

## It Was Never About a Cake: *Masterpiece Cakeshop* and the Crusade to Weaponize Religious Freedom

THIS CHAPTER IS EXCERPTED WITH PERMISSION FROM *AMERICAN CRUSADE: HOW THE SUPREME COURT IS WEAPONIZING RELIGIOUS FREEDOM* BY ANDREW L. SEIDEL (UNION SQUARE & CO., SEPT. 2022)

*Andrew L. Seidel\**

### INTRODUCTORY NOTE

I was honored to be asked to contribute an excerpt from *American Crusade: How the Supreme Court Is Weaponizing Religious Freedom* to this Issue. The student editors were bound to publish several pieces that they felt needed direct responses. A colleague, Nicholas Little,<sup>1</sup> connected them to me and in a two-week scramble, we were able to rework the chapter on *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*,<sup>2</sup> as something of a rebuttal. This is all the more important in light of the Supreme Court's grant of cert in *303 Creative LLC v. Elenis*.<sup>3</sup>

A short introduction is required because *American Crusade* was not written for readers of law reviews. It's not for legal experts and academics, but for everyone. In the author's note, "Jargon Be Damned," I explain to readers that sometimes we legal professionals get buried

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\* Seidel is a constitutional and civil rights attorney. He is also co-editor of an academic text, *Law and Religion: Cases and Materials* (5th Edition), with Professor Leslie Griffin of UNLV Law School, and the author of two books: *The Founding Myth: Why Christian Nationalism Is Un-American* and *American Crusade: How the Supreme Court Is Weaponizing Religious Freedom*. Seidel is a Senior Correspondent at *Religion Dispatches*. He organized and contributed to the groundbreaking report "Christian Nationalism at the January 6, 2021, Insurrection," which the House Select Committee to Investigate the January 6th Attack on the United States Capitol solicited as written testimony. Currently, Seidel is the Vice President of Strategic Communications at Americans United for Separation of Church and State, the largest organization fighting for that founding principle.

1. Nicholas Little is the Vice President and General Counsel of the Center for Inquiry (CFI). CFI advocates for reason, science, and critical thinking to keep religious beliefs from impacting public policy and suppressing human rights. For more information, visit <https://centerforinquiry.org> [<https://perma.cc/M76F-FB3Y>].

2. *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719 (2018).

3. *303 Creative LLC v. Elenis*, 6 F.4th 1160 (10th Cir. 2021), *cert. granted in part*, 142 S. Ct. 1106 (2022).

under legalese, procedure, judicial philosophies, and precedents. Sometimes we hide behind them. Often, it's better just to cut through all that distraction and look at the core of a case or dispute. To go back to basics. I tried to do that in *American Crusade*, and I wrote for everyone, avoiding legal jargon and tests. The book deliberately does not comport with the language the legal academy prefers, but that has the benefit of consistency, longevity, and, I hope, clarity.

The text has been modified slightly for this audience, while staying true to the original goal. Academic readers may feel a bit like being in their house in a black out. The terrain is familiar, but a flashlight helps illuminate stumbling blocks. To help understand this excerpt, you'll need answers to a few questions discussed at length elsewhere in *American Crusade*: Who are the Crusaders and what is their goal? What are the three lines we use to sort out collisions of religion and the law?

#### A. The Crusaders

The people and groups fighting to weaponize religious freedom are Crusaders. Groups like Alliance Defending Freedom, the American Center for Law & Justice, Liberty Counsel, First Liberty Institute, and Becket Fund, to name a few.<sup>4</sup> Individuals, and even judges, rank among the Crusaders. They are overfunded and obscenely well-connected, as the book documents.<sup>5</sup>

The Crusaders' work often appears ecumenical, but they are on a quest to remake a constitutional protection into a weapon for maintaining a dominant, or reclaiming a once-dominant group's, status in the face of waning demographic power.<sup>6</sup> The Crusaders' legal challenges are superficially about Christian crosses and veterans, or playgrounds, or private school vouchers, or bakeries and gay weddings.<sup>7</sup> But at a deeper level, this coordinated campaign has a single, never-stated goal: Christian privilege. Specifically, privilege for the "right" kind of conservative Christian. The Crusaders are fighting to elevate certain Christian beliefs above the law and exempt Christians from the law, while disfavoring all

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4. See generally ANDREW SEIDEL, *AMERICAN CRUSADE: HOW THE SUPREME COURT IS WEAPONIZING RELIGIOUS FREEDOM* (2022) [hereinafter *AMERICAN CRUSADE*]. Each is discussed at greater length in *AMERICAN CRUSADE*. ADF is discussed in Chapters 5 and 13, and at pages 6, 10–11, 50, 106; ACLJ is discussed at pages 109, 192–93 and a supplemental discussion can be found at [www.andrewseidel.com/moreac](https://perma.cc/3Y34-7Z3P) [https://perma.cc/3Y34-7Z3P]; Liberty Counsel is discussed in Chapter 4; First Liberty Institute is discussed in Chapter 12 and a supplemental discussion can be found at [www.andrewseidel.com/moreac](https://perma.cc/PR4P-W48J) [https://perma.cc/PR4P-W48J]; the Becket Fund is discussed in Chapter 10 and at pages 109, 196–97, 243–44.

5. See generally *AMERICAN CRUSADE*, *supra* note 4, at chs. 6–8.

6. *Id.* at 13–15.

7. See *id.* at chs. 12–15, 5 (detailing these legal challenges).

others.<sup>8</sup> So that there is an in-group of conservative Christians and Christian Nationalists, which the law protects but does not bind, and an out-group, everyone else, which the law binds but does not protect.<sup>9</sup>

*B. The Three Lines*<sup>10</sup>

Instead of strict scrutiny, rational basis, coercion, endorsement, offended observers, and reasonable observers, I boiled religion and law down to three lines, creatively referred to by their numbers throughout *American Crusade*.

Line #1 separates action and belief. The freedom to believe and think freely is unlimited, the freedom to act on that belief is not. The obvious and omnipresent example that proves this line is religiously motivated murder or human sacrifice. You may believe a god is telling you to kill your child, but you have no right to act on that belief. And if you do, the law can step in, like the angel in Genesis 22,<sup>11</sup> and stop you or punish you after the fact.

Line #2 then tells us at what point the law may step in and limit religiously motivated actions. The line here is rather simple: where the rights of others begin. Your right to swing your fist ends where the other person's nose begins, and your right to exercise your religion ends where the rights of others begin. It may end sooner in some cases, but it absolutely ends there. Your religion is not a license to transgress another person's rights.

Line #3 ensures that people do not use government power or resources to promote, augment, or impose their religion. Extending the reach of one's religion with governmental power is not part of religious freedom, is specifically prohibited in our Constitution, and violates the religious freedom of everyone else.<sup>12</sup>

Legal questions of religious freedom are not always simple. They can be complicated and, more often, emotionally fraught. Especially when they involve children. But in their push to weaponize religious liberty,

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8. See generally Andrew L. Seidel, *American Crusade: How the Supreme Court is Weaponizing Religious Freedom*, ANDREWLSEIDEL.COM (Sept. 2022), [www.andrewlseidel.com/moreac](http://www.andrewlseidel.com/moreac) [<https://perma.cc/3Y34-7Z3P>]; AMERICAN CRUSADE, *supra* note 4, at chs. 1, 7.

9. See Henry Grabar, *The Pithiest Critique of Modern Conservatism Keeps Getting Credited to the Wrong Man*, SLATE (June 3, 2022), <https://slate.com/business/2022/06/wilhoits-law-conservatives-frank-wilhoit.html> [<https://perma.cc/6HPN-SFZ4>] (tracing the origin of this quote to Frank Wilhoit, "Conservatism consists of exactly one proposition, to wit: There must be in-groups whom the law protects but does not bind, alongside out-groups whom the law binds but does not protect.").

10. The three lines framework can be found in AMERICAN CRUSADE, *supra* note 4, at ch. 3.

11. See generally *Genesis 22*.

12. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .").

the Crusaders have misled and confounded many Americans about where we draw the legal lines for this founding American principle.

*C. No Place for Alternative Facts*

Lastly, *American Crusade* does not uncritically repeat facts as stated by the Supreme Court. Too often, I've seen this court reverse-engineer decisions by emphasizing or ignoring certain facts, and even changing facts to fit their opinion. This reached a pinnacle in last term's *Kennedy v. Bremerton School District* decision,<sup>13</sup> when the six conservative justices "succumbed to the Siren song of a deceitful narrative . . ."<sup>14</sup> Except they didn't succumb, they willingly adopted alternative facts in the face of photographic evidence and warnings from lower court judges intimately familiar with the facts.<sup>15</sup> Throughout *American Crusade*, I worked to recount the full facts of cases and tell the true stories about what actually happened. For this chapter, I interviewed Charlie Craig and Dave Mullins, the couple the bakery refused to serve. I also interviewed the Colorado Civil Rights commissioners that Justice Kennedy slandered as anti-religious bigots to all posterity.<sup>16</sup> Their stories should have been told and vindicated by a court seeking equal justice under law. But most of the justices on this Court are on the wrong side of history.

Professor and constitutional law scholar Erwin Chemerinsky graciously wrote the foreword for *American Crusade*, concluding: "One cannot help but be afraid after reading Seidel's stunning book that explains all of this and what it will mean to have six justices committed to radical change with regard to religion and the Constitution."<sup>17</sup> We're not prepared for that future, but it's here.

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13. *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407 (2022).

14. *Kennedy v. Bremerton Sch. Dist.*, 4 F.4th 910, 911–12 (9th Cir. 2021) (Smith, J., concurring in denial of en banc review).

15. See the supplement for *AMERICAN CRUSADE*, *supra* note 8, which will be included in the second edition (citing *Kennedy*, 142 S. Ct. at 2433 (Sotomayor, J., dissenting)) (displaying photographic evidence which dispels the "brief, quiet, personal" prayer that the majority dishonestly and repeatedly portrayed).

16. See *infra* Part V.A–B. See also *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1729 (2018) ("[S]ome of the commissioners at the Commission's formal, public hearings endorsed the view that religious beliefs cannot legitimately be carried into the public sphere or commercial domain, disparaged Phillips' faith as despicable and characterized it as merely rhetorical, and compared his invocation of his sincerely held religious beliefs to defenses of slavery and the Holocaust. No commissioners objected to the comments. Nor were they mentioned in the later state-court ruling or disavowed in the briefs filed here. The comments thus cast doubt on the fairness and impartiality of the Commission's adjudication of Phillips' case.").

17. *AMERICAN CRUSADE*, *supra* note 4, at ix.

## INTRODUCTION: WHAT REALLY HAPPENED?

*“Jesus was a carpenter. I don’t think he would have made a bed for their wedding.”*<sup>18</sup>

Charlie Craig and Dave Mullins decided to get married after two years together.<sup>19</sup> Months before their wedding, they arrived at Masterpiece to taste some cakes and design their own.<sup>20</sup> The owner greeted them warmly, and they sat to peruse photos of custom cakes baked for other customers.<sup>21</sup> When the owner realized that Charlie and Dave were planning their own wedding, to each other, the atmosphere seemed to darken.<sup>22</sup> Gone were the smiles and warmth.<sup>23</sup> He informed them that he wouldn’t sell them a wedding cake.<sup>24</sup> As Dave and Charlie told me, “We never got a chance to ask for anything, this all happened so fast. It felt like forever in the moment, but we just sat down, he asked who the cake was for, we said it was for us, and he immediately said he wouldn’t make a cake for our same sex wedding.”<sup>25</sup> That forever moment was “a gigantic, yawning, pregnant pause.”<sup>26</sup>

Charlie and Dave left the bakery, feeling humiliated, hurt, and marginalized.<sup>27</sup> Charlie’s mom happened to be in town, and choosing the cake was “the one moment where she got to be involved in the whole process.”<sup>28</sup> The couple had already selected the other vendors, and none had “raised an eyebrow about the fact that [they] were gay.”<sup>29</sup> Charlie’s mom later recounted the scene in an interview: “We went into that store happy. We left broken.”<sup>30</sup> Charlie recalls, “She didn’t really understand what was happening right away, so there was this extra layer of

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18. Robert Barnes, *The Spurned Couple, the Baker and the Long Wait for the Supreme Court*, WASH. POST (Aug. 13, 2017), [https://www.washingtonpost.com/politics/courts\\_law/the-spurned-couple-the-baker-and-the-long-wait-for-the-supreme-court/2017/08/13/c95c7c5c-7ea8-11e7-83c7-5bd5460f0d7e\\_story.html](https://www.washingtonpost.com/politics/courts_law/the-spurned-couple-the-baker-and-the-long-wait-for-the-supreme-court/2017/08/13/c95c7c5c-7ea8-11e7-83c7-5bd5460f0d7e_story.html) [<https://perma.cc/D4WW-22H4>].

19. Interview with Charlie Craig and David Mullins (Feb. 4, 2021) [hereinafter Craig and Mullins Interview] (recording and transcript on file with author).

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. Craig and Mullins Interview, *supra* note 19.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. Craig and Mullins Interview, *supra* note 19.

30. Debbie Munn, *How It Feels When Someone Refuses to Make Your Son a Wedding Cake*, YAHOO! NEWS (Oct. 24, 2017), <https://www.yahoo.com/news/feels-someone-refuses-son-wedding-151740933.html> [<https://perma.cc/VPH8-WJBD>].

embarrassment because we had to explain to her that [the bakery owner] understood perfectly well what we asked for, that is why it's happening."<sup>31</sup>

"We were all upset," Charlie said, admitting he broke down in tears in the car.<sup>32</sup> This kind of discrimination can be damaging. "I grew up in a small town in Wyoming, and it just wasn't okay to be gay," Charlie explained.<sup>33</sup> He was bullied and struggling to be true to himself in the shadow of a hideous murder.<sup>34</sup> Matthew Shephard, a twenty-one-year-old gay man attending the University of Wyoming, in Laramie (which Charlie would also attend), was abducted, tortured, beaten, robbed, tied to a fence, set on fire, and left to die.<sup>35</sup> He died after six days of agony.<sup>36</sup> The vicious murder helped launch a movement against homophobia and eventually led to a federal hate crimes law,<sup>37</sup> but at the time, it also sent a chilling message. "To protect myself and my family," said Charlie, "and even protect Dave later on, I was just really closed off about it. I didn't announce to everybody that I was gay all the time, to protect myself and the people around me."<sup>38</sup> Being gay is, in a way, constantly coming out of the closet, he explains.<sup>39</sup> Most of the time, a person controls if and how to do that. That control allows for self-care and sensitivity to the once-constant threat of violence. But in the bakery, that choice was impossible. It's not that Charlie planned to hide who he was, simply that he was particularly exposed and without a lifelong defense. "There was no way in this situation that I could hide the fact that I was gay because I was getting a cake for Dave and I, and so it was a really vulnerable moment for me."<sup>40</sup> It was in that vulnerable moment that Christian love struck.

The owner explained his side on *The View*: "I don't believe that Jesus

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31. Craig and Mullins Interview, *supra* note 19.

32. *Id.*

33. *Id.*

34. *Id.*

35. Julie Bindel, *The Truth Behind America's Most Famous Gay-Hate Murder*, *GUARDIAN* (Oct. 26, 2014, 5:30 AM), <https://www.theguardian.com/world/2014/oct/26/the-truth-behind-americas-most-famous-gay-hate-murder-matthew-shepard> [<https://perma.cc/V5J9-U3KK>]; Dakin Andone, *Matthew Shepard Finally Laid to Rest 20 Years after He Was Killed for Being Gay*, *CNN* (Oct. 27, 2018, 6:33 AM), <https://www.cnn.com/2018/10/26/us/matthew-shepard-washington-service> [<https://perma.cc/2AYW-6A7X>].

36. Andone, *supra* note 35.

37. The Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act of 2009 (codified at 18 U.S.C. § 249 (2009)).

38. Craig and Mullins Interview, *supra* note 19.

39. *Id.*

40. *Id.*

would have made a cake if he had been a baker.”<sup>41</sup> “Christ . . . wouldn’t make the cake,” he said in another interview.<sup>42</sup> On *The View* he added, “I believe that the bible clearly teaches that marriage is between one man and one woman . . . I don’t believe [Jesus] would have because that would have contradicted the rest of the biblical teaching.”<sup>43</sup> Why bigotry? Because god.

What happened is as important as what didn’t happen. The baker is a for-profit business organized and operating under the laws of the state, not an individual person. The bakery wasn’t for worshipping or praying. Nor was the couple asking the bakery or its employees to participate in a wedding. At the time the business rejected the couple, they were planning a small wedding in Provincetown, Massachusetts, a small, family affair for their “nearest and dearest,” to be followed by “a big, giant party with everybody” when they got back home.<sup>44</sup> “The phrase ‘wedding cake’ for us was always off, it was the cake for the reception,” the couple tell me.<sup>45</sup> But then, that’s most wedding cakes.

We know what happened—and what didn’t—because way back at the beginning of the case, the parties actually agreed on certain important facts. These undisputed facts tell the same story I just recounted: “The whole conversation between Phillips and [Charlie and David] was very brief, with no discussion between the parties about what the cake would look like.”<sup>46</sup>

The refusal was not because of what they wanted on their cake—they never even discussed the design—but because they were gay. The only new piece of information that bakery had between acceptance and rejection was that two men were the couple getting married. They didn’t discuss the decoration, the color, the artistry, or flavor. As Charlie had said, “We never got a chance to ask for anything.”<sup>47</sup>

Charlie and David signed their legal complaint hours before their wedding in Provincetown.<sup>48</sup> The complaint notified the Colorado Civil Rights Commission, the state administrative body that enforced the

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41. The View, *Baker in Supreme Court Gay Wedding Cake Jack Phillips Shares His Story*, YOUTUBE (June 30, 2017), <https://youtu.be/coBIZle18kM> [<https://perma.cc/QYM6-99E9>].

