

Exemptions to the Fourteenth Amendment based on the First Amendment

U.S. Supreme Court Cases in Recent Years

OTMU1114-3005 Rights-Thinking: Exploratory Workshop on Current Legal Issues in the U.S.A.

Bachelor's thesis

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My thesis is about the exemptions made to the Fourteenth Amendment's requirement of equality on the basis of the First Amendment's rights of free speech and religious liberty, and how these decisions are made in the United States Supreme Court. These exemptions have impaired the equal right of minorities in the U.S. since the Court's decisions are above other legislation. Since the Supreme Court has been ruling in favor of these religious exemptions more than any Court before, I also look into the negative consequences these decisions have on the LGBTQIA+ community.

This thesis was made using case argumentation analysis on the Supreme Court cases *Masterpiece Cakeshop v. Colorado*, *303 Creative v. Elenis* and *Fulton v. Philadelphia*. I focused on the arguments provided in the opinion of the Court, the dissenting opinion as well as the Briefs of both the petitioners and the respondents. All of these cases involve a business claiming their constitutional right not to provide service to a same-sex couple because it would be against their religious beliefs. The Court ruled in favor of the exemption in all of these cases.

My thesis proves how harmful these Supreme Court decisions are for the sexual minorities. The Court's Justices' arguments are based on their own values and opinions, and the conservative majority has already done a lot of damage to the equality of people. Besides being denied service, the majority of the Court's arguments could be used to justify broader exemptions in other areas as well such as employment or health care. This development has also raised concerns on how these rulings may affect other minorities, such as racial minorities or disabled people, as well since religion has been used as a justification for their discrimination as well in the past. The election of the Justices and their arguments in the Court should be looked into for these reasons in the future.

Key words: constitution, freedom of speech, religious rights, equality

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ON-työni tutkii poikkeuksia Yhdysvaltain perustuslain neljännen lisäyksen yhdenvertaisuusvaatimukseen, jotka on tehty perustuslain ensimmäisen lisäyksen sananvapauden ja uskonnonvapauden pohjalta. Nämä poikkeukset ovat heikentäneet vähemmistöjen yhdenvertaisia oikeuksia Yhdysvalloissa, koska korkeimman oikeuden päätökset ovat muun lainsäädännön yläpuolella. Lisäksi tarkastelen, miten näitä ongelmallisia päätöksiä tehdään Yhdysvaltojen korkeimmassa oikeudessa. Koska korkein oikeus on puoltanut näitä poikkeuksia enemmän kuin mikään muu oikeus aiemmin, selvitän myös näiden päätösten negatiivisia vaikutuksia seksuaalivähemmistöihin.

Käytän työssäni oikeustapauksen argumenttien analysointia korkeimman oikeuden tapauksissa *Masterpiece Cakeshop v. Colorado*, *303 Creative v. Elenis ja Fulton v. Philadelphia*. Keskityn analyysissä korkeimman oikeuden mielipiteeseen, vastustavaan mielipiteeseen sekä kantajien ja vastaajien toimittamiin asiakirjoihin. Kaikissa näissä tapauksissa on kyse siitä, että yhtiö vetosi perustuslailliseen oikeuteensa kieltäytyä palvelemasta samaa sukupuolta olevia pareja, sillä se olisi palvelun tarjoajan uskontoa vastaan. Oikeus puolsi kaikissa tapauksissa poikkeusta yhdenvertaisuusvaatimukseen.

Työni osoittaa, kuinka haitallisia korkeimman oikeuden päätökset ovat seksuaalivähemmistöille. Korkeimman oikeuden tuomareiden argumentit perustuvat heidän henkilökohtaisiin arvoihinsa ja mielipiteisiinsä, ja konservatiivinen enemmistö onkin jo ehtinyt tehdä paljon haittaa ihmisten tasa-arvolle. Palvelun tarjoamisesta kieltäytymisen lisäksi korkeimman oikeuden argumentteja voidaan käyttää myös oikeuttamaan syrjintää esimerkiksi työelämässä tai terveydenhuollossa. Tämä kehitys on myös herättänyt huolta siitä, miten nämä päätökset voivat vaikuttaa myös muihin vähemmistöihin, kuten rotuvähemmistöihin tai vammautuneisiin ihmisiin, sillä uskontoa on käytetty oikeuttamaan myös heidän syrjintäänsä menneisyydessä. Tämän takia tulisi kiinnittää tulevaisuudessa erityistä huomiota siihen, miten tuomareita valitaan, ja miten he perustelevat päätöksensä oikeudessa.

Avainsanat: perustuslaki, sananvapaus, uskonnonvapaus, yhdenvertaisuus

Table of contents

Exemptions to the Fourteenth Amendment based on the First Amendment.....	I
References.....	VI
List of Abbreviations	IX
1 Introduction	1
2 Research materials and methods	3
3 Masterpiece Cakeshop v. Colorado Civil Rights Commission	5
4 303 Creative v. Elenis	8
5 Fulton v. Philadelphia.....	10
6 Argumentation in the Supreme Court	13
7 Consequences.....	15
7.1 Direct effects of the rulings.....	15
7.2 Possible outcomes in the future.....	18
8 Conclusions.....	21

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List of Abbreviations

CADA	Colorado Anti-Discrimination Act
CSS	Catholic Social Services – a foster care agency operating in the state of Philadelphia
LGBTQIA+	Lesbian-Gay-Bisexual-Transgender-Queer-Intersex-Asexual + more – an acronym for sexual minorities

1 Introduction

The core values of the American legislation and legal system can be found in the U.S. Constitution and its Amendments. These include the First Amendment and the Fourteenth Amendment, which have been at a crossfire in recent legal cases in the U.S. court system as well as in the Supreme Court. The First Amendment goes as the following: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”¹ This guarantees the freedom of speech as well as religion as constitutional and fundamental rights of the people. The Fourteenth Amendment for the relevant part can be found in the first section: “... nor deny to any person within its jurisdiction the equal protection of laws.”² Not only does the Amendment guarantee equality as citizens, it also provides a constitutional base for non-discrimination laws that are applied in individual states. In this paper, I will focus on the discrimination against sexual minorities.

