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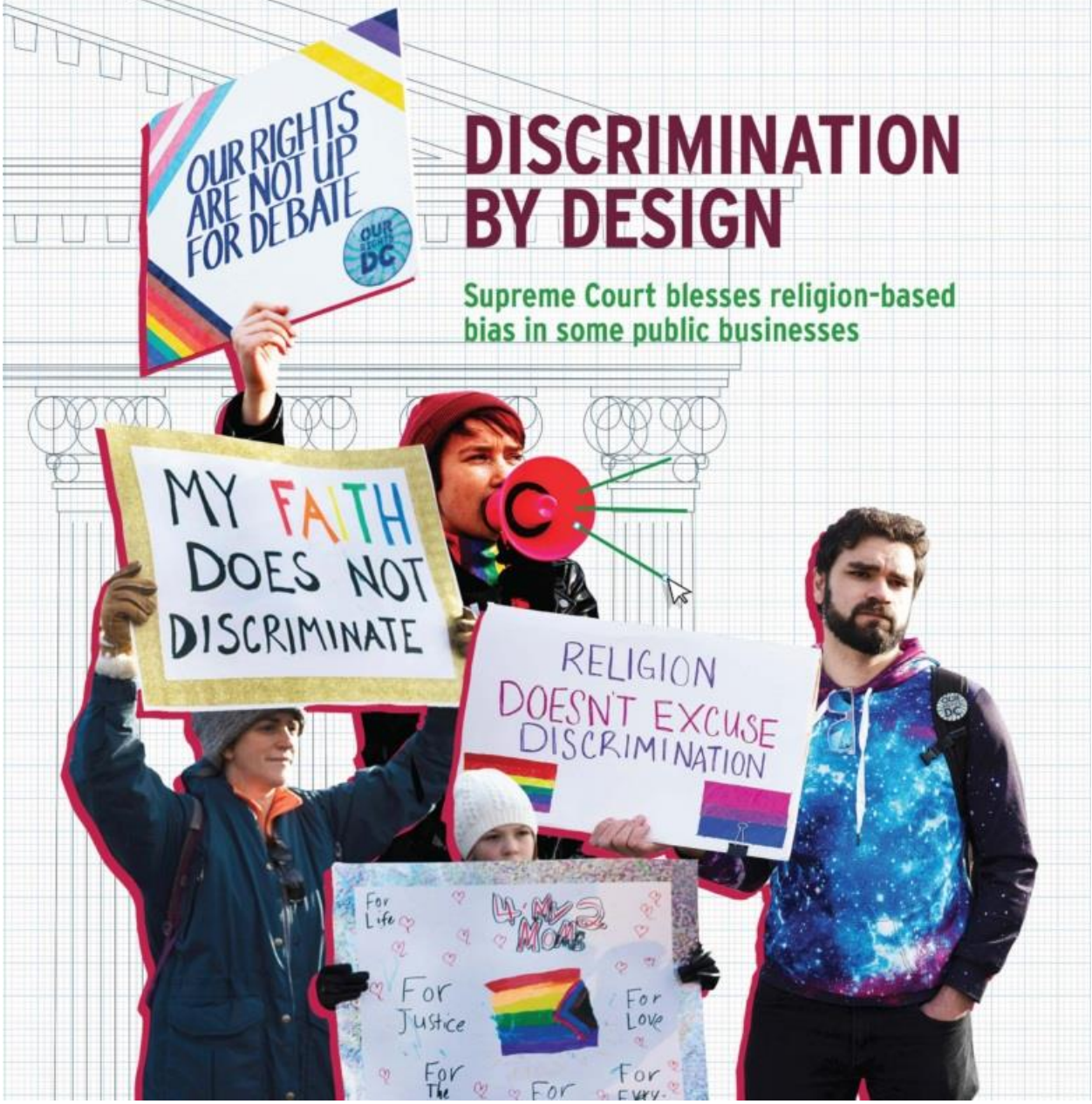
DISCRIMINATION BY DESIGN

Supreme Court blesses religion-based bias in some public businesses



In a major blow to LGBTQ+ equality, nondiscrimination laws and church-state separation, the U.S. Supreme Court ruled June 30 that certain businesses may refuse to serve LGBTQ+ clients and others if doing so would violate the owner's religious beliefs.

The majority opinion, written by Justice Neil M. Gorsuch, held that Lorie Smith, the sole owner of Colorado website design firm 303 Creative LLC, was involved in "expressive" conduct and that requiring the business to serve all members of the public would amount to "compelled" speech.

