not mention one indicator of expressiveness that had been proposed in the *Elane Photography* brief. Customers pay exorbitant prices for wedding cakes, just as they pay a premium for wedding photography. Indeed, people pay inflated prices for everything produced by the wedding-industrial complex, a gazillion-dollar economic enterprise. That indicates they commonly place symbolic value beyond the material in such things. Is that because people traditionally see much wedding paraphernalia as expressive? If they do, that would support the proposition that many of the vendors who make them are seen by the public as expressing something.

But on reflection, the cost of the product probably should not be considered relevant for free speech purposes. Most things associated with weddings, including some that don't involve expressive media, are expensive. Furthermore, expense is a continuum—not a line—so it's not clear how courts would use it to figure out what is and is not protected on that basis.[92]

Volokh did allow that "cake-makers might indeed have a First Amendment right to decline to include written or graphic messages" on the cake itself.[93] In other words, cake-bakers have pastry-gun rights. Writing, whether it's done with ink or icing, is a generally expressive medium.

The *Masterpiece Cakeshop* brief rebutted expansive claims made by ADF and Cato that wedding cakes are protected because they are a form of "art." Cooking is an art, setting a table might be considered an art, and Subway's employees are called "sandwich artists." But the First Amendment would not shield a restaurant that refused to cook or prepare a table for certain customers on the ground that enforcement of a public accommodation law would be a speech compulsion. A similar analysis, the brief argued, would apply to clothing or hair designers who tried to claim constitutional protection for their art.[94]

The brief emphasized the relevance of context for a medium that has not traditionally been regarded as generally expressive. Using a characteristically playful Volokhian example, the brief

92. I'm grateful to Andy Koppelman for raising this point.
93. *Masterpiece Cakeshop* brief, *supra* note 1, at 9–10.
94. *Id*. at 11–13.

noted that Marcel Duchamp's urinal might be protected art when placed on display in a museum. But "functional urinals are not generally protected expression"—even if they are architecturally graceful.[95]

If baked goods, including ones intended for special occasions, are protected forms of "art" Volokh concluded, any human activity could be recast as a form of First Amendment protected expression.[96] That cannot be our law.

Aside from these matters of high constitutional principle, Volokh noted that the specific enforcement action taken by Colorado implicated no speech violation. The Commission's order did not compel symbolic conduct or the creation of any cake that might constitute expression, either with or without writing, symbols, or other design elements. The Commission did not require any customization. The Commission even conceded that a wedding cake baker could decline "to create cakes that feature *specific designs or messages* that are offensive."[97]

This is where facts and context matter in the Volokh analysis. The gay couple walked into Masterpiece Cakeshop, looked through an album of Phillips' customized cakes, and told him they wanted a cake "for our wedding." Phillips replied that he would not "create wedding cakes for same-sex weddings," and then added, "I'll make your birthday cakes, shower cakes, sell you cookies and brownies, I just don't make cakes for same-sex weddings." The couple got up and left. There was no discussion of text, graphics, images, or designs. The entire conversation lasted 20 seconds. The brief noted:

> For all Phillips knew, Craig and Mullins might have settled on a preformulated cake design from Phillips' photo album and asked Phillips simply to execute it to their specifications (regarding, for example, the height, diameter, or number of levels of the cake). In that case, there would be little to suggest the baker was involved in a creative or artistic endeavor.[98]

Such sales of preset designs, tailored only to non-expressive customer specifications (like height or diameter), would draw no

95. *Id*. at 13.
96. *Id*. at 14.
97. Brief of the Colorado Civil Rights Commission in Opposition, Masterpiece Cakeshop v. Colorado Civil Rights Comm'n, 584 U.S. 617 (2018) (No.16-111), at 11 (emphasis added).
98. *Id*. at 16.

First Amendment concern, the *Masterpiece Cakeshop* brief suggested.

> Or the couple could have asked Phillips to sell them a cake, if one were available, that had already been made and was sitting in a display case. There is no reason to think that Masterpiece Cakeshop's selling a bland, nondescript, or premade cake for a same-sex wedding would be intended to and likely would be perceived as symbolic expression.[99]

The sale of a pre-made cake would also not be a speech compulsion. That point was subsequently expanded and explained in the *303 Creative* brief.

Even customization is not invariably expressive. "Everything from automobiles to shoes may be customized, allowing individualized consumer choices among innumerable option combinations," the *Masterpiece Cakeshop* brief explained, giving the Ford 150, with its 10 million option combinations, as an example. An order requiring Ford to sell trucks without discrimination to car buyers would not be a speech compulsion. The constitutional question is not whether the business customizes a product, but whether the customization itself communicates protected expression.[100] This was a further wrinkle in speech protection for commercial products.