The United States Supreme Court has previously ruled in a manner where the equal treatment of U.S. citizens and access to services for minorities were seen as important core values in jurisdiction.³ Many of the Supreme Court cases that rejected the ideology of a constitutional right to discriminate based on the First Amendment were about racial discrimination in public places.⁴ In the state of Colorado, where two of the cases that are analyzed in this thesis are located, sexual minorities belong to the same group of protected characteristics as racial minorities.⁵ The same applies to the anti-discrimination legislation of Philadelphia. Therefore, they should be treated based on the previous rulings of the Court, where exemptions targeting a protected characteristic have been denied.

Still, the current situation of the Supreme Court has been changing to a different direction from these previous rulings. The Justices of the Court have been making more and more decisions where individual freedoms of a person override non-discrimination laws.⁶ There has

¹ Constitution Annotated, 1st Amendment

² Constitution Annotated, 1st Amendment

³ Sepper 2020, pp. 273-294

⁴ Sepper 2020, pp. 273-294

⁵ Protected characteristics mentioned in the Colorado Anti-Discrimination Act are disability, race, creed, color, sex, sexual orientation, gender identity, gender expression, marital status, natural origin and ancestry.

⁶ For example, in the Supreme Court cases 303 Creative v. Elenis, Masterpiece Cakeshop v. Colorado Civil Rights Commission and Fulton v. Philadelphia

been a rise in cases where the petitioners claim to have a right not to follow the state's anti-discrimination laws and they base these claims on the First Amendment. More and more businesses are claiming that serving a customer who they don't share values with is compelled speech and therefore a violation of the First Amendment's Freedom of Speech clause.⁷ A lot of the times the Court has been focusing on the religious rights part of the First Amendment,⁸ and the freedom of speech issue has only recently become relevant with the ruling on 303 Creative v. Elenis. This ruling has opened the opportunity to more businesses not only to claim their religious rights as an exemption to non-discrimination but also to claim their right to free speech. This raises a question on the future of anti-discrimination laws and how the Fourteenth Amendment is perceived in the court system.

The main problem this thesis will be focusing on is the setbacks in equality and civil rights that can be seen within the U.S. legal system. I am especially interested in the way the Supreme Court has changed its stand on the importance of non-discrimination based on protected characteristics and how they have argued in the cases. Their decisions are also often based on their own arguments and cases from the prior century. However, society is constantly changing so just because the discrimination of sexual minorities was allowed then does not mean it should be allowed now. The importance of free speech and religious liberty have been on the rise in the Court and in American society. It should be considered how all of this will affect the future of American legislation and business operations.

Here is a synopsis for this Bachelor's thesis. In section two, I will talk about the materials that were used in this thesis as well as the research methods that have been used to do the analysis. Section three will be focusing on analyzing the Supreme Court case Masterpiece Cakeshop v. Colorado Civil Rights Commission and the argumentation used there. Section four will go through the case 303 Creative v. Elenis. In section five, I will focus on the case *Fulton v. Philadelphia* and the argumentation tactics that were used there. In the sixth section, I will go deeper into the analysis of the argumentation used in the Supreme Court. There will be a more detailed analysis on the development and its consequences based on articles and research materials in section seven. Finally, section eight will be a concluding section where I will explain the most important findings of my analysis and the main questions we are left with.

⁷ Sepper 2020, pp. 273-294

⁸ For example, in the Masterpiece Cakeshop case the petitioners argued that the case is about compelled speech, however the Court only ruled on the Free Exercise clause of the First Amendment.

2 Research materials and methods

As I was reading about the 303 Creative v. Elenis case, I noticed a tension between the First and the Fourteenth Amendments, and how the Court seemed to favor free speech over the equal rights of sexual minorities. I found it fascinating which is why I chose that particular case to be a reference in my thesis. That case led me to the Masterpiece Cakeshop case as it was referenced and used as an example in the arguments of the 303 Creative case. I chose this as the second case, because even though the cases are similar, they focus on different clauses of the First Amendment. The Masterpiece Cakeshop case focuses on religious rights⁹, while the 303 creative case is focusing on the freedom of speech.¹⁰ While I was looking into the Free Exercise clause being used in the Supreme Court, I came across the *Fulton v. Philadelphia* case. I chose the case as a reference because the petitioners of the case used a common tactic of narrowing down the issue in order to get an exemption from the anti-discrimination legislation. In all of these cases, I went through the opinion of the Court, the concurring opinions, the dissenting opinions as well as the briefs on both the petitioners and the respondents in order to get a well-rounded picture of the cases at hand. I chose these three cases as the main sources for my Bachelor's thesis in order to understand the current state of the United States Supreme Court and how the cases are argued there.

Other materials I used in this thesis include academic journal articles that discuss the cases and the Court's arguments as well as the consequences that these rulings have had already and may have in the future. The articles also gave some background to the development that has been happening in the Supreme Court in the past decade. I also used some research materials that show the discrimination against sexual minorities, how much it is being reported and where it is happening. This helped me to understand how the lives of American sexual minorities are being affected by the Supreme Court's rulings. I also used websites such as Constitution Annotated to really understand the background of the Constitution and its Amendments as well as the goals that they are trying to reach.

I made my thesis using case argumentation analysis and I focused on the different ways the same case was argued by different parties, as there were usually some drastic differences. I looked into the disagreements between the petitioners and respondents as well as the different

⁹ Masterpiece Cakeshop v. Colorado 583 U.S. (Syllabus) at 1

¹⁰ 303 Creative v. Elenis 600 U.S. (Syllabus) at 1

Justices delivering the opinion of the Court, concurring opinions and dissenting opinions. The way the facts of the case are stated in different ways on the different sides to achieve its goals is also analyzed in this thesis as well as how the parties framed their questions of the case. It is not unusual that the parties of a case are actually arguing about different questions and it can be seen especially in the briefs of the case The Supreme Court Justices also use norms, cases and precedents very differently, once again framing their own arguments. They even use the same case as an example but in completely different ways where one side is arguing that the case should be distinguished and the other side is arguing that the case should be reaffirmed. I also looked into the context and history surrounding the problem that is using the First Amendment as a justification of discrimination.

