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Berta Esperanza Hernández-Truyol*

I. INTRODUCTION

After several decades of progress on LGBTQIA+ rights, the 21st century is bringing in an era of intentional retrenchment of such rights.[1] After *Obergefell*, many locations in the United States have embraced an intense and hateful anti-LGBTQIA+ rhetoric. The enjoyment of rights many people have fought for which is being severely eroded. There is a vociferous, and sometimes vicious, move, especially in state legislatures, to deny and curtail legal protections against discrimination for LGBTQIA+ persons.[2] Attacks

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[1] *See* Lawrence v. Texas, 539 U.S. 558 (2003) (striking down a Texas statute criminalizing homosexual sex); *see also* Romer v. Evans, 517 U.S. 620 (1996) (holding that a Colorado Amendment which disallowed LGBT persons from seeking legal protection from discrimination was violative of the U.S. Constitution); *see also* Obergefell v. Hodges, 576 U.S. 644 (2015) (legalizing marriage between persons of the same sex in the United States); *see also* Bostock v. Clayton Cty., 140 S. Ct. 1731 (2020) (holding that Civil Rights Act protections against employment discrimination on the basis of sex additionally protected against discrimination on the basis of sexual orientation).

[2] *See, e.g.*, H.B. 1557, 2022 Sess. (Fla. 2022) (which limits discussions in schools regarding the existence of LGBT persons); S.B. 458, 2023 Sess. (Mont. 2023) (defining sex as binary); S.B. 254, 2023 Sess. (Fla. 2023) (banning access to gender-affirming care for minors and severely limiting all gender-affirming care regardless of age of patient); S.B. 115, 2023 Sess. (Ky. 2023) (categorizing all drag as "lewd" and limiting rights to artistic expression); *see also Mapping Attacks on LGBTQ Rights in U.S. State Legislatures in 2023*, ACLU (Nov. 3, 2023), https://www.aclu.org/legislative-attacks-on-lgbtq-rights-2023 [https://perma.cc/3XC7-5ACX].

often originate with Christian Nationalists whose goal is to transmogrify the law to reflect their version of Christianity and opportunistically utilize the legal system—sometimes even fabricating conflicts—to further their goals.[3]

Decisions of the Supreme Court of the United States in the last three terms, in some instances adopting positions advanced by Christian Nationalists, evince an indifference to LGBTQIA+ rights being repudiated or subordinated to other rights. These decisions,[4] that perpetuate or reinstate hierarchies of rights embedded in a heteronormative status quo, constitute a roadblock to justice. The 2023 Supreme Court's *303 Creative v. Elenis*[5] decision—a sad and poignant example of the lengths to which the Court has gone to undermine LGBTQIA+ individuals' legal protections against discrimination—exemplifies such a roadblock.

"Awakening the Law" is a model that responds to the roadblocks and implements a justice-seeking holistic process of balancing rights when fundamental constitutional rights or liberties clash. The paradigm guides decision-makers in conducting a rights-impact inquiry regarding the existing conflict before them in order to reach a solution that preserves all the constitutional values at issue. As such, Awakening the Law is a multilayered process that aims to find just outcomes in complicated legal rights collisions.

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[3] *See e.g.*, 303 Creative LLC v. Elenis, 600 U.S. 570 (2023); *see infra* notes 138-146 (discussing Christian Nationalism); *see infra* note 144 (claiming that some of the lawsuits are fabricated).

[4] *See, e.g.*, Fulton v. City of Phila., 141 S. Ct. 1868 (2021) (Free exercise clause isolated by city's refusal to contract with Catholic Social Services unless it ceased to discriminate against couples of the same sex); Carson v. Makin, 142 S. Ct. 1987 (2022) (mandating funding for religious institutions even for religious activities when funding is available to nonsectarian institutions).

[5] *303 Creative LLC*, 600 U.S. at 570. For a discussion on Christian Nationalism and its impact on LGBTQIA+ rights; *see* Berta E. Hernández-Truyol, *Awakening the Law: Unmasking Free Exercise Exceptionalism*, 72 EMORY L. J. 1063, 1064-67 (2023) [hereinafter Hernández-Truyol, *Awakening the Law: Unmasking Free Exercise Exceptionalism*].