42. Ken McIntyre, *24 Questions for Jack Phillips, the Baker Who Gave Up Wedding Cakes for God*, DAILY SIGNAL (Aug. 19, 2015), <https://www.dailysignal.com/2015/08/19/24-questions-for-jack-phillips-the-baker-who-gave-up-wedding-cakes-for-god/> [<https://perma.cc/484E-MKXQ>].

43. The View, *supra* note 41.

44. Craig and Mullins Interview, *supra* note 19.

45. *Id.*

46. Combined App’x for Petition for Writ of Cert. at app. 70, *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272 (2015) (No. 14CA1351) [hereinafter Combined App’x for Cert. Petition].

47. Craig and Mullins Interview, *supra* note 19.

48. *Id.*

Colorado Anti-Discrimination Act (CADA), about what happened.<sup>49</sup> CADA is a series of laws that prevent discrimination in employment, housing, advertising, and against people with disabilities—it's Colorado's version of the Civil Rights Act.<sup>50</sup>

Charlie and Dave brought their case, with the help of the American Civil Liberties Union (ACLU), to the commission, and the commission agreed with Charlie and David that this bakery had broken the law when it discriminated against them because of their sexual orientation.<sup>51</sup> The bakery made it easy, “aver[ring] that its standard business practice is to deny service to same-sex couples based on religious beliefs.”<sup>52</sup> The business discriminated against a class of people Colorado law protects, just as so many businesses before it had discriminated against Black Americans.<sup>53</sup> The commission ordered the business to stop discriminating against “same-sex couples by refusing to sell them wedding cakes or any product [it] would sell to heterosexual couples,” train its staff, and inform the commission about its progress with compliance.<sup>54</sup>

Sadly, this was just another business discriminating against a minority simply because of who they were. That made the case ordinary.

### I. HOW CIVIL RIGHTS LAWS WORK

Hundreds of similar cases are brought before state and federal civil rights agencies each year.<sup>55</sup> State agencies like the Colorado Civil Rights Commission exist because the cases are so important and plentiful. But most people don't seem to understand how the laws work. The basic idea is simple—don't discriminate. But how does that function legally? Who

49. *Id.*; see generally Joint App'x on Writ of Certiorari to the Colo. Court of Appeals at 50–52, *Masterpiece Cakeshop, Inc. v. Colorado C.R. Comm'n*, 138 S. Ct. 1719 (2017) (No. 16-111) [hereinafter Joint App'x].

50. Colorado Anti-Discrimination Act, COLO. REV. STAT. § 24-34-300 to -801 (2017) (guaranteeing equal access to public accommodations regardless of race, religion, nationality, gender, disability, creed, sexual orientation, marital status, family status, or ancestry).

51. Combined App'x for Cert. Petition, *supra* note 46, at app. 82.

52. *Id.* at app. 93.

53. See, e.g., *Heart of Atlanta Motel v. U.S.*, 379 U.S. 241 (1964) (motel operator refused to provide accommodations to Black patrons).

54. Combined App'x for Cert. Petition, *supra* note 46, at app. 82 (alteration in original). An administrative law judge later adopted the commission's remedies verbatim. See Final Agency Order, *Craig v. Masterpiece Cakeshop, Inc.*, CR 2013-0008 (Colo. Off. of Admin. Cts.) (June 2, 2014).

55. If anything, this is a lowball estimate. The Civil Rights Division in the Department of Justice “addresses approximately 6,000 civil rights cases and matters” each year in addition to however many are handled by state agencies. U.S. DEP'T OF JUST., C.R. DIV., FY 2022 PERFORMANCE BUDGET 3 (2021).



can't discriminate? When? Where? And why can a business put up a sign that says, "No shirt, no shoes, no service," but not "No Jews"?

Civil rights laws operate in basically the same way. They list groups of people who are protected. Then they list businesses, services, and the like that cannot exclude those people. The groups of people are known as "protected classes." Colorado's Anti-Discrimination Act protected several classes: "disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry."<sup>56</sup> That's more than federal civil rights laws.<sup>57</sup> These protected classes are statutory, established by law, and legislators may give additional groups protection if they choose. These laws establish clear legal rights, which is why Line #2 is the central issue in these cases: religion is not a license to violate other people's rights, including rights established by civil rights laws.

As Charlie and Dave's case moved through the courts and up to the Supreme Court, the widespread unfamiliarity with civil rights laws bred thousands of bad "gotcha" analogies (Nazis and Jewish bakeries, bacon and kosher delis, KKK customers in Black-owned businesses).<sup>58</sup> Any good analogy here must have (1) a protected class that's actually protected under the law, (2) a place of public accommodation, and (3) a service that is being provided to others but denied to people in the protected class.<sup>59</sup>

Many of the analogies didn't involve protected classes. "Imagine a Jewish baker being required to put a swastika on a cake," wrote the editorial board of the Chicago Tribune.<sup>60</sup> Nazis aren't a protected class, so businesses can discriminate against them. Bigots aren't protected by civil rights laws. Nor is political affiliation. There's an unintentional bigotry in this analogy. "Why all of a sudden do gays get compared to Nazis and the KKK?" asked Dave.<sup>61</sup>

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56. Colorado Anti-Discrimination Act § 24-34-601, -701.

57. Compare Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241 (defining protected classes as those arising from "race, color, religion, or national origin") with Colorado Anti-Discrimination Act § 24-34-300 to -801.

58. See, e.g., Editorial, *Wedding Cakes and Conscience*, CHICAGO TRIBUNE (Dec. 6, 2017, 4:35 PM), <https://www.chicagotribune.com/opinion/editorials/ct-edit-cake-20171206-story.html> [<https://perma.cc/L3NC-X8R4>]; Eric Bradner, *Huckabee Compares Being Gay to Drinking, Swearing*, CNN: POLITICS (Feb. 1, 2015, 12:00 PM), <https://www.cnn.com/2015/02/01/politics/huckabee-gay-marriage/> [<https://perma.cc/6WEQ-H2FV>] ("Mike Huckabee says expecting Christians to accept same-sex marriage is "like asking someone who's Jewish to start serving bacon-wrapped shrimp in their deli."); see also Transcript of Oral Argument at 17, *Masterpiece Cakeshop, Inc. v. Colorado C.R. Comm'n*, 138 S. Ct. 1719 (2017) (No. 16-111) (Solicitor General Noel Francisco asking the Court: "So they would compel an African-American sculptor to sculpt a cross for a Klan service.").

59. See Civil Rights Act of 1964 § 201 (containing these three elements).

60. *Wedding Cakes and Conscience*, *supra* note 58.

61. Craig and Mullins Interview, *supra* note 19.

Other analogies failed to include places of public accommodation. This means a public business, something that is meant to be open to the public. Your house does not count. Civil rights laws don't require you to host a gay wedding in your backyard.

Finally, other analogies failed to understand a third requirement—the service aspect. *If* a business provides a service, it must provide it to members of protected classes. Civil rights laws do not tell businesses what they must sell, only that if the business sells a certain product, it cannot refuse to sell it to certain classes of people. For instance, if you don't bake wedding cakes for any customers, you don't have to start when a couple, gay or straight, asks. The government can't force a kosher deli to serve bacon because it never served bacon. The government can tell a kosher deli that it must sell a pastrami on rye to people in protected classes.

That's how these laws work, with one caveat. They always exclude any “place that is principally used for religious purposes,” as the Colorado statute phrases it, from the definition of a “place of public accommodation.”<sup>62</sup> So no church, synagogue, mosque, or other house of worship need worry about “the gays” kicking down their doors and forcing homophobic preachers to pronounce their marriage vows. However, businesses organized and protected under the laws of the state have other rules to follow.

Charlie and Dave's case was typical of this genre, but it was made special, a cause célèbre, by Crusaders who saw an opportunity: the Alliance Defending Freedom (ADF).<sup>63</sup>

## II. GOD'S WARRIORS

ADF skillfully manipulated and distorted the narrative of the case.<sup>64</sup> Instead of a loving couple being victimized by a bigoted business owner, the narrative flipped into “the gays” and the big, bad government coercing a poor, persecuted Christian artist. Many people still know the bakery's name, but not the names of the couple that suffered the discrimination.

Weaponizing religious freedom is ADF's principal mission. It was created to entrench homophobia and anti-LGBTQ+ bigotry, and quickly decided religious freedom was the best tool for that. This is best captured by a simple fact: Alan Sears, who ran ADF for its first twenty-five years,

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62. Colorado Anti-Discrimination Act § 24-34-601–605.

63. See *infra* Part II (discussing ADF's history of weaponizing religious freedom).

64. See Kyle Velte, *Postponement as Precedent*, 29 S. CAL. REV. L. & SOC. JUST. 1, 11–14, 25–26, 31–50 (2019) (“Through *Masterpiece*, the ADF brought ‘its foundational fear—that the advance of rights for LGBT[] people turns Christians into their victims—to the Supreme Court.’ It is in this social-meaning context in which the Court considered the claims in *Masterpiece*.”).

co-authored a book entitled *The Homosexual Agenda: Exposing the Principal Threat to Religious Freedom Today*.<sup>65</sup> The title says it all. Using “religious freedom” to oppose LGBTQ+ rights and equality. When Dave rhetorically asked, “Why all of a sudden do gays get compared to Nazis?” it’s because this is a page out of ADF’s playbook.<sup>66</sup> In *The Homosexual Agenda*, Sears wrote that the “radical homosexual activist community has adopted many of the techniques used in Nazi Germany.”<sup>67</sup> Sears likened his fight to overturn marriage equality to Lincoln’s fight to abolish slavery, an analogy as historically flawed as it is narcissistic and deluded.<sup>68</sup> Sears retired in 2017, perhaps because it was clear the Crusaders had captured the Supreme Court and would eventually succeed.<sup>69</sup> Michael Farris, who founded the Homeschool Legal Defense Association and Patrick Henry College “to shelter homeschool graduates and funnel them into Republican politics,”<sup>70</sup> now runs ADF.<sup>71</sup>

ADF is one of the youngest and one of the biggest Crusaders. A group of televangelists and radio preachers—many of them Christian nationalists, such as D. James Kennedy and James Dobson—founded the Alliance Defense Fund, as it was originally known, in 1993 to undermine the work of the ACLU.<sup>72</sup> Sears’s *The ACLU vs. America* shows

65. ALAN SEARS & CRAIG OSTEN, *THE HOMOSEXUAL AGENDA: EXPOSING THE PRINCIPAL THREAT TO RELIGIOUS FREEDOM TODAY* (Broadman & Holman Publ’g Grp. 2003).

66. Craig and Mullins Interview, *supra* note 19; *see also* SEARS & OSTEN, *supra* note 65, at 131 (“[T]he radical homosexual activist community has adopted many of the same techniques used in Nazi Germany.”).

67. SEARS & OSTEN, *supra* note 65, at 131.

68. Erik Eckholm, *Legal Alliance Gains Host of Court Victories for Conservative Christian Movement*, N.Y. TIMES (May 12, 2014), <https://nyti.ms/110vm1Z> [<https://perma.cc/EU9U-SXX2>].

69. *See* Debra Cassens Weiss, *Alliance Defending Freedom Gains Influence with Supreme Court Wins*, ABA JOURNAL (July 9, 2018, 5:45 PM), [https://www.abajournal.com/news/article/alliance\\_defending\\_freedom\\_gains\\_influence\\_with\\_supreme\\_court\\_wins](https://www.abajournal.com/news/article/alliance_defending_freedom_gains_influence_with_supreme_court_wins) [<https://perma.cc/K3Z2-9LH8>] (noting the increase in Supreme Court acceptance of the ADF’s goals). The suggested reason for Sears’s retirement is the author’s own.

70. Sarah Jones, *Who’s Afraid of Higher Education?*, N.Y. MAG. (Nov. 8, 2021), <https://nymag.com/intelligencer/article/bari-weiss-university-of-austin-nothing-new.html> [<https://perma.cc/K2FM-K5K4>].

71. *Michael Farris Biography*, ALLIANCE DEFENDING FREEDOM, <https://adflegal.org/biography/michael-p-farris> [<https://perma.cc/RK8M-VV8T>] (describing Farris’s current role at ADF).

72. Sarah Posner, *The Christian Legal Army behind ‘Masterpiece Cakeshop’*, NATION (Nov. 28, 2017), <https://www.thenation.com/article/archive/the-christian-legal-army-behind-masterpiece-cakeshop/> [<https://perma.cc/G4B5-TCE6>]; *see also* KATHERINE STEWART, *THE POWER WORSHIPPERS: INSIDE THE RISE OF RELIGIOUS NATIONALISM* 74 (2020). *See generally* *Alliance Defending Freedom*, S. POVERTY L. CTR., <https://www.splcenter.org/fighting-hate/extremist-files/group/alliance-defending-freedom> [<https://perma.cc/22MG-ENU6>] (last visited Oct. 15, 2022); Eckholm, *supra* note 68. Sears himself describes the group as a response to the ACLU in

something of an obsession with the ACLU.<sup>73</sup> ADF's total annual revenue exceeded \$60 million in 2019.<sup>74</sup> Homophobia and bigotry are baked into the ethos of ADF, and the Southern Poverty Law Center classifies ADF as a hate group.<sup>75</sup> ADF litigated many of the cases covered in *American Crusade*, including *Town of Greece v. Galloway*, the companion case to *Hobby Lobby*, and *Trinity Lutheran v. Comer*.<sup>76</sup>

ADF works to alter public perception, to cast American Christians as a poor minority besieged by culture and persecuted by the government because, as ADF's website explained, "It is not enough to just win cases; we must change the culture . . ."<sup>77</sup> ADF is so serious about changing the culture that it got into the Christian movie business, teaming up with the makers of the lucrative, risible, and shockingly bigoted *God's Not Dead* movies.<sup>78</sup> A list of "real life" ADF cases appears in the credits in an attempt to further a Christian persecution narrative.<sup>79</sup> This case and

*The ACLU vs. America: Exposing the Agenda to Redefine Moral Values*. ALAN SEARS & CRAIG OSTEN, THE ACLU VS. AMERICA: EXPOSING THE AGENDA TO REDEFINE MORAL VALUES (2005) [hereinafter SEARS & CRAIG, THE ACLU].

73. For instance, the 2005 edition of *The ACLU vs. America* features chapters with the same format: "The ACLU vs." something, including Marriage, Mom and Dad, Children, Human Life, Religion, Christmas, among others. The first chapter is "The ACLU: Against America from the Beginning"; the final chapter is "Taking American Back from the ACLU." SEARS & OSTEN, *supra* note 72; *see generally* SEARS & OSTEN, *supra* note 65.

74. *Alliance Defending Freedom: Form 990 for period ending June 2019*, PROPUBLICA, [https://projects.propublica.org/nonprofits/display\\_990/541660459/10\\_2020\\_prefixes\\_52-55%2F541660459\\_201906\\_990\\_2020100717356372](https://projects.propublica.org/nonprofits/display_990/541660459/10_2020_prefixes_52-55%2F541660459_201906_990_2020100717356372) [<https://perma.cc/3RZV-HD8B>] (last visited Oct. 15, 2022).

75. Chip Somodevilla, *Why Is Alliance Defending Freedom a Hate Group?*, S. POVERTY L. CTR. (Apr. 10, 2020), <https://www.splcenter.org/news/2020/04/10/why-alliance-defending-freedom-hate-group> [<https://perma.cc/2H22-373R>].

76. *See* Brief for Petitioner, *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014) (naming the ADF on the cover page of the brief); *Trinity Lutheran v. Comer*, 137 S. Ct. 2012 (2017) (naming the ADF as the attorneys for petitioner); *see generally* AMERICAN CRUSADE, *supra* note 4.

77. *About Us*, ALLIANCE DEFENDING FREEDOM, <https://www.adflegal.org/about-us> [<https://perma.cc/4GRB-MAGQ>] (last visited Oct. 15, 2022).

78. *See Exclusive Interview with Pure Flix Entertainment for God's Not Dead Movie*, ALLIANCE DEFENDING FREEDOM (Feb. 14, 2014), <https://archive.is/CT6xU>; Russell Wolfe, *The Story Behind 'God's Not Dead' Movie*, CHARISMANEWS (Feb. 20, 2014, 12:30 PM), <https://www.charismanews.com/opinion/42867-the-story-behind-god-s-not-dead-movie> [<https://perma.cc/7TMZ-RDP8>] [hereinafter *The Story Behind God's Not Dead*] (explaining that the movie was inspired by the director's meeting with Alan Sears); *see also* Hemant Mehta, *Let's Debunk the "Christian Persecution" Court Cases That Inspired the "God's Not Dead" Films*, PATHEOS: FRIENDLY ATHEIST (Apr. 8, 2016), <https://friendlyatheist.patheos.com/2016/04/08/lets-debunk-the-christian-persecution-court-cases-that-inspired-the-gods-not-dead-films/> [<https://perma.cc/A6V4-GKUT>] (listing each of the cases that ADF used in the movie credits to support its assertions that Christians were being discriminated against in the U.S.).

On persecution, *see Is Religious Persecution in America Spinning Out of Control?*, GOD'S NOT DEAD 2 BLOG (Aug. 24, 2014), <https://web.archive.org/web/20160424021233/http://godsnotdead.com/blog/religious-persecution-america-control/> [<https://perma.cc/4GBP-GNVD>].