3 Masterpiece Cakeshop v. Colorado Civil Rights Commission

In the case of *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 584 U.S. ___ (2018) a Christian baker from Colorado, Mr. Phillips, refused to make a custom wedding cake for a same-sex couple, claiming it would be against his religious beliefs. He stated that he has a constitutional right to act according to his religious beliefs, and that could not be affected by non-discrimination legislation. He claimed that he would sell other products, such as birthday cakes, to sexual minorities but that making a wedding cake specifically for them would violate his First Amendment rights.¹¹ The couple he refused to serve filed a charge based on the Colorado Anti-Discrimination Act (CADA) and its section on discrimination based on sexual orientation.¹² Lower Courts ruled in favor of the couple stating that Phillips' acts were discriminatory and that making a custom wedding cake does not violate the baker's First Amendment rights. The Supreme Court, however ended up ruling in favor of Phillips stating that Colorado's acts violated the Free Exercise clause¹³ and therefore Phillips' constitutional rights. The lower courts' decisions were reversed.

The Court's opinion focuses on the religious rights granted in the First Amendment and the required neutrality of the Colorado Civil Rights Commission.¹⁴ They build their entire argumentation on the fact that some of the commissioners' comments were hostile towards religion. For example one of the commissioners stated that using religion as a justification to hurt others is "one of the most despicable pieces of rhetoric that people can use."¹⁵ The commissioner also brought up that religion has been used in the past as a justification for horrible events such as slavery and the Holocaust. The commissioner's stance on religion becomes clear in their comments. Because the Free Exercise clause requires full neutrality on matters of religion, they argue that the decisions made needed to be reversed. Some Justices of the majority¹⁶ also see hostility towards religion in the fact that the Commission has ruled differently in three other cases where a baker refused to bake a cake that went against their conscience. In these cases, the ruling was in favor of the baker who did not want to make cakes that had discriminatory messages that were based on religion.¹⁷ The cases differed from

¹¹ *Masterpiece Cakeshop v. Colorado* 584 U.S. (Syllabus) at 1

¹² *Masterpiece Cakeshop v. Colorado* 584 U.S. (Syllabus) at 1

¹³ The First Amendment's Free Exercise clause states that free exercise of religion shall not be prohibited.

¹⁴ *Masterpiece Cakeshop v. Colorado* 584 U.S. at pp. 2-3: The constitution requires religious neutrality, therefore the state has an obligation to act neutral towards religion in these considerations.

¹⁵ *Masterpiece Cakeshop v. Colorado* 584 U.S. at pp. 13-14, These comments were not objected to on the record.

¹⁶ Justice Kagan and Justice Breyer disagreed with this in Kagan's concurring opinion.

¹⁷ *Masterpiece Cakeshop v. Colorado* 584 U.S. (Ginsburg, J., dissenting) at pp. 2-4

Masterpiece v. Colorado in the way that the bakers had made other religious cakes and were serving religious people. The request was denied based on the individual message and not the person requesting it. These differences were the reason why even the majority's Justices were not able to agree whether this proves the Commission's hostility towards religion or not. Some Justices in the majority opinion thought that the cases were in fact different enough and that the decision of the Court could have been based on neutral application of the law instead of claiming hostility.¹⁸

The dissenting opinion also discussed the other cases the Commission had ruled on, and highlighted the fact that in those cases the baker would not serve anyone with requests that were demeaning towards other people regardless of their religion. Phillips on the other hand singled out same-sex couples even if they hadn't mentioned a message but instead had asked simply for a wedding cake, which was a service Phillips would offer other clients.¹⁹ The couple Phillips refused to serve actually hadn't asked for any message to be on their cake, they had just simply asked for a wedding cake. The cake wouldn't have differed from any other wedding cakes that Phillips makes and it wouldn't have included a message in support of same-sex marriage. This proves that Phillips refused service based on the clients' sexual orientation. Therefore, the law was applied neutrally and not in a way that is hostile towards religion. The Justices in the dissenting opinion had not found evidence of hostility based on the comments of some members of the Commission either. More importantly, they bring up that there are four decision-making entities involved in the decision and that the few comments made by a single commissioner would not affect the final decision.²⁰ They do not see why these comments made by one or two individuals should be a reason to overlook the fact that Phillips is acting in a discriminatory way either.²¹ Since refusing the service that the company would provide to others based on the client's sexual orientation is illegal discrimination under CADA, there should not be a justification to allow it.

In this case it is particularly interesting to look at the differing opinions of the Justices since even the majority opinion themselves could not agree on how to interpret the Commission's decisions in the other cases. Even though they were able to base their arguments on the hostility of the Commission in the end, some Justices thought that this wasn't even a

¹⁸ Masterpiece Cakeshop v. Colorado 584 U.S. (Kagan, J., concurring) at 2

¹⁹ Masterpiece Cakeshop v. Colorado 584 U.S. (Ginsburg, J., dissenting) at 3

²⁰ Masterpiece Cakeshop v. Colorado 584 U.S. (Ginsburg, J., dissenting) at 3

²¹ Masterpiece Cakeshop v. Colorado 584 U.S. (Ginsburg, J., dissenting) at 3

necessary argument.²² Instead, they thought that the law itself was applied wrong and that is enough in itself, which would have been a more valid argument for the Court to make. This really shows that there were many ways this case could have been ruled, but that the majority's values of respecting religion and the First Amendment were once again in the center of the decision. Even though the comments of the commissioner were quite hostile in their nature, the dissenting opinion's argument on how it doesn't affect the final decision that has gone through multiple entities and the lower courts is still relevant. This shows that the values of an individual Justice have a major role in the decisions made by the Supreme Court, and that they have the ability to affect the entire country since the lower courts and legislators have to use the decisions of the Court as the base of their own decisions.

