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# Debunking the Narrowness Narrative in LGBTQ Religious Exemption Claims

Kyle C. Velte
*University of Kansas School of Law*, kvelte@ku.edu

# DEBUNKING THE NARROWNESS NARRATIVE IN LGBTQ RELIGIOUS EXEMPTION CLAIMS

KYLE C. VELTE*

ABSTRACT

*In three recent cases*—Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*,* Fulton v. City of Philadelphia*, and* 303 Creative LLC v. Elenis—*the U.S. Supreme Court held in favor of a conservative Christian claimant who sought a religious exemption, reasoning that the First Amendment's Free Exercise or Free Speech clause exempted the claimant from complying with a validly enacted antidiscrimination provision barring discrimination based on sexual orientation and gender identity.*

*Many legal scholars and commentators have decried these decisions as radically altering First Amendment law at the expense of LGBTQ civil rights. In contrast, many national LGBTQ rights organizations have engaged in a different kind of narrative about these cases, one that tends to minimize the scope and breadth of the risk and retrenchment created by these decisions. I call this the Narrowness Narrative because it characterizes these three decisions as narrow in ways that obscure the bigger and more troubling picture, namely the Court's burgeoning sympathy for the interests of the white Christian nationalism movement and the undeniable trend of the Court's elevation of these interests and the concomitant subordination of marginalized communities, including the LGBTQ community.*

*In his Childress Lecture and article, Professor Ball counsels that, in order to keep progressivism's distributive and egalitarian goals centered within the progressive legal movement, "it is important for progressive activists, commentators, and academics to consider how specific constitutional claims made in court impact the framing of policy questions outside of the judicial context." This essay adapts and extends that call to a different stage of the life cycle of LGBTQ rights litigation and, in some instances to different actors in that movement, by focusing on the post-mortem messaging of national LGBTQ*

* Associate Dean for Faculty, Professor, and Karelitz Chair in Evidence, University of Kansas School of Law. I am grateful to have been invited to participate in the 2023 Childress Lecture and Symposium and extend my thanks to all involved, including the student organizers and editors, Professor Carlos Ball, and all of the panelists. Thanks also go to KU Law students Libby Rohr and Cas Katon for their outstanding research assistance.

*rights organizations upon the Court's issuing of a ruling that diminishes LGBTQ equality. I advocate that these national organizations ought to be attentive to progressivism's distributive and egalitarian goals when issuing public statements about anti-LGBTQ U.S. Supreme Court decisions and contend that the Narrowness Narrative is counterproductive to progressivism's goals.*

## INTRODUCTION

Between 2018 and 2023, the U.S. Supreme Court decided three cases involving claims for LGBTQ religious exemptions made by conservative Christians in the wedding vendor and foster care industries. In all three cases—*Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*,[1] *Fulton v. City of Philadelphia*,[2] and *303 Creative LLC v. Elenis*[3]—the Court held in favor of the conservative Christian claimant, reasoning that the First Amendment's Free Exercise or Free Speech clause exempted the claimant from complying with a validly enacted antidiscrimination provision barring discrimination based on sexual orientation and gender identity ("SOGI").

Some legal scholars and commentators have decried these decisions as radically altering First Amendment law at the expense of LGBTQ civil rights.[4] In contrast, many national LGBTQ rights organizations have engaged in a different kind of narrative about these cases, one that tends to minimize the scope and breadth of the risk and retrenchment created by these decisions.[5] I call this the Narrowness Narrative because it characterizes these three decisions as

1. 138 S. Ct. 1719, 1748-49 (2018).
2. 141 S. Ct. 1868, 1881-82 (2021).
3. 143 S. Ct. 2298, 2321 (2023).
4. *See, e.g.*, Note, *Pandora's Box of Religious Exemptions*, 136 HARV. L. REV. 1178, 1178 (2023); Kyle C. Velte, *2022 Quietly Set the Stage for a Massive Rollback of LGBTQ Rights*, TRUTHOUT (Dec. 27, 2022), https://truthout.org/articles/2022-quietly-set-the-stage-for-a-massive-rollback-of-lgbtq-rights/ [https://perma.cc/HB7K-FRDZ]; Sarah Posner, *The 'Masterpiece Cakeshop' Decision Is Not as Harmless as You Think*, NATION (June 4, 2018), https://www.thenation.com/article/archive/masterpiece-cakeshop-decision-not-harmless-think/ [https://perma.cc/U6SC-X999]; Melissa Murray, *The Geography of Bigotry*, 99 B.U. L. REV. 2611, 2622-25 (2019); James M. Oleske, Jr., *Free Exercise (Dis)honesty*, 2019 WIS. L. REV. 689, 732-35 (2019); René Reyes, *Religious Liberty, Racial Justice, and Discriminatory Impacts: Why the Equal Protection Clause Should Be Applied at Least as Strictly as the First Amendment*, 55 IND. L. REV. 275, 287-88 (2022); Carlos A. Ball, *Against LGBT Exceptionalism in Religious Exemptions from Antidiscrimination Obligations*, 31 J.C.R. & ECON. DEV. 233, 239-42 (2018); Ira C. Lupu & Robert W. Tuttle, *The Radical Uncertainty of Free Exercise Principles: A Comment on Fulton v. City of Philadelphia*, AM. CONST. SOC'Y SUP. CT. REV. (2021), https://www.acslaw.org/analysis/acs-journal/2020-2021-acs-supreme-court-review/the-radical-uncertainty-of-free-exercise-principles-a-comment-on-fulton-v-city-of-philadelphia/ [https://perma.cc/AVU9-ZFMJ]; Dahlia Lithwick, *The Supreme Court Moves the Shadow Docket Out Into the Light*, SLATE (June 21, 2021), https://slate.com/news-and-politics/2021/06/fulton-v-philadelphia-supreme-court-religious-freedom-discrimination.html [https://perma.cc/V5YB-VQ7X]; Kyle C. Velte, *Postponement as Precedent*, 29 S. CAL. REV. L. & SOC. JUST. 1, 10 (2019). *Cf.*, Ira C. Lupu & Robert W. Tuttle, *Kennedy v. Bremerton School District – A Sledgehammer to the Bedrock of Nonestablishment*, AM. CONST. SOC'Y EXPERT F. (June 28, 2022), https://www.acslaw.org/expertforum/kennedy-v-bremerton-school-district-a-sledgehammer-to-the-bedrock-of-nonestablishment/ [https://perma.cc/CH4E-8G9N]; Mark Joseph Stern, *The Easy-to-Miss Twist That Makes the Supreme Court's New Gay Rights Case So Strange*, SLATE (Dec. 5, 2022), https://slate.com/news-and-politics/2022/12/303-creative-gay-rights-free-speech-supreme-court.html [https://perma.cc/R9W4-MW74].
5. *See* Part I, *infra*.