No discrimination! Protesters speak out at the U.S. Supreme Court (Photo by Anna Moneymaker/Getty Images)

Gorsuch insisted that requiring the business to follow the law and refrain from discriminating would force it to endorse views with which Smith disagrees. But as critics of the opinion noted, the business would merely be designing a platform for the speech of clients, not speaking itself.

Nevertheless, Gorsuch wrote, "As surely as Ms. Smith seeks to engage in protected First Amendment speech, Colorado seeks to compel speech Ms. Smith does not wish to provide."

Gorsuch was joined by the rest of the high court's conservative bloc — Chief Justice John G. Roberts along with Justices Amy Coney Barrett, Samuel A. Alito, Clarence M. Thomas and Brett M. Kavanaugh.

In dissent, Justice Sonia Sotomayor wrote for herself and Justices Elena Kagan and Ketanji Brown Jackson.

“Today is a sad day in American constitutional law and in the lives of LGBT people,” Sotomayor wrote. “The Supreme Court of the United States declares that a particular kind of business, though open to the public, has a constitutional right to refuse to serve members of a protected class. The Court does so for the first time in its history. By issuing this new license to discriminate in a case brought by a company that seeks to deny same-sex couples the full and equal enjoyment of its services, the immediate, symbolic effect of the decision is to mark gays and lesbians for second-class status.”

Sotomayor continued, “In this way, the decision itself inflicts a kind of stigmatic harm, on top of any harm caused by denials of service. The opinion of the Court is, quite literally, a notice that reads: ‘Some services may be denied to same-sex couples.’”

Americans United sharply criticized the ruling in *303 Creative LLC v. Elenis.*

“In America, everyone should have equal access to goods and services, regardless of who they love, who they are, how they worship, or what they look like. Our longstanding civil rights laws promise these protections,” Americans United President and CEO Rachel Laser said in a statement.

The day the decision was issued, Laser appeared live on the MSNBC program “Deadline: White House with Nicolle Wallace” to explain its magnitude.

“The decision “is dragging us backwards,” Laser said. “A year ago when this court abolished the nationwide right to an abortion, we at Americans United said they’re coming for all other marginalized communities next, and that includes LGBTQ people. And here we are today, heartbreakingly on the last day of Pride, and the court, historically in a terrible way, has said for the first time ever, businesses that are open to the public have a constitutional right to discriminate, have a constitutional right to refuse to serve protected classes.

“This is dragging us back to the days when — my dad, who’s 86, remembers hearing these stories — where there were these signs that said ‘No Jews, No Blacks, No Irish,’” Laser continued. “And let’s not forget who’s behind this case: Alliance Defending Freedom, … a white Christian Nationalist group, part of a billion-dollar shadow network. This case is being brought, make no mistake, to give religious extremists, and white Christian Nationalists specifically, power and privilege above the law. And that’s dragging us way backwards.”

The case centered on what are called “public accommodation” laws, measures designed to ensure that everyone has the right to take part in commercial activity and buy the goods and services they need to function in daily life.

Many public accommodation laws spring from the Civil Rights Movement and were put in place to make certain that Black Americans would no longer be turned away from restaurants, hotels and shops, as was common in some parts of the country during the Jim Crow era.

In more recent years, legislators in several states have expanded these laws to include people who are LGBTQ+. That’s the case in Colorado, which has an Anti-Discrimination Act, legislation that requires businesses that are open to the public to sell goods and services to all customers, including those of several protected classes.

Smith said she would refuse to serve same-sex couples who might seek wedding-website design services from her, arguing that working with these potential customers would offend her religious beliefs.

Interestingly, no same-sex couple had tried to hire 303 Creative, and the firm doesn’t currently offer wedding websites. But Smith argued that she wants to create these sites in the future and if so, she does not want to make them for same-sex couples because she won’t do any work that “contradicts biblical truth.”

A federal district court ruled against 303 Creative, but the firm, backed by the Christian Nationalist legal group Alliance Defending Freedom (ADF), appealed to the 10th U.S. Circuit Court of Appeals, which also ruled

against 303 Creative. ADF then appealed to the Supreme Court, which agreed to hear the case.

The high court announced that it would limit its review to the free speech issue raised by 303 Creative. In August 2022, Americans United joined a friend-of-the-court brief with Muslim Advocates, Columbia Law School's Law, Rights & Religion Project, and several other organizations arguing that creating a First Amendment right to deny products and services to certain people simply because there is a creative aspect to those products and services would radically limit market access for those protected by public accommodation laws.

It's unclear how far the ruling goes. Gorsuch insisted that it applies only to expressive conduct, but he conceded that "determining what qualifies as expressive activity protected by the First Amendment can sometimes raise difficult questions."

