No. 21-476

In the Supreme Court of the United States

303 CREATIVE LLC, ET AL., PETITIONERS

v.

AUBREY ELENIS, ET AL., RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF *AMICUS CURIAE* DAVID BOYLE IN SUPPORT OF NEITHER PARTY

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AMICUS CURIAE STATEMENT OF INTEREST

The present *amicus curiae*, David Boyle (hereinafter, "Amicus"),[1] has written the Court previously about denial of services by businesses for conscience reasons, in, e.g., *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 584 U.S. ___ (2018) (refusal of baker to offer same-sex couple wedding cake, with religious rationale).

It is pretty sad that when thousands are dying in Ukraine, something as comparatively petty (?) as gay-marriage-celebration websites is a matter of contention at the Court. This may help counsel looking for a "moderate" solution which considers both sides carefully instead of taking a partisan part in the "culture war" wracking our Nation and the whole world.

See, e.g., Grayson Quay, *War in Ukraine is a 'metaphysical' battle against a civilization built on 'gay parades,' Russian Orthodox leader says*, Yahoo! News, Mar. 7, 2022, https://www.yahoo.com/news/war-ukraine-metaphysical-battle-against-221058908.html. So, *see id.*, people are literally dying in the name of some "culture war"—as if homosexuality were worth killing over. "Let him without sin cast the first stone[.]" The Nazarene (*John* 8:7).

Amicus had also planned to address issues re the Court's credibility, in tandem with celebrating retiring Justice Stephen Breyer; but then occurred the infamous "leak-to-the-media" of a February 2022 draft opinion ("Draft") in *Dobbs v. Jackson Women's*

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[1] No party or its counsel wrote or helped write this brief, or gave money for the brief, *see* S. Ct. R. 37. Blanket permission to write briefs is filed with the Court.

Health Organization (19-1392). It seems anyone wanting to address Court credibility may now have a lot more to talk about. The leak, and Draft, are an "800-ton gorilla in the room" which bear discussion, meant to enrich the commentary about artistic/ conscience freedom re commercial websites for same-sex weddings.

Amicus shall—following the Summary of Argument—get the Draft out of the way first, since its "culture war" shadow overhangs discussion about the Court and its products, at this time:

SUMMARY OF ARGUMENT

The leak of the Draft was shockingly wrong, but the Draft itself is shocking and may egregiously threaten the Court's credibility, given its:
a) lack of a mandatory exemption, re abortion laws, for the life of a pregnant woman, sans reasoning;
b) its other gross omissions, such as: failing to note that an old English "penalty" for abortion is only a church penalty of penance; and failing to address rape, incest, racial inequalities re maternal mortality, the doubtfulness of the dichotomy that "*Roe* [*v. Wade*, 410 U.S. 113 (1973)] must either keep the 'viability standard' or be overturned", or questions of the adequacy of *Dobbs*, *supra* at 1, as a vehicle;
c) and seemingly assuming the Constitution is silent on abortion, without sufficiently exploring that highly-questionable idea.

The national/international abortion rights/ prosecutability debate is challenging, but may help the Court shed bad/misleading portions of the Draft.

Amongst other threats to the Court's credibility, putting cameras in the courtroom could be not only needless but also corruptive, e.g., leading to a "play-to-the-camera" mentality. Appropriate celebrity references may be given.

America's tradition of artistic/expressive liberty may strongly support Petitioners' free speech, not to mention free/creative speech by amicae/i (or Justice Breyer, even).

The lack of an actual wedding cake may help website-design "freedom of pure speech" claims.

A lower court's unusual theory of "one-person artistic monopoly" may not be tenable, and may lead to damaging consequences, as a hypothetical with an abused courtesan shows.

Bostock v. Clayton County, 590 U.S. ___ (2020), may possibly be interpreted/distinguished, to help Petitioners, in that LGBT (lesbian/gay/bisexual/transgender) employees' freedom of expression and identity, could imply that employers and business owners may also have such freedom.

Giving Petitioners freedom to avoid supporting same-sex weddings could mean giving businesses freedom to discriminate racially "on artistic grounds", so that Petitioners, and the Court, may carefully consider how to avoid such a legal conclusion.

Petitioners should likely receive the relief they seek, but to the narrowest extent reasonably possible, lest LGBT or similarly-situated people

needlessly suffer, and the balance of power between businesses and consumers, be needlessly violated.

If Petitioners are denied their freedom to offend same-sex couples, then, say, a Jewish designer might have to make a wedding website for Nazis following white-supremacist religious ideas. Indeed, part of freedom may be the right to offend—even offend some interfaith couples?—, as unpleasant as that may seem. (And the Court may have to further explore "status-versus-conduct" issues.)

One workable solution to the case could involve fining Petitioners, in a moderate amount, and using the money to compensate same-sex couples for damages, but relieving Petitioners from re-education, being shut down, or jail time for noncompliance. Everyone would be left relatively free, and externalities would be compensated.

Finally, the Court, since people look to it for moral example, must not be biased or give the appearance of bias, in the Draft, the instant case, or anywhere. The Court could permanently abort its own credibility, if it fails to do right—especially after multiple friendly warnings.

ARGUMENT

I. THE DRAFT MAY GROSSLY REDUCE THE COURT'S CREDIBILITY, DUE TO MATERIAL AND/OR MISLEADING OMISSIONS, ETC. RE MORE ISSUES THAN JUST ABORTION

It was atrociously wrong for the leaker(s) to leak the Draft, whether the leak was from the "Left" or

the "Right". However, given the egregiousness of many aspects of the Draft, Amicus was not surprised that the Draft was leaked. Indeed, without correction of the Draft, the credibility of the Court could suffer a colossal, long-term blow, even infecting the instant case itself.

Let us start with possibly one of the worst aspects of the Draft, maybe literally evoking the Third Reich:

A. The Draft's Allowing States to Offer No Exception for the Mother's Life, Is Reminiscent of Some Recorded Auschwitz Experiences

Despite Justice (later Chief Justice) William Rehnquist noting almost 50 years ago the dangers of State abortion laws lacking an exception for the life of the mother, *Roe*, *supra* at 2, at 173, the present-day Draft manages to allow that colossal loophole. States could now pass hyper-statist laws requiring pregnant women to die for lack of an abortion. Is this right? What would Hitler say?