narrow in ways that obscure the bigger and more troubling picture, namely the Court's burgeoning sympathy for the interests of the white Christian nationalism movement[6] and the undeniable trend of the Court's elevation of these interests and the concomitant subordination of marginalized communities, including the LGBTQ community.[7]

In his Childress Lecture and article, Professor Ball counsels that, in order to keep progressivism's distributive and egalitarian goals centered within the progressive legal movement, "it is important for progressive activists, commentators, and academics to consider how specific constitutional claims made in court impact the framing of policy questions outside of the judicial context."[8] This essay adapts and extends that call to a different stage of the life

6. Journalist Katherine Stewart describes Christian nationalism as "not a religious creed but . . . [a] political ideology. It promotes the myth that the American republic was founded as a Christian nation." KATHERINE STEWART, THE POWER WORSHIPPERS: INSIDE THE DANGEROUS RISE OF RELIGIOUS NATIONALISM 4 (2020). The movement is one of nationalism "because it purports to derive its legitimacy from its claim to represent a specific identity unique to and representative of the American nation." *Id.* at 5. It is "Christian" because of "the movement's own understanding of this national identity . . . [as] inextricably bound up with a particular religion." *Id.* Stewart offers the following qualification of this descriptor—a qualification with which I agree: "I do not mean to suggest that Christian nationalism is representative of American Christianity as a whole. Indeed, a great many people who identify as Christians oppose the movement, and quite a few even question whether it is authentically Christian in the first place." *Id.* I add "white" to Stewart's descriptor because the movement was born out of opposition to racial desegregation during the civil rights movement of the 1960s and because white supremacist norms pervade the movement's current legal and political agendas. *See, e.g.*, David Simson, *Most Favored Racial Hierarchy: The Ever-Evolving Ways of the Supreme Court's Superordination of Whiteness*, 120 MICH. L. REV. 1629, 1629 (2022). *See also* Jeffrey Toobin, *The Conservative Pipeline to the Supreme Court*, NEW YORKER (Apr. 17, 2017) ("The Federalist Society has for years been singularly focused on building a farm team of judicial nominees who subscribe to a philosophy that is hostile to the advancement of social and economic progress in the country. Behind the scenes, during Republican Administrations, they are very engaged in identifying and recruiting for judge candidates who are ultra-conservatives—who are opposed to our rights and liberties across the board, whether it's women, the environment, consumer protections, worker protections."), https://www.newyorker.com/magazine/2017/04/17/the-conservative-pipeline-to-the-supreme-court [https://perma.cc/2VWB-ZK8Z].

7. *See, e.g.*, PHILIP S. GORSKI & SAMUEL L. PERRY, THE FLAG AND THE CROSS: WHITE CHRISTIAN NATIONALISM AND THE THREAT TO AMERICAN DEMOCRACY 68-71 (2022); Katherine Stewart, *How Christian Nationalism Perverted the Judicial System and Gutted Our Rights*, NEW REPUBLIC (May 10, 2022), https://newrepublic.com/article/166404/christian-right-roe-alito-abortion [https://perma.cc/UK45-FWRT]; AMANDA HOLLIS-BRUSKY, IDEAS WITH CONSEQUENCES: THE FEDERALIST SOCIETY AND THE CONSERVATIVE COUNTERREVOLUTION 6-8 (2015); Margaret Talbot, *Amy Coney Barrett's Long Game*, NEW YORKER (Feb. 7, 2022); Linda Greenhouse, *Alito's Call to Arms to Secure Religious Liberty*, N.Y. TIMES (Aug. 11, 2022), https://www.nytimes.com/2022/08/11/opinion/religion-supreme-court-alito.html [https://perma.cc/CDV6-W7BK].

8. Carlos Ball, *Progressive Constitutionalism and Its Libertarian Discontents: The Case of LGBTQ Rights*, 68 ST. LOUIS U. L.J. 1, 17 (2024).

cycle of LGBTQ rights litigation and, in some instances to different actors in that movement,[9] by focusing on the post-mortem messaging of national LGBTQ rights organizations upon the Court's issuing of a ruling that diminishes LGBTQ equality. I advocate that these national organizations ought to be attentive to progressivism's distributive and egalitarian goals when issuing public statements about anti-LGBTQ U.S. Supreme Court decisions and contend that the Narrowness Narrative is counterproductive to progressivism's goals.

## I. RADICAL CASES, MUTED RESPONSES

### *A. The Court's Anti-LGBT Trilogy: Masterpiece Cakeshop, Fulton, and 303 Creative*

After nearly two decades of pro-LGBTQ rulings,[10] the Court has taken significant steps backward with regard to LGBTQ equality, particularly in the area of public accommodations laws, in the past half dozen years. The retrenchment began in 2018 in *Masterpiece Cakeshop*. A conservative Christian baker argued that he was exempt from Colorado's public accommodations law based on the First Amendment's Free Speech and Free Exercise Clauses.[11] The baker had refused to sell a cake to celebrate the marriage of a same-sex couple—in violation of the law—based on his sincerely held religious belief that marriage is between a man and a woman, which he argued was protected by the First Amendment.[12]

The Court punted on the substantive question of whether the First Amendment compels such religious exemptions.[13] Instead, the Court held in the baker's favor on procedural grounds: because some adjudicators in an administrative hearing failed to provide constitutionally required neutrality when hearing the baker's religiously grounded claims, the state had violated the baker's free exercise rights.[14]

9. There may, of course, be overlap of these groups when, for example, a national LGBTQ organization represents a party in Supreme Court litigation.