On the facts of the case, Craig and Mullins as the potential customers did not make any request for an expressive message. Of course, the baker might have subjectively believed that making the cake would have communicated a message about the marriage, but "there is not a substantial likelihood 'that the message would be understood by those who viewed it.'"[101] Phillips's refusal to create the cake was therefore conduct (and not protected symbolic conduct), which is unshielded by the freedom of speech.

For Volokh, *Masterpiece Cakeshop* would have been a different case if the Commission had issued an order to use certain "words, symbols, or other politically significant design elements" because that would constitute regulation of a traditionally

99. *Id*. at 16–17 (citing Rumsfeld v. Forum for Academic and Institutional Rights, 547 U.S. 61, 66 (2006) (concluding that mere compliance with antidiscrimination law through providing interviewing rooms is not compelled speech, and noncompliance would not be protected symbolic expression)).

100. *Id*. at 17.

101. *Id*. at 18 (quoting Texas v. Johnson, 491 U.S. 397 (1989)).

expressive medium (words or symbols) rather than an unprotected one (cake baking).[102] For that reason, on the specific facts of the case as presented to the Court, Philips was refusing to provide "a particular sort of product to customers based solely on their sexual orientation," in violation of state law and without constitutional protection for that violation. Under the circumstances, his refusal to serve Craig and Mullins was status-based, not message-based.

The brief concluded with a warning about where Phillips's and his *amici*'s arguments might lead. Their claims could not be limited to baking cakes because cakes aren't the only wedding-related goods or services that might be thought to express messages. In fact, the Volokh brief pointed out that 479 "Creative Professionals" had filed an amicus brief supporting Masterpiece Cakeshop. Among those claiming First Amendment protection for their professions were a seamstress, a milliner, a stage-lighting designer, event planners, a knitter, a needle maker, and a paper crafter.[103]

Nor could Phillips's free-speech claim be limited to weddings, the brief cautioned. Birthdays, baby showers, anniversaries, and graduations, for example, are also studded with importance in a family's life.

Nor would the potential exemption cases be limited to claims of discrimination based on sexual orientation. Public accommodations laws commonly forbid discrimination based on race, national origin, color, religion, and sex. The First Amendment might require exemptions from these statutory applications to other forbidden grounds as well, Volokh allowed, but that only highlighted how limited such exceptions should be. ADF's and Cato's theory of protection for art risked making narrow expressive exemptions the rule.[104]

There was another danger lurking in the litigation. Volokh agreed with the Justice Department, which sided with Phillips, that people can't be required to "actually participate in others' speech or ceremonial expression, religious or secular."[105] But simply making and delivering the cake didn't qualify as sufficient

102. *Id*. at 18–19.

103. *Id*. at 20 (citing Brief of 479 Creative Professionals as *Amici Curiae* in Support of Petitioner at Appendix A (listing professionals from all 50 states)).

104. *Id*. at 22.

105. *Id*.

participation in the wedding. Volokh warned that "such theories would convert the First Amendment into a broad anticomplicity principle punching a hole through the center of the Nation's anti-discrimination laws."[106] The fact that the customers would use the cake in an expressive event did not mean the baker was being unconstitutionally forced to participate in *someone else's* expression.[107] For Volokh, the Constitution's protection for the freedom of *speech* is not an all-encompassing protection for freedom of *conscience*.

C. CRITICAL RESPONSE TO THE *MASTERPIECE CAKESHOP* BRIEF

Academic criticism of the *Masterpiece Cakeshop* brief was muted. For example, although Professor Koppelman continued to oppose drawing lines between expressive and non-expressive business services under antidiscrimination law, he agreed the line proposed in the *Masterpiece Cakeshop* brief was "the most sensible one."[108] Under that line, Koppelman explained, expression should be protected if it falls within a medium that "has historically and traditionally been recognized in the law as expressive."[109] He agreed that writing, website design, and photography are plausibly protected as generally expressive mediums, but cakemaking and flower-arranging are not. But Koppelman worried that this sensible line would be ignored by a right-wing court that was more interested in protecting conservative Christians than in protecting speech.[110]

In June 2018, the Supreme Court issued its decision in *Masterpiece Cakeshop*, reversing the judgment of the Colorado Court of Appeals. The Court held that during its proceedings the Commission violated the Free Exercise Clause of the First Amendment by exhibiting hostility towards Phillips because of his religious beliefs. However, the Supreme Court did not rule on the question of whether businesses can refuse services based on free speech objections to creating expressive products. Resolution of the free-speech issue would come with the Court's decision in *303 Creative*.

106. *Id*.at 25–26.
107. *Id*. at 28.
108. Andrew Koppelman, *The Dangerous 303 Creative Case*, CANOPY FORUM (June 15, 2022), https://canopyforum.org/2022/06/15/the-dangerous-303-creative-case/).
109. *Id*.
110. *Id*.