See George M. Weisz & Konrad Kwiet, *Managing Pregnancy in Nazi Concentration Camps: The Role of Two Jewish Doctors*, Rambam Maimonides Med. J. (July 2018), *available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6115479/pdf/rmmj-9-3-e0026.pdf,

> Even if able to work, pregnant women went to the gas chambers upon arrival. If they managed to hide their pregnancies, their newborn babies were killed either by lethal injection or by drowning.

> The only way the mother could escape the death sentence was by undergoing a secret abortion or by suffocating the newborn . . . . to protect all involved in saving the mother's life.
>
> . . . .
>
> [Jewish gynecologist Dr. Gisella] Perl's greatest agony was the managing of pregnant women. She recalled: "Dr. Mengele told me that it was my duty to report every pregnant woman to him."
>
> The discovered women were all exterminated. Upon realizing the fate of these women, Perl decided that there would never again be a pregnant woman in Auschwitz. The decision cost her dearly, but she realized that if she had not ended the pregnancies, both the mothers and their children would have faced certain death.
>
> . . . . With the threat of a discovered pregnancy removed, the women were able to continue to work, gaining a temporary reprieve from their death sentences.
>
> . . . .
>
> [After the war,] Perl . . . met Eleanor Roosevelt, who [helped her become] a US citizen[; she] opened a private obstetric practice in Manhattan [and] would go on to deliver more than 3,000 babies.

Id. at 2-3 (citations/footnotes omitted). So, unpleasant as this may sound, the Draft literally inflicts on American women the possibility of being treated as women were at Auschwitz, i.e., that they might die if legally denied an abortion.

(The situation *supra* differs variously from modern-day America, e.g., it concerns a Nazi death camp, where the unborn child was doomed anyway. Still, the abortions there apparently *saved the lives of the mothers*, which is the point here.)

Why would the Court want to saddle itself with what could be called Nazi-redolent callousness? Many States may scramble to say, "Oh, of course we'd let women abort to save their lives, just trust our lawmakers." But that's a gamble; not everyone believes women have that right. (The Draft itself has many examples, e.g., at 68 (Missouri, Illinois), 76 (Texas), 76-77 (Louisiana), 79-80 (Pennsylvania), 82 (Nebraska), and 93 (Colorado), of States or Territories *not* offering an exception for the mother's life.) Could it be better for this Court to constitutionalize things, order a mandatory exception for the life of the woman?

Amicus is no friend of abortion; and if the Court has "new evidence", e.g., space aliens gave them incontrovertible proof that women are actually some "inferior species", Amicus and the public can calmly weigh such "evidence". Lacking that, though, the Court might wreck its credibility by not ordering an exception for the life of the mother. The recently-passed "Mother's Day" might lack meaning if laws are allowed to *abort* Mama, make her die.

Of course, Amicus is all for saving both lives: a State could, say, mandate that an aborted (removed-

from-womb) embryo/fetus be put on the best medical care available, and be reimplanted elsewhere as soon as reasonably possible (e.g., in an artificial womb, which may be scientifically possible in the future).

In any case, a Court that has made massive efforts during COVID-19 to protect its Members' own lives, could look hypocritical not to show equal consideration to pregnant women in danger of death, by giving ironclad protection against the whims of any State politician re women's lives. "Do unto others as you would have them do unto you." The Nazarene (*Matthew* 7:12, *Luke* 6:31). People may judge the nine Justices accordingly.

B. Other Material Omissions: The Draft Not Only Seriously Evades, It Even Misleads Outright, Such as with *Leges Henrici Primi*

If we consider it a "gross material omission" that the Draft not only offers no exception for the life of the mother, but *doesn't reason why it is doing so*: there are other colossal omissions, unworthy of any Court. Some may even grossly mislead the reader.

For example, "Even before Bracton's time, English law imposed punishment for the killing of a fetus. See Leges Henrici Primi 222-223 (L. J. Downer ed., 1972) (imposing penalty for any abortion and treating woman who aborted a 'quick' child 'as if she were a murderess')." Draft at 17 n.25.

Unbelievably, the Draft omits mentioning that the "penalty", *id.*, is merely an *ecclesiastical penalty*. *See* Carla Spivack, *To "Bring Down the Flowers": The Cultural Context of Abortion Law in Early Modern England*, 14 Wm. & Mary J. Women & L.

107, 130 (2007), *available at* https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1042&context=wmjowl, offering Latin text, and translation,

> Mulier si partum suum ante xl dies sponte perdiderit tribus annis peniteat, si postquam animatus est, quasi homicida vii annis peniteat. (A woman shall do penance for three years if she intentionally brings about the loss of her embryo before forty days; if she does this after it is quick, she shall do penance for seven years as if she were a murderess.)

Spivack Article, *supra*, at 130 (footnote omitted, though it cites, *id.*, to "LEGES HENRICI PRIMI . . . at 222-223", just as Draft at 17 n.25 does).

Needless to say, a *church* penalty of penance for abortion is not identical with a *criminal or civil* penalty. At all.

Never mind that the Draft's "just a draft": the fact that *at any point*, *any* document approved by a Court majority had this grossly-misleading omission about the mere ecclesiastical nature of the penalty, is flabbergasting. How is the public ever to trust such a Court? Correction is demanded by justice.

There are other gross omissions or errors. For example, the Court doesn't address exceptions for rape or incest; in fact, Amicus couldn't even *find* the words "rape" or "incest" in the Draft. (Amicus isn't necessarily advocating such exceptions; *inter alia*, there are plenty of rapists, or fathers impregnating daughters, who may be overjoyed that such

exceptions could help destroy evidence of their crimes. Then again, female rape/incest survivors may not want to be punished for their abortions.)