10. *See* Romer v. Evans, 517 U.S. 620, 635 (1996); Lawrence v. Texas, 539 U.S. 558, 578 (2003); Christian Legal Society v. Martinez, 561 U.S. 661, 697 (2010); United States v. Windsor, 570 U.S. 744, 775 (2013); Obergefell v. Hodges, 576 U.S. 644, 681 (2015), Bostock v. Clayton Cnty., 590 U.S. __, 140 S. Ct. 1731, 1754 (2020). *See also* Kyle C. Velte, *The Precarity of Justice Kennedy's Queer Canon*, 13 CONLAWNOW 75, 75-76 (2022).

11. *Masterpiece Cakeshop*, 138 S. Ct. at 1723.

12. *Id*. at 1726.

13. *Id*. at 1727; *see also*, *e.g.*, Kyle C. Velte, *Why the Religious Right Can't Have Its (Straight Wedding) Cake and Eat It Too: Breaking the Preservation-through-Transformation Dynamic in* Masterpiece Cakeshop v. Colorado Civil Rights Commission, 36 L. & INEQ. 67, 71 (2018).

14. *Masterpiece Cakeshop*, 138 S. Ct. at 1729, 1732 (finding that the Colorado Civil Rights Commission exhibited "clear and impermissible hostility toward the sincere religious beliefs that motivated his objection" and thus violated the First Amendment Free Exercise Clause).

The Court's backsliding on LGBTQ civil rights continued in 2021 in *Fulton*. A faith-based foster care agency, Catholic Social Services ("CSS"), contracted with the City of Philadelphia to provide screening of prospective foster parents.[15] CSS had a sincerely held religious belief that marriage is a sacred bond between a man and a woman, and based on that belief, did not want to certify same-sex couples as prospective foster parents.[16] However, a refusal to certify such couples would violate both the City's public accommodations ordinance and a nondiscrimination clause in CSS's contract with the City.[17] CSS argued it was exempt from both of these nondiscrimination requirements based on the First Amendment's Free Exercise and Free Speech Clauses.[18]

The Court resolved the case solely on the Free Exercise Clause, holding that the City's denial of an exemption from the contract provision violated that clause.[19] However, like it had in *Masterpiece Cakeshop*, the Court declined to address the substantive legal question of whether the First Amendment requires religious exemptions from state or local public accommodations laws.[20]

Instead of basing its decision on the City's public accommodation ordinance, the Court relied on the contract between CSS and the City.[21] That contract included an antidiscrimination clause prohibiting contractors like CSS from engaging in SOGI discrimination.[22] However, the contract also contained a provision that permitted the City to grant an exception to the antidiscrimination clause at the sole discretion of the city commissioner.[23] The Court held that the possibility of discretionary exceptions rendered the antidiscrimination provision not generally applicable and thus subject to strict scrutiny.[24] The Court concluded that the City failed to carry this burden, thus unconstitutionally burdening CSS's right to free religious exercise.[25]

The Court handed down its most recent anti-LGBTQ decision in 2023 in *303 Creative*. Like *Masterpiece*, this case arose under Colorado's public accommodations law.[26] Unlike *Masterpiece*, it based its holding on the First Amendment's Free Speech Clause.[27] *303 Creative* involved a website designer who planned to begin selling wedding website services but who had a sincerely

15. *Fulton*, 141 S. Ct. at 1875-76.
16. *Id.* at 1875.
17. *Id.*
18. *Id.*
19. *Id.* at 1881-82.
20. The Court held that a foster care agency is not a public accommodation. *Id.* at 1881.
21. *Id.*
22. *Id.* at 1881.
23. *Id.* at 1879.
24. *Id.* at 1879, 1881.
25. *Id.* at 1882.
26. *303 Creative*, 143 S. Ct. at 2303.
27. *Id.;* Masterpiece Cakeshop relied on the Free Exercise Clause. *Masterpiece Cakeshop*, 138 S. Ct. at 1732.

held religious belief that same-sex marriage was "false"[28] and, as a result, wanted to turn away any same-sex couples.[29] Because that denial of service would violate Colorado's law, the website designer argued that the First Amendment's Free Speech Clause exempted her from compliance with that law.[30] The Court agreed with the website designer, holding that Colorado's law was unconstitutional as applied to her.[31]

Each of these cases standing alone represents a troubling departure from the long-understood role and application of public accommodations laws, as well as from established First Amendment doctrine.[32] Taken together, these cases bring into stark relief the Court's campaign to radically rewrite First Amendment law in ways that give primacy to the interests of the white Christian nationalism movement and subordinate the rights of LGBTQ people in the marketplace.[33]

Yet, to read the public statements of many national LGBTQ rights organizations, you wouldn't know it.

28. *303 Creative*, 143 S. Ct. at 2322 (Sotomayor, J., dissenting).

29. *Id.* at 2309.

30. *Id.* at 2308.

31. *Id.* at 2303.

32. *See, e.g.*, Velte, *supra* note 4; Lupu & Tuttle, *supra* note 4; Kyle C. Velte, *The Supreme Court's Gaslight Docket*, 97 TEMPLE L. REV. ____ (forthcoming 2024).

33. *See, e.g.,* Margaret Talbot, *Justice Alito's Crusade Against America Isn't Over*, NEW YORKER (Aug. 28, 2022), https://www.newyorker.com/magazine/2022/09/05/justice-alitos-crusade-against-a-secular-america-isnt-over [https://perma.cc/3TZU-BQEW]; Edward Lempinen, *Crisis of Faith: Christian Nationalism and the Threat to U.S. Democracy*, BERKELEY NEWS (Sept. 20, 2022), https://news.berkeley.edu/2022/09/20/crisis-of-faith-christian-nationalism-and-the-threat-to-u-s-democracy [https://perma.cc/M6EF-7S27]; Mark Joseph Stern, *The Supreme Court's Blessing of Anti-LGBTQ+ Discrimination Will Haunt Gay Couples*, SLATE (June 30, 2023), https://slate.com/news-and-politics/2023/06/supreme-court-lgbtq-gay-wedding-website-discrimination.html [https://perma.cc/6MHA-E6CK]; Velte, *supra* note 32; Daniel Koontz, *Hostile Public Accommodations Laws and the First Amendment*, 3 N.Y.U. J.L. & LIBERTY 197, 203 (2008); Caroline Mala Corbin, *Speech or Conduct?: The Free Speech Claims of Wedding Vendors*, 65 EMORY L.J. 241, 293-94 (2015); Louise Melling, *Will We Sanction Discrimination?: Can "Heterosexuals Only" Be Among the Signs of Today?*, 60 UCLA L. REV. DISC. 248, 250 (2013); Douglas NeJaime & Reva Siegel, *Religious Exemptions and Antidiscrimination Law in Masterpiece Cakeshop*, 128 YALE L.J.F. 201, 201 (2018); Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2516 (2015); Micah Schwartzman, Nelson Tebbe, & Richard Schragger, *The Costs of Conscience*, 106 KY. L.J. 781, 782 (2017-2018); NELSON TEBBE, RELIGIOUS FREEDOM IN AN EGALITARIAN AGE 115 (Harvard Univ. Press 2017).