²² *Masterpiece Cakeshop v. Colorado* 584 U.S. (Opinion of Thomas, J.) at 1

4 303 Creative v. Elenis

In the Supreme Court case 303 Creative v. Elenis 600 U.S. ___ (2023)(Slip Opinion) Ms. Smith wanted to expand her business 303 Creative to creating custom websites for weddings. However, she was worried that the Colorado Anti-Discrimination Act (CADA)²³ would force her to offer these services to same-sex couples, which she thinks would be a violation of her First Amendment rights. The main argument was that providing service to these same-sex couples whose weddings are against her religious beliefs would be compelled speech by the state of Colorado.²⁴ To prevent this, Smith decided to seek an injunction. The district court ruled that Smith did not have a First Amendment right to this injunction. This decision was later affirmed by the Tenth Circuit. The case was granted certiorari and was presented in the Supreme Court. The majority ruled in a 6-3 decision in favor of Ms. Smith, stating that her business that is creating websites falls under the protection of the First Amendments Freedom of Speech clause and that making a website that is against her religious beliefs would in fact be compelled speech.²⁵

In the Brief for Petitioners the question presented is the following: “Does applying public accommodations law to compel an artist violate the Free Speech clause of the First Amendment?”²⁶ The petitioners believe so. They argue that Smith’s designs and websites are in fact her speech and that the people looking at these websites would know that they are artwork done by Ms. Smith.²⁷ The petitioners really focus on the alleged unconstitutionality of anti-discrimination legislation, and they also offer alternatives to the interpretation of CADA. It is stated that government officials cannot decide what is right or wrong and that they are misusing public accommodations laws to force artists to speak the government’s message. In this case, the compelled speech would be offering services to same-sex couples. They also suggest that an individual’s First Amendment rights should override the anti-discrimination legislation and that regulating an artist’s expression is unconstitutional. They propose that Colorado should narrow down what it considers to be public and interpret CADA in a way that would allow Smith to decline a project that would send a message that is against

²³ The Act prohibits discrimination based on sexual orientation, gender identity or gender expression in public accommodations.

²⁴ 303 Creative v. Elenis 600 U.S. (Syllabus) at 1

²⁵ 303 Creative v. Elenis 600 U.S. (Syllabus) at 1

²⁶ 303 Creative v. Elenis 600 U.S. (Brief for Petitioners) at 1

²⁷ 303 Creative v. Elenis 600 U.S. (Brief for Petitioners) at 6: Every website designed by Smith would include the text “Designed by 303creative.com”

her beliefs.²⁸ The petitioners think that an exemption to artists from the regulation is necessary.

The Supreme Court's majority agrees with the petitioners of the case. They state that even though Colorado's anti-discrimination laws have secured civil rights for marginalized groups, in this case Colorado is compelling speech instead of ensuring equal service to people.²⁹ They emphasize how the websites are all expressive and custom-made and therefore they should not be regulated by CADA. Even though Smith hasn't started her wedding website business yet, the majority believes that there is a credible threat that Smith would be penalized for excluding same-sex couples from her services on the basis of previous cases.³⁰ The arguments state that the First Amendment protects Smith from having to speak a message she does not believe in.³¹ It is also brought up how protected speech doesn't have to be logical or even well intended in order to be protected, but rather it is enough that it is a sincerely held belief. Therefore, it doesn't matter that people may find Smith's actions offensive. They also hold the petitioner's arguments on how Colorado is compelling Smith to speak the state's message and that if she doesn't she will face unconstitutional consequences.

The respondents and the dissenting opinion of the Court however, are focusing more on the discrimination that the LGBTQ+ community has to face and how this decision will allow a business to discriminate against protected persons, even though they should be open to all public. Smith would also have the right to flat out say her business doesn't serve this group.³² The dissenting opinion also denies that there is a constitutional right not to serve a minority or advertise that they are not welcomed. They emphasize that CADA is generally applicable and that it targets conduct rather than speech.³³ The dissenting opinion bases its arguments on the fact that the Supreme Court has previously rejected exemptions to public accommodations laws. Smith would also still be able to advocate for her beliefs, so following the law would not be compelled speech.

²⁸ 303 Creative v. Elenis 600 U.S. (Brief for Petitioners) at 48, They base this on the fact that the state of Mississippi has already narrowed down their definition of public accommodations.

²⁹ 303 Creative v. Elenis 600 U.S. at pp. 12-15

³⁰ 303 Creative v. Elenis 600 U.S. at 4, Colorado enforced CADA in the Masterpiece Cakeshop case

³¹ This is a right granted in the Free Speech clause of the First Amendment.

³² 303 Creative v. Elenis 600 U.S. (Sotomayor, J., dissenting) at pp. 1-2: The Court has previously rejected this ideology and this is the first time in the history of the Court that a business has a constitutional right to discriminate against a protected class.

³³ These are both mandatory requirements to the application of the act.

5 **Fulton v. Philadelphia**

The Supreme Court case *Fulton v. City of Philadelphia*, 593 U.S. ___ (2021) was about whether the city of Philadelphia violated the First Amendment by demanding that a private foster care agency must certify same-sex couples as foster parents. The city has stated that if Catholic Social Services (CSS) doesn't certify same-sex couples as foster parents, they would no longer make a contact about cooperating with them or refer children to them. CSS responded to this by arguing that agreeing to these terms would violate their rights to free speech and the free exercise of religion that are granted in the Constitution's First Amendment.³⁴ The Supreme Court ruled in favor of CSS stating that the city of Philadelphia did violate the Free Exercise clause and that the non-discrimination laws in force are not generally applicable as they burden religious activity.³⁵

The Brief for Petitioners brings up the fact that the city of Philadelphia's foster care system relies on private foster care agencies such as CSS. The agencies provide inspections for foster parent candidates and CSS bases some of its requirements on catholic beliefs. However, now Philadelphia is excluding the agency by freezing referrals during a foster parent shortage.³⁶ The petitioners are focusing on the unfairness of the situation as they try to appeal to the reader's emotions, and they even talk about the history of the catholic church helping children in need. On the legal side of things, they argue that while Philadelphia's actions are based on legislation that prohibits discrimination in public accommodations, foster care is not a public accommodation and should not be treated as such.³⁷ In addition, they state that Philadelphia has violated the First Amendment's Free Exercise clause as the city does not have a neutral non-discrimination law and the city also fails strict scrutiny.³⁸ The petitioners also present a question about compelled speech, but the Supreme Court did not take that into consideration.