Whatever the Court decides about exceptions (e.g., that women have a constitutional right to them, or at least some diminishment of penalty for abortion, if they are rape or incest victims), the Draft's current silence on these issues is staggering, especially after Harvey Weinstein, the #MeToo anti-rape movement, etc. The last thing this credibility-vulnerable Court needs is a "turning a blind eye to sexual-abuse victims" reputation.

And, though the Draft at 30 n.41 comments on the disproportionately-large number of African-American aborted fetuses (and Amicus himself decries race-selective abortions), there is nary a word about the disproportionately-large *maternal mortality* (not even mentioning poverty) among African Americans, in Mississippi or elsewhere.

Does the Court think people have forgotten these issues? Including black people, and others?

Too, the Draft, at 5, 8, seemingly accepts the illogical dichotomy that the Court must either accept *Roe* with the viability limit, or strike down the whole thing. But this is absurd. Many European (and other) countries have long maintained a c. 12-14 week abortion limit, sans a viability consideration.

The false dichotomy resembles the false idea, now disproven, that U.S. national health-insurance reform depends on forced purchase of insurance. But it doesn't; and *Roe*, or other abortion law, might survive even if viability vanishes as a criterion.

Finally (though not exhaustively), the Draft doesn't include the debate on whether *Dobbs* is a defective vehicle. Even if legal standards for abortion are hypertechnically "fairly included" in the Question Presented, the fact that the idea of overturning *Roe* (and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992)) is basically crammed into a footnote in the certiorari petition (at 5 n.1), whereas the merits brief (written after Justice Ruth Bader Ginsburg died (RIP)), is largely about overturning *Roe/Casey*, is disturbing. It reminds one of the Draft's misleading "Leges Henrici Primi" footnote.

And quite mysteriously, the 2007 "trigger law" (Miss. Code Ann. § 41-41-45), which, *see id.* at paras. 2, 4, bans nearly all abortions if *Roe* is overturned, and even imposes a 1-to-10-year prison sentence, somehow *isn't mentioned* in the *Dobbs* certiorari petition. But why wasn't it, if the State was really contemplating the death of *Roe* at that point? Does this all look fair, even if it were technically legal?

…And why doesn't the Draft mention § 41-41-45, *supra*, even though the Court must know—since Mississippi's *Dobbs* merits brief, at 36, *explicitly mentions* § 41-41-45—that *that* will be the operative law in Mississippi soon after *Roe* goes? The Draft grossly fails to show transparency and realism.

While the great State of Mississippi may have had the purest *intentions*: the actual *effect* may be unfair and a "bait-and-switch". To find the elephant of overturning *Roe/Casey* in the mousehole of footnote 1 of the "cert" petition, does not inspire Amicus—or many others—as noble or aboveboard.

See, e.g., David Boyle, *"Light in August", Darkness in December? or, What William Faulkner*

Might Think of Mississippi's Odd Dobbs Abortion Case, Boyle's Laws, Nov. 29, 2021, http://boyleslaws.blogspot.com/2021/11/light-in-august-darkness-in-december-or.html (on Mississippi's Faulkneresque *Dobbs* "bait-and-switch", maternal mortality problems, etc.).

C. A Court Assumption That the Constitution Is Silent on Abortion, May Be Erroneous

Too, the Draft may purport to give the abortion debate back to the People, but the People wrote the Constitution as well: is the Court fully bothering to try to understand what that document may say about abortion? The Constitution may support *both* the "pro-life" and "pro-choice" sides (in various ways), maybe making a "moderate" Court opinion more credible than an extremist one.

For example, is it possible that the penumbra of the Eighth Amendment may prevent abortion after fetal pain is, one day, definitively proven to occur at a certain point? (If science can show fetal pain occurs at, say, 12 weeks: would that really be constitutionally meaningless? That sounds cruel.)

And "hate crime" abortions, e.g., race-, gender-, disability-, and LGBT-selective abortions (if genetic markers for likely-LGBT status are discovered), could be considered unconstitutional, at least for abortion at a State/public facility, under due-process/equal-protection provisions (U.S. Const. amend. V, & amend. XIV, § 1).

On the more "pro-choice" side, e.g., the Second Amendment helps argue for a woman's right to

protect her life/health: if you have a right to self-defense with a gun…why not a right to self-defense, period? Too, the Fifth/Fourteenth Amendments on right to "life", *id.* (Due Process Cl., *supra* at 12), may protect the woman's life, not just the fetus'. (Even the Nineteenth Amendment may speak, by implication; what use is a woman's right to vote if she's dead from inability to get an abortion?)

And the Fifth/Fourteenth Amendments, whether, say, due process or equal protection, may also make overprosecution of abortion inappropriate in various cases (e.g., due to: lack of evidence, re miscarriages; or inequity in health care/maternal-mortality rates among various groups; etc.), whether or not there is any general "right to abortion".

So, instead of a silent Constitution, it seems there may be a polyphonic one, which *demands* respect for both mother *and* child throughout the abortion debate. The Court may want to recognize any such nuances in its Opinion, lest it lose further credibility.

D. "The Court Can Do What It Wants"—But It Has to Be Thoughtful and Considerate to All Americans' Rights and Dignities

After all, the very Preamble, starting with "We the People", *id.*, implies that the People deserve fairness and consideration, whether there's a "right to abortion" or not. —People can debate endlessly about the existence of abortion rights in America. Even *Roe* acknowledges that 19th-Century American law became more restrictive of abortion than English common law had been, *see Roe* at 138-141.

But then, as with the "chicken before the egg?" debate: does one say that because of changes in 19th-Century American law, there's now no right to abortion? Or, conversely, that that 1800's law failed to follow the common law, and therefore unfairly disrespected any ancient rights either to abort, or at least to abort before quickening with little, or no, penalty? (Not even mentioning perhaps the most ancient precedent, the *Leges Henrici Primi* offering only an *ecclesiastical* penalty…)

The debate may continue until the Second Coming. But even if *Roe* abortion rights are eventually fully overturned—either near, or far, future?—, the *speed* and *manner* of its happening are still open for discussion. "Rome wasn't built in a day"; and *Roe* may not be dismantled in a day.