79. Mehta, *supra* note 78.

the *Hobby Lobby* case both appear.<sup>80</sup>

ADF is also trying to change the legal profession by training young lawyers to “[e]ngage the legal culture.”<sup>81</sup> ADF claims to have trained nearly 2,600 lawyers through its legal fellowships.<sup>82</sup> With the fellowships, ADF “seeks to recover the robust Christendomic theology of the 3rd, 4th, and 5th centuries.”<sup>83</sup> Author Rob Boston always believed that the Crusaders sought to “take us back to 1950. Turns out [he] was off by about 1,500 years.”<sup>84</sup>

That yearning to return to the days when Christians first seized full political power and unified their church with the state stayed on the ADF website from at least 2010 until mid-2014—the *Deus vult* era<sup>85</sup>—during which a future Supreme Court justice lectured ADF fellows several times.<sup>86</sup> Amy Coney Barrett was a paid ADF teacher from 2011 to 2016, delivering lectures to ADF legal fellows for several thousand dollars.<sup>87</sup> During her Supreme Court confirmation hearing, Barrett disingenuously claimed she was “not aware” of “ADF’s decades-long efforts to

80. *Id.*

81. *Legal Training: Overview*, ALLIANCE DEFENDING FREEDOM, <https://www.adflegal.org/training/overview> [<https://perma.cc/N7EL-QQMY>] (last visited Oct. 15, 2022).

82. *Blackstone Legal Fellowship*, ALLIANCE DEFENDING FREEDOM, <https://www.adflegal.org/training/blackstone> [<https://perma.cc/M4Z3-XDNW>] (last visited Oct. 15, 2022).

83. Archive of the site shows this quote from the first time the site was archived in Feb. 2010 until July 2014. *Resources*, BLACKSTONE LEGAL FELLOWSHIP, <https://web.archive.org/web/20130116021512/http://www.blackstonelegalfellowship.org/Resources/ResourceOverview> [<https://perma.cc/L6Y5-ZMNP>] (last visited Oct. 28, 2022).

84. Rob Boston, *Don’t Want to Be Called a Hate Group? Then Stop Hating.*, PROTECT THY NEIGHBOR (Aug. 13, 2018), <http://www.protectthyneighbor.org/posts/2018/8/13/dont-want-to-be-called-a-hate-group-then-stop-hating> [<https://perma.cc/8ZEJ-MECL>].

85. *Deus vult*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/Deus%20vult> [<https://perma.cc/5BRJ-JPJ8>] (last visited Oct. 19, 2022) (“God wills it → rallying cry of the First Crusade”). *Deus vult* is a recurring theme in AMERICAN CRUSADE. See generally AMERICAN CRUSADE, *supra* note 4. Pope Urban II launched the first crusade to the cheers of *Deus vult*, see *Pope Urban II Orders First Crusade*, HISTORY (Nov. 22, 2022), <https://www.history.com/this-day-in-history/pope-urban-ii-orders-first-crusade> [<https://perma.cc/96NF-NPKS>], and I argue that the Supreme Court’s majority opinion in *Salazar v. Buono*, 559 U.S. 700 (2010), launched the crusade detailed in the book.

86. Emma Brown & John Swaine, *Amy Coney Barrett, Supreme Court Nominee, Spoke at Program Founded to Inspire a ‘Distinctly Christian Worldview in Every Area of Law’*, WASH. POST. (Sept. 27, 2020), [https://www.washingtonpost.com/politics/coney-barrett-christian-law-fellowship-blackstone/2020/09/27/7ae41892-fdc5-11ea-b555-4d71a9254f4b\\_story.html](https://www.washingtonpost.com/politics/coney-barrett-christian-law-fellowship-blackstone/2020/09/27/7ae41892-fdc5-11ea-b555-4d71a9254f4b_story.html) [<https://perma.cc/U89D-6SXJ>]. See also Amy Coney Barrett, Financial Disclosure Report, nomination filing (2017) (reporting income received from Alliance Defending Freedom).

87. See Brown & Swaine, *supra* note 86; Amy Coney Barrett, Financial Disclosure Report, *supra* note 86.

recriminalize homosexuality.”<sup>88</sup> At best, speaking to a group that advocates for criminalizing homosexuality and sterilizing transgender people<sup>89</sup> shows poor judgment; lying about it would be worse. Evidence suggests Barrett’s relationship with ADF was much closer than she disclosed.<sup>90</sup> The day after the Senate voted to confirm Barrett, ADF crowed: “Newly confirmed Justice Amy Coney Barrett will hear an ADF case later this term.”<sup>91</sup> Barrett didn’t recuse herself from that case and decided in favor of ADF.<sup>92</sup>

ADF’s influential tendrils have burrowed deep into the government. Josh Hawley, a Christian nationalist U.S. senator from Missouri, helped push Amy Barrett through the Senate Judiciary Committee.<sup>93</sup> Like Barrett, he was on ADF’s fellowship faculty.<sup>94</sup> As attorney general, Jeff Sessions delivered speeches to ADF and consulted with it on a massive “religious liberty” memo he imposed on the DOJ.<sup>95</sup> Trump made Noel

88. *Nomination of the Honorable Amy Coney Barrett to be an Associate Justice of the Supreme Court of the United States (Day 2)*, COMM. ON THE JUDICIARY, at 2:02:53 (Oct. 13, 2020), <https://www.judiciary.senate.gov/meetings/nomination-of-the-honorable-amy-coney-barrett-to-be-an-associate-justice-of-the-supreme-court-of-the-united-states-day-2> [<https://perma.cc/DK7B-2Q9A>]; Under questioning from Leahy, Barrett is asked about her ADF involvement at 1:49:50. *Barrett Confirmation Hearing, Day 2 Part 1*, C-SPAN (Oct. 13, 2020), <https://www.c-span.org/video/?476316-1/barrett-confirmation-hearing-day-2-part-1> [<https://perma.cc/B9BF-F3B7>].

89. See Jessica Glenza, *The Multimillion-Dollar Christian Group Attacking LGBTQ+ Rights*, GUARDIAN (Feb. 21, 2020), <https://www.theguardian.com/world/2020/feb/20/alliance-defending-freedom-multimillion-dollar-conservative-christian-group-attacking-lgbtq-rights> [<https://perma.cc/7JC2-MHX4>] (“ADF is, ‘an aggressive, strategic legal group that is about Christian supremacy and hegemony in the US and around the world . . . .’”).

90. See, e.g., Max Burns, *Will Amy Coney Barrett Finally Explain Her Ties to Anti-Gay Hate Group?*, DAILY BEAST (Oct. 13, 2020, 9:00 AM), <https://www.thedailybeast.com/can-supreme-court-nominee-amy-coney-barrett-explain-ties-to-hate-group-that-backs-sterilizing-trans-people> [<https://perma.cc/E86L-6KJW>]; Brown & Swaine, *supra* note 86.

91. Sarah Kramer, *The Newly Confirmed Justice Amy Coney Barrett Will Hear an ADF Case Later This Term*, ADF BLOG (Oct. 27, 2020), <https://www.adflegal.org/blog/newly-confirmed-justice-amy-coney-barrett-will-hear-adf-case-later-term> [<https://perma.cc/3LTV-QJLK>].

92. *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 794 (2021).

93. Sen. Josh Hawley, *Justice Barrett Is Pro-Life and Pro-Faith—Good News for Religious Conservatives*, FOX NEWS (Oct. 30, 2020, 7:00 AM), <https://www.foxnews.com/opinion/amy-coney-barrett-josh-hawley> [<https://perma.cc/Y89K-4RGE>].

94. Sarah Posner, *Inside the Christian Legal Army Weakening the Church-State Divide*, TYPE: INVESTIGATIONS (Oct. 4, 2019), <https://www.typeinvestigations.org/investigation/2019/10/04/inside-the-christian-legal-army-weakening-the-church-state-divide/> [<https://perma.cc/NL9H-B7Q7>].

95. Pete Madden & Erin Galloway, *Jeff Sessions Addresses ‘Anti-LGBT Hate Group,’ but DOJ Won’t Release His Remarks*, ABC NEWS (July 12, 2017, 5:37 PM) <https://abcnews.go.com/Politics/jeff-sessions-addresses-anti-lgbt-hate-group-doj/story?id=48593488> [<https://perma.cc/FPD2-GY48>]; Pete Madden, *Jeff Sessions Consulted Christian Right Legal Group on Religious Freedom Memo*, ABC NEWS (Oct. 6, 2017, 6:24 PM) <https://abcnews.go.com/Politics/jeff-sessions-consulted-christian-legal-group-religious->

Francisco, an attorney in ADF's allied network, solicitor general.<sup>96</sup> Francisco then had the United States wade into the cake case on the bakery's side when it reached the Supreme Court, an extraordinary step, even participating in the oral argument himself.<sup>97</sup>

It may be impossible to understand just how devastating that was. "When I was reading their brief to the Supreme Court," Charlie tells me, "It didn't say 'the Trump administration.' It said, 'The United States of America,' and that was just a really awful feeling. To read those words, that the United States of America does not believe Dave and I have equal rights."<sup>98</sup>

ADF tainted almost everyone's understanding of reality with a comprehensive and expensive media strategy, but the ACLU out-lawyered ADF at every step.<sup>99</sup> ADF offered two big legal arguments: (1) Free speech: the government can't compel a person to craft a message in support of gay marriage;<sup>100</sup> (2) Religious freedom: the government can't compel a person to act against their religious beliefs.<sup>101</sup> But these arguments depend on what actually happened that day at the bakery. Judges and law professors are fond of hypotheticals, but cases are about reality and impact real lives.

Accompanying these arguments was a massive dodge—a business refusing to serve people—but ADF substituted a person for that corporation. We'll look at that distinction first, followed by free speech, and then religious freedom.

### III. BAKERY OR BAKER?

Alliance Defending Freedom was remarkably successful at conflating the corporation with its owner, who comes off as gentle and soft-spoken

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freedom/story?id=50336322 [https://perma.cc/VEU8-L258]; *Attorney General Jeff Sessions Delivers Remarks at the Alliance Defending Freedom's Summit on Religious Liberty*, <https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-alliance-defending-freedoms-summit> [https://perma.cc/94H3-3N2B].

96. Posner, *supra* note 72.

97. Posner, *supra* note 94.

98. Craig and Mullins Interview, *supra* note 19.

99. ADF lost at every stage of litigation prior to the Supreme Court, including before the Colorado Civil Rights Division, *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 276 (Colo App. 2015); the Administrative Law Judge, *Craig*, 370 P.3d at 277 ("[T]he ALJ issued a lengthy written order finding in favor of Craig and Mullins."); the Colorado Court of Appeals, *Craig*, 370 P.3d at 272 ("The Commission's order is affirmed."); and the Colorado Supreme Court denied review of that unanimous Court of Appeals decision, *Masterpiece Cakeshop, Inc. v. Colo. C.R. Comm'n*, 2016 WL 1645027, at \*1 (Colo. Apr. 25, 2016) (denying cert).

100. Brief for Petitioners, *Masterpiece Cakeshop, LTD v. Colo. C.R. Comm'n*, 138 S. Ct. 1719 (2017) (No. 16-111).

101. *Id.*

on camera.<sup>102</sup> Soft-spoken bigotry is still bigotry, and the bakery was still a business. A business, in a business mall, the Mission Trace Shopping Center, alongside Freaky’s Smoke Shop & Tattoo VIII, Mojo Massage, Vapergate, a Pizza Hut, an H&R Block, and other businesses.<sup>103</sup> It’s open to the public and, like other businesses, sells products. Not just cakes for special occasions, but T-shirts, candles, cookies, cinnamon rolls, banana bread, coffee, and mugs.<sup>104</sup> If you buy a mug, you get a free coffee.<sup>105</sup>

The bakery is a legal entity organized under Colorado law, which protects the individuals behind the business from personal liability.<sup>106</sup> If a cake gives fifty people food poisoning, the bakery can be sued, but not the owner personally. The business may have to fork over some cash, but the owner’s personal assets are protected. The business could borrow heavily and fail spectacularly, consumed by debt, but the shareholders and owners aren’t personally liable for those debts.<sup>107</sup>

This separation is fundamental to American business.<sup>108</sup> Before the Crusade, the Supreme Court called it “a general principle of corporate law deeply ingrained in our economic and legal systems”<sup>109</sup> and even this Court would probably agree with that principle outside the religious freedom context. Thirty corporate law professors explained, “This separation is not an ancillary part of corporate law and governance. It is instead the *sine qua non* of the wealth-creating legal innovation of the corporate form.”<sup>110</sup> It’s difficult to overstate how important this separation is.

The massive benefits of forming a legal corporation come with some

102. For instance, in its merits brief, ADF mentions “Phillips” about ten times for every mention of “Masterpiece.” Brief for Petitioners, *supra* note 100. This bled into the public conversation. See The View interview, *supra* note 41 (interviewing Phillips and allowing him to tell his story).

103. *Map of strip mall*, GOOGLE MAPS, <http://maps.google.com> [<https://perma.cc/KF7Y-CERA>] (type “Masterpiece Cakeshop” and use aerial map to view surrounding businesses).

104. Jack Phillips, *Shop*, MASTERPIECE CAKESHOP, <https://www.masterpiececakeshop.store/> [<https://perma.cc/5KKE-9PFH>].

105. *Id.*

106. See Colorado Business Corporation Act, C.R.S.A. § 7-106-203(2) (“Unless otherwise provided in the articles of incorporation, a shareholder . . . is not personally liable for the acts or debts of the corporation . . .”).

107. Brief of Amici Curiae Corp. Law Professors in Support of Respondents, *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719 (2017) (No. 16-111) [hereinafter Brief of Amici Curiae Corp. Law Professors]. In rare instances, the separation between the legal corporation and the person, sometimes called the corporate veil, can be “pierced”; that is, the courts can treat the owners and corporation as not separate. *Id.* at 9. Typically, this happens in instances of fraud or abuse, or where the owner himself has not treated the entities as separate. *Id.* But this is rare. *Id.*

108. *United States v. Bestfoods*, 524 U.S. 51, 52 (1998).

109. *Id.* at 61 (citations and internal quotations omitted).

110. Brief of Amici Curiae Corp. Law Professors, *supra* note 107, at 7.



burdens, including obeying laws meant for corporations and places of public accommodation, rather than for individual citizens.<sup>111</sup> Jack Phillips has enjoyed the protections of this corporate separation, the “corporate veil,” for twenty years. Masterpiece Cakeshop Incorporated was founded as a corporation in 1992, with two shareholders and a four-person board of directors, to operate a “retail bakery.”<sup>112</sup> During this litigation, it reorganized several times.<sup>113</sup> Phillips may personally believe that Jesus wouldn’t make a cake for a gay couple, but in 2017, a few months before the Supreme Court heard oral arguments, the bakery reorganized as a limited liability company that didn’t even list Phillips on the paperwork.<sup>114</sup>

Phillips used the laws of the state of Colorado to create a legal entity that was deliberately and completely distinct from him as an individual. He then sought to use that creation to discriminate in the name of his personal god. The state may prevent entities created under its laws from being used for such an end.<sup>115</sup> If Charlie and Dave had knocked on the door of Phillips’s house and said, “Hey, we hear you bake cakes. Would you make one for our wedding?” Phillips could’ve said no without consequence. But Phillips didn’t say no; Masterpiece Cakeshop Incorporated said no.

Imagine a world in which this was not the case, in which for-profit companies could exempt themselves from rules and regulations because

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111. See C.R.S.A. § 7-90-102.5 (“For purposes of this article, the constituent documents of an entity shall govern to the extent not inconsistent with any provision of the organic statutes that may not be waived . . .”).

112. “Certificate and Articles of Incorporation of Masterpiece Cakeshop Incorporated,” Dec. 12, 1992, <https://www.sos.state.co.us/biz/ViewImage.do?fileId=19921115022&masterFileId=19921115022> [<https://perma.cc/48PN-RYBS>].

113. Colorado Secretary of State, Masterpiece Cakeshop Inc., History and Documents, <https://www.sos.state.co.us/biz/BusinessEntityHistory.do?&cmd=passgo&pi1=3> [<https://perma.cc/5H9R-XPR2>].

114. See “Articles of Organization” [for Masterpiece Cakeshop, Ltd.], July 5, 2017, <https://www.sos.state.co.us/biz/ViewImage.do?fileId=20171517245&masterFileId=20171517245> [<https://perma.cc/W7DR-D6EC>].

115. See C.R.S.A. § 24-34-601(2)(a) (“It is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of disability, race, creed, color, sex, sexual orientation, gender identity, gender expression, marital status, national origin, or ancestry, the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation or, directly or indirectly, to publish, circulate, issue, display, post, or mail any written, electronic, or printed communication, notice, or advertisement that indicates that the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation will be refused, withheld from, or denied an individual or that an individual’s patronage or presence at a place of public accommodation is unwelcome, objectionable, unacceptable, or undesirable because of disability, race, creed, color, sex, sexual orientation, gender identity, gender expression, marital status, national origin, or ancestry.”).

an employee or shareholder or owner or operator or employee disagrees with the rules. Guaranteed religious exemptions in a competitive marketplace would launch a race to the bottom as every business decided which rules to follow or not.

How long would it take oil companies to realize that, simply by claiming to adhere to this or that religion, they no longer have to comply with environmental regulations? And before you shrug this off as unlikely, recall that Representative John Shimkus (R-IL) once claimed that global climate change might be happening, but we don't need to worry about it because Shimkus's god promised Noah he wouldn't flood the earth again.<sup>116</sup> Moreover, the "Evangelical Declaration on Global Warming" states four beliefs and four denials of belief, including "We deny that carbon dioxide . . . is a pollutant."<sup>117</sup> How hard would it be for a company to adopt this religious declaration as a sincere religious belief?