From an "Awakening" perspective, *303 Creative* is a stark example of intentional but Unawakened anti-LGBTQIA+ legal and social action. Unawakened actions by those with decision-making power who desire to preserve the status quo effect the subordination, marginalization, and exclusion of persons or groups such as LGBTQIA+, that the "normative" view as outsiders. Unsurprisingly, those who experience the erosion of their rights are the marginable—vulnerable, and marginalized populations.[6] Regrettably, the law plays a leading role in perpetuating the hierarchies—racialized, gendered, sexualized—embedded in the status quo.[7]

In contrast to the United States' retrenchment with respect to the recognition of LGBTQIA+ rights, the jurisprudence of the InterAmerican Human Rights system (of which the United States is a member) reflects progressive, inclusive change.[8] This evolution has occurred notwithstanding the historic and cultural Latin American conservative anti-LGBTQIA+

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[6] "Marginable" is a word coined by the author to encompass marginalized and vulnerable people. Berta Esperanza Hernández-Truyol, *Glocalizing Women's Health and Safety: Migration, Work and Labor*, 15 SANTA CLARA J. INT'L L. 48 (2017); *see also, e.g.,* Melissa Deckman, *Nex Benedict's death is a grim reflection of reality for many young LGBTQ Americans*, MSNBC (Mar. 19, 2024, 3:43 PM), https://www.msnbc.com/opinion/msnbc-opinion/nex-benedicts-death-reflection-reality-young-lgbtq-americans-rcna144077?cid=eml_mda_20240320&user_email=06218a887d549d3495896e2bcd73760ea9f24f5a94740d46b2eaaa360100d9e2 [https://perma.cc/9HWS-JBEN]; Berta Esperanza Hernández-Truyol, *Borders (En)Gendered: Normativities, Latinas, and a Latcrit Paradigm*, 72 N.Y.U. L. REV. 882 (1997) [hereinafter Hernández-Truyol, *Borders (En)Gendered*]; Berta Esperanza Hernández-Truyol, *The Gender Bend: Culture, Sex and Sexuality - A LatCritical Human Rights Map of Latina/o Border Crossings*, 83 IND. L. J. 1283 (2008) [hereinafter Hernández-Truyol, *The Gender Bend*].

[7] *See, e.g.*, *303 Creative LLC*, 600 U.S. at 570; *Fulton*, 141 S. Ct. at 1868; *Carson*, 142 S. Ct. at 1987; Students for Fair Admissions v. Harvard, 600 U.S. 181 (2023); San Antonio v. Rodriguez, 411 U.S. 1 (1973); Plessy v. Ferguson, 163 U.S. 537 (1896); *but see* Bostock v. Clayton Cnty., 590 U.S. 644 (2020).

[8] *See* IACtHR, *Gender Identity and Equality and Non-Discrimination of Same-Sex Couples. State Obligations in Relation to Change of Name, Gender Identity, and Rights Deriving from a Relationship Between Same-Sex Couples,* Advisory Opinion OC-24/17, Inter-American Court of Human Rights Series A No 24 (Nov. 24, 2017) [hereinafter Advisory Opinion]. *See also* Hernández-Truyol, *The Gender Bend*, *supra* note 6.

traditions.[9] Countries such as Argentina and Uruguay have been leaders in promoting equal protection, non-discrimination, and legal recognition of LGBTQIA+ rights and relations.

The case law of the Organization of American States (OAS)[10] evidences an intentional commitment to respect the rights of LGBTQIA+ persons in the Inter-American region.[11] In 2017, the Inter-American Court of Human Rights (IACtHR)[12] established the legal foundation for LGBTQIA+ rights recognition, and protection in the region by way of its Advisory Opinion on gender identity, equality, and non-discrimination of same-sex couples rendered at Costa Rica's request.[13]

In this essay, I will first describe and critique *303 Creative*, a 2023 Supreme Court decision that subordinates LGBTQIA+ equality and non-discrimination rights to an imagined intrusion into the free speech rights of a Christian business owner.[14] Based upon her religious beliefs, the business owner claimed that Colorado's public accommodations law, which prohibited discrimination based upon sexual orientation or gender identity (among other categories), violated her rights because it mandated that she serve the LGBTQIA+ community.[15] Next, this essay shares insights from the recent Awakened decisions of Inter-American Human Rights institutions

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9 Hernández-Truyol, *The Gender Bend*, *supra* note 6.