And Amicus isn't saying, "Don't overturn *Roe*." Indeed, the Court could still "overturn *Roe*" by eliminating the core time-limit in *Roe* ("viability"). But could the Court then, e.g., still acknowledge that first-trimester abortions might be currently unfair or unworkable for States to penalize at this time, given factors like: common law's relative lack of penalties pre-quickening; the uncertainty of whether a huge social experiment like allowing States to ban (nearly?) all abortions, would even be workable at present; Mississippi's "bait-and-switch" re its objectives; and inequities such as black women's comparatively worse maternal-mortality rates?

(The Draft, at 49, excoriates the "uniform viability rule that allowed the States less freedom to regulate abortion than the majority of western democracies enjoy." *Id*. Well, if those latter nations are such role models, why does the Draft adopt a

model which allows States to choose *zero* weeks of legal abortion, not the 12-some weeks many of those "western democracies", *supra*, may have? People may ask why the Draft didn't add the words, "though American women may not want less freedom to choose abortion than the women in the majority of western democracies enjoy.")

See, e.g., David Boyle, *Dobbs may rob SCOTUS of credibility*, San Francisco Daily J., Dec. 9, 2021, at 1, 5 (mentioning that c. 12-15 week "European-style" abortion limit may seem more credible than a zero-week limit). The Court has an obligation to issue the most intelligent, fair, thoughtful Opinion possible.

Whether the Court retains the "undue burden standard", or, e.g., adopts a "skeptical/searching rational basis plus" allowing the Court to, say, forbid States from enacting (a), "Berlin Wall"/"fugitive pursuit laws" that would punish women *who went to other States* (or left the country?) to get an abortion, or (b), laws allowing people not even related to the case to sue abortion providers, is up to the Court.

Indeed, the Court, "Supreme", *can do whatever it wants*, in large part. If it wants to write an even more "pro-life" opinion and ban all abortions everywhere, period, it can do that. (Congress might do that in 2025 anyway…) Or if it wants to reverse itself and declare all abortions must be legal forever, it can do that too. (Of course, if the Court writes an Opinion of *Dred Scott*[*v. Sandford*, 60 U.S. 393 (1857)]-level awfulness, that Opinion may get overturned at some point, like it or not.)

In any case, Amicus, unlikely either to get pregnant or be on the Court anytime soon (…), may not suffer, no matter what the Court does. Amicus is

just cautioning that certain choices/omissions/ misleading elements in the Draft, cry out their desperate inadequacy—some might say, misogyny—, massively threatening the Court's credibility. If he failed to note these problems, Amicus would be no real friend of the Court.

Amicus would rather not have had to deal with the Draft, but felt it a necessity, since the Draft's "credibility black hole" risks tainting everything the Court does from now on, including the instant case. (The value of Amicus' brief, or others', would be largely nullified, if the Draft's spirit did taint Petitioners' "culture-war-related" case.) —There will now be a considerable tonal shift, as Amicus salutes both Justice Breyer and his style, while still discussing credibility issues…

II. THE COURT COULD ALSO LOSE CREDIBILITY BY ALLOWING CAMERAS AT COURT PROCEEDINGS; OR, "HOLLYWOOD AT 1 FIRST STREET NE?"

As for "Breyer style", *see, e.g.*, Joan Biskupic, *Justice Stephen Breyer's last weeks of oral arguments bring 'radioactive muskrats and John the Tiger Man'*, CNN, Apr. 27, 2022, updated 3:28 p.m., https://www.cnn.com/2022/04/27/politics/stephen-breyer-oral-arguments-radioactive-muskrats/index.html,

> On Wednesday, Chief Justice John Roberts, in a brief but touching acknowledgment of Breyer's last argument, took note of [Breyer's "Tiger Man"] hypothetical when he said, "For

> 28 years this has been his arena for remarks profound and moving, questions challenging and insightful, and hypotheticals downright silly. This sitting alone has brought us radioactive muskrats and John the Tiger Man."
>
> Roberts choked up as he added that "we leave the courtroom with deep appreciation for the privilege of sharing this bench with him." Breyer grinned. His wife, Joanna, watched from a special section of the courtroom reserved for justices' guests.

Id. Well, since Breyer has given the stylistic example, one may follow it…

(Linton Weeks, *Time To Mark National Theme Day Appreciation Day*, WBUR, June 17, 2011, https://www.wbur.org/npr/137147462/time-to-mark-national-theme-day-appreciation-day)

There are many people angry at the Court these days, whether: complaining about the Draft, or about Justice Clarence Thomas *vis-à-vis* his wife; or, trying to "pack" the Court with more members, or to impose term limits; or, asking for more financial disclosure; or…wanting to put the Court on camera, for the entertainment of all. (Transparency, maybe; but *de facto*, also entertainment.)

Amicus agrees that there could be more stringent ethics measures at the Court (of whatever nature); but the "live TV" thing might be…a little much. What if a Justice were to "play for the camera", like Justice Breyer in the "Cat in the Hat" picture *supra*? Would dancing chaos reign??

Amicus appreciates same-day transcripts of oral arguments, and even audio can be interesting. What would be served by turning Court sessions into the latest television "soap opera" ("*American Judicial Idol*"?), though, is questionable.

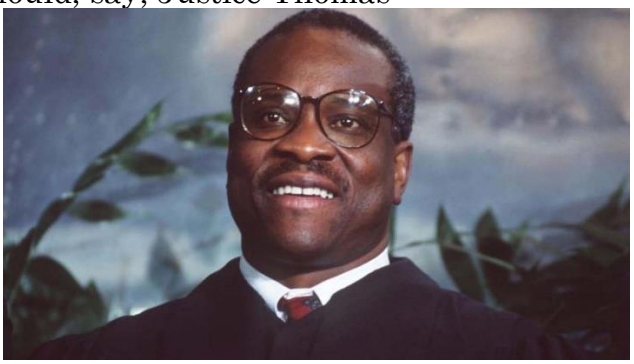
For example, what if there were a "looks, not books, arms race" to put the most conventionally attractive, flashy, or famous/notorious people on the Court, rather than the most experienced or smartest? People may laugh, but it's a real possibility that "photogenic" judges might be picked over more competent judges, in today's brutal political and media environment.