### *B. National LGBTQ Organizations' Muted Responses to a Revolution in First Amendment and Public Accommodations Jurisprudence*

#### 1. National LGBTQ Organizations and the Media

National LGBTQ rights organizations play an important role in the quest for LGBTQ civil rights in the United States, in both the political and legal spheres.[34] Many of these national organizations issue press releases upon the occurrence of notable events that impact the LGBTQ community, including U.S. Supreme Court decisions. These press releases reflect a "need for minority organizations to build and frame messages in the mass media that are able to reach the majority community."[35]

Press releases play a role in agenda setting by working to "increase the salience of certain topics over others in news media content."[36] Communications professionals in national LGBTQ organizations "act as information subsidies, communicating tailored information to journalists and newsmakers" by the issuing "of media releases that inform the media about what topics to cover and how to cover them."[37] Moreover, the national LGBTQ organizations' framing of issues and events is in and of itself significant because "[w]hile agenda building tells newsmakers what to think about, framing tells them how to think about the salient issue."[38]

#### 2. The Narrowness Narrative

In this essay, I focus on just one aspect of national LGBTQ organizations' media strategies, namely their public statements about the recent trilogy of anti-LGBTQ decisions issued by the U.S. Supreme Court, which largely describe

34. *See generally* Marie-Amélie George, *Expanding LGBT*, 73 FLA. L. REV. 243, 243 (2021); Gabriel Arkles, Pooja Gehi, & Elana Redfield, *The Role of Lawyers in Trans Liberation: Building a Transformative Movement for Social Change*, 8 SEATTLE J. FOR SOC. JUST. 579, 579 (2012); Douglas NeJaime, *The Legal Mobilization Dilemma*, 61 EMORY L.J. 663, 664 (2012); Kyle C. Velte, *From the Mattachine Society to Megan Rapinoe: Trancing and Telegraphing the Conformist/Visionary Divide in the LGBT-Rights Movement*, 54 U. RICH. L. REV. 799, 799 (2020); Justin R. Long, *Demosprudence, Interactive Federalism, and Twenty Years of* Sheff v. O'Neill, 42 CONN. L. REV. 585, 608 (2009).

35. Joseph M. Cabosky, *Framing an LGBT Organization and a Movement: A Critical Qualitative Analysis of GLAAD'S Media Releases*, 3 PUB. RELS. INQUIRY 69, 70 (2014).

36. *Id.* (internal citation omitted).

37. *Id.* (internal citation omitted).

38. *Id.* at 71 (internal citation omitted). More specifically:

> This occurs as various attributes of the broader issue are highlighted, and these salient attributes thus frame how the receiver views the topic . . . This "selection of a restricted number of thematically related attributes" . . . creates a "central organizing idea" on how receivers then perceive an issue. . . . This is an argument of accessibility as receivers react to these framed attributes based on their prominence in coverage.

*Id.* (internal citations omitted).

those holdings as narrow.[39] Specifically, I highlight that in the wake of *Masterpiece Cakeshop*, *Fulton*, and *303 Creative*, many of the national LGBTQ organizations persistently framed the decisions as 'narrow' ones that were, in fact, a 'win' for LGBTQ people. While these organizations were not categorically positive in their descriptions, they did tend to bury the lede—the Court's alarming departure from established norms and legal principles in First Amendment and public accommodations law—by framing their message with assurances of narrowness. In Part II, I describe the consequences of the Narrowness Narrative.

The following charts illustrate the Narrowness Narrative.[40]

STATEMENTS ABOUT MASTERPIECE CAKESHOP

| Organization | Statement |
|---|---|
| **GLBTQ Legal Advocates & Defenders (GLAD)** | "[T]his **limited ruling** provides no basis for this Cakeshop or other entities covered by anti-discrimination laws to refuse goods and services in the name of free speech or religion."[41] |

39. I focus only on the fact that these organizations promulgated a Narrowness Narrative and leave for another day an analysis of *why* these organizations chose to take this approach. Scholars posit that such choices are made for strategic, movement-building reasons. *See, e.g.*, Cabosky, *supra* note 35, at 72 (noting that the queer theory idea of strategic essentialism considers "how a group strategically decides to portray its members in a specific, or essentialized, manner in hopes of achieving its goals, even if it ignores certain realities or truths of the overall group . . . notion is that a hopefully temporary essentializing, what would amount to a positive stereotyping and branding of the group, may be necessary to accomplish this goal, even if there are other negatives created"); *id.* at 77 (noting that some minority organizations seek to strike an assimilationist rather than disruptive tone for strategic reasons); *id.* at 80 ("[I]f the [LGBTQ] organization was indeed the actor with less power in such a relationship [with news entities], strategic decisions would likely have to be made that would limit disruptive abilities."). Moreover, I do not focus on individual movement actors or academics, some of whom did, in fact, frame these decisions accurately as broad threats to LGBTQ equality. *See, e.g.*, Elizabeth Sepper, *Opinion: With Its 303 Creative Decision, the Supreme Court Opens the Door to Discrimination*, L.A. TIMES (June 20, 2023), https://www.latimes.com/opinion/story/2023-06-30/supreme-court-303-creative-gay-rights-first-amendment-lorie-smith-neil-gorsuch-sonia-sotomayor [https://perma.cc/CXZ5-UE7M].

