

No. 21-476

IN THE
SUPREME COURT OF THE UNITED STATES

303 CREATIVE LLC, A LIMITED LIABILITY COMPANY;
LORIE SMITH

Petitioners,

v.

AUBREY ELENIS; CHARLES GARCIA; AJAY MENON;
MIGUEL RENE ELIAS; RICHARD LEWIS; KENDRA
ANDERSON; SERGIO CORDOVA; JESSICA POCOCK; PHIL
WEISER,

Respondents.

*On Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit*

**BRIEF OF SCHOLARS OF
FAMILY AND SEXUALITY
AS *AMICI CURIAE* IN SUPPORT
OF PETITIONERS**

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QUESTION PRESENTED

Whether applying a public-accommodation law to compel an artist to speak or stay silent violates the Free Speech Clause of the First Amendment.

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INTEREST OF AMICI CURIAE¹

Amici are social science scholars who have researched and written extensively about family and human sexuality.

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¹ No counsel for a party authored this brief in whole or in part, and no counsel for a party made a monetary contribution to the preparation or submission of this brief. No person, other than amici curiae, its members, or its counsel made a monetary contribution to intended to fund the preparation or filing of this brief. Letters from all parties consenting to the filing of this brief have been submitted to the Clerk or provided to amici counsel.

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These social science scholars submit this brief to bring to the Court's attention important social science research and public policy concerns bearing on whether LGBT persons in today's inclusive environment experience measurable threats to their emotional and physical health, including to dignitary interests, from being denied access to a specific artist for otherwise widely available services, which research calls into question Colorado's purported compelling state interest to coerce and forbid religious speech.

SUMMARY OF ARGUMENT

What is squarely at issue in this case is the freedom of speech, not anti-gay prejudice. In *Brown v. Entertainment Merchants Association*,² this Court reaffirmed that it will not curb free speech on an assumption—even a logical probability—that actions implicating the First Amendment will have a deleterious impact on others' health and wellbeing. “The State must specifically identify an ‘actual problem’ in need of solving, and the curtailment of

² 564 U.S. 786 (2011).

free speech must be actually *necessary* to the solution. That is a demanding standard.”³ More than just showing the existence of an “actual problem,” the government must also “show a direct causal link between [the acts being regulated] and harm to [be avoided]. . . . [A]mbiguous proof will not suffice.”⁴ Nor will “anecdote and supposition.”⁵

Here, there is a speculative problem and Colorado’s overreaching solution is entirely unnecessary. Rather, Colorado’s “proof” of purported LGBT dignity harms is, at best, anecdotal, ambiguous, and is based largely in supposition, not grounded in solid social science research. Specifically, there is no evidence of widespread and pervasive discrimination and service declination of LGBT persons by artists in Colorado. Furthermore, the government’s harsh dualistic suppression of speech and simultaneous coercion of speech, particularly harming those artists with deeply held religious beliefs about marriage, is not directly causally linked to Colorado’s overstated LGBT dignitary harms. Constitutionally, it is far from the *necessary* solution.

CADA’s speech regulations harm petitioner Lorie Smith in two important ways. First, they silence Lorie Smith’s speech. That is, Ms. Smith is constrained from placing a notice on 303 Creative LLC’s business website explaining her reasons why she only offers to create websites for opposite-sex marriages. Second, her speech is being compelled.

³ *Id.* at 799 (emphasis added) (citations omitted).

⁴ *Id.* at 799-800.

⁵ *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 822 (2000).

That is, if Ms. Smith’s business elects to offer her wedding services to couples comprised of a man and a woman, she would be compelled to offer the identical product to same-sex couples.

Colorado claims its antidiscrimination law achieves a compelling interest by preventing “dignitary and economic” harms “inflicted by denials of equal access to commercially available goods and services.”⁶ But to meet this standard, Colorado must actually produce evidence to support this proposition. *Brown* rejected similar studies as evidence of a compelling interest because “[n]early all of the research [was] based on correlation, not evidence of causation, and most of the studies suffer[ed] from significant . . . flaws in methodology.”⁷ Those same flaws are present in studies that purport to show that the actions to be regulated here cause the harm to be avoided.

In truth, Ms. Smith’s beliefs and actions are not targeted toward LGBT persons. Certainly, the proposition that anti-gay discrimination can diminish psychological and physical health is widely acknowledged, though—as we will demonstrate—the exact mechanisms are disputed.⁸ However, Lorie

⁶ Respondents’ Brief in Opposition to Certiorari, 303 *Creative, Lorie Smith v. Elenis et al.*, (No. 21-476) (Opp.to.Cert.) at 33.

⁷ *Brown*, 564 U.S. at 800.

⁸ Todd G. Morrison, C. J. Bishop, Melanie A. Morrison, & Kandice Parker-Taneo, *A Psychometric Review of Measures Assessing Discrimination Against Sexual Minorities*, 63 *Journal of Homosexuality* 1086 (2016).

Smith does not discriminate against anyone because of status. She is simply asserting her constitutional right to exercise control over her own messages. Anti-gay prejudice is not what is motivating Ms. Smith's speech claims. Rather it is the biblical centrality of marriage between a man and woman in the long history of her Christian faith which motivates her to speak her own message and decline to speak the government's.

Moreover, there is no substantial evidence that Ms. Smith's conscientious objection fosters anything more than a minor inconvenience or annoyance to LGBT persons pursuing a same-sex civil marriage. This is especially true considering recent changes in societal norms and the increasing acceptance of same-sex unions. As a result of these changes, same-sex couples can locate countless wedding service alternatives in the free market without forcing individuals of faith to compromise their consciences, as constrained by religion, about the meaning of marriage. With such rapidly changing societal views, there is simply no evidence that Ms. Smith's desire to abstain from offering wedding services for same-sex marriages will cause lasting harm to would-be customers or the LGBT community at large either through mental health harms or significantly curtailed free market access.

We recognize that Colorado's claim is that Ms. Smith's delimiting the wedding services she offers must necessarily discriminate against LGBT-identified people. However, the delimitation is not particularized to LGBT-identified persons, even if

they are the ones who may be most affected. Her position is not about targeting sexual orientation or sexual identities, but rather is grounded in Christianity's longstanding assertion about the sacred and unchangeable structure of the marital union.