If someone named, say, "Dim Dumushian" were to win a spot on the Court, over Beryl (or Brad)

Bookish, just because Dim happens to be a celebrity and Beryl isn't, that would hurt the whole Nation.

Amicus hereby imagines some possible "celebrity replacements" for current Justices, and readers can imagine if the replacements would really be better than the real Justices:

Should, say, Justice Thomas

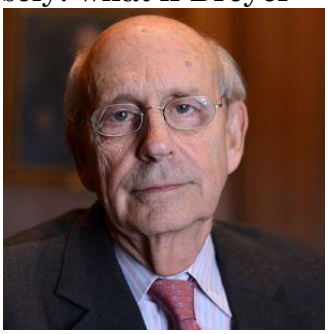


(Antonin Scalia Law School (George Mason U.), *Justice Thomas's Thirty-Year Legacy on the Court*, Scalia Law Events (undated, but previewing Oct. 21, 2021 event), https://sls.gmu.edu/events/event/justice-thomass-thirty-year-legacy-on-the-court/)

…be replaced by "Judge" Steve Harvey?

(David Bauder, *Here comes the judge: Steve Harvey an initial hit*, Lowell Sun, Jan. 13, 2022, 5:00 a.m., https://www.lowellsun.com/2022/01/13/here-comes-the-judge-steve-harvey-an-initial-hit/)

Or, matching Justices' names to counterparts' names more closely: what if Breyer



(A&E Television Networks, *Stephen Breyer*, Biography, July 15, 2015 (originally published Apr. 1, 2014?), last updated Jan. 26, 2022, https://www.biography.com/law-figure/stephen-breyer)

…had been replaced by Barker? (Travis Barker of "Blink-182")

(John Lockett, *Travis Barker Talks Tattoos and Pain*, GQ, Aug. 19, 2016, https://www.gq.com/story/travis-barker-blink-182-tattoos-and-pain)

Or, Kagan

(Harvard Law School, *Elena Kagan Named Next Dean of Harvard Law School*, Harvard Law Today, Apr. 3, 2003, https://today.law.harvard.edu/elena-kagan-named-next-dean-of-harvard-law-school/)

…were replaced by Kardashian?

(Pearl JYX, Twitter, July 26, 2015, 3:55 a.m., https://twitter.com/jyx_pearl/status/625258253333626880/photo/2)

Or, Ketanji Brown Jackson

(Maya Yang and agencies, *Ketanji Brown Jackson: who is Biden's supreme court choice?*, The Guardian, Feb. 25, 2022, 2:20 p.m., https://www.theguardian.com/us-news/2022/feb/25/ketanji-brown-jackson-joe-biden-supreme-court-choice)

…by Janet Jackson?

(CELEBRITY, *Sugar Bits — Janet Jackson's Mystery Illness Revealed*, POPSUGAR, Oct. 15, 2008, https://www.popsugar.com/celebrity/Photo-Janet-Jackson-Whose-Previously-Unknown-Illness-Caused-Vestibular-Migraines-2367080)

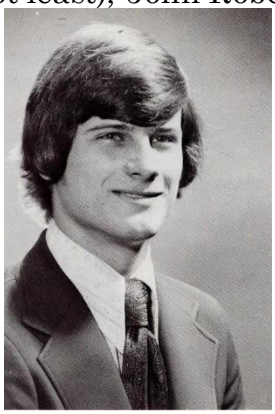
Or, Coney Barrett

(Jenni Fink, *Amy Coney Barrett Memes Flood the Internet After She's Asked to Hold Up Her Notepad*, Newsweek, Oct. 13, 2020, 1:53 p.m., https://www.newsweek.com/amy-coney-barrett-memes-flood-internet-after-shes-asked-hold-her-notepad-1538762)

…by Cardi B?

(Emilia Petrarca, *Every Fashion Moment You May Have Missed at the Grammys*, The Cut, Jan. 29, 2018, https://www.thecut.com/2018/01/grammys-2018-performance-costumes.html)

Or (last but not least), John Roberts



(James Pasley, *The life of John Roberts Jr., the Supreme Court's youngest chief justice in 200 years*, Bus. Insider, Jan. 30, 2020, 11:26 a.m., https://www.businessinsider.com/john-roberts-bio-photo-chief-justice-supreme-court-2020-1)

…by Julia Roberts?

(Tammy Favata, *How to Prevent Red Hair Color from Fading Out and Dying Red Hair*, HubPages, July 29, 2011, https://discover.hubpages.com/style/Color-Correction-Fading-Red-Hair-Color)

Amicus may have "made his point" with his hypotheticals *supra*, that cameras in the Court's courtroom may be a crazy capitulation to the celebrity circus of media madness. —Now, on the war over wedding websites:

III. PETITIONERS' "EXPRESSIVE" OR "ARTISTIC" SPEECH—NOT TO MENTION AMICAE/I'S OR JUSTICES' SPEECH—MAY DESERVE SERIOUS FREEDOM

Part of the reason Amicus has used his "artistic freedom" (photos, even) in the previous section—somewhat as Justice Breyer has often been "creative"—, is to underline the importance of artistic/intellectual First Amendment freedom, and to note that Petitioners' cause has strength. We may not like others' opinions, but they may have substantial right to those opinions, in a free country—even if Colorado's Anti-Discrimination Act (CADA) (Colo. Rev. Stat. § 24-34-601, *as amended by* H.B. 21-1108 (enacted May 20, 2021)) would have it otherwise.

As a methodological note: Amicus wrote the Court five years ago on a similar topic, in *Masterpiece Cakeshop* (brief *available at* https://www.scotusblog.com/wp-content/uploads/2017/09/16-111_ac_david-boyle.pdf), and to his surprise received favorable

commentary on the brief: *see* Adam Feldman, *Empirical SCOTUS: Getting rid of those amicus blues*, SCOTUSblog, July 16, 2018, 2:16 p.m., https://www.scotusblog.com/2018/07/empirical-scotus-getting-rid-of-those-amicus-blues/, graph 4 (https://www.scotusblog.com/wp-content/uploads/2018/07/Feldman-graph-4.png) (noting that analytical tool BriefCatch ranked Amicus' brief as one of the 14 best amicus briefs submitted to the Court in the 2017 Term).