The Court made its decision unanimously, and they ruled in favor of CSS, stating that Philadelphia did violate the Free Exercise clause as the petitioners suggested.³⁹ Their arguments were based on Philadelphia's anti-discrimination laws burdening religious activity and therefore not being generally applicable. Since the religious views of CSS are a major

³⁴ *Fulton v. Philadelphia* 593 U.S. (Syllabus) at 1

³⁵ *Fulton v. Philadelphia* 593 U.S. (Syllabus) at 2

³⁶ *Fulton v. Philadelphia* 593 U.S. (Brief for Petitioners) at 1

³⁷ *Fulton v. Philadelphia* 593 U.S. (Brief for Petitioners) at 13

³⁸ *Fulton v. Philadelphia* 593 U.S. (Brief for Petitioners) at pp. 17-18

³⁹ *Fulton v. Philadelphia* 593 U.S. (Syllabus) at 1

part of their activity, the requirement of non-discrimination is burdening their religious exercise.⁴⁰ According to the Court, the city does not have a compelling reason not to exempt CSS based on their religious hardships. It is argued that the government is not neutral when it acts in an intolerant way towards religion and that individual exemptions should be granted.⁴¹ The Court also answers to the city's claims of CSS being public accommodation by stating that foster parent certifications are not available to everyone in the public therefore, it is not public accommodation and should be exempt from the non-discrimination requirements. Since CSS is willing to certify gay individuals as foster parents and place gay children into homes, they are not guilty of illegal discrimination.⁴²

The case involves many concurring opinions by the Justices. They bring up even more arguments on ruling in favor of CSS. They bring up that even offensive or disagreeable expressions are protected by the First Amendment and that preventing this kind of harm is not an interest that should be able to justify the infringement of a constitutional right.⁴³ Justice Alito also states that CSS has not interfered with the efforts of a same-sex couple fostering a child and that there is no credible threat to that happening.⁴⁴ In the documents, it is also found that same-sex couples did not seek certifications from CSS knowing their catholic values and if they were to do so, CSS would recommend another agency for them.⁴⁵

In the Brief for Respondents, the question is whether the First Amendment bars Philadelphia from requiring non-discrimination from private foster care agencies in its contracts or not. The respondents base their arguments on the claim that foster care agencies such as CSS are exercising delegated government power.⁴⁶ Therefore, CSS lacks the constitutional right to exercise this power on Philadelphia's behalf in a way the city has determined would be harmful to the children that CSS has the duty to protect. The government also has the authority to require non-discrimination that is neutral and generally applicable from these agencies. The respondents also compare CSS staff to government workers and claim that they don't have the permission to perform their job in a way their religion requires, as this would be against the obligation of equal treatment.⁴⁷ CSS also receives government funding, so they

⁴⁰ *Fulton v. Philadelphia* 593 U.S. at pp. 4-5

⁴¹ *Fulton v. Philadelphia* 593 U.S. at pp. 5-6

⁴² *Fulton v. Philadelphia* 593 U.S. at 2

⁴³ *Fulton v. Philadelphia* 593 U.S. (Alito, J., concurring) at 13

⁴⁴ *Fulton v. Philadelphia* 593 U.S. (Alito, J., concurring) at 5

⁴⁵ *Fulton v. Philadelphia* 593 U.S. (Alito, J., concurring) at 5

⁴⁶ *Fulton v. Philadelphia* 593 U.S. (Brief for Respondents) at 11

⁴⁷ *Fulton v. Philadelphia* 593 U.S. (Brief for Respondents) at 9

should have to follow the rules that are set for these agencies.⁴⁸ Another argument that is used is that CSS is not being burdened because of religion, but instead is being treated equally with other foster care agencies.⁴⁹ Every contract the city has made has the same non-discrimination requirements, and the other agencies follow these requirements. By allowing same-sex couples to be certified, there would be more qualified parents available for the children in need. The respondents also bring up the fact that no one has ever gotten an exemption from this legislation, so if CSS would not be able to get one it wouldn't be because of their faith. They also mention that CSS is not actually excluded from foster care and is still in fact performing its services.

The Supreme Court issued a narrow ruling in this case, only stating that Catholic Social Services is not public accommodation under Philadelphia law and should not be treated as such. Therefore, they should be exempt from the anti-discrimination legislation based on their religious values.⁵⁰ This is a common tactic that the petitioners use when arguing their religious rights against non-discrimination requirements. The Court is more likely to rule in favor of the exemption when the issue is solely about the religious condemnation of same-sex marriage instead of the condemnation of homosexuality itself.⁵¹ When the petitioners narrow down their religious beliefs against sexual minorities to only apply to the conduct of marriage, they have a better chance at winning the case. Since the Court doesn't question the sincerity of these religious beliefs and values, this tactic has resulted in a lot of allowed discrimination against sexual minorities.⁵²

⁴⁸ *Fulton v. Philadelphia* 593 U.S. (Brief for Respondents) at 2

⁴⁹ *Fulton v. Philadelphia* 593 U.S. (Brief for Respondents) at 24

⁵⁰ *Fulton v. Philadelphia* 593 U.S. (Syllabus) at 3

⁵¹ Kazyak – Burke – Behrendt – Oliver 2023, pp. 1-24

⁵² Kazyak – Burke – Behrendt – Oliver 2023, pp. 1-24

6 Argumentation in the Supreme Court

The majority opinion and the dissenting opinion of the Supreme Court tend to use different kinds of arguments in order to achieve their goal. There are times when they have even argued about different questions. For example in *Masterpiece Cakeshop v. Colorado*, the majority opinion is focusing on the behavior of the Colorado Civil Rights Commission and the neutrality of it when they were deciding on the discrimination issue while the dissenting opinion was discussing the application of anti-discrimination laws.