III. THE *303 CREATIVE* BRIEF

In the interim between *Masterpiece Cakeshop* and *303 Creative*, considerable momentum gathered behind the compelled-speech argument in the Volokh briefs.

In *Telescope Media Group v. Lucero*, Volokh and Cato together submitted an amicus brief in support of a Minnesota video production company run by a Christian couple who objected to producing videos for same-sex marriages.[111] The Eighth Circuit determined that wedding videos are a form of speech subject to First Amendment protection. Requiring them to make the videos was in effect a content-based regulation that compelled them to speak favorably about same-sex marriage. The court applied strict scrutiny and concluded the law was not narrowly tailored to achieve a compelling government interest.[112]

In *Brush & Nib Studio, LC v. Phoenix*, Volokh, Cato, and I teamed up for another amicus brief to support two Arizona calligraphers who objected to making custom invitations for same-sex weddings.[113] The Arizona Supreme Court determined that the invitations were "pure speech" because they contained "hand-drawn words, images, and calligraphy, as well as [the calligraphers'] hand-painted images and original artwork."[114] Although the city's anti-discrimination law was facially content-neutral, it operated as a content-based regulation of the plaintiffs' expression "by forcing them to engage in speech they 'would not otherwise make.'"[115] In this case, the state could not meet the strict-scrutiny standard.

Both victories involved pre-enforcement actions based either on stipulated facts or facts asserted in the plaintiffs' own complaints. *303 Creative* involved a similarly clean factual record.

The *303 Creative* brief did not need to wrestle with potentially difficult line-drawing questions of whether a certain product fell on this or that side of the line between expression and conduct. The contending parties stipulated that website design was expressive, that the designer wanted to express certain ideas about marriage through her creations, that the websites would be

111. *Telescope Media Group* brief, *supra* note 1.
112. *Telescope Media Group v. Lucero*, 936 F.3d 740, 756 (8th Cir 2019).
113. *Brush & Nib* brief, *supra* note 1.
114. 247 Ariz. 269, 287 (2019).
115. *Id*. at 293.

customized, that the designs would implicate the designer's speech, and that she would serve customers regardless of sexual orientation. The *303 Creative* brief need only press the principle that protection against speech compulsion extended to the commercial marketplace and urge the Court to reject an appeals court's perilous misapplication of strict scrutiny.

A. THE FACTUAL AND PROCEDURAL BACKGROUND

Lorrie Smith owned and operated 303 Creative, a Colorado graphics and website design business. In 2016, she wanted to expand her business to offer wedding website services that would promote her understanding of marriage as a union of one man and one woman. Although she was willing to create graphics or websites for LGBT customers, she did not want to design websites for same-sex weddings. As we have seen, CADA prohibits discrimination based on sexual orientation and other protected characteristics in places of public accommodation. It also prohibits businesses from publishing or displaying any communication that indicates that the full enjoyment of services will be refused based on protected characteristics. Smith wanted to post a statement on her website explaining that she would only create websites promoting her view of marriage as the union of one man and one woman.

To avoid the possible consequences of violating CADA, Smith brought a pre-enforcement challenge seeking preliminary injunctive relief. She argued that applying CADA to force her to create websites for same-sex weddings would violate her First Amendment rights to free speech, free exercise of religion, and freedom of association.

Both the district court and the Tenth Circuit ruled against her. The Tenth Circuit agreed that CADA regulated her "pure speech" and should be reviewed using strict scrutiny. But the appeals court held that CADA served Colorado's compelling interest in ensuring equal access to publicly available goods and services. It also held that requiring Smith to create same-sex wedding websites would be narrowly drawn to serve that interest because only Smith could offer her unique talents to the websites she created.

Smith appealed to the Supreme Court, which granted certiorari to decide only whether applying CADA to compel her in this way would violate her free speech rights. The facts were

undisputed and straightforward. The free speech argument was teed up.

B. THE BRIEF

On May 31, 2022, Volokh filed an amicus brief supporting Smith in the United States Supreme Court.[116] Other co-counsel included lawyers for AUF, the Hamilton Lincoln Law Institute, Ilya Shapiro, and me.

Volokh started with familiar propositions going back to the *Elane Photography* brief. Government may neither compel, nor force the creation of, speech. Creative professionals—graphic designers included—could not be required to promote events or display messages they disapprove of. "Films and graphic designs published on websites are a 'significant medium for the communication of ideas' ranging from 'direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression,'" the brief proclaimed.[117] As with the photographers in *Elane Photography*, it did not matter that Smith contemplated selling her website design services to the public for profit.[118]

In fact, the brief argued that the intrusion on Smith's "individual freedom of mind" would be especially serious because compliance with the law in this instance would not merely make her a conduit or passive receptacle. Smith would be actively involved in creating each website rather than simply hosting customer-generated content on her platform.