This all is not to boast (goodness forbid), but rather, to note that a longer version of some of the arguments herein can be read in Amicus' 2017 brief; and the present brief may summarize/recapitulate/refresh some of those arguments. (If one has written a top-14 brief, can one do much better in a new brief?) —We start with cakelessness:

IV. THE LACK OF A WEDDING CAKE MAY AID PETITIONERS

One thing helping Petitioners is that there isn't a real "material object" like a cake involved, as opposed to the *Masterpiece Cakeshop* case. With a wedding cake, arguendo, one possibly-fair solution might be to force the baker to provide a cake (everyone has to eat, whether at weddings or not), but not force the baker to decorate it with any words (or two little men holding hands on top of the cake, etc.) that would endorse same-sex marriage.

But Petitioners are creating not a cake, but a bunch of whirring colors, electrons and pixels, bits and bytes: a website. You can't eat a website (much less munch down a whole computer monitor). If you tried, you might get quite sick.

Too, in terms of ease of travel, a same-sex couple might be able to get their wedding website from anywhere, on the Internet, even from Timbuktu; by contrast, a wedding cake made in Timbuktu would tend to lose a little of its shape and freshness, maybe, by the time it got to the couple.

And in this case, there might be not only a missing cake, but also a missing "monopoly", so to speak…

V. IS A LOWER COURT'S IDEA OF "MONOPOLY" CORRECT? OR, THE CURIOUS CASE OF CATIE COURTESAN

One questions calling a one-woman operation like Lorie Smith's a "monopoly", as does the Tenth Circuit, Pet. App. 29a. Amicus may be missing something here. Standard Oil might have been a monopoly, say, but a single religiously-devout website designer?

If this is so, there may be unpleasant implications. …Let us imagine the case of Catie Courtesan, a professional strumpet, and a member of the "More Whores Galore!" prostitution-legalization activist group, which has been successful in legalizing "the world's oldest profession" in her State. Catie one night gets a text from her co-worker Priscilla Prostitute, saying, "OMG! That hideous beast Mudd E. Pigg says he wants you – even if you don't want him!"

Catie drops her hot-pink Birkin bag in shock, remembering the grossly-obese, untrimmed-nose-hairs lecherous creep whose advances she had repeatedly rejected. Suddenly, Pigg himself waddles into her place of business (a dilapidated Starbucks

adjoining a strip club), and chortles, "Heh-heh-heh Catie! I want you to do one of your trademark erotic dances, the sleaziest you got! Here's the money, let's go next door and you can strip-strip-strip away!"

Ms. Courtesan walks off in a huff and sees what her other co-worker Samantha Slutt (who takes law-school night classes) has to say. Slutt notes, "Unfortunately, my sweet smokeshow, you are legally a 'unique monopoly', and your artistic expressive services—a.k.a. erotic dancing—must be available to everyone to purchase… or you're a dirty un-American monopolist!"

Catie starts bawling into her Birkin bag (to muffle the sound a little), realizing that for the rest of her life (unless she changes professions), she may have to share some of her most intimate and creative artistry with an abusive schmuck whom she loathes—and he could sue her if she doesn't.

There are several depths to the above astounding scenario. First, it seems unlikely, fortunately, that Pigg could force Catie to have actual sexual relations with him, since that could be called "conduct", rather than "speech". It is possible, though, that if she has made pornographic films recording some of her escapades, that if the "one-woman artistic monopoly" theory were true, that Pigg could force her to sell her (undoubtedly unique, i.e., "monopoly") video(s) to him, as long as she sells them to others as well.

As for "conduct" versus "speech", it is also possible that forcing her to do an actual striptease/creative dance routine with her body, in person, might also be considered forced "conduct", though it could also be called "speech", being advertised as a unique erotic

artistic performance. Again, even if she can argue that those performances are enough "conduct" that she can choose for whom to perform *in person*, or not: she may not be able to prevent Pigg from at least purchasing video (or audio) of them, as long as she is selling to other people.

Even if Catie can make some type of "privacy claim" about her own body (?): if, say, she participates in erotic/artistic cartoons/animation/ drawings, she may not be able to prevent those imaginary depictions of her—no matter how intimate or revealing or embarrassing—from being sold to Mudd E. Pigg, if indeed she is a "monopolist", and she sells them to others.

Then, there's the idea of "new creation". What if Mr. Pigg not only wants to see her do her old stuff, but also demands her best customized innovation to do some, or all, of: a) brand-new personalized, and in-person, erotic dance/prostitution; b) brand-new personalized sketch, cartoon, or animation of a figure resembling her, in erotic performance; c) video or audio of the above?

Here, her own creativity would be a shackle for Catie, though creativity is often seen as something that's supposed to be liberating, not oppressive.

People may not all care about the above scenarios: "She's just a whore", they may say. Still, even the common trollop may have some rights and dignity; and many women (or men, or "non-binaries") might feel deeply uncomfortable to have to share intimate sexualized performances—or be forced to do

anything with their own bodies—, in person, on film, or even as a cartoon, with unwanted others.

Or, regardless of the *theories* the lower court has about "one-person monopoly": what about those theories' *effects* in the real world? Are they fair? Or legal?

VI. *BOSTOCK* MAY NOT HAMPER PETITIONERS' FREEDOM OF SPEECH

As for something that is good, solid law, as opposed to an "innovative theory" like "one-person artistic monopoly": people may wonder if one may distinguish the solid and landmark case of *Bostock*, *supra* at 3, in promoting Petitioners' claims. *Bostock*, broadly speaking, *see id.*, allows a transgender person to freely express her/him/themself(selves) and not be fired from a job. So, does *Bostock* automatically favor the State of Colorado and CADA here?

Well, if, per *Bostock*, free expression and standing up for your identity is important and even legally protected, it seems that conversely, the employer, or any businessperson (such as Lorie Smith), should her/him/themself(selves) also have a broad freedom of self-expression, speech, and belief. It would seem perverse, if the employee had lifestyle freedom, but the employer did not.