Want to test your drugs on animals? The biblical god gave man "dominion over the fish of the sea, and over the fowl of the air, and over the cattle, and over all the earth, and over every creeping thing that creepeth upon the earth."<sup>118</sup>

Want to keep women out of management positions? The Christian god permits no woman to "teach or . . . assume authority over a man; she must be quiet."<sup>119</sup>

When I wrote about this race to the bottom after the *Hobby Lobby* decision in 2014, I worried that "[r]acism, sexism, and homophobia all have biblical and religious support for any company to avoid complying with all that burdensome equality legislation."<sup>120</sup> These fears aren't hypothetical, but real cases. In 1990, a Christian school paid male employees 25 percent more than females, using a "head of household salary supplement" because "the Bible clearly teaches that the husband is the head of the house, head of the wife, head of the family."<sup>121</sup> The school also underpaid support staff for years.<sup>122</sup> The school argued that it didn't have to comply with wage laws because its pay scale was based on "a

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116. Andrew Seidel, *God's Not Fixing Climate Change, He's Making It Worse*, FREETHOUGHT NOW (June 1, 2017), <https://freethoughtnow.org/gods-not-fixing-climate-change/> [https://perma.cc/3U8Q-A49Y].

117. *An Evangelical Declaration on Global Warming*, CORNWALL ALLIANCE (May 1, 2009), <https://cornwallalliance.org/2009/05/evangelical-declaration-on-global-warming/> [https://perma.cc/K9WE-YTR5].

118. *Genesis* 1:26 (King James).

119. 1 *Timothy* 2:12 (King James).

120. Andrew Seidel, *Five Reasons the Hobby Lobby Decision Should Terrify You*, ONLYSKY (July 11, 2014), <https://onlysky.media/hemant-mehta/five-reasons-the-hobby-lobby-decision-should-terrify-you/> [https://perma.cc/VM5C-5GLT].

121. *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1392 (4th Cir. 1990).

122. *See id.* at 1398 (noting that support staff has been paid appropriately since 1982).

sincerely-held belief derived from the Bible.”<sup>123</sup> The Court rejected this argument in 1990, partly using Line #2.<sup>124</sup>

In another case, a religious nonprofit funded its proselytizing ministry with commercial businesses, including gas stations, retail clothing and grocery stores, farms, construction companies, a record-keeping company, a motel, and candy companies.<sup>125</sup> To keep costs down, the businesses employed workers, “most of whom were drug addicts, derelicts, or criminals before their rehabilitation,” but didn’t pay the workers a salary, instead giving them “food, clothing, shelter, and other benefits.”<sup>126</sup> The businesses had a sizable edge over secular competitors because they didn’t pay employees, let alone pay them fairly.<sup>127</sup> The Supreme Court rejected the argument in 1983.<sup>128</sup>

In *Masterpiece Cakeshop*, the Court would depart from this precedent and bring us closer to that imaginary world by simply ignoring the bedrock principle of American corporate law.<sup>129</sup>

#### IV. FREE SPEECH

The parties’ agreed-upon facts destroy the free speech arguments. The bakery didn’t reject a “message,” but people. It didn’t refuse to design a specific cake because of what that cake communicated; it refused to design any cake for them.

The first judge found that

[t]he undisputed evidence is that Phillips categorically refused to prepare a cake for [Charlie and Dave’s] same-sex wedding before there was any discussion about what that cake would look like. Phillips was not asked to apply any message or symbol to the cake, or to construct the cake in any fashion that could be reasonably understood as advocating same-sex marriage.”<sup>130</sup>

The bakery had no idea about their potential design, only who they were. “For all Phillips knew at the time,” explained the judge, the couple

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123. *Id.* at 1397.

124. *Id.* See also *Mitchell v. Pilgrim Holiness Church Corp.*, 210 F.2d 879, 884 (7th Cir. 1954) (“We can find no reason for holding that the employees of a church corporation, who work in a printing establishment owned and operated by the corporation, should not be entitled to the benefits of this remedial legislation.”).

125. *Tony & Susan Alamo Found. v. Sec’y of Lab.*, 471 U.S. 290, 293–94 (1985).

126. *Id.* at 292.

127. *Id.*

128. *Id.*

129. See *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719, 1740 (2018) (explaining how the Court of Appeals misunderstood free-speech jurisprudence here, according to Justices Thomas and Gorsuch).

130. App’x for Cert. Petition, *supra* note 46, at 75a.

“might have wanted a nondescript cake that would have been suitable for consumption at any wedding.”<sup>131</sup> The free speech claim was “specious.”<sup>132</sup>

It’s also specious in another respect: “What kind of a cake is gay?” the couple asked me.<sup>133</sup> It’s a good point. What’s the difference between a gay wedding cake and a straight wedding cake? If given a lineup of twenty cakes, could you sort them into gay and straight? The three-tiered white wedding cake with the word “Congratulations,” is that one gay or not? Charlie and Dave didn’t want a rainbow cake; they wanted a minimalist cake, probably three tiers of white cake that incorporated red and teal, their wedding colors.<sup>134</sup> In the end, that’s pretty much what they got. It was only after they were discriminated against that they added a single rainbow layer under the icing.<sup>135</sup>

There’s an argument to be made that cakes are expressive speech, but Justice Sonia Sotomayor disposed of this nicely in oral argument, “The primary purpose of a food of any kind is to be eaten. Now, some people might love the aesthetic appeal of a special dessert, and look at it for a very long time, but in the end its only purpose is to be eaten.”<sup>136</sup>

At oral argument, much of the free speech discussion centered on hypotheticals involving chefs, makeup artists, sandwich artists, jewelers, hair stylists, hotel chefs, and more.<sup>137</sup> Hypotheticals about denying service to the KKK were popular.<sup>138</sup> There was even a hypo about a cake celebrating Kristallnacht.<sup>139</sup> These analogies were shockingly bad for the three reasons explained above,<sup>140</sup> but were still trotted out by the nation’s top jurists.

Interestingly, the bakery admitted, under questioning from Justice Elena Kagan, that a hair stylist is “[a]bsolutely not” engaging in “expression or protected speech,” and neither are the makeup artist, tailor, or, most tellingly, the chef.<sup>141</sup> “Bakers are speaking, but chefs aren’t” was the sum of the Crusader’s free speech argument.

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131. *Id.*

132. *Id.* at 76a.

133. Craig and Mullins Interview, *supra* note 19.

134. *Id.*

135. *Id.*

136. Oral Argument at 00:09:55, *Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm’n*, 584 U.S. \_\_\_ (2018) (No. 16-111), [www.oyez.org/cases/2017/16-111](http://www.oyez.org/cases/2017/16-111) [<https://perma.cc/G76S-EH9L>].

137. *See generally id.*

138. *Id.*

139. *Id.* at 00:55:25.

140. *See supra* Part I (noting the requirements for a civil rights violation and why the analogies at the oral argument do not cover protected classes or places of public accommodation which are required for bona fide violations under the law).

141. Oral Argument, *Masterpiece Cakeshop*, *supra* note 136, at 00:08:50.

Charlie mentioned another curious moment during oral argument that undermines the free speech claim: “They asked if Jack Phillips would give us an already made cake, a pre-made cake.”<sup>142</sup> There were quite a few such exchanges, and the Crusader repeatedly said things like, “In the context of a pre-made cake . . . Mr. Phillips is happy to sell anything in his store . . . .”<sup>143</sup> But Charlie told me that he was watching Phillips, not the justices, and “while that was happening, Phillips was shaking his head ‘no.’”<sup>144</sup>

Between oral-argument admissions and the undisputed facts, it would have been almost impossible for the Court to decide the case in the bakery’s favor on free speech grounds. So instead, the Court decided the case on religious freedom, but probably not how you remember.

#### V. HOSTILITY TOWARD RELIGION

The Supreme Court should have reiterated Line #2 in this case. Sorry, bakery, your owner’s religion does not trump the rights of others. Done.

Instead, it invented some hostility *against* a bigoted bakery.<sup>145</sup> Essentially, it gave the bakery a “get out of jail free” card. It didn’t fully weaponize religious freedom. This was before Kavanaugh and Barrett, when Kennedy was still the swing vote. Reading between the lines of Kennedy’s 7–2 opinion, it sounds like the Court was looking for a way out of deciding a case that initially seemed to involve simpler issues. The justices held that the Colorado Civil Rights Commission said mean things about the religion of the man who runs the bakery.<sup>146</sup> The Court claimed this “hostility” tainted the entire civil rights case against the bakery, and so the Court threw it all out.<sup>147</sup> In doing so, it ratified the bakery’s overt hostility toward LGBTQ+ people.

Hostility toward religion was barely mentioned by the parties, let alone argued as a central pillar of the case.<sup>148</sup> In 345 pages of briefing from the principal parties and the United States, it was an afterthought: maybe eleven paragraphs and one footnote mention hostility.<sup>149</sup> In the eighty-

142. Craig and Mullins Interview, *supra* note 19.

143. Oral Argument, Masterpiece Cakeshop, *supra* note 136, at 00:01:00.

144. Craig and Mullins Interview, *supra* note 19.

145. *See generally* Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm’n, 138 S. Ct. 1719 (2018).

146. Or, to quote Kennedy, “This sentiment is inappropriate.” *Id.* at 1729.

147. *Id.* at 1721.

148. *See generally* Brief for Petitioner, Brief for Petitioners, *supra* note 100; Brief for Respondents, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111); Transcript of Oral Argument, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111).

149. *See, e.g.*, Petition for Writ of Certiorari at 29, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No.

seven minutes of oral argument, hostility toward religion came up during a brief exchange between Justice Kennedy and attorney Frederick Yarger that, though short, is in hindsight revealing because Kennedy tipped his hand.<sup>150</sup>

This exchange was noteworthy, but “unexpected,” even for conservative observers.<sup>151</sup> Kennedy mentioned a single quote by one commissioner that he actually misattributed to a different commissioner, inadvertently confessing to the esoteric nature of the comment.<sup>152</sup> It was so unimportant he couldn’t get the name right. Hostility was barely mentioned in the briefing and misattributed in the oral argument because the hostility wasn’t real. We were witnessing its creation.

In the opinion, Kennedy wrote: “The neutral and respectful consideration to which Phillips was entitled was compromised here, however. The Civil Rights Commission’s treatment of his case has some elements of a clear and impermissible hostility toward the sincere

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16-111) (discussing hostility briefly in a single paragraph); Brief for Petitioner at 43, 55, *supra* note 100 (referencing hostility in three separate paragraphs); Reply Brief for Petitioners at 23–25, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111) (discussing hostility in five paragraphs); Brief for Respondent Colo. C.R. Comm’n at 9, 36, 53, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111) (remarking on types of hostility, secular and otherwise). *Cf.* Brief for Respondents Charlie Craig and David Mullins at 14, 41, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111) (explaining that religious beliefs cannot excuse discrimination). These arguments can, of course, be quibbled with. For instance, some might wish to include the bias discussion of analogous contexts.

150. Oral Argument at 00:40:48–00:42:33, 00:50:10, *Masterpiece Cakeshop*, *supra* note 136 (briefly discussing religious hostility and bias toward religion).

151. Walter Olson, *The Oral Argument in the Supreme Court’s Masterpiece Cakeshop Same-Sex Marriage Case Is Heartening*, CATO INST. (Dec. 6, 2017), <https://www.cato.org/commentary/oral-argument-supreme-courts-masterpiece-cakeshop-same-sex-marriage-case-heartening> [<https://perma.cc/K73G-ELD4>]; *see also* Amy Howe, *Argument Analysis: Conservative Majority Leaning toward Ruling for Colorado Baker*, SCOTUSBLOG (Dec. 5, 2017), <https://www.scotusblog.com/2017/12/argument-analysis-conservative-majority-leaning-toward-ruling-colorado-baker/> [<https://perma.cc/2VND-KG83>] (covering the exchange between Kennedy and Frederick Yarger, attorney for respondents Colorado Civil Rights Commission); Mark Walsh, *A ‘View’ from the Courtroom: Setting the Table for a Major Ruling*, SCOTUSBLOG (Dec. 5, 2017), <https://www.scotusblog.com/2017/12/view-courtroom-setting-table-major-ruling/> [<https://perma.cc/U3W3-K8BY>] (omitting any discussion of the exchange with Yarger).

152. STATE OF COLO. DEP’T OF LAW, OFFICE OF THE ATT’Y GEN., NOTICE REGARDING CLARIFICATION OF THE RECORD, (Jan. 8, 2018) [hereinafter Letter of “Notice Regarding Clarification of Record”], [https://www.supremecourt.gov/DocketPDF/16/16-111/26984/20180108115658861\\_No.%2016-111%20-%20Letter%20to%20Clarify%20Record.pdf](https://www.supremecourt.gov/DocketPDF/16/16-111/26984/20180108115658861_No.%2016-111%20-%20Letter%20to%20Clarify%20Record.pdf) [<https://perma.cc/NL9T-7GFX>]. Because Kennedy misattributed the quote, we know precisely where he pulled it from. Only one other submission to the Court made the same error, and it was not from the parties. *See* Brief of Amici Curiae Ethics and Religious Liberty Comm’n of the Southern Baptist Convention, *Masterpiece Cakeshop*, 138 S. Ct. 1719). That brief was written by Matthew Whitehead, an attorney with close ties to the ADF and other Crusaders, according to his firm website. *See* WHITEHEAD LAW FIRM, LLC, <https://thewhiteheadfirm.com> [<https://perma.cc/XG48-6H2G>] (last visited Nov. 3, 2022).

religious beliefs that motivated his objection.”<sup>153</sup>

That’s a harsh accusation to level at any official, but especially those charged with protecting civil rights and eradicating discrimination. That’s career-ending criticism. And, as will be shown below, it was unfounded.

Kennedy manufactured this hostility from three pieces of evidence: two commissioners’ statements that he mangled and fragmented, and a homophobic troll.<sup>154</sup>

#### A. Commissioner Rice’s Statement

Kennedy focused primarily on one statement by Commissioner Diann Rice (which he misattributed to another commissioner in oral argument).<sup>155</sup> Rice’s comment came after the case was over. The commission had written its final order two months before, the bakery had responded, and notice of appeal was already filed.<sup>156</sup> The commissioners had considered the merits and were just deciding whether or not to stay their final order.<sup>157</sup> They had already rejected the bakery’s arguments three separate times and voted unanimously against the stay.<sup>158</sup>

The case was over. The commission’s work was done. But Kennedy claimed that the entire case against the bakery had to be thrown out because the commission was so hostile to Christianity during the case that the bakery couldn’t have received a fair hearing.<sup>159</sup> But Rice’s comment was, quite literally, the last substantive comment in that hearing, and therefore, in the commission’s inquiry as well. She said:

Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust, whether it be—I mean, we—we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others. So that’s just my personal point of view.<sup>160</sup>

Kennedy’s retelling truncated Rice’s quote to exclude the final

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153. *Masterpiece Cakeshop*, 138 S. Ct. at 1728.

154. *See infra* Part V.A–C.

155. Letter of “Notice Regarding Clarification of the Record”, *supra* note 152.

156. *See* Joint App’x at 217–18, *supra* note 49 (citing to Order on Respondents’ Motion for Stay of Final Agency Order, filed July 25, 2014).

157. *Id.*

158. *Id.*

159. *Masterpiece Cakeshop*, 138 S. Ct. at 1732.

160. Colo. C.R. Comm’n Meeting Transcript, *Craig v. Masterpiece Cakeshop, Inc.*, CR 2013-0008 at 2 (Colo. Off. Admin. Cts.) (July 25, 2014), <https://adfmmedialegalfiles.blob.core.windows.net/files/MasterpieceHearingTranscript.pdf> [<https://perma.cc/KPX9-GZQW>]. *See also* *Masterpiece Cakeshop*, 138 S. Ct. at 1729.

sentence, “So that’s just my personal point of view.”<sup>161</sup> Kennedy took umbrage at Rice’s words, “To describe a man’s faith as ‘one of the most despicable pieces of rhetoric that people can use’ is to disparage his religion in at least two distinct ways: by describing it as despicable, and also by characterizing it as merely rhetorical—something insubstantial and even insincere.”<sup>162</sup> When Justice Alito delivered the keynote address to Leo’s Federalist Society, he mentioned not only the *Masterpiece Cakeshop* case, but also singled out Rice’s statement for additional opprobrium.<sup>163</sup> Rice later told me that Kennedy’s rendering of her words was wrong “on many levels.”<sup>164</sup> But I think it’s a deliberate misreading. Rice was arguing for Line #2, a line the Supreme Court upheld *until this Crusade*.<sup>165</sup>

As a college freshman at George Washington University, Rice and her friends went to a civil rights march on the Mall.<sup>166</sup> The young Rice heard Martin Luther King Jr.’s “I Have a Dream” speech.<sup>167</sup> Rice tells me, “His speech gave me chills” and “is what led me to where I am and my beliefs. [Since then,] people’s rights have always been at the core of my beliefs.”<sup>168</sup>

Rice comes across as a thoughtful, careful public servant, concerned with the rule of law and human rights, nothing like the bigot of Kennedy’s opinion: “I believe to my core that every person should be allowed their faith and their beliefs, and far be it for me to criticize . . . but I will always believe it’s wrong to use your religion or beliefs to hurt or discriminate

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161. See *Masterpiece Cakeshop*, 138 S. Ct. at 1729 (omitting Commissioner Rice’s final statement from Justice Kennedy’s reprinted quotation); see also Letter of “Notice Regarding Clarification of Record”, *supra* note 152 (clarifying Justice Kennedy’s statement).

162. *Masterpiece Cakeshop*, 138 S. Ct. at 1729–30 (noting that the remarks were made “by an adjudicatory body deciding a particular case” and thus the statements “may properly be taken into account in determining whether a law intentionally discriminates on the basis of religion” despite citing no authority for this contention).