The majority opinion of the Court is mainly focusing on the First Amendment as a constitutional right. In the center of these rulings are religious values which are respected in the Supreme Court. The majority opinion believes that because the First Amendment guarantees the freedom of religion as well as the freedom of speech, it is above anti-discrimination legislation and therefore it grants exemptions to individuals claiming their constitutional rights. It is extremely important to note that the religious values that are respected are Christian values that the Supreme Court majority seems to share. The majority doesn't take into consideration that equality is also a constitutional right that is granted by the Fourteenth Amendment. Instead, they focus on the single anti-discrimination law in question and put the First Amendment above it. They do not acknowledge the consequences their decisions will have on minorities or why sexual minorities are a protected group in the first place either.

The dissenting opinion has a different kind of approach while writing their opinion. They tend to highlight the context of the situation at hand as well as the consequences the ruling will have. For example, they place the case at hand in the context of previous rulings and how these rulings have decided against exemptions from non-discrimination. The dissenting opinion also acknowledges the discrimination minorities face and why they should be protected by these anti-discrimination laws that are still very much needed today.⁵³ A common part of the dissenting opinion is also the possible effects the ruling will have on minorities' lives, legislation and the behavior of the lower courts. They bring up that there have already been laws passed that are harmful to sexual minorities and that these types of decisions will lead to even more discrimination and stigmatization. A very relevant question

⁵³ 303 *Creative v. Elenis* 600 U.S. (Sotomayor, J., dissenting) at pp. 2-22, The entire section discusses the development of civil rights for marginalized groups and the difficulties that they have been through.

on how the discrimination could expand to other protected groups in the future is also brought up.⁵⁴ Finally, the dissenting opinion has a more neutral approach to their argumentation. They focus on the law in question and how it is standardly applies. They don't interpret single comments and the possible tone they have, but rather focus on the legal aspects of the situation. The dissenting opinion's Justices' personal values are not clearly seen in the writings while the Justices' of the majority opinion personal values have become extremely clear in these cases.

⁵⁴ 303 Creative v. Elenis 600 U.S. (Sotomayor, J., dissenting) at 37. Sotomayor brings up that this kind of logic could be used to justify discriminating for example interracial couples or disabled people as well.

7 Consequences

7.1 Direct effects of the rulings

The current Supreme Court has ruled in favor of religion more than any other Court in the past 70 years.⁵⁵ Even though neutral and generally applicable law, such as anti-discrimination laws, should not be rejected the Supreme Court has been making several exceptions to this with its conservative majority.⁵⁶ Especially in the past few years we have seen broader exemptions from states' non-discrimination laws that even stretch out to advertising.⁵⁷ The discrimination that these exemptions have enabled is for the most part targeting sexual minorities and especially same-sex couples who are looking for wedding services. These rulings allow more discrimination to happen and people who are against the equal rights of sexual minorities have already become more vocal about it. The attempts to resist anti-discrimination regulation have been more successful than ever and many businesses have been able to refuse to provide service for sexual minorities.

There has been a rise in cases involving vendors who are refusing service to same-sex couples based on the First Amendment.⁵⁸ This has stretched out so far that even a bed and breakfast, which is classified as public accommodation, refused to welcome a same-sex couple.⁵⁹ Their case was however denied certiorari to the Supreme Court. This still shows the change in behavior that has happened after the Supreme Court rulings. A study done by Netta Barak-Corren showed that vendors were less willing to provide service for sexual minorities after the ruling of *Masterpiece Cakeshop v. Colorado*.⁶⁰ This also included businesses that were providing these same services to sexual minorities before the decision. Since the Supreme Court case was so widely reported, it led to more businesses using the ruling to their own advantage in order to discriminate. The decision signaled that anti-discrimination laws are not enforced in courts of law, and therefore it is also socially acceptable to refuse service based on one's religious beliefs.⁶¹ Not only did the conduct become more acceptable, more businesses have started to identify as religious. This study highlighted the fact that the

⁵⁵ Lavelle 2022, pp. 69-110

⁵⁶ Brannon 2022, pp. 1-6

⁵⁷ Brannon 2023, pp. 1-5

⁵⁸ Sepper 2020, pp. 273-296

⁵⁹ Barak-Corren 2021, pp. 315-366

⁶⁰ Barak-Corren 2021, pp. 315-366

⁶¹ Barak-Corren 2021, pp. 315-266

Supreme Court has the power to change people's behavior as well as attitudes, which is why it is important to look into the possible consequences of a decision before confirming it.

When it comes to the *Fulton v. Philadelphia* ruling, the consequences of the decision can be looked through on how having anti-discrimination laws affect the foster care and adoption system. Anti-discrimination laws increase the possibilities of a child finding a home slightly.⁶² The benefit is greater for older children and children with special needs since same-sex couples tend to adopt those children more than heterosexual couples.⁶³ A benefit for all the children is that anti-discrimination laws do make the process of placing a child a lot faster.⁶⁴ So when agencies do not have to follow these laws, the effects are the opposite. The process becomes slower and children may have a harder time finding a home. The amount of possible homes is also cut down, especially since same-sex couples have been found to be more likely to foster and adopt in comparison to heterosexual couples.⁶⁵

Even though the Supreme Court decisions have been narrow and based on the specific details of the case at hand, the consequences have been seen across the country. After *Fulton v. Philadelphia* foster care agencies have been less accepting towards same-sex couples especially in states that did not grant religious exemptions to their anti-discrimination policies.⁶⁶ People have also become more accepting of service being denied based on religious beliefs. The outcome of the ruling has been in a bigger role than the reasoning which has led to agencies taking advantage of the exemption even in cases where they are not entitled to it.⁶⁷ After the ruling, some states have passed legislation that permits religious exemptions to anti-discrimination laws. This has led to more discrimination which has also led to the increased distress for sexual minorities. Research has shown that in these states the reporting of distress by sexual minorities has increased by 10%.⁶⁸ It is important to acknowledge that these decisions do have an effect on the everyday lives of sexual minorities, even if the ruling doesn't handle an everyday kind of a situation.