Although there will be social scientific evidence brought to bear on the case, the social sciences remain underprepared to offer thorough guidance on the effects of actions like Ms. Smith's on the health outcomes of LGBT persons in this era of rapid growth in support for them, in particular, as well as for same-sex marriage, in general. Indeed, while LGBT-identified young adults appear to be struggling more than their elders, they have experienced a fraction of the prejudice the latter did. It's not the only social scientific enigma that complicates the straightforward narrative promulgated by advocates of "minority stress theory." All this serves as indication of a rapidly-expanding field of study still prone to significant disagreements and wrestling with contrary findings.

While public support for same-sex marriage continues to climb, there is no basis to suggest that freedom of thought and speech with respect to marriage must be publicly repressed. To suggest somehow that accommodating conscience opens the door to wide, pent-up discriminatory intentions is to misread Ms. Smith's heart, public opinion, and the versatility of the American market economy to accommodate diversity of thought and speech regarding human sexuality and religious liberty.

Consumers have long voted with their feet, and remain free to do so in this case.

ARGUMENT

I. There are Valid Reasons to Question Whether a Decision Not to Help Celebrate a Same-Sex Wedding Comprises the Kind of Discrimination that Creates “Minority Stress” and Undermines Emotional and Physical Health.

No strong assumptions that LGBT persons are only married to, or else interested in marrying, someone of the same sex are merited here. Social reality is diverse, as numerous studies highlight.⁹ For example, in 2020, researchers examined U.S. Census and Gallup poll data and found that 2.2 million LGBT-identified individuals described themselves as highly religious, 1 in 5 (20.5%) of whom were in an opposite-sex marriage.¹⁰ Ms. Smith would not have

⁹ Ilan H. Meyer, Stephen T. Russell, Phillip L. Hammack, David M. Frost, & Bianca D. M. Wilson, *Minority Stress, Distress, and Suicide Attempts in Three Cohorts of Sexual Minority Adults: A U.S. Probability Sample*, 16 PLoS ONE e0246827 (2021); Mark A. Yarhouse and Olya Zaporozhets, *The Mental Health and Well-Being of Celibate Gay Christians*, Living Out (2021) https://www.livingout.org/resources/articles/96/the-mental-health-and-well-being-of-celibate-gay-christians#footnotelist_0_3; Mark A. Yarhouse and Olya Zaporozhets, *Costly Obedience: What We Can Learn From the Celibate Gay Christian Community*, (2019).

¹⁰ Kerith J. Conron, Shoshana K. Goldberg, & Kathryn O'Neill, *Religiosity Among LGBT Adults in the US*, The Williams

any religious objection to creating wedding websites for these opposite-sex couples, regardless of the LGBT identification of one or more of the individuals involved.

Scholars of LGB discrimination, few of whom are not personally motivated by the topic, have often overstated estimates of its extent and uniqueness. Many heterosexual Americans experience victimization or discrimination for unique characteristics at rates comparable to sexual minority discrimination. While Herek estimated in 2008 that “about half” of LGB adults had experienced enacted discrimination,¹¹ Boutwell et al., examining high-quality contemporaneous data from the 2008 wave of the National Longitudinal Survey of Adolescent to Adult Health (Add Health), reported the comparable proportion of all Americans who had ever experienced discrimination to be 68.3%.¹² The LGB respondents

Institute (2020), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Religiosity-Oct-2020.pdf>.

¹¹ Gregory M. Herek, *Hate Crimes and Stigma-Related Experiences Among Sexual Minority Adults in the United States: Prevalence Estimates From a National Probability Sample*, 24 *Journal of Interpersonal Violence*, 54 (2009).

¹² Brian B. Boutwell, Joseph L. Nedelec, Bo Winegard, Todd Shackelford, Kevin M. Beaver, Michael Vaughn, J. C. Barnes, & John P. Wright, *The Prevalence of Discrimination across Racial Groups in Contemporary America: Results from a Nationally Representative Sample of Adults*, 12 *PLoS One* e0183356 (2017). See also *Add Health: Wave IV In-Home Interview Codebook*, Section 14, Social Psychology and Mental Health, Question H4MH28 at 229. Available at https://adata.site.wesleyan.edu/files/2017/08/Addhealth_W4_In-home_Codebook.pdf.

on the 2008 Add Health survey did report slightly higher discrimination, at 70.5%, a difference that is much smaller than the margin of uncertainty in the sample.

Boutwell et al. also did something important that Herek did not do: they examined a follow-up question asking why the reported discrimination occurred. In addition to sexual orientation, respondents could attribute their experiences of discrimination to race, gender, age, religion, height or weight, education or income, or a physical disability. Strikingly, less than half of one percent of reported discrimination was due to sexual orientation,¹³ even among LGB respondents. Most of the discrimination Americans experienced, Boutwell et al. reported, was due to “unique and perhaps situationally specific factors other than race, gender, sexual orientation, and age.”¹⁴

Meyer et al. have recently updated estimates of sexual minority discrimination, replicating Herek’s questions in a population sample of sexual minority persons and reporting higher prevalence similar to Boutwell et al. They reported that from 72-81% of sexual minority persons have experienced the mildest form of discrimination (verbal abuse).¹⁵ Like Herek, they also did not report how much of the discrimination experienced by LGB persons was actually due to their sexual orientation and not some other characteristic, such as race, gender or obesity,

¹³ Boutwell et al., *supra* note 12, at 5.

¹⁴ *Ibid.*

¹⁵ Meyer et al., *supra* note 9, at 10.

that they may share with non-LGB persons. Further analysis of the data used in Meyer et al.'s study reveals that, in the view of the respondents themselves, only 46% of the reported discrimination was due to sexual orientation. Most of the discrimination experienced by this representative sample of U.S. sexual minorities was attributed by them, not to their sexual orientation, but rather to their race, age, gender, physical appearance, religion/spirituality, income level or disability. In sum, most of the discrimination experiences reported by Meyer as "minority stressors" were, in the opinion of the victims themselves, not due uniquely to sexual orientation but to characteristics they share with non-LGB Americans, who also experience similar levels of discrimination for similar reasons.