163. National Lawyers Convention, *Address by Justice Samuel Alito to the Federalist Society* at 31:14, YOUTUBE (Nov. 12, 2020), <https://youtu.be/tYLZL4GZVbA> [<https://perma.cc/R3N2-VBVJ>] (“Consider what a member of the Colorado Human Rights Commission said to Jack Phillips, the owner of the now notorious Masterpiece Cakeshop, when he refused to create a cake celebrating a same-sex wedding. She said that freedom of religion had been used ‘to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the Holocaust, we can list hundreds of situations where freedom of religion has been used to justify discrimination.’ You can easily see the point. For many today, religious liberty is not a cherished freedom. It’s often just an excuse for bigotry, and it can’t be tolerated, even when there is no evidence that anybody has been harmed.”).

164. Interview with Diann Rice (Nov. 26, 2021) [hereinafter Rice Interview] (on file with author).

165. This is a point I make more clearly in the full book. *AMERICAN CRUSADE*, *supra* note 4.

166. Rice Interview, *supra* note 164.

167. *Id.*

168. *Id.*



against someone else.”<sup>169</sup> That’s Line #2. She believes in freedom and equality, but that necessarily means one person’s religion cannot trump another person’s rights.

I asked Rice about being the Supreme Court’s scapegoat. “I was very disappointed and hurt at the time,” she said, but she also had perspective. Throughout our conversation, she touched on the hurt and anger over Kennedy “twisting” her words, but her overriding feeling was frustration that this might’ve hurt civil rights: “I really regret that the work of the Civil Rights Commission was hurt. That’s my biggest regret.” She worried that Kennedy’s decision “made the entire Civil Rights Division take a step back and say, ‘maybe we can’t fight this battle.’”<sup>170</sup>

It also shattered some illusions she had about the Court, which many Americans still have<sup>171</sup>: “It hurts. It made me somewhat angry. It made me realize that I’ve wanted the Supreme Court to be that one place, that one pillar in our democracy that is above politics, where the decisions are made on the basis of law and precedent. I thought that they left their political biases behind. . . . I question that every day now.”<sup>172</sup>

Rice’s statements are, of course, true. And they’re true to the extent she was talking explicitly about religion rather than religious freedom. Half of Americans who opposed same-sex marriage in 2012 justified that stance by citing their religion or the bible.<sup>173</sup> Religion has been used to justify slavery and murder.<sup>174</sup> More to the point, the bakery in this case was claiming a right to discriminate based in religious freedom.<sup>175</sup>

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169. *Id.*

170. *Id.*

171. Americans’ views on the Supreme Court are changing even since I wrote this sentence in the fall of 2021. See, e.g., Charles Franklin, *New Marquette Law Poll National Survey Finds Approval of the Supreme Court at New Lows, With Strong Partisan Differences Over Abortion and Gun Rights*, MARQ. UNIV. L. SCH., <https://law.marquette.edu/poll/2022/07/20/mlspsc09-court-press-release/> [<https://perma.cc/RFY2-HU7W>] (Table 1 showing approval versus disapproval of the Supreme Court).

172. Rice Interview, *supra* note 164.

173. Frank Newport, *Religion Big Factor for Americans against Same-Sex Marriage*, GALLUP, (Dec. 5, 2012), [https://news.gallup.com/poll/159089/religion-major-factor-americans-opposed-sex-marriage.aspx?g\\_source=%22interpretation+of+the+bible%22&g\\_medium=search&g\\_campaign=titles](https://news.gallup.com/poll/159089/religion-major-factor-americans-opposed-sex-marriage.aspx?g_source=%22interpretation+of+the+bible%22&g_medium=search&g_campaign=titles) [<https://perma.cc/YH3F-TBHJ>].

174. See generally ANDREW SEIDEL, *THE FOUNDING MYTH: WHY CHRISTIAN NATIONALISM IS UN-AMERICAN* (Sterling Press, 2019); JOHN PATRICK DALY, *WHEN SLAVERY WAS CALLED FREEDOM: EVANGELICALISM, PROSLAVERY, AND THE CAUSES OF THE CIVIL WAR* (Univ. Press of Ky., 2002); William N. Eskridge Jr., *Noah’s Curse: How Religion Often Conflates Statutes, Belief, and Conduct to Resist Antidiscrimination Norms*, 45 GA. L. REV. 657, 665–672 (2011); Noel Rae, *How Christian Slaveholders Used the Bible to Justify Slavery*, TIME (Feb. 23, 2018, 3:30 PM), <https://time.com/5171819/christianity-slavery-book-excerpt/> [<https://perma.cc/YGA7-3HYK>].

175. See Brief for Petitioner at 9, *supra* note 100 (“[The baker] cannot design custom cakes that express ideas or celebrate events at odds with his religious beliefs.”).

Religiously motivated bigotry was one of the issues the commission had to decide because the bakery made it an issue.<sup>176</sup>

Judicial bodies, as well as many Supreme Court justices, routinely declare that bigotry and discrimination are wrong, “abhorrent,” “odious,” or even “despicable.”<sup>177</sup> Kennedy himself, in an opinion penned during the previous term, said, via quote, that racial discrimination is “odious in all aspects” and “especially pernicious in the administration of justice.”<sup>178</sup> But saying that such bigotry is motivated by religion, even when true and the bigot himself is claiming so, is apparently a bridge too far.

### B. Commissioner Jairam’s Statement

Kennedy also constructed hostility from another statement at an earlier meeting:

One commissioner suggested that Phillips can believe “what he wants to believe,” but cannot act on his religious beliefs “if he decides to do business in the state.” A few moments later, the commissioner restated the same position: “[I]f a businessman wants to do business in the state and he’s got an issue with the—the law’s impacting his personal belief system, he needs to look at being able to compromise.”<sup>179</sup>

Kennedy suggested different interpretations were possible but chose to read these as “inappropriate and dismissive comments showing lack of due consideration for Phillips’ free exercise rights and the dilemma he faced.”<sup>180</sup>

This is so disingenuous as to be dishonest. Commissioner Raju Jairam was restating Lines #1 and #2 in the first sentence Kennedy mangled. The transcript actually reads, “I don’t think the act necessarily prevents Mr. Phillips from believing what he wants to believe. And—but if he decides to do business in the state, he’s got to follow (inaudible).”<sup>181</sup>

176. See Joint App’x at 148–54, *supra* note 49 (citing to an excerpt from Masterpiece’s Brief in Opposition to Complainants’ Motion for Summary Judgment and in Support of Jack Phillips’s Cross Motion for Summary Judgment, *Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm’n*, 138 S. Ct. 1719 (2018) (No. 16-111)).

177. Chief Justice Roberts said discrimination against religion was “odious” in 2017. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2025 (2017). Justice Thomas referred, correctly, to segregation as “despicable” in *Missouri v. Jenkins*, 515 U.S. 70, 118 (1995). Justices Blackmun, Brennan, Marshall, and Stevens said that racial discrimination is “abhorrent” in *McCleskey v. Kemp*, 481 U.S. 279, 346 (1987).

178. *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 868 (2017) (internal quotations omitted) (quoting *Rose v. Mitchell*, 443 U.S. 545, 555 (1979)).

179. *Masterpiece Cakeshop*, 138 S. Ct. at 1729 (alteration in original) (citations omitted) (referencing the Colorado Civil Rights Commission Meeting held on May 30, 2014, at which they discussed the administrative law judge’s findings).

180. *Id.*

181. Joint App’x at 205, *supra* note 49.

In the second sentence, Jairam was trying to quote a concurring opinion in the New Mexico Supreme Court's *Elane Photography* case, in which the court said a photography business cannot discriminate against LGBTQ+ couples.<sup>182</sup> The Supreme Court refused to hear that same case three years before it accepted Charlie and Dave's case.<sup>183</sup> Justice Ruth Bader Ginsburg cites this same case in her *Hobby Lobby* dissent.<sup>184</sup> Jairam explicitly invoked the court decision these same justices allowed to stand:

And I believe the—it was best said by the judges in the New Mexico case, where the laws are here just to protect individuals from humiliation and dignitary harm. . . . I'm referring to the comments made by Justice [Bosson] in that case. And essentially he was saying that if a businessman wants to do business in the state and he's got an issue with the—the law's impacting his personal belief system, he needs to look at being able to compromise. And I think it was very well said by that judge.<sup>185</sup>

This thoughtful public servant was not offering an off-the-cuff opinion but trying to decide a nearly identical case by referring to the opinion of top jurists in a similar case that the Supreme Court let stand. This is how public officials should behave.

The judicial passage to which Commissioner Jairam was referring is eloquent on the necessity of Line #2:

At its heart, this case teaches that at some point in our lives all of us must compromise, if only a little, to accommodate the contrasting values of others. A multicultural, pluralistic society, one of our nation's strengths, demands no less. The [owners of the photography business] are free to think, to say, to believe, as they wish; they may pray to the God of their choice and follow those commandments in their personal lives wherever they lead. The Constitution protects the [owners] in that respect and much more. But there is a price, one that we all have to pay somewhere in our civic life. In the smaller, more focused world of the marketplace, of commerce, of public accommodation, the [owners] have to channel their conduct, not their beliefs, so as to leave space for other Americans who believe something different. That compromise is part of the glue that holds us together as a nation, the tolerance that lubricates the varied moving parts of us as a people.<sup>186</sup>

This is accurate, well-stated, and, for a legal opinion, somewhat

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182. *Id.* (referencing *Elane Photography, LLC v. Willock*, 309 P.3d 53, 79 (N.M. 2013) (photography business owned by a husband and wife refused to photograph lesbian couple's commitment ceremony based on religious beliefs of company owners)).

183. *Elane Photography*, 309 P.3d 53, *cert. denied*, 572 U.S. 1046 (2014) (No. 13-585).

184. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 770 (2014) (Ginsburg, J., dissenting).

185. Joint App'x at 207, *supra* note 49.

186. *Elane Photography*, 309 P.3d at 79–80.

moving—it’s certainly not hostile toward religion. To say, as Kennedy did,<sup>187</sup> that paraphrasing this opinion shows “a lack of due consideration” for the baker’s religion is a lie. Six fellow justices assented to that lie.<sup>188</sup>

Raju Jairam “grew up in the Hindu faith” in Madras among Muslims and had a Zoroastrian mentor.<sup>189</sup> He went to Irish Catholic school, then a Syrian Christian school, then a Jesuit college for a time, and an engineering school, before coming to the states for graduate school.<sup>190</sup> He told me that he served on the commission to “give back to the community.”<sup>191</sup> Our conversation revealed a thoughtful, measured man, neither Democrat nor Republican, a small businessman, a caring person trying to do the right thing.<sup>192</sup> “I was sick when I saw what they [the justices] said” about him; “That was not pleasant.”<sup>193</sup> When I ask how it feels knowing that, because of this opinion, his name will be remembered in this way, he responds that it is, in a word, “appalling.”<sup>194</sup> He even hoped that the Court might “revisit this decision and set the record straight”—clear his name, as it were.<sup>195</sup> After reading Kennedy’s opinion, Jairam tells me, “I think I decided it correctly.”<sup>196</sup>

Largely because of these two statements, Kennedy wrote, “Phillips’ religious objection was not considered with the neutrality that the Free Exercise Clause requires.”<sup>197</sup> This is not only wrong, but absurd. At worst, religious bigotry was called out in mild and truthful terms, and only because the bakery made it an issue, and only after the case was decided. Kennedy took issue with the tone.<sup>198</sup> Then White House Press Secretary Sarah Huckabee Sanders was, for once, actually not far off the mark when she said, “the Supreme Court rightly concluded that the Colorado Civil Rights Commission failed to show tolerance and respect for [the baker’s] religious beliefs.”<sup>199</sup> Or, to quote Kennedy, “This

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187. *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719, 1729 (2018).

188. *Id.* at 1722 (noting Roberts, C.J., Breyer, Alito, Kagan, & Gorsuch, JJ., joined Justice Kennedy, with Justice Thomas concurring in part).

189. Interview with Raju Jairam (Nov. 23, 2021) [hereinafter *Jairam Interview*] (on file with author).

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. *Jairam Interview*, *supra* note 189.

195. *Id.*

196. *Id.*

197. *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719, 1731 (2018).

198. *Id.* at 1729 (stating the “neutral and respectful consideration” was “compromised.”).

199. *Press Briefing by Press Sec’y Sarah Sanders & CEA Chairman Kevin Hassett*,

sentiment is inappropriate . . . .”<sup>200</sup> This was about tone and propriety, not the law. Basically, the commission was mean.

The decision elevates delicate Christian sensibilities over the civil rights of citizens. To offend Christianity, even in the slightest manner, is to be hostile to religion in a way that violates the Constitution.

### C. *The Troll*

A “victim” offered Kennedy the final piece of evidence for the commission’s hostility toward Christianity.<sup>201</sup> In internet slang, a “troll” is an attention seeker who traffics in inflammatory rhetoric to antagonize and sow chaos and discord.<sup>202</sup> As Supreme Court author and journalist Ian Millhiser pointed out, to defend Masterpiece Cakeshop Incorporated, a troll visited other Colorado bakeries and demanded custom cakes with homophobic imagery and bible verses.<sup>203</sup>

For instance, “an image of two groomsmen, holding hands in front of a cross, with a red ‘X’ over the image” and decorated with bible verses:

“God hates sin. Psalm 45:7 . . .

Homosexuality is a detestable sin. Leviticus 18:2”<sup>204</sup>

The troll filed three cases; all three recount him asking for Leviticus 18:2, which says, “Give the following instructions to the people of Israel. I am the LORD your God.”<sup>205</sup> The troll can’t even get his own biblical bigotry right; he meant Leviticus 18:22, “Do not practice homosexuality,

WHITEHOUSE.GOV (June 5, 2018), <https://trumpwhitehouse.archives.gov/briefings-statements/press-briefing-press-secretary-sarah-sanders-cea-chairman-kevin-hassett-091018/> [<https://perma.cc/C5UX-42HE>].

200. *Masterpiece Cakeshop*, 138 S. Ct. at 1729.

201. Ian Millhiser, *The Christian Right’s Bizarre Plan to Destroy Civil Rights Laws by Trolling*, THINKPROGRESS (June 6, 2018, 11:49 AM), <https://archive.thinkprogress.org/the-christian-rights-bizarre-plan-to-destroy-civil-rights-laws-by-trolling-3ac9d939cd1b/> [<https://perma.cc/74LV-5VMM>].

202. *Troll*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/troll> [<https://perma.cc/4M49-75TU>] (“[T]o antagonize (others) online by deliberately posting inflammatory, irrelevant, or offensive comments or other disruptive content”).

203. Millhiser, *supra* note 201. See also Joint App’x at 227, *supra* note 49 (“These recent developments include Determinations issued by the Colorado Civil Rights Division in: (1) Jack v. Azucar Bakery, No. P20140069X, Determination (Colo. Civ. Rights Div. March 24, 2015) (Exhibit A); (2) Jack v. Le Bakery Sensual, Inc., P20140070X, Determination (Colo. Civ. Rights Div. March 24, 2015) (Exhibit B); and (3) Jack v. Gateaux, Ltd., No. P20140071X, Determination (Colo. Civ. Rights Div. March 24, 2015) (Exhibit C).

204. Joint App’x at 233, 243, 252, *supra* note 49; see also Zach Ford, *This Baker Refused to Bake an Anti-Gay Cake. Here’s Why That’s Not Discrimination*, THINKPROGRESS, (Apr. 6, 2015, 2:47 PM), <https://archive.thinkprogress.org/this-baker-refused-to-bake-an-anti-gay-cake-heres-why-that-s-not-discrimination-bbfabf6e75e8/> [<https://perma.cc/5S5S-GW6K>] (interviewing Marjorie Silva, owner of Azucar Bakery).

205. See Joint App’x at 233, 243, 252, *supra* note 49 (showing the various lawsuits filed by the “troll” in which they invoke the Leviticus verse); Leviticus 18:2 (New Living Translation).

having sex with another man as with a woman. It is a detestable sin.”<sup>206</sup>

The troll’s delicious biblical illiteracy and inattention to detail are fitting. He’s a young-earth creationist who founded Jesus camps (42,000 campers claimed)<sup>207</sup> and gave Christians “biblically correct” tours of zoos and science and history museums.<sup>208</sup> He agreed that inclusive public schools “are whorehouses” and said, “We need to burn ’em down.”<sup>209</sup> Not just that, but that earlier generations of Americans would, if alive today, “tear the bricks out of the walls” and “use the bricks to stone the apostates.”<sup>210</sup> This was Kennedy’s counterbalance for the commission’s “inappropriate” tone.<sup>211</sup>

The troll targeted bakeries he identified as gay-friendly.<sup>212</sup> Each bakery listened to the troll’s design request.<sup>213</sup> Unlike Masterpiece Cakeshop Incorporated, none kicked the troll out when they realized he was a Christian.<sup>214</sup> Each bakery employed Christians and regularly prepared custom, Christian-themed, and bible cakes for anyone; but all refused to make bigotry cakes for anyone, including this troll.<sup>215</sup>

The gleeful troll brought his three cases to the Colorado Civil Rights Commission, which found no discrimination.<sup>216</sup> The law requires businesses to treat people from protected classes as they would treat any other customer.<sup>217</sup> The bakeries the troll visited treated everyone

206. Compare Leviticus 18:2 (New Living Translation) with Leviticus 18:22 (New Living Translation). The words “detestable sin” in 18:22 indicates the troll used the New Living Translation of the Bible, as only this translation uses such words. See Bible Hub for a comparison of other Bible versions: *Leviticus* 18:2, BIBLE HUB, <https://biblehub.com/leviticus/18-2.htm> [https://perma.cc/26EM-PK26] (last visited Oct. 20, 2022); *Leviticus* 18:22, BIBLE HUB, <https://biblehub.com/leviticus/18-22.htm> [perma.cc/K6WG-8Z9U] (last visited Oct. 20, 2022).