40. Emphasis added in all quotes.

41. GLAD Statement of Mary L. Bonauto on Supreme Court Ruling in Masterpiece Cakeshop v. Colorado (June 4, 2018), https://www.glad.org/glads-mary-l-bonauto-on-scotus-ruling-in-masterpiece-cakeshop-v-colorado/ [https://perma.cc/8SUJ-9QSV].

| Organization | Statement |
|---|---|
| **Gay & Lesbian Alliance Against Defamation (GLAAD)** | "The Supreme Court has made a **narrow ruling** in favor of a Christian baker in Colorado who refused to make a custom cake for a same-sex couple."[42] |
| **Lambda Legal** | "Today, the U.S. Supreme Court handed the religious right a **limited, fact-specific victory**, ruling that the Colorado civil rights agency violated the religious rights of a Denver baker who refused to sell a same-sex couple a wedding cake. The Court **ruling was limited**, however, finding the state agency that rejected the baker's religion and free speech claims had been improperly biased against him."[43] |
| **American Civil Liberties Union (ACLU)** | "The court reversed the Masterpiece Cakeshop decision **based on concerns unique to the case** but reaffirmed its longstanding rule that states can prevent the harms of discrimination in the marketplace, including against LGBT people."[44] |
| **National Center for Lesbian Rights (NCLR)** | "Today's Supreme Court decision in Masterpiece Cakeshop is a **narrow**, **fact-based decision** that does not break any new constitutional ground or create any new exemptions to anti-discrimination laws."[45] |

42. GLAAD statement on Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission SCOTUS ruling (June 4, 2018), https://glaad.org/releases/glaad-statement-masterpiece-cakeshop-ltd-v-colorado-civil-rights-commission-scotus-ruling/ [https://perma.cc/4PNF-VXLN].

43. Lambda Legal, *Supreme Court Fails to Affirm LGBT Equality Rights* (June 4, 2018), https://legacy.lambdalegal.org/blog/20180604_masterpiece-cakeshop-decision.

44. ACLU, *Supreme Court Upholds Basic Principles of Nondiscrimination, Reverses Colorado Civil Rights Commission Decision* (June 4, 2018), https://www.aclu.org/press-releases/supreme-court-upholds-basic-principles-nondiscrimination-reverses-colorado-civil [https://perma.cc/6XRP-LMDF].

45. NCLR Statement: Masterpiece Cakeshop (June 4, 2018), https://www.nclrights.org/about-us/press-release/nclr-statement-masterpiece-cakeshop/ [https://perma.cc/3N69-69SA].

| Organization | Statement |
|---|---|
| **Human Rights Campaign (HRC)** | "In today's **narrow ruling** against the Colorado Civil Rights Commission, the Supreme Court acknowledged that LGBTQ people are equal and have a right to live free from the indignity of discrimination."[46] |

STATEMENTS ABOUT *FULTON*

| Organization | Statement |
|---|---|
| **GLAD** | Title: "**Narrow Supreme Court Ruling** for Catholic Social Services in Philadelphia Leaves Fundamental Principles of Fairness and Nondiscrimination Intact"[47]<br><br>"On June 17, 2021, the Supreme Court issued a **narrow and limiting ruling** for Catholic Social Services that focuses on specific contractual language. The ruling leaves intact the broader principle that governments can require contractors, including religious agencies, to comply with nondiscrimination laws—including those that protect same-sex married couples – when providing taxpayer-funded social services.…"[48] |

46. Nick Morrow, *Narrow Scope of SCOTUS Ruling in Masterpiece Cakeshop Case Does Not Change Civil Rights Laws*, HRC (June 4, 2018), https://www.hrc.org/news/narrow-scope-of-scotus-ruling-in-masterpiece-cakeshop-case-does-not-change [https://perma.cc/G5SR-LBQQ].

47. GLAD, *Narrow Supreme Court Ruling for Catholic Social Services in Philadelphia Leaves Fundamental Principles of Fairness and Nondiscrimination Intact* (June 17, 2021), https://www.glad.org/narrow-supreme-court-ruling-leaves-principles-of-fairness-intact/ [https://perma.cc/U7JC-HESZ].

48. *Id.*

| Organization | Statement |
|---|---|
| **Family Equality** | Title: "Supreme Court Hands Down **Narrow, Case-Specific Ruling** in Fulton v. Philadelphia"[49]<br><br>"Today, the Supreme Court issued a **very narrow ruling** in favor of Catholic Social Services (CSS) in Fulton v. City of Philadelphia. The ruling, **specific to the circumstances of this case**, held that the City of Philadelphia violated the Free Exercise Clause of the First Amendment. . . . 'While today may have been a loss for the City of Philadelphia, **it was a victory for the principle that nondiscrimination protections** that our families depend upon are valid and enforceable when properly implemented[.]"[50] |
| **ACLU** | "Court Issues **Narrow Fact-Specific Ruling** That Does Not Create a License To Discriminate Based On Religious Beliefs . . . Opponents of LGBTQ equality have been seeking to undo hard-won non-discrimination protections by asking the court to establish a constitutional right to opt out of such laws when discrimination is motivated by religious beliefs. . . . **This is good news for LGBTQ people** and for everyone who depends on the protections of non-discrimination laws . . . ."[51] |
| **NCLR** | Title: "**NCLR Relieved by Narrow SCOTUS Ruling** in Fulton Allowing Governments to Prohibit Anti-LGBTQ Discrimination . . . **'Properly understood, today's decision is a significant victory for LGBTQ people,'** said Shannon Minter, NCLR Legal Director. 'The Court ruled in favor of Catholic Social Services, but on the **narrowest possible ground'**. . . ."[52] |

49. Family Equality, *Supreme Court Hands Down Narrow, Case-Specific Ruling in Fulton v. Philadelphia* (June 17, 2021), https://www.familyequality.org/press-releases/supreme-court-rules-in-fulton-v-city-of-philadelphia/ [https://perma.cc/Y837-7N43].