10 Charter of the Organization of American States, U.N. Charter no. 1609, Apr. 30, 1948.

11 *See, e.g.*, Atala Riffo & Daughters v. Chile, Merits, Reparations, & Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239 (Feb. 24, 2012).

12 The Inter-American Court on Human Rights (IACtHR) is the judicial mechanism of the Organization of American States (OAS), the human rights region to which the United States of America belongs. Organization of American States (OAS), Charter of the Organization of American States, 30 April 1948. While the United States has contested the jurisdictional authority of the IACtHR to enforce rulings against the United States, the United States has ratified at least one treaty that places them under the IACtHR's jurisdiction. Marlin Gray v. United States, Case 396/04, Report No. 79-05, Inter-Am. C.H.R., OEA/Ser.L/II.124 Doc. 5 (2005).

13 *See* Advisory Opinion, *supra* note 8.

14 303 Creative LLC v. Elenis, 600 U.S. 570 (2023).

15 *Id*.

to demonstrate a path towards achieving justice for LGBTQIA+ persons when a conflict emerges between high-value rights protected by the Constitution and human rights treaties. In the section that follows the discussion of the Inter-American developments, this essay describes the "Awakening the Law" paradigm specifically designed as a roadmap to achieving justice. This novel framework is especially informative as an analytical tool in conflicts in which high-value rights are on a collision course. Finally, I posit that *303 Creative* is quintessentially Unawakened because its outcome, by uncritically favoring religion over equality rights, effects a blanket subordination of the non-discrimination and equality rights of LGBTQIA+ persons. Application of the Awakening paradigm, as informed by the Inter-American system's jurisprudence, unveils the injustices generated by the *303 Creative* decision and suggests a pathway to attaining a just result.

II. 303 CREATIVE V. ELENIS[8]

303 Creative marked a crossroads in the U.S. approach to public accommodations law.[16] Until the *303 Creative* decision, the law on public accommodations mandated that establishments subject to the law serve the public without discrimination.[17] Several cases specifically extended anti-discrimination protections in public accommodations law to protect LGBTQIA+ individuals.[18] Ignoring precedent, the majority in *303 Creative*

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[16] *Id.*

[17] *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 261 (1964) (in which the Court upheld Title II of the Civil Rights Act of 1964 which provides that "[a]ll persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation" as constitutional as applied to privately owned hotel which was open to the public); *see also* Katzenbach v. McClung, 379 U.S. 294, 303 (1964) (in which the Court extended those protections over a privately owned restaurant).

[18] *See, e.g.*, Elaine Photography L.L.C. v. Willock, 309 P.3d 53 (N.M. 2013, *cert. denied*, 134 S. Ct. 1787 (2014) (where a photographer failed in the quest to legitimize refusal to provide publicly offered services to same-sex couples in defiance of a public

pretended the opinion reflected a mere application of existing First Amendment free speech norms and held that "[a]s surely as Ms. Smith seeks to engage in protected First Amendment speech, Colorado seeks to compel speech Ms. Smith does not wish to provide."[19] In reality, though, the majority (following its current trend of elevating religion above other constitutional values) created a new religious free speech category that transmogrified conduct based on religious belief into protected speech.[20]

In *303 Creative*, Laurie Smith, a graphic designer with an existing business in Colorado, claimed she wished to expand her business by designing custom wedding websites for sale to the public.[21] Unlike claims that arise out of ongoing customer concerns, Ms. Smith determined that Colorado's Anti-Discrimination Act (CADA), which includes sexual orientation and gender identity as proscribed grounds for discrimination as well as prohibits discriminatory communications,[22] would infringe upon her

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accommodation nondiscrimination law. The Court denied review); *see also* State of Washington v. Arlene's Flowers, Inc., 192 Wn.2d 469, 441 P.3d 1203 (2019).

[19] 303 Creative LLC v. Elenis, No. 21–476, slip op. at 10 (S. Ct. Jun. 30, 2023).

[20] *See, e.g.*, Hernández-Truyol, *Awakening the Law: Unmasking Free Exercise Exceptionalism*, *supra* note 5, at 1087–88.

[21] 303 Creative LLC v. Elenis, 600 U.S. at 570.