For her part, Sotomayor asserted that businesses that want to deny services to other groups of vulnerable people will find ways to expand the ruling, writing, "[T]he decision's logic cannot be limited to discrimination on the basis of sexual orientation or gender identity. The decision threatens to balkanize the market and to allow the exclusion of other groups from many services. A website designer could equally refuse to create a wedding website for an interracial couple, for example. … Yet the reason for discrimination need not even be religious, as this case arises under the Free Speech Clause. A stationer could refuse to sell a birth announcement for a disabled couple because she opposes their having a child. A large retail store could reserve its family portrait services for 'traditional' families. And so on."

Ruling in Postal Service case

The day before issuing its decision in *303 Creative*, the high court ruled on a case concerning religious accommodations in the workplace.

The legal tussle, *Groff v. DeJoy*, didn't attract as much attention as *303 Creative* because the facts were somewhat complicated. But the case was important. Christian Nationalist legal organizations had hoped to use

it to usher in a new era that would have granted employees sweeping powers to demand religious accommodations, even if they negatively affected other workers.

No one wants to work these days? Groff's refusal to take Sunday shifts burdened others (Getty Images)

That didn't happen. Instead, a unanimous Supreme Court did some fine-tuning of a previous ruling and returned the case to a lower court for further consideration.

Americans United breathed a sigh of relief at the June 29 ruling in *Groff*, pointing out that the high court declined to give Christian Nationalists what they wanted.

"We're facing an aggressive movement working to weaponize religious freedom, but religious freedom must never be a license to harm others, and that remains true in the workplace," Laser said. "In a unanimous opinion, the court 'clarified' the standard for granting religious accommodations without overturning precedent."

The court has grappled with the issue of religious accommodations in the workplace several times. Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment on the basis of religion. The law says employers are required to make a good-faith effort to grant employees' requests for religious accommodations in the workplace, but they are not required to grant a request that would impose an "undue hardship" on their business.

In this case, part-time postal carrier Gerald Groff requested a religious accommodation from his employer, a small post office in Pennsylvania, because he did not want to work Sunday shifts due to his evangelical Christian beliefs. But as a part-time employee, Groff's job duties specifically required him to provide coverage for full-time employees on weekend, holidays and other times, making some Sunday work inevitable.

Although U.S. mail is not delivered on Sundays, the Postal Service began delivering packages for Amazon in Los Angeles and New York City in 2013 and about a year later began doing so nationwide. This means Groff was expected to work on Sundays. He simply refused to show up for 24 Sunday shifts over 14 months, leading other employees — nearly all of whom were also church-going Christians — to cover for him. (Some of them requested transfers or filed grievances.)

Groff's supervisors disciplined him for refusing to come to work, and he eventually resigned. But then Groff sued, claiming that the Postal Service had failed to reasonably accommodate his religious practice. In court, Groff was represented by two Christian Nationalist groups, First Liberty Institute and Independence Law Center.

Americans United believes that some religious accommodations in the workplace are reasonable but said Groff's went too far because his refusal to work affected others.

"Religious accommodations that don't burden or harm others, like wearing a hijab or having a beard, or praying privately, are exactly what the law was designed to permit," Laser observed. "In this case, however, Groff was hired as a part-time, flexible carrier at a four-person post office, and he refused to show up for 24 Sundays of work. He refused to work the same flexible schedule for which he was hired. This created huge burdens for the remaining — mostly Christian — employees and led them to resign, transfer, file grievances and cover for him while he, as he admitted, watched NASCAR on Sundays."

A federal district court ruled against Groff, holding that the Postal Service had met its responsibility to reasonably accommodate him by rearranging shifts to lessen the work-religion conflict and that further accommodations would have imposed an undue hardship on the business.

A federal appeals court agreed, holding that exempting Groff from Sunday work entirely would have resulted in undue hardship to the Postal Service "because it actually imposed on his coworkers, disrupted the workplace and workflow, and diminished employee morale." The Supreme Court then agreed to hear the matter.

In a friend-of-the-court brief AU filed jointly with Lambda Legal Defense and Education Fund, AU asserted that federal law should permit employers to

consider whether requested religious accommodations would impose financial, logistical, health and safety, dignitary or other burdens on coworkers.

“We argued that whatever standard the court adopted for workers seeking religious accommodations, the only way to ensure equality was to ensure that workers obeying the rules of their own religion do not harm others,” Laser said. “If anything else were true, one religion would be superior to others.

“The court’s ‘clarified’ standard correctly allows employers to continue to consider the burdens an employee’s requested accommodation could impose on co-workers,” she added. “Importantly, Groff has not won this case. The court refused to decide the specifics of Groff’s case and is leaving that to the lower courts, which got this case right the first time around. We live to fight another day.”

Editor’s Note: *The story contains material prepared by Americans United’s Legal Department.*