In their review of 75 studies of sexual assault among sexual minorities, Rothman and colleagues observed the indications of exaggeration bias, noting that "studies using non-probability samples reported higher sexual assault prevalence rates than did population-based or census sample studies,"¹⁶ and that "few of the articles included in this review include non-GLB participants [for comparison]."¹⁷ On the question pertinent to this case, they concluded: "Some have suggested that the rates of sexual assault victimization among gay, lesbian or bisexual (GLB)

¹⁶ Emily F. Rothman, Deinera Exner, & Allyson L. Baughman, *The Prevalence of Sexual Assault Against People Who Identify as Gay, Lesbian, or Bisexual in the United States: A Systematic Review*, 12 *Trauma Violence Abuse* 55 (2011) at 55.

¹⁷ *Id.* at 62.

individuals may be elevated compared to those in heterosexual populations.... These suggestions remain speculative, however, as estimates of sexual violence victimization among GLB individuals range widely, and often have been derived from convenience samples and are therefore non-generalizable.”¹⁸

Therefore, the sweeping assertion that a religious business owner’s decision to decline to celebrate a same-sex marriage constitutes the type of “discriminatory refusals of generally available opportunities” that are held to “exacerbate the stress from social exclusion and stigma that can lead to serious health problems, including depression, anxiety, substance use disorders, and suicide attempts,” such as was made in the Lambda Legal Education and Defense Fund amicus brief, are an overreach.¹⁹ The events that give rise to the current case, which are decreasingly common, are simply not akin to severe forms of behavior such as sustained bullying, interpersonal violence, or the experience of widespread, consistent discrimination.

Invidious discrimination and dignitary harms cannot be assumed and imputed every time a citizen or company declines to celebrate or participate in activities which conflict with a conscience informed or constrained by religious beliefs. Indeed, as this Court

¹⁸ *Id.* at 56.

¹⁹ Brief Amicus Curiae of Lambda Legal Defense and Education Fund, Inc. at 19, *303 Creative LLC v. Elenis*, 6 F.4th 1160 (10th Cir. May 1, 2020) (19-1413) (hereinafter “Lambda Br.”).

affirmed in *Obergefell v. Hodges*, “[m]any who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here.”²⁰ Specifically, when it comes to weddings, it can be assumed that a member of the clergy who objects to officiating or participating in same-sex marriage ceremony on religious grounds could not be compelled to perform the ceremony without a denial of his or her right to the free exercise of religion. As this Court acknowledged in *Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm’n*, “this refusal would be well understood in our constitutional order as an exercise of religion, an exercise that gay persons could recognize and accept without serious diminishment to their own dignity and worth.”²¹

Similarly, an Orthodox Jewish believer who owns a delicatessen or a devout Muslim who owns a halal grocery may object to providing non-kosher or non-halal foods in their stores. Therefore, because of their deeply held religious beliefs and practices, they object to the provision of particular forms of services (food) which are inconsistent with their religion. The customer who is content to abide by the owner’s personal constraints may do so; the one who is uninterested in the limitation is free to seek services elsewhere. The basis of the owner’s decision, however, is one of conscience, informed and constrained by religious belief and practices, not invidious discrimination targeting any group’s dignity. These religiously informed choices admittedly limit the

²⁰ 576 U.S. 644, 672 (2015).

²¹ 138 S. Ct. 1719, 1727 (2018).

market; the offerings of these business owners are not accessible to those who desire non-kosher or non-halal foods on their menu or in their store. However, this small “lack of accommodation” is not aimed at any customer’s dignity or worth and, furthermore, the robust and pervasive food service marketplace in the United States easily accommodates any impacted customers with a myriad of alternative choices.

Here, Ms. Smith’s religious beliefs compel her to limit her services to weddings which are consistent with her religious beliefs and practices. No dignity harms are intended nor may dignity harms be inferred. Her religiously proscribed boundary existed before she decided to enter the wedding marketplace and is not at all not intended to discriminate, nor does it appreciably discriminate against LGBT individuals, who possess a myriad of other marketplace choices for wedding website services. Furthermore, Ms. Smith’s claim is even more distinctly one of a direct burden on her conscience than the food analogy above. Colorado is not merely demanding that she stock and sell certain religiously non-conforming food products but that she, with her personal thoughts, words, and actions, create original pieces of art (custom-made website designs) which directly conflicts with her religiously informed conscience on the subject of marriage.

Again, Ms. Smith’s beliefs and actions have nothing to do with targeting LGBT persons. Consider these points: Ms. Smith is willing to create websites and serve LGBT-identified customers as well as all others with anything except that which requires a

violation of her religiously informed conscience. Thus Ms. Smith would likely create a website for an opposite-sex couple in which one or both may self-identify as bisexual, or a couple that identified as being in a “mixed orientation” relationship.²² She would not refuse to create a website for LGBT persons who desired to enter into a man-woman marriage. This is not a fanciful example. According to 2020 U.S. Census and Gallup poll data, over 450,000 LGBT-identified persons were in an opposite-sex marriage.²³

On the other hand, she would not likely create a wedding website even for an opposite-sex couple who professed and intended an “open” or polyamorous marriage. Similarly, she might have to respectfully decline a couple where one or both had undergone a gender transition. Again, the message about marriage is the issue. It’s fundamentally about respecting Ms. Smith’s deeply held beliefs about the nature of the institution of marriage, not the individuals’ LGBT identification or status, per se.

While some potential customers may take Lorie Smith’s website statement and limitations as an affront, speculations about resulting harm are overblown, or at the very least not well founded. The scientific literature on how minor incidents like this actually affect psychological or physical health is

²² Jill. L. Kays and Mark A. Yarhouse, *Resilient Factors in Mixed Orientation Couples: Current State of the Research*, 38 *The American Journal of Family Therapy* 334 (2010).