The brief ventured further to observe that free speech protection extended beyond a speaker's views about same-sex marriages. Speech is protected regardless of whether the messages involve matters of religion, sexual orientation, sex, race, national origin, or other classifications. As examples, the *303 Creative* brief offered these hypothetical scenarios:

> Web designers should be free to choose not to speak for any political movement, no matter how laudable or condemnable it is. They should be free not to create web sites or graphic designs proclaiming "White Lives Matter," "The Nation of Islam Is Great," "KKK," "There is No God but Allah," "Jesus

116. *303 Creative* brief, *supra* note 1.
117. *Id.* at 4 (citing Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501-02 (1952)).
118. *Id.*

> is the Answer," or any other message that they cannot in good conscience abide.[119]

The *303 Creative* brief acknowledged, as the earlier Volokh briefs had, that there were important limits on this precept. Free speech protection for web designers, like others, did not mean they were shielded in all aspects of their businesses. "They must in some meaningful sense be 'speaking' or refusing to speak, before First Amendment interests are triggered," cautioned the brief.

Echoing a point made in the *Masterpiece Cakeshop* brief, the Volokh *amici* in *303 Creative* noted: "For example, the same-sex couple that wants merely to purchase a publicly displayed readymade print from a photographer's shop must be treated like other customers under an applicable antidiscrimination law."

This limitation on First Amendment protection in the commercial sphere was now more fully elaborated as a matter of doctrine and theory. Even if the photographer somehow learned a same-sex couple planned to use an existing print to decorate their wedding reception hall, the revelation would activate no speech protection. With respect to the sale of existing wares available to the public, the antidiscrimination requirement to complete the sale would not by itself involve a requirement to speak, even if speech was involved in the original creation of the product. Any speech would have already occurred; constraining a customer's intended use would not be a further exercise of speech. If it were otherwise, every commercial sale could be said to involve speech if only because the business objected to the purpose to which the customer might put the sold item.[120]

In other words, a commercial transaction *per se* is not speech and thus would not draw heightened First Amendment scrutiny. This was another way in which the Volokh briefs

119. *Id*. at 6.

120. *Id*. at 10. In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, the Court advised that "if a baker refused to sell any goods or any cakes for gay weddings, that would be a different matter and the State would have a strong case under this Court's precedents that this would be a denial of goods and services that went beyond any protected rights of a baker who offers goods and services to the general public and is subject to a neutrally applied and generally applicable public accommodations law." 584 U.S. 617 at 632 (2018).

distanced themselves from broad anti-complicity theories of First Amendment protection for all matters of conscience.

In Smith's case, however, the expressiveness of the individual websites had been conceded by stipulation. There was no need to argue whether fungible goods or ready-made creations should be constitutionally shielded from anti-discrimination law.[121]

In analyzing the different outcomes in *Roberts* and *Hurley*, the brief contended that factual differences had driven the results. Both the Jaycees organization and the annual St. Patrick's Day parade were expressive. But the Court concluded that a requirement that the Jaycees simply admit women did not change their message, whereas the forced inclusion of an LGBT group *behind a banner proclaiming their presence* did alter the parade's overall message. The Jaycees were excluding women from membership based on their status as women. The parade organizers were excluding only an unwanted message, not a group of people based on their status as gay, lesbian, or bisexual. It is clear the Court is "willing to draw careful lines between the expressive and non-expressive elements of otherwise expressive activities and organizations," the *303 Creative* brief reasoned. "The details matter."[122]

There was a potentially more wide-ranging threat to First Amendment speech doctrine in the *303 Creative* litigation. In its opinion below, the Tenth Circuit agreed that Smith was speaking through her website creations, that the speech was within the domain of First Amendment protection, and that strict scrutiny applied to any compulsion. But, in a peculiar application of strict scrutiny, it ruled that even if a law forces an individual to create and promote a message to which she objects, such speech can be compelled so long as courts characterize the expressive product or service denied as unique. Since Smith was the only person offering the designs she offered, her services were unique and therefore Colorado could require her to provide them. Even though there was a speech compulsion, the appeals court determined it could be constitutionally enforced because Colorado met the most stringent judicial scrutiny.

121. *Id*. at 11.

122. *Id*. at 13–14 (citing Masterpiece Cakeshop, 584 U.S. at 624 ("In defining whether a baker's creation can be protected, these details might make a difference.")).