There has been a movement for legislation against the rights of the LGBTQIA+ community since the ruling of *Obergefell v. Hodges*, and it has only increased since the Supreme Court

⁶² Barak-Corren 2022

⁶³ Barak-Corren 2022

⁶⁴ Barak-Corren 2022, the process may speed up by nearly 40%

⁶⁵ Barak-Corren 2022

⁶⁶ Barak-Corren – Berkman 2024

⁶⁷ Barak-Corren – Berkman 2024

⁶⁸ Barak-Corren – Berkman 2024

has ruled in favor of these exemptions.⁶⁹ Especially laws granting exemptions to religious individuals and organizations for not respecting the equal rights of sexual minorities have risen in the United States.⁷⁰ This can be seen especially in foster care and adoption agencies that have religious values as eleven states have made laws to ensure that these agencies don't have to act against their religious beliefs. The state of Mississippi has gone as far as to have legislation that prohibits the government from de-funding these organizations.⁷¹ Suing these agencies for discriminatory conduct is also prohibited. At this moment there are multiple states in the U.S. that require government-funding for agencies that discriminate against sexual minorities. Some of these agencies are even allowed to refuse to place LGBTQIA+ children to foster homes.⁷² These laws violate the Fourteenth Amendment's equality requirement as well as the First Amendment's Establishment clause, so they can be seen as unconstitutional.⁷³ If these laws were challenged in the Supreme Court, it would be especially interesting to see the argumentation of the conservative Justices who justify these exemption laws under the First Amendment.

It is also important to note that few situations of illegal discrimination actually become cases and it is even less likely for these cases to make it to court.⁷⁴ Many businesses go around the anti-discrimination legislation by using contracts. For example, it is common in catholic schools to have employment contracts that state that the employee must follow the teachings of Catholicism.⁷⁵ Many religious businesses are also worried about how the public views them, so they regulate the social impact instead. For example, a religious foster care agency was placing children with sexual minorities until their conduct was made public.⁷⁶ It was only after this that they started to refuse to provide services based on religious reasons. The "don't ask, don't tell" policy is still used in the U.S., which makes some of the discrimination experienced by the LGBTQIA+ community go under the radar.⁷⁷

⁶⁹ In *Obergefell v. Hodges* the Supreme Court ruled that states cannot deny access to marriage form same-sex couples in 2015.

⁷⁰ Spoto 2021, pp. 296-333

⁷¹ Spoto 2021, pp. 296-333

⁷² Spoto 2021, pp. 296-333

⁷³ These actions can be seen as favoring Christianity, which is not neutral conduct.

⁷⁴ Barak-Corren 2020, pp. 259-320

⁷⁵ Barak-Corren 2020, pp. 259-320

⁷⁶ Barak-Corren 2020 pp. 259-320

⁷⁷ The policy is used to avoid illegal discrimination by being able to claim the religious or otherwise conservative party did not know about the sexual identity of the person involved and therefore serving them is acceptable.

7.2 Possible outcomes in the future

Since the 303 Creative decision is recent, there is not yet reliable data of its consequences. There are still many takes on how the decision will enable discrimination. Since expressive wedding services have been granted an exemption, it is easy to apply the same logic for other wedding services such as catering companies or florists as well.⁷⁸ The exemption could also be spread from simply denying wedding services to denying service to sexual minorities altogether. Since the exemption was granted on the belief that same-sex marriage is not aligned with religious beliefs, the same logic could be used to grant an exemption based on religious beliefs that homosexuality itself is wrong.⁷⁹ Although the Supreme Court is more likely to rule in favor of a narrow objection, using their arguments and logic would allow broader discrimination as well. Especially since the 303 Creative case's petitioner claimed that she has a constitutional right to exclude same-sex couples from her services as a wedding website designer altogether.⁸⁰ These exemptions could spread to other establishments as well, such as restaurants and movie theaters, if they are able to claim that serving same-sex couples would be compelling them to endorse the relationship publicly.⁸¹

A very interesting viewpoint is about how these rulings could also affect the health care of LGBTQIA+ patients. There has already been a movement that argues that clinicians should be free to express their views on certain patients and therefore they should be exempt from public accommodations laws.⁸² Health care providers are subject to public accommodations laws if they receive federal funding, and they are not allowed to discriminate based on sexual orientation or gender identity.⁸³ The 303 Creative decision has enabled denial of service on the basis of protected characteristics and the Court has failed to define the bounds of its reasoning. As a result, this provides an opportunity for health care providers to argue that they also have a constitutional right to select who they provide services to, based on freedom of speech.⁸⁴ As treatment is more often than not personalized for the patient and health care includes speech and expression, a health care provider could for example argue that providing fertility treatments for same-sex couples would violate their First Amendment rights. There

⁷⁸ Verilli 2022

⁷⁹ Verilli 2022

⁸⁰ Smith 2024

⁸¹ Smith 2024

⁸² Sepper – Romero – Aaron 2023

⁸³ Sepper – Romero – Aaron 2023

⁸⁴ Sepper – Romero – Aaron 2023

have already been some cases concerning this in lower courts. For example some therapists have claimed that the ban on conversion therapy is restricting their speech.⁸⁵ In the case of *Dignity Health v. Minton*, a violation of free speech as well as free exercise were argued as a justification not to treat a transgender person.⁸⁶ Even though there are valid arguments on why the 303 Creative decision could not be applied in cases like this involving professional conduct, the risk of these cases entering the Supreme Court is still very possible in the future.

Besides being denied service, this development could also have an effect on the employment of sexual minorities. Anti-discrimination laws prohibit employers from making their decisions based on certain characteristics, such as sexual orientation.⁸⁷ The employers are not allowed to directly ask or in other ways find out about the applicant's protected characteristics. However, businesses have been successful at resisting this regulation.⁸⁸ For example, religious institutions have exemptions in non-discrimination, and they are allowed to hire or not to hire a candidate based on their sexual orientation.⁸⁹ So if a business is able to identify as a religious institution, they are able to benefit from these exemptions that were designed for churches and other places alike. This kind of identification can be achieved if the directors of the business all agree on the same religious values.⁹⁰ This has gone as far as a school threatening to fire a professor based on their support for the LGBTQIA+ community.⁹¹ The professor in this case was however able to claim discrimination and keep their position.