[22] COLO. REV. STAT. § 24-34–601 (2022) (providing that "It is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of disability, race, creed, color, sex, sexual orientation, gender identity, gender expression, marital status, national origin, or ancestry, the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation or, directly or indirectly, to publish, circulate, issue, display, post, or mail any written, electronic, or printed communication, notice, or advertisement that indicates that the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation will be refused, withheld from, or denied an individual or that an individual's patronage or presence at a place of public accommodation is unwelcome, objectionable, unacceptable, or undesirable because of disability, race, creed, color, sex, sexual orientation, gender identity, gender expression, marital status, national origin, or ancestry"). It is noteworthy that this law has two components: an "accommodation" clause that applies to businesses that make sales to the public (not to locations utilized for religious purposes), and a "communications" clause that applies to discriminatory communications both of which would be applicable to the 303 Creative business.

rights before ever being in the business of designing such sites or being hired to design such a wedding website. Ms. Smith, represented by The Alliance Defending Freedom (ADF), a Christian Nationalist entity that the Southern Poverty Law Center has labeled a hate group,[23] filed a preemptive lawsuit. The litigation requested a declaration that the application of CADA would violate her constitutional right to free speech if the law prohibited her from being able both to refuse to sell wedding website creation services to same-sex couples and to advertise that refusal on her website.[24] Patently, CADA expressly disallows the public accommodations discrimination in which Ms. Smith wants to engage: the exclusion of potential clients based on sexual orientation and the publication of her desire and intent to refuse such clients.

303 Creative's challenges to CADA are similar to those presented in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, a 2018 Supreme Court case that concerned a religious business owner who wished to refuse to sell wedding cakes to same-sex couples.[25] However, the Court's *303 Creative* holding not only disregarded *Masterpiece*,[26] but its ruling was much more far-reaching. In *Masterpiece,* the Court's decision hinged on its evaluation of statements made by a Commissioner of the Colorado Civil Rights Commission that the Court interpreted as expressing animosity towards religion.[27] On such "animosity to religion" grounds, the

[23] *Why Is Alliance Defending Freedom a Hate Group*?, S. POVERTY L. CTR. (Apr. 10, 2020), https://www.splcenter.org/news/2020/04/10/why-alliance-defending-freedom-hate-group [https://perma.cc/38QF-4ECB].

[24] *Id.*

[25] Masterpiece Cakeshop v. Colo. Civ. Rts. Comm'n, 584 U.S. 617 (2018).

[26] *See infra* text accompanying notes 27–29; *303 Creative LLC*, 600 U.S. 570 at 603 (Sotomayor, J., dissenting, quoting Masterpiece Cakeshop v. Colo. Civ. Rts. Comm'n, 138 S. Ct. 1719, 1727 (2018) (Sotomayor's dissent noting disregard for the precedent set in *Masterpiece*).

[27] Masterpiece v. Colo. Civ. Rts. Comm'n, 584 U.S., No. 16-111, slip op. at 17–18 (Colo. Ct. Ap. Jun. 4, 2018).

Masterpiece Court simply concluded that the Commission's decision was not neutral or just.[28]

In contrast, *303 Creative*'s conclusion that Colorado's anti-discrimination law is unconstitutional in instances in which the services provided by the business can be construed as speech is a much broader holding.[29] Indeed, the breadth of the opinion has led one commentator to note that "[t]he reasoning of the opinion is so obscure that it effectively gives lower courts a free hand to use First Amendment doctrine to mutilate anti-discrimination laws of all kinds."[30]

The framework of the *303 Creative* decision is odd for three salient reasons. First, Ms. Smith, the graphic designer who brought the case seeking to be free to discriminate by choosing not to design wedding websites for same-sex couples and by publishing that choice, did not even have a business of designing wedding web pages at the time she filed the case, nor does she have one now.[31] Second, nobody, not a single couple—not an opposite-sex couple or a couple of the same sex—had requested that Ms. Smith design a wedding web page.[32] In fact, her wedding website design business did not yet exist.[33] Finally, at the time Ms. Smith filed suit, the State had neither accused nor threatened to accuse the web designer and her non-existent business for wedding web design of discrimination in

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28 *Masterpiece*, 584 U.S. at 617.

29 *303 Creative LLC*, 600 U.S. at 596.

30 Robert Post, *Public Accommodations and the First Amendment: 303 Creative and "Pure Speech,"* YALE LAW SCHOOL PUBLIC LAW & LEGAL THEORY, RESEARCH PAPER SERIES at 4.