²³ Conron et al., *supra* note 10.

simply unclear, while post-hoc speculation based on vague self-reports is rife and overreaching.²⁴

II. Only Widespread, Intense Discrimination—which is Rare in Today’s Increasingly Accepting Society—has been Shown to Harm Individuals’ Wellbeing. Minority Stress Theory is Employed as a Near-Universal but Undertheorized and Largely Post-Hoc Explanation for Purported Harm to LGBT Health.

Although there will be social scientific evidence brought to bear on this case, the social sciences remain underprepared to offer thorough guidance on the effects of religiously constrained choices like Ms. Smith’s on the health outcomes of LGBT persons in this era of rapid growth in support for them as well as for same-sex marriage—including from within numerous religious faiths. In June 2021, Gallup

²⁴ *E.g.* Jillian R. Scheer, Patricia Harney, Jessica Esposito, & Julie M. Woulfe, *Self-reported Mental and Physical Health Symptoms and Potentially Traumatic Events among Lesbian, Gay, Bisexual, Transgender, and Queer Individuals: The Role of Shame*, 10 *Psychology of Violence* 131 (2020); Travis Salway, Dionne Gesink, Selahadin Ibrahim, Olivier Ferlatte, Anne E. Rhodes, David J. Brennan, Rick Marchand, & Terry Trussler, *Evidence of Multiple Mediating Pathways in Associations between Constructs of Stigma and Self-reported Suicide Attempts in a Cross-sectional Study of Gay and Bisexual Men*, 47 *Archives of Sexual Behavior* 1145 (2018); Richard Bränström, Mark L. Hatzenbuehler, & John E. Pachankis, *Sexual Orientation Disparities in Physical Health: Age and Gender Effects in a Population-based Study*, 51 *Social Psychiatry and Psychiatric Epidemiology* 289 (2016).

released a poll showing record high support for same-sex marriage. A full 70 percent of American adults supported it, including a first-time majority (55 percent) of Republicans supporting it as well. In addition, a majority among older Americans are also in favor (60 percent).²⁵ Moreover, data from the 2021 General Social Survey show that the majority of evangelicals under 40 support same-sex marriage (64 percent). In five years, support increased by 16 percent, narrowing the gap between evangelicals and others under 40 to 14 percent (78 percent of all Americans under age 40 are in favor).²⁶

Just as in *Brown v. Entertainment Merchants Association* (2011), a case involving the purported effects of violent video games, the social science literature here is unable to demonstrate a direct causal link between a refusal to offer a particular service and the types and magnitude of physical and psychological harms that are being claimed. We presently have no evidence that declining to help

²⁵ Justin McCarthy, *Record-High 70% in U.S. Support Same-Sex Marriage*, June 8 (2021) <https://news.gallup.com/poll/350486/record-high-support-same-sex-marriage.aspx>.

²⁶ Ryan Burge, (@ryanburge) “64% of evangelicals under the age of 40 support same-sex marriage now. It's 78% of all people under the age of 40. For young evangelicals, their support for same-sex marriage has increased from 48% in 2016 to 64% in 2021.” Citing to General Social Survey Data 1972-2021. Compiled and graphed (The gap between these groups is the smallest ever now). May 16 (2022), 8:27 a.m. Tweet. <https://twitter.com/ryanburge/status/1526222714062704641> (last accessed May 31, 2022).

celebrate a same-sex wedding unequivocally causes them downstream emotional harm and physical toll.²⁷

Public health researcher Ilan Meyer, whose work is widely cited in studies of LGBT discrimination, notes that “(r)esearchers’ preferred explanation for the cause of the higher prevalence of disorders among LGB people is that stigma, prejudice, and discrimination create a stressful social environment that can lead to mental health problems in people who belong to stigmatized minority groups.”²⁸ Meyer applies to their experience what he has dubbed the “minority stress” model, which “describes stress processes, including the experience of prejudice events, expectations of rejection, hiding and concealing, internalized homophobia, and ameliorative coping processes.”²⁹ An implication of the model is that reducing or eliminating these stresses would significantly ameliorate the emotional health challenges experienced by sexual minorities, with the supposition that contexts which may cause stress would aggravate sexual minority health problems.

In Meyer’s outline of the processes of minority stress as they relate to LGB individuals, “external, objective stressful events and conditions (chronic and acute)” are a key component.³⁰ Yet the (prospective)

²⁷ *Brown*, 564 U.S. 786 (2011).

²⁸ Ilan H. Meyer, *Prejudice, Social Stress, and Mental Health in Lesbian, Gay, and Bisexual Populations: Conceptual Issues and Research Evidence*, 129 *Psychological Bulletin* 674 (2003) at 674-675.

²⁹ *Id.* at 675.

³⁰ *Id.* at 676.

stress of Ms. Smith explaining up front that she, because of conscience, declines to create websites celebrating same-sex weddings is neither a “chronic” event, that is, occurring repeatedly for LGBT customers because it occurs consistently across proprietors, nor is it “acute.” And this case is certainly not an example of wide “alienation from social structures, norms, and institutions,” as Meyer asserts about Emile Durkheim’s classic study of normlessness as a key cause of suicide.³¹ LGBT communities are no longer widely and consistently alienated from American institutions and social structures. Indeed, they are not prevented from entering a civil marriage today and enjoy the approbation of a significant share of business and cultural elites—those persons and entities most effective at shifting norms.

Moreover, the minority stress perspective actually opposes the idea that sexual minorities should be seen merely as victims of social stress. Meyer himself writes, “(S)tress and resilience interact in predicting mental disorder. LGB people counteract minority stress by establishing alternative structures and values that enhance their group.”³² This suggests that the effect of perceived or actual discriminatory or prejudicial events on health outcomes ought not be evaluated as a simple and direct association but as one that concerns interaction effects with sources of social support that boost resilience. The concept of

³¹ *Id.* at 675; Emile Durkheim, *Suicide: A Study in Sociology* (1951).