207. *About Us*, WORLDVIEW ACAD., <https://worldview.org/about/> [https://perma.cc/J48K-CY2K] (last visited Oct. 20, 2022).

208. Catherine Tsai, *Bible Museum Tours Cast Doubt on Science*, WASH. POST (Feb. 16, 2006), <https://wapo.st/3p31Bqf> [https://perma.cc/9RCX-J277] (outlining the scope of the camps and tours).

209. Stephanie Mencimer, *Did the Supreme Court Fall for a Stunt?*, MOTHER JONES, (June 7, 2018), <https://www.motherjones.com/politics/2018/06/did-the-supreme-court-fall-for-a-stunt/> [https://perma.cc/UG9U-YR36]; see also Kyle Mantyla, *Kevin Swanson and Co-Host Say Schools that Violate God’s Law Should Be Burned Down*, RIGHT WING WATCH, (Aug. 11, 2017, 12:13 PM), <https://www.rightwingwatch.org/post/kevin-swanson-and-co-host-say-schools-that-violate-gods-law-should-be-burned-down/> [https://perma.cc/FB2H-CRKS] (noting remarks by Swanson on his radio program that advocate for the burning of public schools).

210. Mantyla, *supra* note 209.

211. *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719, 1729 (2018).

212. See Exhibits A–C in Joint App’x at 226–58, *supra* note 49 (describing Colorado Anti-Discrimination Act’s three case determinations).

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.* at 230, 240, 249.

217. Colorado Anti-Discrimination Act § 24-34-601.

equally—essentially saying, “we don’t sell these kinds of cakes to anyone.” Masterpiece Cakeshop Incorporated refused to treat LGBTQ+ people equally—“we don’t sell these kinds of cakes to you.” Remember, the government cannot force kosher delis to sell bacon, but if they sell bacon, they must sell it to everyone. These bakeries were refusing that kind of cake to anyone, as opposed to refusing to sell wedding cakes to a protected class.

More obviously, civil rights laws are meant to stop discrimination. They outlaw discrimination primarily, but are also intended to protect businesses that refuse to discriminate. Bigots once demanded businesses discriminate or face boycotts or worse—common KKK tactics before such laws existed.<sup>218</sup>

Masterpiece Cakeshop made “a lot of money” selling wedding cakes, six-figures annually off about 200 to 250 wedding cakes of about \$500 each.<sup>219</sup> The bakery tried to get around “selling wedding cakes but not to gays” by later arguing that it would sell Charlie and David a bland, undecorated cake, just not a custom cake.<sup>220</sup> Or sell them “birthday cakes, shower cakes, sell you cookies and brownies, I just don’t make cakes for same-sex weddings.”<sup>221</sup> But from a legal standpoint, even if that were factually true, we settled the “separate but equal” stupidity a few decades ago.<sup>222</sup> Separate isn’t equal; it’s discrimination.

Like a drowning man thrown a lifeline, Kennedy seized on the troll, the creationist who wants to stone apostates and “the gays” and burn down public schools, as evidence of hostility against Christians. “Another indication of hostility is the difference in treatment between Phillips’ case and the cases of other bakers who objected to a requested cake on the basis of conscience and prevailed before the Commission,” he wrote.<sup>223</sup>

218. See, e.g., Bo Yun Park, *Radicalized Political Consumerism in the United States*, in THE OXFORD HANDBOOK OF POLITICAL CONSUMERISM ch. 32 (Magnus Boström ed., 2018) (explaining how consumers advance their beliefs). See also Chris Tomlinson, *Breitbart Boycotts Sound a Little Like KKK Tactics*, HOUSTON CHRON. (Dec. 6, 2013), <https://www.houstonchronicle.com/business/outside-the-boardroom/article/Breitbart-boycotts-reminiscent-of-KKK-tactics-10693517.php> [<https://perma.cc/Q7Y5-G5SX>] (correlating the boycotts of the KKK with the boycotts of Breitbart website, which advocated for a boycott of Kellogg’s after they stopped advertising on the site).

219. Ken McIntyre, *24 Questions for Baker Who Gave Up Wedding Cakes for God*, DAILY SIGNAL (Aug. 21, 2015), <https://dailysign.al/3Lk36KG> [<https://perma.cc/4U8M-LNF4>].

220. Initial Decision Granting Complainant’s Motion for Summary Judgment & Denying Respondent’s Motion for Summary Judgment, *Craig v. Masterpiece Cakeshop, Inc.*, CR 2013-0008 at 2 (Colo. Off. of Admin. Cts.) (Dec. 6, 2013).

221. *Id.*

222. See generally *Plessy v. Ferguson*, 163 U.S. 537 (1896), *overruled by* *Brown v. Bd. of Educ.* (Brown I), 347 U.S. 483 (1954).

223. *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rights Comm’n*, 138 S. Ct. 1719, 1730 (2018).

This exposed the raging hypocrisy at the center of the opinion. Kennedy pointed to the explicit religious bigotry of that troll, who wanted to proclaim that “homosexuality is a detestable sin,” to justify his decision, while also arguing that it’s hostile to religion to point out that bigotry in the name of god exists.<sup>224</sup> Kennedy disproved his own argument.

## VI. RELIGIOUS FREEDOM AND CIVIL RIGHTS LAWS

In Charlie and Dave’s case, the justices all agreed that civil rights laws are perfectly valid and legitimate: it’s “unexceptional that Colorado law can protect gay persons.”<sup>225</sup> Nevertheless, a larger conversation wedges itself into arguments about whether religion should be a license to discriminate. Its basic thrust is that civil rights laws are wrong, though it’s rarely phrased so candidly. Instead, the argument usually sounds something like: “Why not just get another cake at another store?”; “You don’t want a bigot baking your cake anyway”; “Just go somewhere else!”; or sometimes, “The free market punishes bigots with less business.”<sup>226</sup>

Understanding the history and success of civil rights laws is crucial to understanding why these arguments are wrong. Martin Luther King Jr. explained in a letter to his fellow clergymen, penned on scraps of paper

224. *Id.* at 1730–31.

225. *Id.* at 1721.

226. See, e.g., Sandhya Somashekhar, *Trial Begins in Colorado Same-Sex Marriage Cake Case*, WASH. POST (July 7, 2015, 8:38 AM), <https://www.washingtonpost.com/news/post-nation/wp/2015/07/07/trial-begins-in-colorado-same-sex-marriage-cake-case/> [<https://perma.cc/5NDS-UQCN>] (showcasing the “just go to another” bakery argument when the interviewer asks Craig and Mullins this exact question). See Lucia Graves, *How a Colorado Cake Shop Could Erode Civil Rights for LGBTQ Americans*, GUARDIAN (Nov. 26, 2017), <https://www.theguardian.com/law/2017/nov/26/how-a-colorado-cake-shop-could-erode-civil-rights-for-lgbtq-americans> [<https://perma.cc/R7SJ-MJCW>] (“At a glance the issue might seem trivial—the couple could just go to another cake shop. But the underlying principle . . . a constitutional challenge to LGBTQ nondiscrimination law, is far more profound”); Michael Helfand, *In Colorado Cake Case, Religious Values Clash with Discrimination. Jews Have Been on Both Sides*, JEWISH TEL. AGENCY (Dec. 11, 2017, 12:51 PM), <https://www.jta.org/2017/12/11/ny/jews-as-a-bridge-on-religious-liberty> [<https://perma.cc/8ZR5-8ETG>] (“[T]hose who promote religious liberty discount the dignitary harm of being told of not being served by business, wondering why the prospective customers can’t just go to another store.”); Michael Graham, *Opinion, Gay-Wed Court Case No Piece of Cake*, BOSTON HERALD (Nov. 17, 2018, 12:00 AM), <https://www.bostonherald.com/2017/12/05/graham-gay-wed-court-case-no-piece-of-cake/> [<https://perma.cc/4CLK-H4M7>] (“The competing legal principles in this case, loosely translated from the original Latin, are: “Just bake the damn cake!” vs. “Just go to another damn bakery!”); Dahleen Glanton, *Cake Case Is About Gay Intolerance—But Isn’t the Same as Racial Intolerance*, CHICAGO TRIB. (Dec. 11, 2017, :00 AM), <https://www.chicagotribune.com/columns/dahleen-glanton/ct-met-gay-wedding-cake-dahleen-glanton-20171208-story.html> [<https://perma.cc/55B3-4RKX>] (“In this cake case, a victory would force a bigot to bake a cake for gay couples, even when it is unlikely that any gay couple would choose to enlist the services of a bigot.”).



and smuggled out of the Birmingham jail by his lawyers, the harm that these laws guard against.<sup>227</sup> King listed injustices Black people had endured, such as being forced “to sleep night after night in the uncomfortable corners of your automobile because no motel will accept you . . . .”<sup>228</sup> And being constantly humiliated “by nagging signs reading ‘white’ and ‘colored.’”<sup>229</sup> Another outrage spoke to every parent:

[W]hen you suddenly find your tongue twisted and your speech stammering as you seek to explain to your six year old daughter why she can’t go to the public amusement park that has just been advertised on television, and see tears welling up in her eyes when she is told that Funtown is closed to colored children, and see ominous clouds of inferiority beginning to form in her little mental sky . . . .<sup>230</sup>

The harm is not just denying a motel room or amusement park or cake, but also denying a person’s humanity. The incalculable damage of implanting that heinous sense of inferiority in a child’s impressionable mind is the real and enduring harm. That the harm is mental and difficult to quantify makes it no less real.

The physical denial is harmful too. Sleeping in a car, as King was forced to do,<sup>231</sup> may not seem risky but is during a Wisconsin winter or in a state where the KKK roamed the night. And what if it weren’t being denied entry to Funtown, but groceries—food or baby formula? Or gas? Or medical care? “Just go somewhere else” might not meet the exigencies or even be possible. Before the Civil Rights Act, entire towns

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227. Each year on Martin Luther King Day, I reread his “Letter from Birmingham Jail.” King was arrested for asking and organizing for equal rights. See Letter from Martin Luther King sent from Birmingham Jail (Apr. 16, 1963) (on file with Stanford University & Estate of Martin Luther King, Jr.) [hereinafter “Letter from Birmingham Jail”]. He was unjustly jailed for violating an unconstitutional court injunction that, the Tuscaloosa News wrote, “bans every imaginable form of demonstration.” *Negroes to Defy Ban*, TUSCALOOSA NEWS (Apr. 11, 1963), <https://news.google.com/newspapers?id=YREdAAAIBAJ&sjid=8poEAAAIBAJ&pg=7376%2C1391871> [<https://perma.cc/JLE6-D8SG>]. The injunction was directed at King and more than one hundred other civil rights activists and meant to stop their 1963 campaign for civil rights in Birmingham. On Good Friday, King and about fifty others walked down the street, arms linked, obeying traffic laws and singing. After four blocks, they were arrested and thrown in the Birmingham jail. King was put in solitary confinement. He wrote on scraps of paper, toilet paper, newspaper, and a greasy paper bag, anything that could hold a few of the letter’s almost 7,000 words. Lawyers slipped the scraps out of the jail, and Willie Pearl Mackey King pieced it together and typed up the full letter. See *Woman Who Helped MLK Change the Nation Talks about Famous Letter*, CBS News DFW (Jan. 19, 2015, 9:53 PM), <https://www.cbsnews.com/dfw/news/woman-who-helped-mlk-change-the-nation-talks-about-famous-letter/> [<https://perma.cc/CL25-89YW>]. There are numerous, slightly different texts of the letter on file with The Martin Luther King Jr. Research and Education Institute at Stanford, which has an early draft.

228. “Letter from Birmingham Jail,” *supra* note 227.

229. *Id.*

230. *Id.*

231. *Id.*

denied services to Black people. The KKK firebombed businesses that dared to treat Blacks equally. Successful Black businesses were also targeted. Rampaging whites killed and jailed Black citizens in the Tulsa Massacre of 1921 and then targeted the thriving Black business community known as Black Wall Street, burning down almost forty city blocks.<sup>232</sup>

Widespread denials of service could happen again. In early 2016, Georgia legislators proposed a new “religious freedom” law that would weaponize religious freedom just like Mississippi’s.<sup>233</sup> CNN visited a small Georgia town and interviewed all five of the florists who admitted that they would refuse to serve LGBTQ+ people if given legal sanction.<sup>234</sup> These could easily be gas stations. Or grocery stores. Or doctors refusing to treat children because of who their parents are. These are real examples.<sup>235</sup> What if the next town is the same? And the town after that? (After civil rights groups organized pressure from businesses such as the NFL, Coca-Cola, and film and television studios, Governor Nathan Deal vetoed the Georgia bill.)<sup>236</sup>

Without these laws, discrimination thrives, and the Supreme Court’s utter failure to do the right thing in this case also led to more discrimination. Dr. Netta Barak-Corren documented a substantial

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232. See, e.g., SCOTT ELLSWORTH, *THE GROUND BREAKING: THE TULSA RACE MASSACRE AND AN AMERICAN CITY’S SEARCH FOR JUSTICE* (Dutton ed., Penguin Books, 2021) (categorizing the events in Tulsa as a “massacre”); see also RANDY KREHBIEL, *TULSA 1921: REPORTING A MASSACRE*, at xi (Univ. of Okla. Press, 2019); *TULSA RACE RIOT: A REPORT BY THE OKLA. COMM’N TO STUDY THE RACE RIOT OF 1921*, at iv (Feb. 28, 2001), <https://www.okhistory.org/research/forms/freport.pdf> [<https://perma.cc/EW3X-6WXP>] (both noting that a white mob invaded “Black Wall Street,” setting fire to buildings and killing the Black people they encountered).

233. See H.B. 757, 161st Gen. Assemb., Reg. Sess. (Ga. 2016) (vetoed by the governor on March 28, 2016); see also *Protecting Freedom of Conscience from Gov’t Discrimination Act*, MISS. CODE ANN. § 11-62-1 (2016), formerly 2016 Miss. Ch. 334 (H.B. 1523) (Gov. Bryant signed H.B. 1523 into law in April 2016, less than two months after it was proposed in the House, making it the state’s third “religious freedom” law in as many years). The Mississippi law here refers to a law discussed at length in *American Crusade*. See *AMERICAN CRUSADE*, *supra* note 4, at 10–12 (discussing emails that revealed ADF’s widespread involvement with the bill).

234. Gary Tuchman, *Why One Georgia Florist Won’t Serve Gay Couples*, CNN: ANDERSON COOPER 360 (Apr. 1, 2015), <https://cnn.it/3cQRoap> [<https://perma.cc/JA33-QM9Q>].

235. Refusals of service happened regularly during Jim Crow. For a modern example, see Mark Joseph Stern, *Anti-Gay Doctor Refuses to Treat Lesbian Parents’ 6-Day-Old Baby*, SLATE (Feb. 19, 2015, 1:04 PM), <https://slate.com/human-interest/2015/02/doctor-refuses-to-treat-baby-of-lesbian-parents-because-theyre-gay.html> [<https://perma.cc/6JQG-L5L8>] (detailing the story of a Detroit doctor, Vesna Roi, who refused to treat a 6-day old baby because her mothers were lesbians).

236. *Governor of Georgia Vetoes ‘Religious Freedom’ Bill*, BBC NEWS (Mar. 28, 2016), <https://www.bbc.com/news/world-us-canada-35912227> [<https://perma.cc/V75P-26KV>] (“[Gov.] Deal said his decision was ‘about the character of our state and the character of our people. Georgia is a welcoming state; it is full of loving, kind and generous people.’”).

increase in discrimination against LGBTQ+ people in the wake of this bad decision.<sup>237</sup> Her team contacted more than 1,000 wedding vendors (photographers, bakers, florists, etc.) four different times: pretending to be part of a same-sex couple before and after the decision and pretending to be part of an opposite-sex couple before and after the decision.<sup>238</sup>

The Court’s “decision seems to have exposed same-sex couples to heightened risk of discrimination . . . .”<sup>239</sup> It emboldened discrimination evenly across conservative/liberal and rural/suburban/urban divides.<sup>240</sup> But the “discriminatory effect of the decision was significantly more pronounced in counties with relatively more religious congregations per capita.”<sup>241</sup> The Supreme Court undermined a civil rights law, and that caused a meaningful increase in discrimination against LGBTQ+ people, “even among previously willing vendors.”<sup>242</sup> In other words, before the decision, some vendors would have served LGBTQ+ couples, but they would have refused after the decision.

Enforcing civil rights laws works.

The market, on the other hand, failed because market solutions assume that people make rational, rather than emotional, decisions. We don’t. One major political party has consistently convinced about half of the electorate to vote against its own economic self-interest.<sup>243</sup>

The market allowed discrimination for centuries. People were sold in

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237. Netta Barak-Corren, *Religious Exemptions Increase Discrimination toward Same-Sex Couples: Evidence from Masterpiece Cakeshop*, 50 J. LEGAL STUD. 75, 106 (2021); see also Netta Barak-Corren, *How One Supreme Court Decision Increased Discrimination against LGBTQ Couples*, ATLANTIC (Feb. 8, 2021), <https://www.theatlantic.com/ideas/archive/2021/02/masterpiece-cakeshop-lgbtq-discrimination/617514/> [<https://perma.cc/5RSS-T2CC>] [hereinafter Barak-Corren, *Supreme Court Decision Increased Discrimination*] (explaining her study that preemptively explored potential effects of a decision for the baker in *Masterpiece Cakeshop*, and describing her finding that the decision would subject same-sex couples to discrimination).

238. Barak-Corren, *Supreme Court Decision Increased Discrimination*, *supra* note 237.

239. *Id.*

240. *Id.*

241. *Id.*

242. Barak-Corren, *Religious Exemptions Increase Discrimination*, *supra* note 237, at 75 (Corren estimated “the odds that same-sex couples would experience discrimination post-Masterpiece [are] between 61 percent and 85 percent.” The effect is significantly more pronounced in religiously dense environments.).