50. *Id.*

51. ACLU, *Supreme Court Decision Does Not Create a License to Discriminate* (June 17, 2021), https://www.aclu.org/press-releases/supreme-court-decision-does-not-create-license-discriminate [https://perma.cc/2B8P-ZNJ8].

52. Christopher Vasquez, *NCLR Relieved by Narrow SCOTUS Ruling in Fulton Allowing Governments to Prohibit Anti-LGBTQ Discrimination*, NCLR (June 17, 2021), https://www.ncl

| Organization | Statement |
|---|---|
| **HRC** | "Though **today's decision is not a complete victory**, it does not negate the fact that every qualified family is valid and worthy—children deserve a loving, caring, committed home."[53] |
| **National LGBTQ Task Force** | "The **Court's narrow ruling** applies only to the City of Philadelphia's contract with CSS. The **ruling does not create a broad license to discriminate** and is **very specific to the city of Philadelphia** and their nondiscrimination ordinance."[54] |

STATEMENTS ABOUT *303 CREATIVE*

The response of some national LGBTQ organizations shifted in response to the *303 Creative* decision,[55] but others continued the trend of minimizing the significance of the Court's holding.

rights.org/about-us/press-release/nclr-relieved-by-narrow-scotus-ruling-in-fulton-allowing-governments-to-prohibit-anti-lgbtq-discrimination/ [https://perma.cc/6JE4-5HYZ].

53. Aryn Fields, *The Human Rights Campaign Reacts to Supreme Court Decision in Fulton v. City of Philadelphia*, HRC (June 17, 2021), https://www.hrc.org/press-releases/the-human-rights-campaign-reacts-to-supreme-court-decision-in-fulton-v-city-of-philadelphia [https://perma.cc/8PXL-6XJK].

54. Kierra Johnson, *Response to Supreme Court Decision on Fulton v. City of Philadelphia, Pennsylvania*, NATIONAL LGBTQ TASK FORCE (June 17, 2021), https://www.thetaskforce.org/news/statement-in-response-to-supreme-court-decision-on-fulton-v-city-of-philadelphia-pennsylvania/ [https://perma.cc/YTW4-GQAU].

55. *See, e.g.*, GLAAD, *GLAAD Response to U.S. Supreme Court Decision in "303 Creative" Case Allowing a Business to Violated Nondiscrimination Laws to Refuse Service to LGBTQ Couples*, GLAAD (June 30, 2023), https://glaad.org/releases/glaad-response-to-us-supreme-court-decision-in-303-creative-case-allowing-a-business-to-violate-nondiscrimination-laws-to-refuse-service-to-lgbtq-couples/?gad_source=1&gclid=CjwKCAiAjrarBhAWEiwA2qWdCCOiV_TrAR—GDT958ECMGDKYG3ngHfKOaVvri4WH2s-zceHuNkurRoCXYIQAvD_BwE [https://perma.cc/M2AL-2NK7]; Aryn Fields, *Supreme Court's Reckless Ruling in 303 Creative Case Undermines Non-Discrimination Laws for LGBTQ+ People and Others*, HRC (June 30, 2023), https://www.hrc.org/press-releases/human-rights-campaign-supreme-courts-reckless-ruling-in-303-creative-case-undermines-non-discrimination-laws-for-lgbtq-people-and-others [https://perma.cc/2PS8-G5BC].

| Organization | Statement |
|---|---|
| **GLAD** | "[T]he U.S. Supreme Court issued a **highly fact-specific decision** authorizing a **narrow exception** to a state nondiscrimination law for a website developer whose work it found involves selecting customers to convey the designer's message. While the case allows for the first time a limited First Amendment exemption from laws requiring businesses open to the public to offer the goods and services they sell without discrimination, the **unusual nature of the transaction in the case suggests the ruling has virtually no application to the overwhelming majority of businesses** providing goods and services to the public."[56] |
| **NCLR** | "While the **Court's holding is narrow** and **will apply only to a very small number of businesses**, the dissenting justices rightly stress that the decision creates an unprecedented exception to nondiscrimination laws.[57] |
| **Lambda Legal** | Title: "Lambda Legal Condemns **'Misguided' But 'Narrow'** Supreme Court Ruling Endorsing Discrimination"<br><br>"[T]oday's smug attack on civil rights law **will have limited practical impact** in the marketplace. . . . But **today's narrow decision** does continue the Court majority's dangerous siren call to those trying to return the country to the social and legal norms of the Nineteenth Century because it jettisons without even acknowledging what was part of the legal test for decades."[58] |

56. GLAD, *Statement on Supreme Court Ruling in 303 Creative v. Elenis* (June 30, 2023), https://www.glad.org/statement-on-supreme-court-ruling-in-303-creative-v-elenis/ [https://perma.cc/Q8HS-K9S4].

57. NCLR, *NCLR Disappointed by Supreme Court Ruling Allowing Discrimination in Certain Circumstances* (June 30, 2023), https://www.nclrights.org/about-us/press-release/nclr-disappointed-by-supreme-court-ruling-allowing-discrimination-in-certain-circumstances/ [https://perma.cc/LT9J-SA3S].

58. Lambda Legal, *Lambda Legal Condemns 'Misguided' But 'Narrow' Supreme Court Ruling Endorsing Discrimination* (June 30, 2023), https://lambdalegal.org/newsroom/us_20230630_ll-condemns-scotus-ruling-endorsing-discrimination/ [https://perma.cc/89S4-R566].

While these statements are not factually inaccurate, their framing is troubling for several reasons, to which I turn next.

## II. THE HARMS OF THE NARROWNESS NARRATIVE

### *A. Empirical Legal Research Illustrates the Inaccuracy of the Narrowness Narrative*

Research reveals that the Narrowness Narrative is inaccurate. For example, Professor Netta Barak-Corren has demonstrated an increase in discrimination toward LGBTQ people after *Masterpiece Cakeshop*.[59] Her study showed a fourteen percent change in how same-sex couples and opposite-sex couples were treated by wedding vendors after *Masterpiece Cakeshop*.[60]

Moreover, experiments in psychology find that antidiscrimination law impacts levels of personal prejudice.[61] When people learn that certain kinds of discrimination are prohibited by law, it leads some people to report less prejudicial attitudes and greater feelings of interpersonal warmth toward members of the group protected by the law.[62] Conversely, when people learn that law permits discrimination against a group, that knowledge facilitates and enables more prejudicial attitudes toward the marginalized group.[63]

This research is consequential because it demonstrates that cases like *Masterpiece Cakeshop*, *Fulton*, and *303 Creative* in fact *do* have detrimental consequences notwithstanding that they may be "narrow" as a formalistic matter of legal reasoning. In centering the narrowness of these rulings, the Narrowness Narrative—especially those portions of it that frame LGBTQ losses as victories—may hide the stark empirical reality of the harm done by these decisions. The research reveals that these cases impact social norms of discrimination in addition to altering the substantive law. The Narrowness Narrative works to obscure these shifts in norms and social practices, along with obscuring the scope of the shifting legal landscape.