³² Meyer, *supra* note 28, at 677.

resilience, or rebounding from adversity, has a rich history across the social sciences and education studies, versions of which have been around for decades.³³

For example, simply documenting that poverty is inversely associated with health (or with educational achievement, etc.) is not terribly informative. Nor does it account for why some persons fare better than others when exposed to comparable struggles. In step, the minority stress model suggests that the effects of discriminatory events can be moderated or exacerbated by a variety of factors: what the victim believes about themselves, the sources, types, and amounts of social support they receive, and the centrality and valence of sexual orientation or gender identity to their personal sense of self. Others assert that “[t]he minority stress model has relied exclusively on self-report data to quantitate stigmatization” but that “[t]he accuracy of such self-report data is plausibly influenced by individual temperament.”³⁴ That is, vulnerability to stress and stigma is a generalizable part of the human condition that is not only experienced by minorities. Moreover, resilience is an important factor in determining responses and effects and may have to do with temperament. The same experience of a conscience-based denial of a request to conduct business, such as

³³ Ann S. Masten, *Global Perspectives on Resilience in Children and Youth*, 85 *Child Development* 6 (2013); Andrew Zollie and Ann Marie Healy, *Resilience: Why Things Bounce Back* (2012).

³⁴ J. Michael Bailey, *The Minority Stress Model Deserves Reconsideration, Not Just Extension*, 49 *Archives of Sexual Behavior* 2265 (2020) at 2266.

Ms. Smith’s pre-emptively informing potential same-sex wedding customers that she cannot contract with them, may prompt one person to ruminate about the matter, while being quickly forgotten by another who experienced the same. These considerations demonstrate that minority stress theory tends to lack a clear sense of agency on the part of persons.

All of these are matters well beyond the scope of the stress-inducing event itself. Mediating and moderating factors, according to the theory of minority stress, matter a great deal to how events are interpreted by those who experience them, such as rumination tendencies,³⁵ rejection sensitivity,³⁶ and neuroticism.³⁷ For instance, the authors of one recent study concluded that while “[s]exual orientation-based victimization and neuroticism may both contribute to the sexual orientation-related disparities in psychological well-being and self-harm attempts,” neuroticism appeared to be “the more powerful factor.”³⁸ To surmise or assume that Ms.

³⁵ Elissa L. Sarno, Michael E. Newcomb, & Brian Mustanski, *Rumination Longitudinally Mediates the Association of Minority Stress and Depression in Sexual and Gender Minority Individuals*, 129 *Journal of Abnormal Psychology*, 355 (2020).

³⁶ Brian A. Feinstein, *The Rejection Sensitivity Model as a Framework for Understanding Sexual Minority Mental Health*, 49 *Archives of Sexual Behavior* 2247 (2020).

³⁷ Yin Xu, Scott Montgomery, & Qazi Rahman, *Neuroticism and Sexual Orientation-Based Victimization as Mediators of Sexual Orientation Disparities in Mental Health*, *Archives of Sexual Behavior* (2022) <https://doi.org/10.1007/s10508-022-02319-2>.

³⁸ *Id.* at 1.

Smith’s speech would necessarily and consistently induce considerable stress, anxiety, self-loathing, or despair is to take a leap that is unmerited.

This individualized process may be reflected in a recent publication of Meyer’s, based on the Williams Institute’s large, five-year survey data collection effort aimed at understanding differences between “generations” of LGBT adults.³⁹ The study reinforces the difficulty in making simple assumptions about the connection between discrimination and unwanted outcomes such as anxiety, depression, and suicidality. In it, Meyer and his co-authors evaluate three distinct cohorts of LGBT adults: those aged 18-25, 34-41, and 52-59. They observe higher suicide behavior among the youngest cohort of LGBT adults—those who have experienced the least overt stigma and report the greatest levels of social acceptance, and who came of age amid what many hold to be the signal social achievement—the advent of nationwide same-sex civil marriage. And yet these developments have not yielded greater mental health. Instead, the youngest cohort displays “no signs that the improved social environment attenuated their exposure to minority stressors,”⁴⁰ but rather exhibits worse psychological distress and suicide behavior.

In additional analyses of the Generations data, researchers observed that the association between stigma and psychological distress was essentially the same—nearly nil—among the three age cohorts. This despite the overall elevated levels of psychological

³⁹ Meyer et al., *supra* note 9.

⁴⁰ *Id.* at 1.

distress among the younger respondents in the Generations study. In other words, the youngest exhibit more psychological difficulties, but these are less connected to experiences of “felt stigma.” That the youngest (dubbed the “equality”) generation of LGBT Americans is in worse emotional shape than the older pair of cohorts studied, despite the latter’s far longer experience with social disapproval, signals obvious weakness in the minority stress theory’s fit. For if in fact social stigma is a central cause of stress, there should be less stress for this youngest generation, given lower social stigma.

But instead of reckoning with this, Dr. Meyer (and his coauthors) double down. They assert in the face of the evidence that in spite of the clear diminution of anti-LGBT stigma in the United States—especially among young people—the results somehow “speak to the endurance of cultural ideologies such as homophobia and heterosexism and accompanying rejection of and violence toward sexual minorities.”⁴¹

The implied causal direction of the minority stress theory may be backwards, meaning it is unable to distinguish causal directionality. In the case of the cohort data, it is not at all obvious “whether prejudice and discrimination lead to a greater likelihood of developing mental health problems, or whether mental health problems lead to a greater likelihood of experiencing—or perceiving—prejudice and

⁴¹ *Ibid.*

discrimination.”⁴² Among younger LGBT persons, the latter process may be at work.

In sum, minority stress is not a simple model to test. That is, it is difficult to distinguish the negative influence of anti-gay discrimination on sexual minorities from experiences of sex-, class-, race-, and ethnicity-based forms of discrimination. Add to this stigma—a very real social phenomenon, but one which can apply to a manifold number of conditions—and it becomes very challenging to conclude that Smith’s conscience-based business practices are akin to sustained, acute discrimination or violence and likely to produce a negative effect on the health of sexual or gender minorities.