243. There has been plenty of ink spilled on answering this paradox (and whether it even exists). <https://www.theguardian.com/world/2012/oct/29/working-class-voters-america-republican>. See, e.g., Gary Younge, *Working Class Voters: Why America’s Poor Are Willing to Vote Republican*, GUARDIAN (Oct. 29, 2012, 1:42 PM), <https://www.theguardian.com/world/2012/oct/29/working-class-voters-america-republican> [<https://perma.cc/4CRY-2XUL>]; Jeff Madrick, *Why the Working Class Votes against Its Economic Interests*, N.Y. TIMES (July 31, 2020), <https://www.nytimes.com/2020/07/31/books/review/the-system-robert-reich-break-em-up-zephyr-teachout.html> [<https://perma.cc/9VDH-YUF7>].

that same market for centuries.<sup>244</sup> Later, non-market actors, like the KKK, added costs to market actors, disincentivizing equality with death and destruction.<sup>245</sup> While we were waiting for common decency to infuse itself into the market, an entire class of people were, quite literally, second-class citizens. Without these laws, we'd still be waiting.

Markets also reward bigotry. The reward mechanism is disputed, but exists. Chick-fil-A capitalized on its owners' bigotry.<sup>246</sup> It became a "hub for the anti-same-sex marriage brigade," and eating there became its own form of activism, leading to long lines and huge profits.<sup>247</sup>

244. See, e.g., Zoe Thomas, *The Hidden Links between Slavery and Wall Street*, BBC NEWS (Aug. 29, 2019), <https://www.bbc.com/news/business-49476247> [<https://perma.cc/AK98-75JC>]; Dina Gerdeman, *The Clear Connection between Slavery and American Capitalism*, FORBES (May 3, 2017, 12:47 PM), <https://www.forbes.com/sites/hbsworkingknowledge/2017/05/03/the-clear-connection-between-slavery-and-american-capitalism/?sh=400c44427bd3> [<https://perma.cc/N9JH-8Q9K>] (both discussing the market incentives and mechanisms that facilitated slavery in the United States).

245. See, e.g., Angela A. Allen-Bell, *The Incongruous Intersection of the Black Panther Party and the Ku Klux Klan*, 39 SEATTLE U. L. REV. 1157, 1160–64, 1169–71, 1174–77 (2016) (noting that the Ku Klux Klan had roughly five million members nationwide at its peak, controlling hundreds of elected officials and several state legislatures while engaging in a terror campaign against Black Americans that included "intimidation, force, ostracism in business and society, bribery at the polls, arson, and even murder."); Walker Mason Beauchamp, *The Legacy of Racial Zoning in Birmingham, Alabama*, 48 CUMB. L. REV. 359, 361, 394 (2018) (discussing the interplay between laws and private norms which led to *de jure* and *de facto* racial residential segregation during the twentieth century, inhibiting constitutional protections for Black Americans and creating lingering racial inequality); Elvia R. Arriola, *Faeries, Marimachas, Queens, and Lezzies: The Construction of Homosexuality before the 1969 Stonewall Riots*, 5 COLUM. J. GENDER & L. 33, 48, 57, 62–63 (1995) (recounting the "collective forces of medicine, religion, social reform, law, and popular culture" that "forged a cultural mindset of negative attitudes about homosexuality," where private and government desires to "enforce the social and moral codes of proper gender behavior" manifested into state closure of LGBTQ-friendly businesses and police harassment of LGBTQ Americans in "parks, bathhouses, parked cars, restaurants, bars, and home parties.").

246. See Amanda Holpuch, *Chick-fil-A Appreciation Day Brings Huge Crowds to Fast-Food Chain*, THE GUARDIAN (Aug. 1, 2012), <https://www.theguardian.com/lifeandstyle/us-news-blog/2012/aug/01/chick-fil-a-appreciation-day> [<https://perma.cc/U63U-5B7S>] (describing an event in which Americans opposed to same-sex marriage were encouraged to eat at Chick-fil-A to support the CEO's public opposition to same-sex marriage); Jacques Couret, *Chick-fil-A Sales Jump 12% in 2012*, ATLANTA BUS. CHRON. (Jan. 30, 2013), <https://www.bizjournals.com/atlanta/news/2013/01/30/chick-fil-a-sales-jump-12-in-2012.html> [<https://perma.cc/LPW3-Z5FA>] (noting that Chick-fil-A's sales increased roughly 12 percent in 2012 "despite last summer's gay marriage/gay rights controversy" involving CEO Dan Cathy's statements against same-sex marriage); see also Louise Lee, *Social Media Boycott of Goya Did Not Harm Sales*, CORNELL CHRON. (Aug. 24, 2022) <https://news.cornell.edu/stories/2022/08/social-media-boycott-goya-did-not-harm-sales> [<https://perma.cc/X3LQ-F74F>] (identifying a 22 percent increase in Goya Food's net sales in the two weeks following calls to boycott Goya Foods after CEO Robert Unanue publicly praised then-President Donald Trump).

247. Holpuch, *supra* note 246 ("In an unusual act of fast-food activism, Americans opposed to same-sex marriage were encouraged to dine at the chain restaurant Chick-fil-A . . ."); see also *Chick-fil-A Restaurants Become Rallying Points for Supporters*, CNN (Aug. 2, 2012, 5:30 AM),

Bigotry also brought notoriety and customers to Masterpiece Cakeshop Incorporated. Media profiles often included anecdotes about customers shopping to express their support for homophobia; it “happens all the time,” said the co-owner.<sup>248</sup> People organized fundraisers. One pulled in more than \$300,000 and continues to take donations.<sup>249</sup> Another raised over \$75,000.<sup>250</sup> The company’s legal team worked for free (fundraising on the narrative was more lucrative).<sup>251</sup> The bakery owner sold the rights for his book.<sup>252</sup> A free, unrestricted market, populated by irrational, emotional consumers and producers, is incapable of solving every problem, including discrimination against a stigmatized minority.<sup>253</sup>

Finally, there is the freedom argument against civil rights laws. Two months after King was jailed in Birmingham, President John F. Kennedy delivered a televised address on civil rights.<sup>254</sup> He wanted a law to guarantee “all Americans the right to be served in facilities which are open to the public—hotels, restaurants, theaters, retail stores, and similar

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<https://www.cnn.com/2012/08/01/us/chick-fil-a-appreciation> [<https://perma.cc/SN6S-94QD>] (reporting that thousands across the United States purchased Chick-fil-A sandwiches “to show their support for the restaurant chain and its president’s opposition to same-sex marriage”).

248. Jim Campbell, *I Represent Christian Baker Jack Phillips. Believe Me, He’s a Good Man.*, DAILY SIGNAL (June 19, 2018), <https://dailysign.al/39alasar> [<https://perma.cc/V6VK-M8BK>].

249. *Support Jack Phillips*, CONTINUE TO GIVE, <https://www.continuetogive.com/4821919> [<https://perma.cc/9AJS-V3M3>] (last visited Oct. 20, 2022).

250. *Masterpiece Cakeshop*, GOFUNDME, <https://gofund.me/b3df95f7> [<https://perma.cc/P626-Y637>] (last visited Oct. 20, 2022).

251. In an interview, Jim Campbell, then a senior counsel at Alliance Defending Freedom, told James Dobson, who helped found ADF, “So yes, we are a nonprofit organization that represents our clients pro bono, and pro bono of course is a fancy way of saying we defend our clients for free, but the work we do isn’t free so that’s why we depend on people who believe in what we do and support our organization. And that allows us to defend people like Jack Phillips without needing to charge them.” *Masterpiece Cakeshop v. Religious Intolerance*, DOBSON DIGIT. LIBR., <https://dobsonlibrary.com/resource/article/748889c0-01c6-4d16-b21a-a93b8b5a6392> [<https://perma.cc/BZ5V-82T7>] (last visited Oct. 20, 2022).

252. Rachel Kramer Bussel, *June 2020 Memoir ‘The Baker’ by Jack Phillips Will Discuss Supreme Court Case about His Refusal to Bake Cake for Same-Sex Couple*, FORBES (Jan. 31, 2020, 9:20 PM), <https://www.forbes.com/sites/rachelkramerbussel/2020/01/31/june-2020-memoir-the-baker-by-jack-phillips-will-discuss-supreme-court-case-about-his-refusal-to-bake-cake-for-same-sex-couple/?sh=375403f6a8c9> [<https://perma.cc/YVB9-JC66>].

253. Market regulation corrects for our irrational ways. Adam Smith didn’t like government regulations that constrained competition, but he was fine with regulation of the market in general. He wrote, referring to a specific regulatory system involving London’s tailors, that regulation was great: “[R]egulation, therefore, in favour of the workmen, it is always just and equitable; but it is sometimes otherwise when in favour of the masters.” ADAM SMITH, WEALTH OF NATIONS 151 (N.Y., Cosimo Classics 2007).

254. John F. Kennedy, *Excerpt from a Report to the American People on Civil Rights*, CBS (June 11, 1963), <https://www.jfklibrary.org/asset-viewer/archives/TNC/TNC-262-EX/TNC-262-EX> [<https://perma.cc/HT68-BHDE>].

establishments.”<sup>255</sup> That law would be the Civil Rights Act of 1964.<sup>256</sup> Kennedy was assassinated five months after this address.<sup>257</sup>

The Civil Rights Act went into effect in July,<sup>258</sup> and by October, the Supreme Court was hearing oral argument in a case challenging the law.<sup>259</sup> The owner of the Heart of Atlanta Motel was a virulent segregationist and an attorney, so he argued the case himself: “[T]he fundamental question, I submit, is whether or not Congress has the power to take away the [liberty] of an individual to run his business as he sees fit in the selection and choice of his custom[er]s.”<sup>260</sup> Sound familiar?

The racist motelier rooted his liberty argument in the Thirteenth and Fourteenth Amendments.<sup>261</sup> The unanimous Court batted away the arguments with a restrained contempt that I find pleasing: “[I]t would be highly ironical to use the guarantee of due process—a guarantee which plays so important a part in the Fourteenth Amendment, an amendment adopted with the predominant aim of protecting Negroes from discrimination—in order to strip Congress of power to protect Negroes from discrimination.”<sup>262</sup> Recall that the same businesses that yearn for freedom are taking advantage of many laws and regulations that protect them from financial and legal liability when they breach a contract or a human finger ends up in a customer’s food, a disturbingly common occurrence.<sup>263</sup> Strings can and should be attached to these protections.

Perhaps the most grotesque iteration of this freedom argument is that “forced” equality amounts to “involuntary servitude” that violates the Thirteenth Amendment.<sup>264</sup> Slavery. The Thirteenth Amendment

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255. *Id.* at 00:08:51.

256. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended at 42 U.S.C. § 2000).

257. *See November 22, 1963: Death of the President*, JOHN F. KENNEDY PRESIDENTIAL LIBR. & MUSEUM, <https://www.jfklibrary.org/learn/about-jfk/jfk-in-history/november-22-1963-death-of-the-president> [<https://perma.cc/6LXV-EFCT>] (last visited Oct. 20, 2022) (describing the events leading up to President John F. Kennedy’s assassination and the assassination itself).

258. *See Civil Rights Act (1964)*, NAT’L ARCHIVES, <https://www.archives.gov/milestone-documents/civil-rights-act> [<https://perma.cc/4JZJ-SCDM>] (stating that the Civil Rights Act was signed into law on July 2, 1964).

259. *See* Transcript of Oral Argument, *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (No. 515), <https://www.oyez.org/cases/1964/515> [<https://perma.cc/GPU9-6RNA>] (noting that oral arguments were heard on Oct. 5, 1964).

260. Oral Argument at 00:9:32, *supra* note 259. The transcription fails to correctly render the southern accent of Moreton Rolleston, the attorney and hotel owner. I have corrected the quote in the text.

261. *Heart of Atlanta Motel*, 379 U.S. at 244.

262. *Id.* at 278 (Black, J., concurring).

263. Elise Hu, *A History of Human Fingers Found in Fast Food*, NPR (May 17, 2012, 2:43 PM), <https://n.pr/3HZHIsP> [<https://perma.cc/9GA7-E5QA>].

264. *Heart of Atlanta Motel*, 379 U.S. at 244.

abolished slavery and involuntary servitude.<sup>265</sup> Attached to the contemptuous sentence batting down the motelier’s Fourteenth Amendment freedom argument is a derisive footnote explaining that the motel’s Thirteenth Amendment argument “is so insubstantial that it requires no further discussion.”<sup>266</sup> Crusaders actually made this same argument to the Court more than fifty years later in *Masterpiece*.<sup>267</sup> The Foundation for Moral Law, disgraced and twice-removed judge Roy Moore’s outfit,<sup>268</sup> argued that “Phillips has been subjected to involuntary servitude.”<sup>269</sup>

## VII. RELIGIOUS FREEDOM AND RACE

In the months after the Civil Rights Act took effect, Anne Newman, Sharon Neal, and John Mungin went for barbeque at Maurice’s Piggie Park, a barbeque chain in South Carolina.<sup>270</sup> The details aren’t as clear as in Charlie and David’s case, but are clear enough. The restaurant was the kind of place where you pull in, park, and a server comes out to the car to take your order.<sup>271</sup> When Anne, Sharon, and John stopped by, the

265. U.S. CONST. amend. XIII, § 1 (“Neither slavery nor *involuntary servitude*, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction”) (emphasis added).

266. *Heart of Atlanta Motel*, 379 U.S. at 278 n.12 (Black, J., concurring).

267. See Brief for Found. for Moral Law as Amicus Curiae Supporting Petitioners at 22, *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rights Comm’n*, 138 S. Ct. 1719 (2018) (No. 16-111) [hereinafter *Brief for Foundation for Moral Law*] (“The decision of the Colorado Court of Appeals violates the Involuntary Servitude Clause of the Thirteenth Amendment”).

268. In 2003, Moore was removed as chief justice of the Alabama Supreme Court after he refused to comply with a federal court order to remove an unapproved two-ton stone Ten Commandments monument he installed overnight in the rotunda of the State Judicial building. He was again removed from the court in 2016, having been re-elected as chief justice in 2012, after defying the U.S. Supreme Court by ordering Alabama judges to deny marriage licenses to same-sex couples. See, e.g., Press Release, ACLU, *Alabama’s Chief Judge Ordered to Remove Ten Commandments Monument from Courthouse*, (Nov. 18, 2002), <https://www.aclu.org/press-releases/alabamas-chief-judge-ordered-remove-ten-commandments-monument-courthouse> [https://perma.cc/5EAJ-GF67] (issuing statement on Monument); Emma Margolin, *Roy Moore Suspended from Alabama Supreme Court for Anti-Gay Marriage Order*, NBC NEWS (Sep. 30, 2016, 12:20 PM), <https://www.nbcnews.com/feature/nbc-out/alabama-chief-justice-suspended-over-gay-marriage-stance-n657511> [https://perma.cc/783N-ZB2M] (discussing Moore’s second removal).

269. *Id.* at 24–25; see also Deroy Murdock, *Why Christians Are Losing the War Over Gay-Wedding Cakes*, N.Y. POST (Apr. 29, 2016, 7:39 PM), <https://nypost.com/2016/04/29/why-christians-are-losing-the-war-over-gay-wedding-cakes/> [https://perma.cc/Q9Y2-EFKL] (“If bakers must spend hours and hours creating cakes unwillingly, this is involuntary servitude. . . . Is this exerting one’s labor against one’s wishes? Yes. This insults the free society.”).

270. *Newman v. Piggie Park Enters., Inc.*, 256 F. Supp. 941, 947 (D.S.C. 1966), *rev’d*, 377 F.2d 433 (4th Cir. 1967), *aff’d*, 390 U.S. 400 (1968) [hereinafter *Piggie Park*]. *Piggie Park Enterprises, Inc.* owns and operates five eating establishments specializing in southern style barbecue. *Id.* at 946. Maurice Bessinger is the principal stockholder and general manager of these establishments. *Id.*

271. *Piggie Park*, 377 F.2d at 434.

server saw they were Black and “went back into the building without taking their order or saying anything to them.”<sup>272</sup> A second server did the same, although “white customers were being served.”<sup>273</sup> The lower court opinion ends the story there, but John Mungin, also a Black minister, told Slate fifty years later that someone at Piggie Park “put a pistol to my head” to make them leave.<sup>274</sup>

If true, Maurice Bessinger may have wielded the gun. He owned the chain and was president of the local chapter of the National Association for the Preservation of White People, founded to “fight for the restoration of legal segregation” and “to boycott any Merchant, Manufacturer or Industry who fosters racial integration” (making so-called market solutions impossible).<sup>275</sup>

Bessinger was known to proclaim, “God gave slaves to whites” and believed South Carolina’s “biblical slavery” was a kind form of owning human beings.<sup>276</sup> He was “a devout Baptist,” “supported missionaries abroad,” and thought highly of himself because of his Christianity: “I’m just a fair man. I want to be known as a hard-working, Christian man that loves God and wants to further God’s work.”<sup>277</sup> His restaurants sold Confederate flags and other racist paraphernalia, including the “Biblical View of Slavery,” a pamphlet written by a Baptist minister who argued that slavery is not evil because the bible permits it.<sup>278</sup> Through the early 2010s, his franchises flew Confederate flags, and the corporate offices featured a massive, building-length sign that read, CHRIST IS THE

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272. *Piggie Park*, 256 F. Supp. at 947.

273. *Id.*

274. Cristian Farias, *We’ve Already Litigated This*, SLATE (Dec. 4, 2017, 5:11 PM), <https://slate.com/news-and-politics/2017/12/the-key-principle-in-the-masterpiece-cakeshop-case-was-litigated-in-1968.html> [<https://perma.cc/22MC-KKJ9>].