In sum, the Narrowness Narrative may work to hide two important and disturbing points: first, that the Court has consistently granted religious exemptions from public accommodations laws and contracts with nondiscrimination provisions, thus allowing discrimination against LGBTQ people. Second, that the Court's decisions *are* cause for alarm, a message betrayed by the Narrowness Narrative but with which many scholars and

59. *See* Netta Barak-Corren, *A License to Discriminate? The Market Response to* Masterpiece Cakeshop, 56 HARV. C.R.-C.L. L. REV. 315, 319 (2021).

60. *Id.* at 319, 345.

61. *See* Sara Emily Burke & Roseanna Sommers, *Reducing Prejudice through Law: Evidence from Experimental Psychology*, 89 U. CHI. L. REV. 1369, 1408 (2022).

62. *Id.*

63. *Id.*

commentators agree.[64] After all, those seeking LGBTQ religious exemptions are "three for three" at the Court—a perfect winning record. Describing these decisions as narrow may thus lull the LGBTQ community and its allies into believing that there is little threat to their civil rights generally—a belief that is mistaken based on legal empirical research.

### *B. Other Harms of the Narrowness Narrative*

The Narrowness Narrative is potentially harmful for several reasons in addition to those demonstrated by empirical legal research. First, the Narrowness Narrative may obscure connections among and between the civil rights of other marginalized identities, such as race, class, sex, and transgender rights. While the current wave of religious exemption requests are aimed at same-sex couples, there is no principled argument that exemptions may or should be limited to that group or even to SOGI.[65] Instead, the principles applied in *Masterpiece Cakeshop*, *Fulton*, and *303 Creative* should apply to allow the same denial of goods and services to people of color, people with disabilities, and women.[66]

In obscuring these connections, the Narrowness Narrative risks minimizing the vulnerability of the civil rights of *all* marginalized groups. Highlighting, rather than obscuring, these connections is of utmost importance at this political and cultural moment. In 2022, the U.S. Supreme Court completed its first full term with a conservative supermajority with astonishing results. The Court issued decidedly anti-equality and anti-democratic decisions across multiple substantive areas—reproductive rights, environmental rights, voting rights, and civil rights—that threaten the promise of equal citizenship for people of color, women, and LGBTQ people.[67]

Second, the Narrowness Narrative discourages broader thinking about what *will* or *could* be viable longer-term strategies to stop the onslaught of conservative attacks not only on the LGBTQ community, but on all marginalized communities. The Narrowness Narrative thus risks collective myopia that

64. *See supra* notes 4-7; *seegenerally*, Marc Spindelman, *Masterpiece Cakeshop's Homiletics*, 68 CLEV. ST. L. REV. 347 (2020).

65. *See, e.g.*, Kyle C. Velte, *Recovering the Race Analogy in LGBTQ Religious Exemption Cases*, 42 CARDOZO L. REV. 67, 127-128 (2020).

66. *Id.*; *see also* Kenji Yoshino, *Rights of First Refusal*, 137 HARV. L. REV. 244, 265-66 (2023); Mark Strasser, *Masterpiece of Misdirection?*, 76 WASH. & LEE L. REV. 963, 977 (2019); Donald Verrilli, *What's at Stake in 303 Creative*, 47 HUM. RTS. 49, 50 (2022); Scott Lemieux, *How the 'Narrow' Ruling in Masterpiece Cakeshop Could Undermine Future Civil Rights Cases*, NBC NEWS (June 5, 2018), https://www.nbcnews.com/think/opinion/how-narrow-ruling-masterpiece-cakeshop-could-undermine-future-civil-rights-ncna879976 [https://perma.cc/XCB3-6LK4]; Oral Argument at 13:5-14:7, 303 Creative v. Elenis, 600 U.S. 570 (2023).

67. *See* Velte, *supra* note 32, at 1, 2, 18; Mark A. Lemley, *The Imperial Supreme Court*, 136 HARV. L. REV. F. 97, 110-11, 113-15 (2022).

perpetuates the "can't see the forest for the trees"[68] problem for marginalized communities and their allies. A more accurate narrative would sound the alarm about the risks posed by these decisions to all marginalized communities, which may encourage coalition building and intersectional agenda setting.

The court's decision in *Dobbs v. Jackson Women's Health*,[69] which overturned the constitutional right to abortion previously established in *Roe v. Wade*,[70] is an example of the intersectional harm that might be done by the Narrowness Narrative in LGBTQ religious exemption cases. Although *Dobbs* overturned a 50-year-old precedent that provided the constitutional ground on which the LGBTQ civil rights cases of *Lawrence*, *Windsor*, and *Obergefell* were based, Justice Alito framed the *Dobbs* decision in his own kind of Narrowness Narrative. He did so by claiming that the decision was limited to abortion and chided advocates who argued the reasoning in *Dobbs* would lead to the resurrection of same-sex marriage bans and the outlawing of same-sex sodomy,[71] notwithstanding that one of his colleagues in the Court's conservative supermajority explicitly called for a reexamination of marriage equality and sodomy cases.[72]

Justice Alito's Narrowness Narrative in *Dobbs* is reminiscent of the Narrowness Narrative of national LGBTQ rights organizations in LGBTQ religious exemption cases. In both, proponents of the narrative create an impression that there is "nothing to see here," which obfuscates the true scope and impact of the decisions. Scholars and commentators alike blasted Justice Alito's Narrowness Narrative in *Dobbs* and instead sounded the alarm about that decision's threat to a myriad of civil rights.[73]

When national LGBTQ organizations are deploying similar rhetorical tactics to those of ultraconservative Justice Alito, that should give progressives pause. Just as progressives called for a rejection of Justice Alito's Narrowness

68. *See* Martha Campos, *An Idiom, a Catch Phrase, an Aphorism: A Reference Question*, 13 PERSP: TEACHING LEGAL RES. & WRITING 29, 30-31 (2004).