Some may query in response, "So a business with a transgender employee, can refuse to create artistic materials for a transgender (or other LGBT) wedding?" Possibly, if the Court thinks so. Just as, say, a Muslim butcher may be compelled to hire

someone who himself is a pork-eater—at least if the pork-eater claims religious/conscience freedom as a reason for eating pork—, but he (the butcher) may not be compelled to serve pork to anybody, nor to create a wedding-day meat plate/display, for a wedding of two Islam-hating bigots, which spells out, with carefully arranged pieces of meat, "I HATE ISLAM!"

So, again, *Bostock*, thoughtfully considered, may not favor Respondents any more than it favors Petitioners.

VII. PETITIONERS' CLAIMS MAY ALLOW A BUSINESS TO DISCRIMINATE RACIALLY—SO PETITIONERS MAY WANT TO NARROW OR CAREFULLY FRAME THEIR CLAIMS

Despite Amicus defending Petitioners' freedom *supra*, he notes that, however, there is currently nothing he sees in the certiorari petition, that would prevent a business from, say, racially discriminating against customers, at least in some instances.

For example, what if wedding-website designer Kurt K. Klannish says, "Well, ah just *love* me some black people. Ah even saw one on TV once! But while ah'm happy to serve them in all other ways, my kute little kkkonscience don't allow me to make wedding websites for black people—and especially not for a black person marryin' a white person! Gooooo First Amendment artistic freeeeedom!!"

Amicus cannot see much of a stopping point for a business's "artistic freedom", that Petitioners propose. Is this acceptable? Petitioners don't even cite, e.g., *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964), a landmark public-

accommodations case that the Tenth Circuit cites (Pet. App. 27a, 32a), in order to try to distinguish it. If *Heart of Atlanta*, *supra*, can't be distinguished from the instant case, that's a huge problem.

Obviously, *Heart of Atlanta* may not involve artistic freedom. But, *see id.*, it obviously does involve people being excluded from public accommodation. And LGBT customers of 303 Creative could complain that they, too, are being excluded, if not for a personal characteristic/status (LGBT-ness), then for a consequence/conduct of that characteristic (LGBT people will tend to have weddings that are same-sex or otherwise "non-traditional"). What can be done?

Is there some magic method that would allow freedom of conscience to businesspeople like Petitioners, but not let them employ race discrimination or other forms of discrimination that people find particularly odious? One case noting that "race is special" is *Peña-Rodriguez v. Colorado*, 580 U.S. ___ (2017). While the "no-impeachment" rule for juries is often considered sacred, the Court held in *Peña-Rodriguez*, *supra*, that racial animus is so vile that it allows an exception to the "no-impeachment" rule.

Other cases may have similar commentary about the special noxiousness of racial bias; but *Peña-Rodriguez*, by itself, nicely supports the idea that one could completely ban race discrimination by business, but in matters relating to moral or sexual issues, there might be more freedom of conscience for businesses. If Petitioners have other ideas about how they can limit their claims of total artistic freedom,

in order to avoid hurting vulnerable groups, they are welcome to share them.

VIII. ON DENIAL OF SERVICES TO "RELIGIOUS NAZI" OR INTERFAITH MARRIAGES, ETC.; AND "STATUS VERSUS CONDUCT" ISSUES

Naturally, thoughtful people might consider *non*-racialized (e.g., LGBT-related) denial of services to be a very serious problem. However, Amicus is concerned that if Petitioners receive no relief, that could endanger other cases of conscience. For example, what if there were an Orthodox Jewish website-designer, Shlomo Satmar, who is called upon to make a website for a Nazi wedding, with a big swastika prominent on the website? What protection could there be, if any, for a Jewish designer in that situation? (By the way, these Nazis are "*religious Nazis*", in a "Viking worship" group called "Odin's Nordic Sons", so that they can claim "religious discrimination" if they're refused services.)

So even those who say, "Lorie Smith is a horrible bigot, make her suffer", might want to think about the Shlomo Satmars of the world. Even allowing Smith to do a (putatively) "horrible thing", by refusing to make same-sex couples a wedding website, might be the price to pay for making sure that the Satmars don't have to make a website for Odin's Nordic Sons.

(Also, if Satmar somehow refuses to make a wedding website for a Gentile marrying a Jew, in an interfaith ceremony…that may sound horrible to some, and Amicus is not encouraging it; but again, it

may be the price for, conversely, allowing Satmar not to make a website for the "religious Nazis". — Then again, if a court sees both cases as including possibly-forbidden, animus-laden religious proxies for race and racial prejudice, a court might force Satmar to make the website for the Jewish/Gentile couple, but *not* to make one for the "religious" Nazis.)

Instinctively, it seems that businesses should have some way to opt out of particular actions that seem abominable to them, except for absolute no-go zones like race. (One can debate about the difference between "status" and "conduct" endlessly, of course, *vis-à-vis* mere group membership: e.g., being a Satanist who wants a cookie just like a Christian might; versus what that group might actually *do*, e.g., being a Satanist who wants to practice a Satanic ceremony, as opposed to just buying and eating a cookie like anyone else. Amicus hopes the Court comes to common-sense conclusions about "status" and "conduct" issues.)

What if, say, polygamy is legalized—not an impossible thing—, and 303 Creative is forced to design websites for polygamous weddings? Where does it end? Can the Court create balanced justice?

IX. IF GRANTED RELIEF, PETITIONERS SHOULD RECEIVE REASONABLY NARROW RELIEF, SO AS NOT NEEDLESSLY TO HURT MEMBERS OF ANY VULNERABLE MINORITIES OR OTHER PERSONS

If the Court finds Petitioners' arguments worthy re artistic/expressive issues, it could grant various types of relief. It could give Petitioners full relief as

they ask; or it could allow a fine but limit the amount of it; etc. The larger the relief, though, the more risk that the rights and dignities of LGBT people, or other people, such as racial minorities, might get trampled on needlessly.