31 Melissa Gira Grant, *The Mysterious Case of the Fake Gay Marriage Website, the Real Straight Man, and the Supreme Court*, NEW REPUBLIC (Jun. 29, 2023), https://newrepublic.com/article/173987/mysterious-case-fake-gay-marriage-website-real-straight-man-supreme-court [https://perma.cc/6Z4L-DMF2].

32 *Id*. *See also* Colleen Slevin et al., *Client Cited in Gay Wedding Website Case Ruled on by U.S. Supreme Court Says He's Married to a Woman and Never Requested Wedding Website*, COLO. SUN (Jul. 1, 2023), https://coloradosun.com/2023/07/01/303-creative-client-lorie-smith-stewart/ [https://perma.cc/MZ7Y-D6BK].

33 Grant, *supra* note 31; Slevin et al., *supra* note 32.

violation of Colorado's public accommodations law.[34] Given these circumstances, it is clear that the Supreme Court went out of its way to render the *303 Creative* decision even though the requirements of standing[35] and ripeness,[36] as traditionally analyzed, were wholly lacking.

Significantly, the District Court held that Ms. Smith did not have standing as there was no evidence presented "that anyone, much less a same-sex couple, will request Plaintiff's services."[37] Both the Tenth Circuit and the Supreme Court disagreed with the District Court on the standing issue, though.[38] Indeed, the Supreme Court was quick to point out that the Tenth Circuit had granted Ms. Smith standing to sue.[39] Somehow, despite never having sold a wedding website or having received any requests to make one for a same-sex couple, the Circuit Court concluded that Ms. Smith faced a credible threat that Colorado would seek to compel her speech and force her to promote the marriage of this hypothetical future couple in her hypothetical future wedding site sales.[40] To bolster this point, the Tenth Circuit "pointed to the fact that 'Colorado has a history of past enforcement against nearly identical conduct—*i.e.*, *Masterpiece*

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[34] *303 Creative LLC*, 600 U.S. at 596.

[35] The issue of standing "is whether the litigant is entitled to have the court decide the merits of the dispute" (Warth v. Seldin, 422 U.S. 490, 498 (1975)). This is because generally they have suffered or are in danger of imminently suffering harm (Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992)); *See also* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES, 61-111 (6th ed. 2019).

[36] Ripeness is a doctrine that determines if review of a certain action is appropriate. *See* O'Shea v. Littleton, 414 U.S. 488, 489 (1974) (holding in a suit that claimed that a judge and a magistrate discriminated against Black residents in setting bail, that because none of the claimants were involved in any proceeding in the judge's or the magistrate's courtroom at the time of the suit "the threat of injury from the alleged course of conduct they attack is too remote to satisfy the case-or-controversy requirement"); *see also* CHEMERINSKY, *supra* note 35, at 112–22.

[37] Order Granting in Part and Denying in Part Motion to Dismiss and Denying Motion for Preliminary Injunction and Motion for Summary Judgment, in Petition for Writ of Certiorari, at 159a-160a ("District Court Order"). 405 F. Supp. 3d 907 (Colo. 2019).

[38] *303 Creative LLC*, 600 U.S. at 596.

[39] *Id*.

[40] *Id*. at 580 (citing 6 F. 4th at 1168).

Cakeshop,'" where Colorado attempted to enforce this anti-discrimination statute against a bakery.[41]

On the merits, however, both the District Court and the Tenth Circuit ruled against Ms. Smith, noting that "the possibility of enforcement based on a refusal of services is attenuated and rests on the satisfaction of multiple conditions precedent," calling the likelihood of enforcement "not credible."[42] In analyzing the case's merits, the Tenth Circuit concluded: "that Ms. Smith's planned wedding websites qualify as 'pure speech' protected by the First Amendment."[43] Consequently, the Circuit Court observed that the State had to meet the "strict scrutiny" standard "before compelling speech from her that she did not wish to create."[44] However, the Circuit Court panel, although divided, ultimately held that the State had met the strict scrutiny burden, which meant that, based on public accommodations law precedent, the State had a compelling interest in eliminating discrimination and that the statute was narrowly tailored to meet that interest.[45]

The Supreme Court disagreed with the Tenth Circuit's finding that "Colorado has a compelling interest in ensuring 'equal access to publicly available goods and services' and no option short of coercing speech from Ms. Smith can satisfy that interest because she plans to offer 'unique services' that are, 'by definition, unavailable elsewhere.'"[46] Indeed, the

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41 *Id.* at 581–82 (citing 6 F. 4th at 1174) (the Court also found that the Circuit Court had concluded in support of standing, "that anyone in the State may file a complaint against Ms. Smith and initiate 'a potentially burdensome administrative hearing' process; and that 'Colorado [has] decline[d] to disavow future enforcement' proceedings against her").