What should a court do once it determines that a speech compulsion is present? One option is to employ strict scrutiny, asking whether forcing the vendor to create speech is a necessary means to achieving the government's compelling interest in preventing marketplace discrimination. Another option is to hold that such compelled speech is *per se* unconstitutional. It can never be justified. Notably, the Volokh briefs did not explicitly take a position on what analysis should apply.

Nevertheless, the rest of the *303 Creative* brief was devoted to refuting the Tenth Circuit's erroneous application of strict scrutiny, which would mean the end of speech protection for providers of expressive products.[123]

The brief acknowledged Colorado's strong interest in preventing both dignitary and material harm to gay couples when they seek goods and services from businesses open to the public. The Court said as much in *Masterpiece Cakeshop*.[124]

But, contrary to the view of the Tenth Circuit, the Volokh brief argued the state failed to meet its burden to show that requiring designers to create websites for same-sex weddings was narrowly tailored to protect those interests.

The *303 Creative* brief stressed that the service compulsion heavily burdened Smith's speech while achieving little to give gay couples wider access to wedding website services. The brief argued that these services could be readily obtained from many other providers, just as the *Elane Photography* brief had argued that the lesbian couple could easily find other wedding photographers. The Volokh *amici* anticipated the objections this alternative-availability analysis would draw based on the history of anti-discrimination protections dating to the 1960s struggle over civil rights. But they balked at the idea that the denial of a website designer's services for a same-sex wedding in 2021 could be likened to the plight of Blacks trying to find hotel accommodations across the segregated South. Yet the state clumsily hinted at such a comparison in its Supreme Court brief.[125]

The appeals court maintained that Smith had a "monopoly" on the market for her services. For the Tenth Circuit, this

123. *Id*. at 15–26.

124. *Id*. at 17.

125. Brief on the Merits for Respondents at 38, Elane Photography LLC v. Willock, 600 U.S. 570 (2023) (No. 21-476).

monopoly justified compulsory access to Smith's expressive creations under strict scrutiny. "Under that approach," the brief noted, "no means chosen by the state could be regarded as underinclusive or overinclusive." Any speech regulation would be perfectly tailored to achieve what the state says it is designed to do: compel the expression of the "unique" speech of the speaker.

The Tenth Circuit's version of strict scrutiny was so deferential regarding the state's choice of means that it was hard to tell whether the state might be compelling Smith's speech for the improper purpose of suppressing her disfavored view about marriage. And, even more ominously, the *303 Creative* brief warned that if that version of strict scrutiny were to migrate into other First Amendment doctrines, it would be the end of meaningful judicial review of free-speech regulation.[126]

The brief concluded by linking the cause of gay rights to that of Lorrie Smith. Gays and lesbians had achieved equal treatment in the legislative and judicial arenas over the decades because "the First Amendment has historically protected the rights of Americans to organize politically and to advocate unpopular causes." The same "freedom of mind" protects those who disapprove of same-sex marriage. Volokh urged the Court to "reaffirm all Americans' right to choose what speech they will create."[127]

C. CRITICAL RESPONSE TO THE *303 CREATIVE* BRIEF

In contrast to their silence about the *Masterpiece Cakeshop* brief, this time lawyers and academics lined up to respond to Volokh's arguments. In one sense, this reaction was puzzling: unlike the cake baker's case, *303 Creative* was straightforward. It was not an edge case. The important facts were uncontested and plainly supported the core of the speech claim: wedding website design as Smith proposed it was expressive. But perhaps precisely because the constitutional argument for protecting speech in public accommodations was now so cleanly presented, the argument provoked a strong rebuttal.

Colorado's brief maintained that Volokh's arguments for protection of "unique and expressive" goods and services in the commercial marketplace should fare no better than Smith's plea

126. *303 Creative* brief, *supra* note 1 at 26.
127. *Id*. at 27.

for protecting all artists.[128] The state suggested the line-drawing problems would be insoluble. It questioned how the Volokh *amici* could "exclude tailors from this exemption, even though their work is both expressive and customized to unique customers."[129] The state insisted the Volokh brief offered "no way to assess what qualifies as expressive enough to fall within their exemption."[130] Yet, the state reminded the Court, "these same *amici* recognized that problem in *Masterpiece*, where they noted that a similar exemption could not be limited in any principled way and 'would apply to a vast range of conduct.'"[131]

But taken together, the Volokh briefs did propose a way to assess what qualifies as expressive. That assessment, as laid out especially in the *Masterpiece Cakeshop* brief, involved an inquiry into whether a given activity has historically and traditionally been regarded as expressive, including whether legal precedent had deemed it expressive. There was plenty of support for photography and films on that score. The elements of Smith's wedding website designs would involve original writing and visuals like photographs and video to create a story of the marital relationship. These elements are both functionally and historically expressive.