69. 142 S. Ct. 2228 (2022).

70. 410 U.S. 113 (1973).

71. *Dobbs*, 142 S. Ct. at 2280.

72. *Id.* at 2301-03 (Thomas, J., concurring).

73. *See, e.g.*, Morgan Marietta, *'A Revolutionary Ruling – and Not Just for Abortion': A Supreme Court Scholar Explains the Impact of* Dobbs, THE CONVERSATION (June 24, 2022), https://theconversation.com/a-revolutionary-ruling-and-not-just-for-abortion-a-supreme-court-scholar-explains-the-impact-of-dobbs-185823 [https://perma.cc/G2FX-SEJF]; Len Niehoff, *Unprecedented Precedent and Original Originalism: How the Supreme Court's Decision in Dobbs Threatens Privacy and Free Speech Rights*, ABA (June 9, 2023), https://www.americanbar.org/groups/communications_law/publications/communications_lawyer/2023-summer/unprecedented-precedent-and-original-originalism/#ref31 [https://perma.cc/278P-UXUT]; Samantha Allen, *Will the Supreme Court Overturn Queer Rights in a Post-Roe America?*, THEM (July 6, 2022), https://www.them.us/story/supreme-court-overturn-lgbtq-rights-abortion-gay-marriage-expert-interview [https://perma.cc/F6NV-4BAG].

Narrative after *Dobbs*, they similarly should call for a rejection of that narrative by national LGBTQ organizations. For, while we haven't yet seen formal frontal assaults on *Obergefell* or *Lawrence*, *Dobbs* may and ought to be understood as planting the seeds for those attacks. The Narrowness Narrative in LGBTQ religious cases may make it more difficult to expose the connection between *Dobbs* and LGBTQ civil rights, namely that *Dobbs* has laid the groundwork for undoing LGBTQ civil rights gains.

As this example demonstrates, jettisoning the Narrowness Narrative in LGBTQ cases may create opportunities for connecting the legal and political plight of LGBTQ people to the legal and political plights of other marginalized communities, such as those seeking reproductive justice after *Dobbs*.

Third, the Narrowness Narrative risks normalizing discrimination. The LGBTQ religious exemption victories in *Masterpiece Cakeshop*, *Fulton*, and *303 Creative* put the imprimatur of the state behind the idea that certain groups can expect discriminatory treatment in the public square. One anti-equality project plants a seed for the next. This risk has materialized in the wave of anti-transgender bills proposed and passed by numerous states in the past few years.[74]

While it might be a long road to the unraveling of LGBTQ civil rights such as marriage and same-sex intimacy, the chipping away at such rights has begun through *Masterpiece Cakeshop*, *Fulton*, and *303 Creative* (as well as *Dobbs*). Because the Court decided that same-sex weddings are not entitled to the same treatment as different-sex weddings and that same-sex couples are not deserving of equal treatment in foster care settings, we have already begun walking down the road toward that unraveling. The Narrowness Narrative plays a role in this journey by distracting progressives from what is important at this moment, namely relentless vigilance and persistent drawing of connections among the rollback of rights being sanctioned by the Court.[75]

## CONCLUSION

This essay has identified and attempted to debunk the Narrowness Narrative, as well as highlight its potential harms. I contend that the Narrowness Narrative is ill-advised because it hides the important and disturbing trend of the Court consistently granting LGBTQ religious exemptions, one "narrow" ruling at a time.

74. *See, e.g.* Trans Legislation Tracker, *2024 Anti-Trans Bills Tracker,* https://translegislation.com/ [https://perma.cc/LZY7-FAB2]; Anne Branigin & N. Kirkpatrick, *Anti-Trans Laws Are on the Rise. Here's a Look at Where—and What Kind*, WASH. POST (Oct. 14, 2022), https://www.washingtonpost.com/lifestyle/2022/10/14/anti-trans-bills/ [https://perma.cc/V6MR-3UN8].

75. *See* Lemley, *supra* note 67, at 110-11, 113, 115. See also generally Leah Litman, Melissa Murray, and Kate Shaw, Strict Scrutiny Podcast: Student Debt Relief Bad, Bigotry Good, S4: E44 at minute marker 22:30-26:35 (Crooked Media June 30, 2023), available at https://crooked.com/podcast/student-debt-relief-bad-bigotry-good/

Naming the Narrowness Narrative for what it is shines light on what is otherwise obscured—that we are facing a coordinated campaign by groups such as the Alliance Defending Freedom, fueled by dark money, to stop progressivism's distributive and egalitarian goals at all costs.[76] Shining a light on this may encourage more intersectional work, may encourage coalition building, and may even encourage attorneys in specific cases to think more broadly about progressivism's distributive and egalitarian goals when stating claims for particular clients.

Identifying the Narrowness Narrative is just the first step. The second step is to encourage national LGBTQ organizations to suppress the instinct to create and perpetuate the Narrowness Narrative. Abandoning the Narrowness Narrative, and instead providing the public with more accurate assessments of what is really going on, may serve to broaden our vision by encouraging us to zoom out from the specific claims and outcomes in particular cases. As our vision broadens, so does our understanding of what is occurring and what is at stake. Taking a broad, rather than narrow, view of the Court's recent anti-LGBTQ cases encourages us to make connections among the widespread attack on progressive ideals, whether that be issues of race, class, sex, or reproductive rights.[77]

76. *See, e.g.*, 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/RBA9-4FQQ]; Kyle C. Velte, *The Nineteenth Amendment as a Generative Tool for Defeating LGBTQ Religious Exemptions*, 105 MINN. L. REV. 2659, 2689-92 (2021).

77. *See generally* Velte, *supra* note 32, at 2, 18, 38; Lemley, *supra* note 67, at 110.