The First Amendment also includes the freedom of expressive association. This means that it grants an individual the constitutional right to associate with who they want as well as choose who they do not want to associate with.⁹² Excluding members of the LGBTQIA+ community can be used as a means of expressive association. If including an individual would affect the group's desired message in an altering way, or if it would affect the group's ability to advocate their views, they have a right to exclude the unwanted member.⁹³ There have already

⁸⁵ Sepper – Romero – Aaron 2023

⁸⁶ Sepper – Romero – Aaron 2023

⁸⁷ Norton 2020, pp. 209-254

⁸⁸ Norton 2020, pp. 209-254

⁸⁹ Austen 2021, pp. 181-194

⁹⁰ This tactic was used in the case *Burwell v. HobbyLobby*

⁹¹ Austen 2021, pp. 181-194

⁹² Rahrig – McLaughlin – Wright 2023, pp. 553-572

⁹³ Rahrig – McLaughlin – Wright 2023, pp. 553-572

been cases involving these arguments in the Supreme Court before and it is possible that the recent decisions made by the Court will raise the number of these cases again.⁹⁴

The Justices of the Supreme Court have also raised a very relevant question about how these decisions might also enable other kinds of discrimination as well in their dissenting opinion of the 303 Creative case.⁹⁵ The argumentation used in the majority's opinion would apply to the discrimination of other minorities as well. If a company is able to claim that their expressiveness is affected by serving a certain client, they could be granted an exemption.⁹⁶ This has already happened in the past, as racism and segregation were also once justified by religious beliefs that stated "races were not intended to mix".⁹⁷ A business owner could for example claim that they won't serve women, because in their religious beliefs women should stay home.⁹⁸ This would apply to any protected class based on the logic used in the ruling. If these kinds of cases make it into the Supreme Court in the future, it would be interesting to see how the Court would decide on them. If they continue to follow their interpretations and arguments they have used recently, the Court would have to allow exemptions to non-discrimination. The rights of sexual minorities have already taken a setback, so it is possible that this kind of progression will also be seen in court cases handling racism, sexism or ableism in the future.⁹⁹ The Court could also rule in a way which would uphold minority rights, since it has done so in the past. Even though the logic and arguments might apply to the case, the Court may not be willing to make these kinds of broad exemptions that people fear they will.

⁹⁴ Freedom of association was argued for example in *Dale v. Boy Scouts of America* in 2000.

⁹⁵ *303 Creative v. Elenis* 600 U.S. (Sotomayor, J., dissenting) at 37

⁹⁶ Smith 2024

⁹⁷ *303 Creative v. Elenis* 600 U.S. (Sotomayor, J., dissenting) at 37

⁹⁸ Smith 2024

⁹⁹ Brannon 2023 pp. 1-5

8 Conclusions

Even though many other countries have made decisions that discrimination will not be protected by freedom of speech, the United States Supreme Court has taken a different stance on the matter in the past decade.¹⁰⁰ They have been choosing the rights granted in the First Amendment to be more important than the ones granted in the Fourteenth Amendment of the Constitution. The justification is usually based on arguments on religious liberty and free speech, more specifically compelled speech. The Court has been ruling in favor of these views more than ever and many exemptions from anti-discrimination laws have been made. Since the lower courts have been upholding the rights of minorities, this development has clearly been made possible by the Supreme Court's conservative majority.¹⁰¹ As a result, more and more businesses are claiming that they have a constitutional right not to provide service for sexual minorities and the LGBTQIA+ community has had to see their standing fall.¹⁰²

This is a worrying direction as preventing harm to third parties, in this case minorities, is a legitimate government interest that can and should be regulated.¹⁰³ Since equality is a right promised in the Fourteenth Amendment and therefore is a constitutional right, it shouldn't be presumed that companies can just dismiss the anti-discrimination legislation in force because of their religious beliefs. Especially since the need for these laws is still relevant, as the discrimination of sexual minorities can even reach employment and housing.¹⁰⁴ There should be no justification for dismissing general and neutrally applied laws that secure the civil rights of marginalized groups, especially since the consequences can go this far.

These Supreme Court decisions have had an effect on American society as well. More discrimination based on protected characteristics has risen as this has been legalized by the Court. This has especially targeted sexual minorities and the discrimination has spread from not providing customized service to companies being able to advertise that they do not provide services to same-sex couples at all.¹⁰⁵ The effects are not limited to a business being

¹⁰⁰ Stone – Schauer 2021

¹⁰¹ Treible 2023, pp. 61-88

¹⁰² Sepper 2020, pp. 273-294

¹⁰³ Kendrick 2020, pp. 105-116

¹⁰⁴ UCLA School of Law Williams Institute, C. Mallory & B. Sears, Evidence of Discrimination in Public Accommodations Based on Sexual Orientation and Gender Identity (2016)

¹⁰⁵ 303 Creative v. Elenis 600 U.S. ___ (2023)(Slip opinion) allowed a company to put a sign on their website that would say they do not serve same-sex couples.

able to discriminate. These rulings have also allowed an environment where people are open about their hatred for minorities which can lead to said minorities feeling unsafe in their everyday lives.

The Supreme Court doesn't represent the whole nation's opinions though. There is also more acceptance than ever and many are against the recent development of the rights of sexual minorities. Some people even think that the government's constitutional power to regulate discriminatory conduct is under attack.¹⁰⁶ The development has been made possible by the Court's conservative majority since the lower courts are upholding minority rights and the liberal Justices argue against these decisions and dissent from them. This raises a question on how the Supreme Court Justices are nominated and how much power an individual Justice has. The Justices are at the moment able to make decisions based on their own personal values that don't necessarily align with the people's values or opinions. And since the Court has a clear conservative majority, we have seen many rights being taken away from the citizens of the United States since the Court's decisions are the basis of both legislation and the lower court's conduct. There is a possibility to reform the Supreme Court and it would be beneficial for the whole country, even the conservatives, to look into that.

Even though the First Amendment including religious liberty and free speech is one of the core values of the American legal system as well as the American society, it should be taken into consideration how these Supreme Court rulings affect minorities and their rights. If the current development of the Court continues, the rights of not only sexual minorities but also other protected groups are at stake. Illegal discrimination is not and should not be protected by the Constitution, and this should have more standing in the future cases of the Supreme Court like it has had in lower courts.

¹⁰⁶ Norton 2020, pp. 209-254