By contrast, there is no legal precedent, history, or tradition of free speech protection for tailoring clothes. Tailoring is not a recent invention. Absent such historical support, the common tools of the tailor's trade (measuring, cutting, sewing) could not be reasonably regarded as inherently or functionally expressive (unlike writing or singing). It would not matter that the tailor had created a beautiful suit or dress, needed great training and skill to do so, or subjectively intended the clothes to send a message about the wedding. Far from extending speech protection to a "vast array of conduct," the Volokh argument by its terms applied only to a narrow set of expressive products.

In an amicus brief, the ACLU also took on Volokh's arguments.[132] It characterized the Volokh *amici* as supporting the

128. Brief on the Merits for Respondents at 34, 303 Creative LLC v. Elenis, 600 U.S. 570 (2023) (No. 21-476).

129. *Id.*

130. *Id.*

131. *Id*.

132. Brief of the American Civil Liberties Union and American Civil Liberties Union of Colorado as Amici Curiae Supporting Respondents at 28 n.23, 303 Creative LLC v. Elenis, 600 U.S. 570 (2023) (No. 21-476) [hereinafter ACLU Brief in *303 Creative*].

notion that "businesses selling 'inherently expressive' products or services should be permitted to discriminate—a rule that would allow, among others, newspapers, bookstores, and law schools to discriminate on the basis of race."

But the Volokh briefs did not support such a conclusion. Businesses would only be protected insofar as they were engaging in expression. Even expressive businesses would not be protected in their non-expressive activities. Newspapers are expressive, and they would be protected in decisions about what stories to run or what candidates to endorse, but they would not get a free speech exemption from employment, environmental, or health laws.[133]

The ACLU claimed the Volokh *amici* "simply assert, without reasoning, that a bakery's cake would be expressive but a tailor shop's custom-made bespoke suit would not be."[134] The group added that "they offer no administrable principle—nor any explanation for why the plainly expressive character of O'Brien's draft card burning did not earn him the exemption they support for 303 Creative."[135]

That assertion was triply wrong. First, the *Masterpiece Cakeshop* brief *opposed* protection for the baker (although Cato had supported Phillips). Second, the ACLU did not acknowledge, much less rebut, the limiting principle sketched in the Volokh briefs for determining expressiveness based on legal precedent, history, and tradition. That limiting principle, the *Masterpiece Cakeshop* brief explained, could be drawn from *Hurley*, which had no trouble concluding that parades had historically been regarded as expressive. Nor did the ACLU explain why the line between expressive and non-expressive conduct would be any more difficult to administer in the compelled-speech context than in the speech-regulation context. Third, while O'Brien's act of draft-card burning at an anti-war protest was expressive, the government's interest in prosecuting such crimes—the practical need to administer a selective-service system dependent on paper documentation—was arguably unrelated to his speech.[136] Requiring O'Brien not to destroy his draft card involved a

133. Whether some individuals and businesses might have a free-exercise or statutory religious exemption for conduct under some circumstances to such laws is another matter. The Volokh briefs took no position on those questions.

134. ACLU Brief in *303 Creative*, *supra* note 132, at 28 n.23.

135. *Id*. at 19.

136. *U.S. v. O'Brien*, 391 U.S. 367, 376 (1968).

restraint on his conduct that certainly had an incidental effect on his desired speech. But 303 Creative's case, in the actual application of the statute, involved a *compulsion to speak*. In a case where speech itself is declared to be the public accommodation, forcing the speaker to create the message is not "incidental" to the regulation, it *is* the regulation. That's why O'Brien's expression did not "earn" him an exemption from a content-neutral law otherwise aimed only at prohibitable conduct.

The Volokh briefs granted that government has a strong interest in making public accommodations equally available to all. But the ACLU and others missed the monumental significance of having government make *speech itself* (rather than, say, a job, housing, or healthcare) the accommodation to which people are equally entitled. By contrast, *Wooley*, *Hurley*, and *Dale* involved only requirements to accommodate or platform *others'* speech. That was bad enough. In *303 Creative*, the government was claiming the power to make people *themselves* come up with the speech. The Volokh briefs pointedly observed how extreme this power claim is. Short of making schoolchildren mouth ideological messages written by the state, there had never been anything quite like it. The expanding reach of public accommodations laws may make such "unusual" applications increasingly common.

Like the state and the ACLU, the American Bar Association charged that the line between protected and unprotected commercial products "lacks an analytic principle to guide the States or the courts."[137] The Volokh *amici*'s claim, for example, that catering would not be protected was "conclusory and counterintuitive," wrote the ABA.