(And, "what is art", even? In this age of "3-D printing", "customized packaging with computerized help", etc., what is to prevent, say, a businessperson from taking an otherwise-standard good, and either (a) making a tiny change to it, or (b) packaging it in some "individualized artistic way", and then saying, "Well, now it's my unique art, so you just can't have it, or my freedom will be violated"? So, the "how much art does something need to be 'Art'?" issue may lurk in the background.)

The Court can be creative and conscientious here, naturally. For example, if it does grant full relief, it could mix that with the obligation for all future wedding-website makers (or, by extension, all other businesses) to post publicly that they refuse to serve same-sex weddings; or if local laws do not allow them to do that, then at least posting, either in-store or on the Internet, what disclaimers or relevant information they can—e.g., that they know the State requires them not to deny service on the basis of LGBT identity, but they respectfully disagree with the State—, to give some reasonable warning to potential clients.

One problem that could make it more difficult to give full and untrammeled relief to Petitioners, is the externalities, the damaging baggage, their actions cause. In *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), by contrast, there may

have been largely some paperwork involved in order to get employees birth control, and using accommodations which non-profit corporations were allowed, *see id.*, so that there were arguably few serious externalities.

But in the instant case, some externalities include the hurt which LGBT people might claim, that their dignity was insulted as being treated as less than that of opposite-sex marrying partners', along with the need to go find someone else to create a wedding website, with the time and energy that entailed. This cannot be ignored.

X. ONE FAIR SOLUTION COULD INVOLVE FINING PETITIONERS FOR THEIR BURDEN ON SAME-SEX COUPLES, BUT WITHOUT FORCING FUTURE COMPLIANCE OR THREATENING SHUTDOWN OR JAIL TIME

So, is the Court caught between Scylla and Charybdis? I.e., must it either rule that: Petitioners' putative rights must be violated, and Petitioners must be fined, forced to "re-educate" their employees, and maybe shut down or even jailed for non-compliance? (CADA may not currently include jail time; but things could always change…) or, on the other hand, must the Court rule that LGBT couples' putative rights must be violated, and that website-designers have carte blanche to refuse service and thus to make gay spouses-to-be go hunting for another designer?

Fortunately, all that might be a false dichotomy. What if, instead, if the Court felt that Lorie Smith has to be punished in some way: what about just

allowing Colorado to fine her and give the same-sex couple the money? (Say, $50-$500; likely not enough to bankrupt Smith.) This would perform several tasks:

a. Petitioners would be punished;

b. Petitioners would be made to compensate same-sex couples for lost time, energy, and money spent in having to go find another website maker;

c. Any "dignitary harm" to same-sex couples would be compensated, at least in part.

Points "b" and "c" *supra* deal with the externalities Petitioners ladle out on same-sex couples (lost resources, emotional hurt), so that Petitioners would be forced to spend money to help place the couples in roughly the place they were before the refusal to make the wedding website.

But, since Petitioners' conscience rights and dignity are also important: the Court might not allow the State to excessively fine Petitioners, nor to force them to re-educate their employees, nor to shut down. (The State could *encourage* re-education, and provide ample resources for doing so; however, re-education wouldn't be mandatory, but rather, precatory, in that there'd be no penalty for non-compliance by Petitioners.)

Critics could sneer and call this the "Led Zeppelin solution": i.e., that Petitioners would be "buying a stairway to heaven", Led Zeppelin, *Stairway to Heaven*, *on* Led Zeppelin IV (Atlantic 1971), by being allowed to "buy" the right of conscience ("buy" it by paying fines) not to make a wedding website for

LGBT people, without any further punishment. But would that be such a terrible thing?

Under that rubric, Petitioners would be punished and have to pay some damages, but they would still be allowed to practice their faith and business the way they want—with the proviso that every time they refuse service, they must pay a fine (and maybe incur community ill-will or boycotts).

No jail, no mandatory re-education, no denial of artistic freedoms, no lack of monetary compensation for externalities forced on people. If such a solution solves problems, maybe it could be adopted.

But if the Court thinks 303 Creative can go unpunished, without encouraging homophobia, that's up to the Court.

* * *

"Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example." *Olmstead v. United States*, 277 U. S. 438, 485 (1928) (Brandeis, J., dissenting) (*overturned by Katz v. United States*, 389 U.S. 347 (1967)). Amicus is acutely concerned about what lessons the Draft—written by the Court, which is part of the Government—is teaching the People; what lessons the Court's *303 Creative LLC v. Elenis* Opinion might teach; and what the Court's efforts to be neutral, or non-neutral, in America's "culture war", might teach.

Many critics wonder if the present Court is biased towards one side of the cultural conflicts in America, which may revolve around abortion, LGBT issues, etc. (Naturally, Amicus prays that protesters will do

no physical violence to Members of the Court or their families.) Amicus isn't asserting that the Court is so biased; but even the appearance of bias can be devastating to the credibility of judges.

If Amicus has asserted anything in this brief, about any case or other matter, which might make the Court appear biased, the Court might carefully want to think again, and eliminate anything which might give the appearance of bias—and that includes *omissions* that reflect bias or appearance of bias.

On that note: this brief, has, partially as a tribute to a departing Member of the Court, used some creative hypotheticals, which could even be called "comedic" in part. A concern of Amicus, though, is that some things the Court has done may be perceived as even more off-the-wall or ridiculous than anything Amicus has said, and in a dangerous way—a virtual "multiverse of madness", an alternate reality of considering pregnant women disposable/abortable by law, valorizing ecclesiastical penalties, etc. (even if nobly driven by, e.g., grief over unborn children/fetuses/embryos, or over challenges to "traditional morality")—that hurts the Court's image and character.

And if the Court, and its credibility and integrity, come to be seen as a joke, even cruel partisan farce… Amicus does not have to complete the sentence.

CONCLUSION

The Court should consider what will uphold the dignity of both Lorie Smith and same-sex couples, showing due respect for both free speech and

consumer rights, at the same time the Court takes measures in all matters to do nothing, or make no omission, that could harm its own credibility and honor; and Amicus humbly thanks the Court for its time and consideration.

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