A recent review of the measures employed in studies assessing discrimination against sexual minorities uncovered little consistency in measures across studies, including methods of evaluating the “psychometric” properties of the measures. Across 162 studies, scales were found to “possess questionable content validity.”⁴³ Another review of research concluded that “studies have not been designed in such a way that could allow them to test conclusively the hypothesis that social stress accounts for the high

⁴² Kenneth J. Zucker, Anne A. Lawrence, & Baudewijntje P. C. Kreukels, *Gender Dysphoria in Adults*, 12 Annual Review of Clinical Psychology 217 (2016) at 230. *Also quoted in* Bailey, *supra* note 34, at 2266.

⁴³ Morrison et al., *supra* note 8, at 1086.

rates of poor mental health outcomes in non-heterosexual populations...”⁴⁴

To be clear, we are not calling into question a basic association between anti-gay discrimination and subpar psychological health, broadly defined. What the evidence suggests, we wish to reiterate, is that the downstream risk of allowing Ms. Smith’s business practices in an era of broad acceptance of same-sex marriage is impossible to project. To suppose that it will pave the way for a surge of wide discriminatory practices is both speculative and highly unlikely, especially given elevated pro-LGBT attitudes among younger cohorts.⁴⁵

These shortcomings have long been acknowledged regarding MST, but largely ignored. In a 2011 critique, researchers called MST an “assumed truth that frequently results in its evocation as an explanation for mental health discrepancies among sexual orientation groups,” pointing out that there are “considerable limitations with the minority-stress hypothesis—chief among them is insufficient,

⁴⁴ Lawrence S. Mayer and Paul R. McHugh, *Sexuality and Gender: Findings from the Biological, Psychological, and Social Sciences*, 50 *The New Atlantis* 10 (2016) at 82.

⁴⁵ See PBS, *Poll Says Majority of Young Americans Support LGBT Rights*, August 9 PBS News Hour (2016), <https://www.pbs.org/newshour/nation/poll-says-majority-young-americans-support-lgbt-rights>; Julie Moreau, *Nearly 1 in 5 Young Adults Say They’re Not Straight, Global Survey Finds*, June 9, NBC News (2021), <https://www.nbcnews.com/feature/nbc-out/nearly-1-5-young-adults-say-they-re-not-straight-n1270003>.

empirically validated research demonstrating the direct causal mechanism by which societal stigma is translated into negative mental health effects.”⁴⁶ Furthermore, critics stated: “We can find no evidence that all sex and sexual orientation subgroups face, as Meyer asserted, the same exposure to stress or experience comparable effects. Neither are we convinced by the data that minority stress is necessarily and directly causally linked to poorer mental health outcomes.”⁴⁷ Long-standing sex research scholar J. Michael Bailey echoed the same concerns a decade later (and a decade earlier⁴⁸), saying, “the minority stress model has been prematurely accepted as the default explanation for sexual orientation-associated differences in mental health. Yet minority stress research has not generated findings uniquely explicable by the model, and it has ignored the model’s serious limitations.”⁴⁹

III. The social-science studies regarding the direct effects of stigma and discrimination on the health of sexual minorities is hamstrung by the inability to develop a

⁴⁶ Ritch C. Savin-Williams, Kenneth M. Cohen, Kara Joyner, & Gerulf Rieger, *Rejecting the Refutation That Never Was: Reply to Meyer’s (2010) Comments on Savin-Williams, Cohen, Joyner, and Rieger (2010)*, 40 *Archives of Sexual Behavior* 659 (2011) at 659.

⁴⁷ *Id.* at 660.

⁴⁸ J. Michael Bailey, *Homosexuality and Mental Illness*, 56 *Archives of General Psychiatry* 883 (1999).

⁴⁹ Bailey, *supra* note 34, at 2267.

consensus regarding measurement and overreach in interpreting results.

A recent brief filed by the state of Massachusetts and joined by 18 states and the District of Columbia in a separate case litigated New York state courts claims that “[a] large and growing body of evidence shows that discriminatory social conditions have severe negative health impacts on LGBTQ people, including increased rates of mental health disorders and suicide attempts, especially for LGBTQ youth.”⁵⁰ What is discerned by way of basic statistical associations, however, is often complicated by methodological limitations and interpretational overreaches, examples of which we have already demonstrated. This is common in the domain of sex and sexuality research, as typically befits a comparatively new, popular, and politicized area of study.

It is worth highlighting the difference between studying the experiences of general discrimination reported by sexual minorities and that of experiences of discrimination based on sexual orientation *specifically*. In a study utilizing excellent measures of discrimination and a large national probability sample of LGB-identified adults, past-year substance use disorders were indeed more numerous among LGB respondents who reported any form of discrimination. However, “(o)ne unexpected result was that there was no statistically significant

⁵⁰ See Brief Amici Curiae of Massachusetts, et al. 4, *Carpenter v. James*, No. 22-75 (2d Cir. May 16, 2022).

relationship between substance use disorders and sexual orientation discrimination alone in the final regression models.”⁵¹ It was, however, associated with substance use disorders when combined with experiences of racial/ethnic or gender discrimination. Results like these are actually in keeping with the minority stress theory, given that, as Meyer asserts, “minority stressors for a gay man who is poor would undoubtedly be related to his poverty.”⁵² In short, far too many in this domain unfortunately tend to conflate all sources of discrimination when the sample involves a sexual minority.⁵³

While many scholars share comparable conceptual ideas about the social reality of gay and lesbian health—including an appreciation for the minority stress model—fundamental disagreements also remain about basic measurement and analytic strategies.⁵⁴ A primary example of this concerns what exactly stigma is and how to measure it. Stigma, Meyer holds, concerns the *expectation* of rejection and discrimination, not the *experience itself*. Nevertheless,

⁵¹ Sean E. McCabe, Wendy B. Bostwick, Tonda L. Hughes, Brady T. West, & Carol J. Boyd, *The Relationship between Discrimination and Substance Use Disorders among Lesbians, Gay, and Bisexual Adults in the United States*, 100 *American Journal of Public Health* 1946 (2010) at 1949-1950.

⁵² Meyer, *supra* note 28, at 678.

⁵³ David M. Frost, Keren Lehavot, & Ilan H. Meyer, *Minority Stress and Physical Health among Sexual Minority Individuals*, 38 *Journal of Behavioral Medicine*, 1 (2015).