42 *Id.* at 580–81.

43 *Id.* at 583 (citing 6 F. 4th at 1176).

44 *Id.* (citing 6 F. 4th at 1178) (the Court continued to note that under the strict scrutiny standard "the State had to show both that forcing Ms. Smith to create speech would serve a compelling governmental interest and that no less restrictive alternative exists to secure that interest").

45 *Id.*

46 *Id.* at 584 (citing 6 F. 4th at 1179–80) (a dissenting Judge in the 10th Circuit noted that "ensuring access to a particular person's" voice, expression, or artistic talent has

Supreme Court expressly rejected the State's position that *303 Creative* "involves only the sale of an ordinary commercial product and any burden on Ms. Smith's speech is purely 'incidental.'"[47]

In reaching its decision, the Supreme Court's majority relied not only on the Tenth Circuit's finding that Ms. Smith had standing but also on (1) the stipulations made by the parties that Ms. Smith sought to engage in expressive activity,[48] thus implicating First Amendment rights,[49] and (2) the Colorado nondiscrimination law's provisions that would result in compelled speech.[50] Based on these stipulations, the Supreme Court concluded that Ms. Smith had established a credible threat that, under Colorado law, she would be unconstitutionally compelled to speak in support of marriage between persons of the same sex.

By designating *303 Creative's* graphic designs as art and pure speech,[51] rather than as the service of a business open to provide services to the public, the Supreme Court concluded that the nondiscrimination law could not be applied against the company because "[w]hen a state public accommodations law and the Constitution collide, there can be no question

never qualified as "a compelling state interest" under this Court's precedents). 6 F. 4th at 1203. (the dissenting Judge also urged that adherence to such precedents should continue as the majority's opinion would allow the unprecedented situation in which the state could "regulate the messages communicated by all artists"); *Id.* at 1204.

47 *303 Creative LLC*, 600 U.S. at 593.

48 *Id.* at 599 (emphasis in original).

49 The stipulations made by the parties include: "The owner works with all persons regardless of sexuality or gender for graphics and websites not related to weddings; The owner refuses to produce content that contradicts her view of the Bible regardless of the purchaser; The graphics and websites are "expressive in nature as they contain images, words, symbols and other forms of expression." *Id*. at 582–83. Each website will be an "original, customized" creation. The website will communicate ideas. The graphics "contribute to the overall messages her business conveys" so they involve her speech.

50 Masterpiece Cakeshop v. Colo. Civ. Rts. Comm'n, 584 U.S. 617 (2018).

51 Pure speech is the spoken or written word. *See, e.g*., Tinker v. Des Moines, 393 U.S. 503 (1969) (holding that wearing a black armband to protest the war is akin to "pure speech").

which must prevail."[52] The Court's majority utilized a "pure speech" analysis to rule in Ms. Smith's favor, rather than assessing it as commercial speech (which is less protected under the First Amendment).[53] But the Court deployed a flawed free speech/compelled speech analytical paradigm conflating two different speech concepts to veil its patent desire to rule that religious believers have a right to discriminate, even in public businesses, if any action contravenes their religious beliefs.[54]

Based upon Justice Gorsuch's labeling of the dealings of *303 Creative* (Ms. Smith's business) as pure speech[55]—a "wobbly, innovative abstraction,"[56] the Supreme Court deviates from precedent and ignores the general rule articulated in *Masterpiece* "that religious and philosophical objections to gay marriage '*do not allow business owners and other actors in the economy* and society to deny protected persons equal access to goods

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[52] *303 Creative LLC*, 600 U.S. at 592; *see also* Post, *supra* note 30, at 24–26 (in determining that Ms. Smith's websites qualified as "pure speech," the majority put into place several conditions that, when they are met, establish a communication as "pure speech." First, the speech must be an assembly of "images, words, symbols." Second, a communication must be "customized," so that the government is compelling speech where a vendor would be expressing unique messaging or a personal view. Third, the product must be designed to communicate ideas).