> Why does the caterer—who must design the menu, prepare the food, and physically attend the wedding to serve the couple and their guests—have any less of a claim to the shelter of the Free Speech Clause than the designer of the online invitation? The caterer's service, after all, is integral to the expressive character of the wedding celebration.[138]

The ABA ignored the analytic principle articulated in the Volokh briefs. There is nothing in legal precedent, much less in the nation's larger history or tradition, to support free speech

137. Brief of American Bar Association as Amici Curiae Supporting Respondent at 23–24, 303 Creative LLC v. Elenis, 600 U.S. 570 (2023) (No. 21-476).

138. *Id.*

protection for designing a menu or preparing food. As for the acts of attending the reception or serving food to the guests, the caterer at most would be engaging in conduct facilitating the celebration. But the caterer is not being forced to sing or dance for the newlyweds.

The ABA was making the same analytic error the federal government made in *Masterpiece Cakeshop*—albeit to different effect—by mistaking the anti-compulsion principle for a more expansive anti-complicity principle. Free speech claims do not necessarily justify free conduct claims. Helping to facilitate an event, however indirectly, is not necessarily to express support for it. That's a line the Volokh briefs were at least attempting to draw. The ABA made no substantive attempt to challenge it.

A trio of public accommodations scholars also took issue with the Volokh *amici* in *303 Creative*.[139] In their own *amicus* brief, the scholars argued that the petitioner and the Volokh *amici* had committed several "core errors."

The scholars first argued there was no speech compulsion because Colorado's law would not require Smith "to create anything [she] would not otherwise create." She merely had to sell her "*designs* to all buyers."[140] This was an evasion. Under the stipulations, Smith would be required to create expression (the websites were by concession and common-sense expression) if she engaged in the business at all. The websites would not be mere templates where only details of time and place were inserted. Smith proposed to include her own original writing and customized graphics to tell the couple's love story. The scholars did not even attempt to argue that the elements of Lorrie Smith's proposed wedding websites were not expressive.

They next claimed that the arguments for *303 Creative* "largely ignore the commercial context here." Citing a 1984 concurrence by Justice O'Connor, they asserted that "going into business marks a qualitative change in" free speech protection.[141] But the Volokh briefs, including the *303 Creative* brief, pointed

139. Brief of Public Accommodations Law Scholars as Amici Curiae Supporting Respondents at 17–20, 303 Creative LLC v. Elenis, 600 U.S. 570 (2023) (No. 21-476) [hereinafter Scholars' Brief in *303 Creative*]. The scholars were Professors James Oleske, Elizabeth Sepper, and Joseph Singer.

140. *Id*. at 17 (emphasis added).

141. *Id*. at 18 (citing Roberts v. Jaycees, 468 U.S. 609, 636 (O'Connor, J., concurring in part and concurring in the judgment)).

out that the commercial exchange of speech for money does not immunize state restriction on that speech. The mystery is why public accommodations laws should be thought uniquely immune from constitutional review. *Hurley* and *Dale* showed there was no such immunity. It's true that commerce by itself is not speech, and the act of selling alone is not speech, but much more was present in *303 Creative*.

Next, the public accommodations scholars tried to distinguish *Hurley* as a "'peculiar' exception" to the general principle that antidiscrimination laws are not unconstitutional.[142] They attributed this peculiarity to "the uniquely expressive nature of a parade" and its "'inherent expressiveness.'" By contrast, they argued "a store is not a parade" because stores "do not by their nature exist to express messages."

The problem here is that the rationale driving *Hurley* cannot so easily be limited to its specific facts. The Court discussed the expressiveness of parades as an example of the larger point that the Constitution protects expression beyond written and spoken words. Depending on the context, it shields wearing an armband, saluting or displaying a flag, or walking around in a Nazi uniform.[143]

The Volokh briefs explained that *Hurley* set forth a principle whereby a medium can be considered expressive in our history and tradition and thus could be shielded against state compulsion in the form of an antidiscrimination law. The *Hurley* court itself recognized that the conflict therein was the product of the expanding application of antidiscrimination laws in ways hitherto unseen. This included an expansion in both the spaces and classifications to which the laws applied. While neither aspect of that expansion is inherently unconstitutional, the development risks more conflict with the First Amendment. The application of antidiscrimination law to force the creation of protected speech is a manifestation of that risk.

True, a store is not a parade. But Smith was not planning to sell widgets. She was proposing to sell speech. The Volokh briefs concluded that forcing her to create speech for sale warranted an exception to the general rule that applying public

142. *Id*. at 18.

143. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 569 (1995).

accommodations laws to commercial transactions is constitutional. If *Hurley* was a peculiar application of Massachusetts' public accommodations law, and *Dale* was a peculiar application of New Jersey's, then *303 Creative* was a peculiar application of Colorado's.