⁵⁴ Wilson S. Figueroa and Peggy M. Zoccola, *Sources of Discrimination and their Associations with Health in Sexual Minority Adults*, 63 *Journal of Homosexuality* 743 (2016).

stigma and discrimination tend to be conflated by the “minority stress” theory, each becoming “stress processes.”⁵⁵ Herek tags stigma as a “cultural belief system.”⁵⁶

Hatzenbuehler, on the other hand, defines stigma quite differently, as “the co-occurrence of labeling, stereotyping, separation, status loss, and discrimination in a context in which power is exercised.”⁵⁷ In that case, stigma is enacted, not just anticipated.. However, in a study of “structural” stigma, Hatzenbuehler measured the concept as a simple dichotomous variable (that is, 0 or 1) indicating whether study participants lived in a neighborhood in which sampled respondents answered fewer than two of four questions in what researchers identified as an anti-gay manner.⁵⁸ Even an articulate theory like the minority stress model will prove unhelpful in the presence of poor measurement decisions.

Conflation of key terms has been a consistent theme in this area of study. For example, the American Psychological Association (APA) groups

⁵⁵ Meyer, *supra* note 28, at 680.

⁵⁶ Herek, *supra* note 11, at 57.

⁵⁷ Mark L. Hatzenbuehler, Jo C. Phelan, & Bruce G. Link, *Stigma as a Fundamental Cause of Population Health Inequalities*, 103 *American Journal of Public Health* 813 (2013) at 813.

⁵⁸ Mark L. Hatzenbuehler, Anna Bellatorre, Yeonjin Lee, Brian K. Finch, Peter Muennig, & Kevin Fiscella, *Structural Stigma and All-Cause Mortality in Sexual Minority Populations*, 103 *Social Science & Medicine* 33 (2014).

them together: “(T)he social stigma, prejudice, discrimination, and violence associated with not having a heterosexual sexual orientation and the hostile and stressful social environments created thereby adversely affect the psychological, physical, social and economic well-being of lesbian, gay, and bisexual individuals.”⁵⁹ Studies that lump criminal violence into the same category as unintended stigma, however that term is variably defined, are simply inadequate to measure what effects, if any, Lorie Smith’s faith-based decision to decline to create a custom website celebrating a same-sex wedding has on the LGB population.

Failure to replicate studies is another casualty of the field’s relative novelty. The Hatzenbuehler study of structural stigma revealed dramatically shorter life expectancy—approximately 12 years—for sexual minorities who resided in communities purported to exhibit high levels of anti-gay prejudice, even after controlling for a variety of demographic and health-related indicators.⁶⁰ Repeated attempts to replicate the study, however, failed to generate the original study’s key finding, yielding no model in which the effect of structural anti-gay stigma on the mortality of

⁵⁹ R. U. Paige, *Proceedings of the American Psychological Association, Incorporated for the Legislative Year 2004: Minutes of the Annual Meeting of the Council of Representatives*, 60 *American Psychologist* 436 (2005), <https://www.apa.org/about/policy/marriage.pdf> at 1.

⁶⁰ Mark L. Hatzenbuehler, *How Does Sexual Minority Stigma ‘Get Under the Skin’? A Psychological Mediation Framework*, 135 *Psychological Bulletin* 707 (2009) at 707.

sexual minorities was statistically significant.⁶¹ Eventually, the error was disclosed as a coding mistake, and the study was officially retracted.⁶²

The domain of research here, highlighted by studies in service to Minority Stress Theory (MST), has always been limited in its ability to understand exactly *how* stigma and discrimination harm the health and well-being of LGBT-identified persons, and such challenges to the theory are exacerbated in our current social setting that is experiencing rapid acceptance of the same. Moreover, new research seems to undermine key aspects of MST. Too many scholars conflate stigma, discrimination, and self-negativity; they should not. Correlation isn't causation. LGBT-identified young adults appear to be struggling more than their elders, yet have experienced a fraction of the prejudice the latter did. This is further complicated by a normative climate that lends itself to politicized interpretations of results accompanied by a rush among interested observers to make strong claims that are impossible to establish with certainty using retrospective data often collected at one point in time.

Finally, building scholarly consensus based on small or profoundly nonrandom samples is problematic. Repeatedly, influential research on

⁶¹ Mark Regnerus, *Is Structural Stigma's Effect on the Mortality of Sexual Minorities Robust? A Failure to Replicate the Results of a Published Study*, 188 *Social Science & Medicine* 157 (2017).

⁶² Hatzenbuehler et al., *supra* note 60, *RETRACTED*, <https://www.sciencedirect.com/science/article/pii/S0277953613003353>.

sexual minority populations is based on “snowball” samples, meaning whoever fits the description and would like to participate is welcome to. That is, researchers invite interested, motivated people to be a part of research programs that appear to be socially significant. That is not an ideal pattern for rigorous research and the production of basic knowledge.

IV. With society’s recent shift toward greater inclusion and acceptance of gay and lesbian Americans, remaining discrimination by members of the general public has diminishing discernible impact on health and wellbeing.

The age of studies is doubly important, given the rapid shift in attitudes about same-sex marriage. Citing studies conducted more than 10 years ago makes little sense when attempting to understand the role of anti-gay discrimination and health in America today. The authors of one recent (2016) study noted:

The majority of the work examining the effects of sexual minority discrimination was published in the early 2000s, with data collected in the mid- to late 1990s.... Given the current trend toward equality, it is plausible that sexual minorities are not experiencing or reporting as much discrimination as they once were.⁶³

This conclusion emerged from a survey of 277 LGB adults which took an unusually nuanced

⁶³ Figueroa and Zoccola, *supra* note 56, at 758.

approach toward assessing both direct and indirect effects of discrimination as well as differentiating sources of discrimination—that from family or friends, and that from “others.” The more nuanced approach made a difference:

(W)hen both sources of discrimination were examined together, only discrimination from family and friends continued to significantly predict greater psychological distress, physical symptoms, and poorer subjective physical health.⁶⁴

No independent effect of discrimination by “others” (on physical and emotional health) was visible after accounting for the discrimination of family and friends. Indeed, discrimination by others was not even significantly associated with perceived stress reactivity, a key indirect pathway by which the former is believed to be associated with downstream health challenges.