275. Letter from L. Maurice Bessinger, President, Nat’l Ass’n for the Preservation of White People Columbia Chapter, to Citizens of Columbia (Feb. 10, 1963), <https://digital.tcl.sc.edu/digital/collection/mmsimkins/id/13683> [<https://perma.cc/9ARN-5G95>]. The footer of NAPWP’s letterhead stated, “YOU Are White BECAUSE Your Ancestors Believed In SEGREGATION.” *Id.*

276. Dennis Carlson & Susan L. Schramm-Pate, *Risky Business: Teaching about the Confederate Flag in a South Carolina High School*, in BEYOND SILENCED VOICES: CLASS, RACE, AND GENDER IN UNITED STATES SCHOOLS 217, 223 (Michelle Fine & Lois Weis, eds., SUNY Press, rev. ed. 2005) (1993); John Monk, *Barbecue Eatery Owner, Segregationist Maurice Bessinger Dies at 83*, STATE (Feb. 24, 2014, 8:59 AM), <https://web.archive.org/web/20171215221350/http://www.thestate.com/news/business/article13839323.html> [<https://perma.cc/Y7PT-4LH4>].

277. Monk, *supra* note 276.

278. David Firestone, *Sauce Is Boycotted, and Slavery Is the Issue*, N.Y. TIMES (Sept. 29, 2000), <https://www.nytimes.com/2000/09/29/us/sauce-is-boycotted-and-slavery-is-the-issue.html> [<https://perma.cc/8BB6-JBLF>]. “I am not pro-slavery,” he said, “but no man on earth can make me deny what the Bible says about slavery. The stores are just yielding to outside pressure from people who want to destroy the Constitution and remake America to fit their globalism strategy.” *Id.*



ANSWER.<sup>279</sup> If you're wondering about the barbecue, don't. Louisiana food writer Rien Fertel visited and wrote, "I have eaten plenty of bad barbecue in my life: microwaved mystery meat; pork doused with vegetable oil to remoisten stale grub, pork the taste and color of cigarette ash. Maurice Bessinger's barbeque was not the worst bite I've ever chewed, but it ranks mighty low."<sup>280</sup>

Piggie Park refused to serve Anne Newman, Sharon Neal, and John Mungin because Bessinger believed that "serv[ing] members of the Negro race . . . would violate his sacred religious beliefs."<sup>281</sup> Bessinger argued to the Supreme Court that the Civil Rights Act was invalid because it "contravenes the will of God" and interfered with the "free exercise of his religion."<sup>282</sup>

The religious freedom argument was so ridiculous that the Supreme Court in 1968 laughed it off in a footnote.<sup>283</sup> "[T]his is not even a borderline case," wrote the Court, adding that Bessinger's defenses were "patently frivolous."<sup>284</sup> This was true even though Bessinger opened a Christian mission "in Piggie Park Headquarters," "became a lay preacher and started directing a Bible Study . . ."<sup>285</sup> No court involved in the case, at any stage, countenanced the religiously motivated discrimination, however well-entrenched.<sup>286</sup> Line #2 was clear. There was no religious right to violate others' rights.

Like Masterpiece Cakeshop's owner, stories about Piggie Park BBQ and its owner abound. The brave Black women and man who challenged the law are all but written out of the story. Anne Newman, who worked for the South Carolina NAACP at the time, is given one line in most stories and typically is just identified as a minister's wife, if she appears at all.<sup>287</sup> Her husband, Isaiah DeQuincey Newman, is rarely identified as

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279. The sign can be seen on Google Maps starting in Oct. 2014 but is gone in Dec. 2018. See Street View at 1601 US-321, GOOGLE MAPS, <https://goo.gl/maps/CtiUvx7EAUmfSRAd8> (click on "Street View" located in the bottom of the box in the upper left of the screen to toggle between years); see also RIEN FERTEL, *THE ONE TRUE BARBECUE: FIRE, SMOKE, AND THE PITMASTERS WHO COOK THE WHOLE HOG* 161 (N.Y.: Atria Books, 2017) (noting the presence of Bessinger's Piggie Parks throughout South Carolina).

280. FERTEL, *supra* note 279, at 162.

281. *Newman v. Piggie Park Enter., Inc.*, 256 F. Supp. 941, 945 (D.S.C. 1966).

282. *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 n.5 (1968) (internal quotations omitted).

283. *Id.*

284. *Id.*

285. MAURICE BESSINGER, *DEFENDING MY HERITAGE: THE MAURICE BESSINGER STORY* 134 (Lmbone-Lehone 2001). I believe this is truly one of the most heinous books I've ever read.

286. See cases cited *supra* note 270.

287. See, e.g., Jim Shahin, *A Barbecue Case That Helped the Cause of Civil Rights*, WASH. POST:

NAACP field secretary at the time or the first Black state senator in South Carolina after Reconstruction and a civil rights icon in the state.<sup>288</sup> Sharon Neal and John Mungin are mentioned even less. The 2017 Slate interview with Mungin talking of the gun to his head is an outlier.<sup>289</sup> I could find little more than that they were denied service on two separate days. As far as I can tell, their stories of this world-changing Supreme Court win have never been told.<sup>290</sup>

*Masterpiece* and *Piggie Park* cases are conjoined—inseparable. The media focus on the bigot, rather than the victims, is one similarity.<sup>291</sup> Another is that there is no way to say that discrimination is legal and acceptable in one case and not the other. If a homophobic god can grant a license to discriminate against LGBTQ+ people despite civil rights laws, then a racist god can do the same against Black and Brown Americans.

The Crusaders tried, desperately, to distinguish discriminating against one stigmatized minority from discriminating against the other, but they failed.<sup>292</sup> Utterly and repeatedly. I think this failure may be why the Court (pre-Kavanaugh) didn't fully dive into the weaponized religious-freedom abyss. During oral argument, none of the justices or the bakery's attorneys could draw a satisfactory line that would allow anti-LGBTQ+ discrimination but not racial discrimination.<sup>293</sup>

Interracial marriage was outlawed in many states—laws justified with

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FOOD (Aug. 2, 2016), [https://www.washingtonpost.com/lifestyle/food/a-barbecue-case-that-helped-the-cause-of-civil-rights/2016/08/01/cc5edcd8-5203-11e6-b7de-dfe509430c39\\_story.html](https://www.washingtonpost.com/lifestyle/food/a-barbecue-case-that-helped-the-cause-of-civil-rights/2016/08/01/cc5edcd8-5203-11e6-b7de-dfe509430c39_story.html) [<https://perma.cc/S8DZ-ATGP>]; Lauren Collins, *America's Most Political Food*, NEW YORKER (Apr. 17, 2017), <https://www.newyorker.com/magazine/2017/04/24/americas-most-political-food> [<https://perma.cc/85DL-NNU2>] (both mentioning Newman only briefly).

288. For more on Mr. Newman, see *THE SPIRIT OF AN ACTIVIST: THE LIFE AND WORK OF ISAIAH DEQUINCEY NEWMAN* (Sadye L. M. Logan, ed., Univ. of S.C. Press, 2014).

289. Farias, *supra* note 274.

290. Even recorded interviews with Anne Newman focus on her husband's work. *See, e.g.*, *CHAMPIONS OF CIVIL AND HUMAN RIGHTS IN SOUTH CAROLINA: VOL. 1 DAWN OF THE MOVEMENT ERA, 1955–1967* (Marvin Ira Lare, ed., Columbia: Univ. of S.C. Press, 2016) (see book for transcript of Lare interview with Newman).

291. *See, e.g.*, Shahin, *supra* note 287 (focusing on Bessinger rather than the victims, including Newman); *When the Right to Religion Conflicts with a Changing Society*, NPR (Jan. 11, 2014), <https://www.npr.org/2014/01/11/261699145/when-the-right-to-religion-conflicts-with-a-changing-society> [<https://perma.cc/DB3A-QL7R>] (focusing on Little Sisters of the Poor and Jack Phillip's *Masterpiece Cakeshop* rather than the victims of the discrimination).

292. *See generally* Oral Argument, *supra* note 259.

293. Oral Argument, *supra* note 259, at 00:13:50 (Justice Breyer asking, "All right, then, what is the line?").

Christianity<sup>294</sup>—until the Supreme Court struck them down in 1967.<sup>295</sup> During the *Masterpiece* oral argument, after some excellent questioning on the *Piggie Park* case from Justice Sotomayor, Justice Kagan asked the Crusader about interracial marriage:

JUSTICE KAGAN: Same case or not the same case, if your client instead objected to an interracial marriage?

CRUSADER: Very different case in that context.

JUSTICE KAGAN: Not the same. How about if he objected to an interreligious [marriage]?

CRUSADER: Similar case, assuming that the objection is to—

JUSTICE KAGAN: Similar to what?

CRUSADER: Similar to Mr. Phillips [bakery owner]. That would be protected . . . .

JUSTICE KAGAN: You're just saying race is different?

CRUSADER: I'm saying yes . . . I think race is different . . . .<sup>296</sup>

Crusader's clumsy attempts to distinguish the indistinguishable boiled down to the bare assertion that “race is different.”<sup>297</sup> Noel Francisco, Trump's Crusader-affiliated solicitor general, put race in a “different category” and offered the same conclusion without substantive support: “I think that race is particularly unique . . . .”<sup>298</sup>

This failure to distinguish racial and homophobic discrimination is predictable. It's impossible to draw a logical or consistent line between discrimination against one protected class (race) and another (sexual orientation) because once religiously motivated discrimination is permitted, the line has already been drawn in the wrong place. Line #2 was the appropriate line in this case: your religion is not a right to violate the rights of others. Instead of drawing the line between night and day, the Crusaders tried to draw the line between shades of benighted bigotry.

Racial discrimination is different in one sense: it is now reviled by

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294. See generally ANDREW SEIDEL, *THE FOUNDING MYTH: WHY CHRISTIAN NATIONALISM IS UN-AMERICAN* ch. 19 (2021) (chapter 19 is titled, “Unoriginal and Tribal: The Sixth, Eighth, and Ninth Commandments”).

295. *Loving v. Virginia*, 388 U.S. 1 (1967). The trial judge in Virginia upheld the state's anti-miscegenation law reasoning,

“Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.”

*Id.* at 3. The Supreme Court overturned and held, “the freedom to marry or not marry, a person of another race resides with the individual and cannot be infringed by the State.” *Id.* at 12.

296. Oral Argument, *supra* note 259, at 00:17:05.

297. *Id.*

298. *Id.* at 00:26:27 (Justice Sotomayor talks about Piggie Park at 00:16:00; Justice Kagan talks about interracial marriage at 00:17:05, stating “Race is different,” at 00:17:52).

most Americans. That shift in public opinion is due in no small part because civil rights laws mandated equal treatment. Justice Sotomayor explained this to the bakery at the end of oral argument: “America’s reaction to mixed marriages and to race didn’t change on its own. It changed because we had public accommodation laws that forced people to do things that many claimed were against their expressive rights and against their religious rights.”<sup>299</sup> Those laws work.

Once discrimination is permitted in the name of one’s god in some cases, the constitutional Rubicon has been crossed, and nothing makes sense. The most remarkable aspect of the cake case was how easy it should have been for the Court to decide and how miserably Kennedy and six other justices failed to uphold Line #2.

Chief Justice Roberts may have inadvertently offered some insight into why the justices may have decided the case with manufactured hostility: they were personally affronted.<sup>300</sup> They, perhaps, felt hostility toward their religious sentiments on LGBTQ+ equality. Roberts acknowledged during oral argument that “the racial analogy obviously is very compelling,” but objected to “decent and honorable” religious bigots who oppose LGBTQ+ equality, perhaps like himself, being lumped in with religious bigots who oppose racial equality.<sup>301</sup> Roberts was deeply opposed to the Court’s 2015 marriage-equality decision and even read his dissent from the bench—the only time he’s done that in a decade and a half on the Court. He began that diatribe, “From the dawn of human history until a few years ago for every people known to have populated this planet, marriage was defined as the union of a man and a woman for any civilization at anytime at anyplace in the world,” which is as untrue as it is sweeping.<sup>302</sup> His anger was palpable: “Just who do we think we

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299. Oral Argument, *supra* note 259, at 1:25:50.

300. *Id.* at 1:00:00.

301. *Id.*

302. Oral Dissent of Chief Justice Roberts, *Obergefell v. Hodges*, 576 U.S. 644 (2015) (No. 16-111), [www.oyez.org/cases/2014/14-556](http://www.oyez.org/cases/2014/14-556) [<https://perma.cc/74JT-9THE>]. For instance, polygyny and polygamy have been common throughout human history. And same-sex marriage between individuals was not unheard of. *See, e.g.*, ELIZABETH ABBOTT, *A HISTORY OF MARRIAGE* 10–11 (N.Y.: Seven Stories Press, 2011) (noting Roman men—including Emperor Nero—married other men). It was also common among many native people prior to Christian influence, in part because gender was fluid and multifaceted, rather than rigid and dichotomous. *See, e.g.*, Chynna Lockett, *Native American Tribes Are Wrestling with Decision to Legalize Same-Sex Marriage*, NPR (Aug. 16, 2019, 5:59 PM), <https://www.npr.org/2019/08/16/751861386/native-american-tribes-are-wrestling-with-decision-to-legalize-same-sex-marriage> [<https://perma.cc/GEC4-3DYQ>] (“LGBT people aren’t a new concept for tribes. In Lakota and other native cultures, they’re traditionally referred to as two-spirited people.”).

are?” Roberts asked his fellow justices.<sup>303</sup>

While Roberts might object, the reality is that religion motivates racism and homophobia. A year after the cake decision, Boone’s Camp Event Hall, a Mississippi wedding venue, refused to rent to an interracial couple: “[W]e don’t do gay weddings or mixed race, because of our Christian race—I mean, our Christian belief,” said the owner.<sup>304</sup> As the story exploded, the owner reversed course. Christianity motivates both anti-Black and anti-LGBTQ+ bigotry, and the Christian justices seemed personally affronted by this fact.<sup>305</sup> Had the Court gone whole hog and allowed discrimination in the name of religious freedom, we would have seen more Boone’s Camps.

What’s the worst that would have happened had the Court decided against the bakery? The bakery owner wasn’t forced to marry a man. He wasn’t asked to officiate a wedding. In fact, as a religious individual, he wasn’t asked to do anything; a business organized under Colorado law and open to the public was asked to do what it has done for thousands of couples and provide a cake for a reception. The owner was still able to go to church and worship as he saw fit. He could still read and study his bible. He could still condemn homosexuality as an abomination and justify that bigotry with Jesus’s carpentry.

The case was not the win the Crusaders wanted, but it was a win, and their legions of followers were emboldened. Their zeal has only grown since Brett Kavanaugh and Amy Coney Barrett, mercenaries plucked from their own ranks, were dumped on the Court.<sup>306</sup> They’re not going to be content with winning a license to discriminate. They’re coming for marriage equality, for Charlie and David’s marriage.

“When all of this really got crazier and crazier,” explained Dave, “we just decided that we were always a team and that we were always going to put ourselves first in this process.”<sup>307</sup> They learned to communicate

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303. Court watchers noted the anger where an average observer might not. See, e.g., Erwin Chemerinsky, *Justice at Risk*, AM. PROSPECT (Winter 2017), <https://prospect.org/power/justice-risk/> [<https://perma.cc/TW2J-JRAW>] (“[O]ne need only read the passionate dissents of Roberts, Thomas, and Alito in *Obergefell* to see that they likely would vote to overrule this decision in an instant.”).

304. Ashton Pittman, *No ‘Mixed’ or ‘Gay’ Couples, Mississippi Wedding Venue Owner Says on Vide*, DEEP VOICE (Sept. 1, 2019), <https://www.deepsouthvoice.com/index.php/2019/09/01/no-mixed-or-gay-couples-mississippi-wedding-venue-manager-says-on-video> [<https://perma.cc/848R-JREP>].

305. See generally Oral Dissent of Chief Justice Roberts, *supra* note 302; Chemerinsky, *supra* note 303.

306. I discuss this at greater length in the full book, especially the increasing frequency of the cases. See AMERICAN CRUSADE, *supra* note 4, at 246–47 (outlining various examples of religious freedom cases that have been heard by the court in recent years).

307. Craig and Mullins Interview, *supra* note 19.

better and while under media scrutiny: “We’d have to be able to read the other’s body language or eyes or pick up on certain words.”<sup>308</sup> They developed a language of silent hand signals they could use while holding hands.<sup>309</sup> In the moments before oral argument, Charlie felt anxious and panicky.<sup>310</sup> In the Court, everyone except the arguing lawyers are packed tightly together on benches, including Charlie and Dave.<sup>311</sup> “I thought I was going to have a panic attack,” Charlie recalled.<sup>312</sup> But Dave was there. On the television show *Arrested Development*, each character has a taunting chicken dance they use to mock their fellow family members, none of them remotely resembling a chicken.<sup>313</sup> Dave “whispered in my ear ‘everybody’s chicken dance’ and made me laugh and . . . I was able to carry on and not have a full-blown panic attack in the middle of the Supreme Court.”<sup>314</sup> A story that is all the more endearing if you watch any of these dances.

From communicating with the eyes, certain words, and hand signals, to simply putting their team first and growing as a couple, “a lot of that was really beautiful,” mused Charlie.<sup>315</sup> Bigotry is meant to break, but Charlie and Dave fought back and found beauty in the struggle.

There are cases in which hostility toward religion is a serious concern, but they are vanishingly rare against Christians in the United States. This should go down as one of the Court’s worst decisions: cowardly, mendacious, and ratifying bigotry in the name of god.

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308. *Id.*

309. *Id.*

310. *Id.*

311. *Id.*

312. Craig and Mullins Interview, *supra* note 19.

313. *Id.*

314. *Id.*

315. *Id.*