The public accommodations scholars criticized Smith for "pronouncing certain professions to be 'too expressive' to be subject to antidiscrimination law."[144] Echoing the New Mexico Supreme Court in *Elane Photography*, they opined that picking and choosing among innumerable professions would be unsound and unworkable. But whatever the petitioner's position on an unyielding "artistic exemption," it wasn't the one advocated in the Volokh briefs. Under the analysis of the Volokh *amici*, the non-expressive activities of a generally expressive professional would not be protected. Conversely, by the same logic, the expressive activities or products of a generally non-expressive professional should also be shielded. In these cases, Volokh's *303 Creative* brief explained, "the details matter."[145]

The scholars closed their brief with a surprising concession: concern about free speech in public accommodations cases "start from a reasonable intuition." Sometimes, they acknowledged, "it matters whether a business is engaged in activities that seek to express its own message."[146] In other words, a business operating in the commercial marketplace can occasionally be exempt from a public accommodations law insofar as it is expressing its own message. There is no talismanic exclusion of public accommodations laws from First Amendment review after all.

To assess whether an expressive exemption for commercial businesses applies, the scholars called for a "multi-factor, fact-intensive objective inquiry that asks whether a public accommodations law interferes with a business's own message." Their proposal was different from Volokh's, to be sure, but once the sacrosanct commercial-noncommercial line is abandoned, the details of how and how much ground to surrender become more manageable.

144. Scholars' Brief in *303 Creative*, *supra* note 139, at 19.
145. *303 Creative* brief, *supra* note 1, at 14.
146. Scholars' Brief in *303 Creative*, *supra* note 139, at 20.

Finally, Professor Tobias Wolff, who represented the lesbian complainants against Elane Photography in the initial litigation that intensified the whole conflict, decided to weigh in with a solo amicus brief. He questioned whether 303 Creative's wedding websites would really be customized in the way the Volokh *amici* argued would be decisive.[147] Wolff fretted that despite the stipulations in the case, Smith's services might not even turn out to be expressive. What if "wedding websites are more modular and formulaic than Petitioner suggests, with most of Petitioner's creativity going into making a well-designed template where customers simply plug in their images and details?"

In that case, the Volokh analysis suggested, there would be no expressive customization performed by the designer and thus no speech protection. As the *Masterpiece Cakeshop* brief explained, whatever expression the service provider contributed would have been created *before* the customer's purchase. The *sale* of pre-made or pre-fabricated products would not warrant speech protection. Wolff acknowledged none of this.[148]

CONCLUSION

In June 2023, ten years after Volokh submitted the first brief in *Elane Photography*, the Supreme Court agreed that professionals offering expressive services could not be forced to create speech. The opinion aligned with principles regarding speech compulsion formulated in the Volokh briefs. Citing the stipulations in the litigation regarding the expressive elements of Smith's services, the Court viewed the designer's wedding websites as a form of expression and concluded that making her produce such websites contrary to her beliefs would force her to create messages she did not agree with. It upheld her right to select commissions based on their content and her personal beliefs. As the Volokh briefs argued, it did not matter that she was offering her services for profit in the commercial marketplace. While the "vast array of businesses" selling "innumerable goods

147. Brief of Professor Tobias B. Wolff as Amicus Curiae in Support of Respondents at 21, 303 Creative LLC v. Elenis, 600 U.S. 570 (2023) (No. 21-476) (citing *303 Creative* brief, *supra* note 1, at 11).

148. For additional critical commentary on the *303 Creative* brief, see Linda McClain, *Do Public Accommodations Laws Compel "What Shall be Orthodox"?: The Role of Barnette in* 303 Creative LLC v. Elenis, 68 *St. Louis U. L.J.* 755 (2024) (critically noting the *303 Creative* brief's reliance on quotes from *Barnette*).

and services" must comply with public accommodations laws, providers could not be required by such laws to create expression.[149]

The Court did not write a treatise on the First Amendment. It decided the case before it, leaving open many questions about future applications. Hard cases about where to draw the line between protected speech and unprotected conduct will arise, as they have in many other First Amendment cases. The Court did not indicate how the line should be drawn. Nor did it do much to ease the anxieties of its critics. There can be no certainty about how far the decision might be taken in the hands of aggressive litigants and maverick lower courts.

However, there is a methodology that would avoid expanding *303 Creative* in ways that would gut public accommodations laws. Limiting principles can be identified. They can be found in the Volokh briefs.

In short, what Volokh did in these briefs was an impressive achievement on two fronts. The briefs were infused with the classical liberal ideals of tolerance and pluralism that undergird both free speech and the cause of gay rights at their best. They were pragmatic, nuanced, and thoughtful. They drew from deep wells of knowledge about First Amendment theory and doctrine. It was Eugene Volokh at his best, and that's about as good as it gets.

149. *303 Creative*, 600 U.S. at 591–92.