Moreover, it is notable that the frequency of discrimination by “others” was uncommon. The average person’s experience with discrimination was more frequent than “the event has never happened to you” but less often than “once in a while,” an assessment that does not fit the minority stress model’s assumption of “excess” and “chronic” stress.”⁶⁵

⁶⁴ *Id.* at 755.

⁶⁵ Meyer, *supra* note 28, at 690.

The times have changed. As one recent study concluded: “Although minority stress continues to be a negative factor in the lives of sexual minority individuals, the current findings resulting from a cohort comparison support the hypothesis that recent social and policy changes in the US may be translating to improved relational experiences for sexual minority emerging adults (i.e., the “social change hypothesis”).”⁶⁶ Intimations that Ms. Smith’s actions are common or could spread widely and reverse gains in LGBT acceptance strain the imagination. As explained above, Lorie Smith does not discriminate against any individual because of status. Simply put, her choice to decline creating same-sex wedding websites is based solely on the conscience-undermining messages that such websites would require her convey, and is not based on any desire or motivation to invidiously discriminate against LGBT people.

CONCLUSION

Ms. Smith’s objects to ideas, not people. Still, Colorado proposes to eradicate LGBT discrimination by suppressing religious speech. The conflict “arises from competing and equally sincere visions of the highest good,” and “is unavoidable in a pluralistic society;” however, “quashing [free speech] would do immense harm in undermining basic civil liberties.”⁶⁷

⁶⁶ *Id.* at 11.

⁶⁷ Brief Amicus Curiae of Robert P. George, at 13, 303 *Creative LLC v. Elenis*, 6 F.4th 1160 (10th Cir. 2021) (No. 19-1413).

The 10th Circuit’s ruling demonstrates precisely “the marginalization of the many Americans who have traditional ideas” about marriage Justice Alito warned about in *Obergefell*⁶⁸ and the hostility Justice Kennedy’s majority opinion in *Masterpiece* found unconstitutional.⁶⁹

Colorado is disfavoring Ms. Smith’s views, seeking their exclusion from the public square. Ironically, this locates her in a disfavored minority position. Research demonstrates actions involving “moral incongruence,”⁷⁰ defined as “the experience of violating one’s deeply held moral values,” can lead to “distress and unhappiness.”⁷¹ One study documented men engaging in same-sex sexual behavior, as well as women engaging in nonmarital sex—while holding convictions that such behavior is “always” wrong—were more likely to report unhappiness. It concluded: “Sexual behavior per se is not associated with unhappiness, but moral inconsistency or conflict regarding one’s sexual behavior is.”⁷² Such incongruence is being demanded of Lorie Smith. The 10th Circuit’s ruling does not speech “any protection, endorsing CADA’s compulsion of both speech and

⁶⁸ *Obergefell*, 576 U. S. 644, 742 (2015) (Alito, J., dissenting).

⁶⁹ 138 S.Ct. 1719, 1729-32 (2018).

⁷⁰ Samuel L. Perry, *Pornography Use and Depressive Symptoms: Examining the Role of Moral Incongruence*, 8 *Society and Mental Health* 195 (2018).

⁷¹ Samuel L. Perry, Joshua B. Grubbs, & Elizabeth E. McElroy, *Sex and Its Discontents: How Moral Incongruence Connects Same-Sex and Non-Marital Sexual Activity with Unhappiness*, 50 *Archives of Sexual Behavior* 683 (2021) at 683.

⁷² *Ibid.*

silence.”⁷³ Once again, ironically, the Court’s ruling is reminiscent of CADA’s own prohibitions—because of her “creed,” Ms. Smith is deemed “unwelcome, objectionable, unacceptable,” and “undesirable”⁷⁴ in the public marketplace.

Lambda Legal seeks to marginalize, stigmatize, and vilify⁷⁵ Ms. Smith and all religious Americans who maintain traditional views about marriage, openly demanding the suppression of dissenting views: “[E]ach person’s religious liberty ends where legally prohibited harm to another begins...Religious liberty cannot shield invidious deprivations of another’s basic rights.”⁷⁶

LGBT customers will not be forced from “shop to shop” like “pariahs.”⁷⁷ If anything, it is Lorie Smith who will be stigmatized and subject to derision (e.g., Memories Pizza).⁷⁸

⁷³ *Creative LLC v. Elenis*, 6 F.4th 1160, 1198 (10th Cir. 2021) (Tymkovich, CJ, dissenting).

⁷⁴ Colo. Rev. Stat. § 24-34-601(2)(a).

⁷⁵ Lambda Br., *supra* note 19, at 4, 6, 7, 9, 12 (Lambda’s anti-religious rhetoric is pervasive).

⁷⁶ *Id.* at 23-24.

⁷⁷ *Id.* at 25; See Michelle Lou, *When He Heard a Georgia Venue Wouldn’t Do Same-Sex Marriages, He Offered His Own Yard*, June 15 CNN (2019), <https://www.cnn.com/2019/06/15/us/corey-forrester-georgia-same-sex-wedding-trnd/index.html>.

⁷⁸ Ariel Sobel, *Memories Pizza, which Refused to Cater Same-Sex Weddings, Is No More*, April 25, *The Advocate* (2018), <https://www.advocate.com/small-business/2018/4/25/memories-pizza-which-refused-cater-same-sex-weddings-no-more>.

Colorado cannot show there is a problem—a widespread denial of artistic services to LGBT individuals—nor that suppressing and coercing artist free speech is *necessary* to solve the problem.⁷⁹ Anecdotes, supposition and ambiguous proofs simply aren't enough,⁸⁰ especially when this Court is being asked to justify the suppression of free speech.

Respectfully, the 10th Circuit Court's ruling must be reversed.

Respectfully submitted,

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June 1, 2022

⁷⁹ *Brown v. Entertainment Merchants Association*, 564 U.S. 786, 799-800 (2011).

⁸⁰ *Id.*; *See also, United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 822 (2000).