[53] Central Hudson Gas & Elec. v. Public Svc. Comm'n, 447 U.S. 557 (1980) (pure speech receives higher protection than commercial speech).

[54] *See, e.g.*, Post, *supra* note 30, at 24–26; *See, e.g.*, *Central Hudson Gas & Elec.*, 447 U.S. at 557 (noting that "[g]overnment routinely requires persons to engage in pure speech in ways that the First Amendment has never been thought to prohibit" giving as an example the requirement to file a tax return; and noting that "government routinely imposes affirmative duties to publish pure speech on attorneys, doctors, and accountants…[as well as] that American society is full of examples of compelled pure speech, ranging from required product disclosures, to disclosures in real estate transactions, to the required testimony of witnesses in a trial, to a raft of statutory obligations to report various events and circumstances").

[55] *See* Post, *supra* note 30. Post distills Gorsuch's definition of the "essence of 'pure speech'" to four elements derived from the stipulations: (1) "Smith's websites will contain 'images, words, symbols, and other modes of expression." *303 Creative LLC*, 143 S. Ct. 2298 (2023); (2) "Smith's websites will be 'original, customized' creation[s]." *Id.*; (3) "Smith's websites will be created 'to communicate ideas.'" *Id.*; (4) "Smith's websites will 'involve *her* speech.'" *Id*. at 2298.

[56] Post, *supra* note 30, at 4 (emphasis added).

and services under a neutral and generally applicable public accommodations law.'"[57] Although *303 Creative* presents itself as a case which preserves the freedoms afforded "pure speech," the most accurate view of the case is as a preemptive religious supremacy case.[58] While still shocking in its disregard of precedent, *303 Creative* is not surprising in the Free Exercise context—it is but one in a line of recent Supreme Court cases that places religion over equality rights.[59] The Court's Free Exercise decisions in the last few years have created a hierarchy of rights that subordinates the rights of LGBTQIA+ persons to the right to free exercise.[60]

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[57] *303 Creative LLC*, 600 U.S. 570 at 603 (Sotomayor dissenting, quoting Masterpiece Cakeshop v. Colo. Civ. Rts. Comm'n, 138 S. Ct. 1719, 1727 (2018) (emphasis added). In addition to requiring citizens to engage in compelled pure speech whenever they file a tax return, pure speech is affirmatively required of several professions, such as attorneys and doctors).

[58] *See* Post, *supra* note 30, at 59–60 (noting that "Smith pressed urgent claims of conscience … [because] she regarded involvement in same sex weddings as a profound violation of her religious convictions … [but that] is relevant only to potential violations of Smith's Free Exercise rights, not to potential violations of her free speech rights" and that it resulted in "confusing free speech and free exercise doctrine … [which] makes hash of basic First Amendment principles") *Id*. at 23 (and also noting that "[the vast and careless overreach of the concept of 'pure speech' likely derives from the Court's urgent need to protect what it regarded as Smith's genuine conscientious objection to publishing websites announcing same-sex marriages. But while claims of conscience may be relevant to Free Exercise jurisprudence, they have no natural home in free speech doctrine. . . .By improperly transposing intuitions about religious freedom into the quite different context of freedom of speech, the Court in *303 Creative* creates doctrinal chaos").

[59] Fulton v. City of Phila., 141 S. Ct. 1868 (2021) (city's refusal to contract with Catholic Charities for foster care services unless the entity agrees to certify same-sex couples violates the 1st Amendment); Carson v. Makin, 142 S. Ct. 1987 (2022); Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049 (2020) (holding that the First Amendment prohibits the Court from intervening in employment relationship between a religious school and its teachers); Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022) (holding that the Free Exercise Clause protects a school official engaging in religious observance on school grounds).

[60] *See, e.g*., Carson v. Makin, 596 U.S. 767, 788 (2022) (state law prohibiting students who participate in general student aid program from utilizing aid to attend schools that provide religious education violates the Constitution); *see generally* Hernández-Truyol, *Awakening the Law: Unmasking Free Exercise Exceptionalism*, *supra* note 5 (tracing the

Ceding to Ms. Smith's religious sensibilities, the Court limned free exercise with freedom of speech, and conflated speech with conduct generating a puzzling outcome that Justice Sotomayor condemns in her formidable dissent as "[p]rofoundly wrong."[61] *303 Creative* is noteworthy because, as Justice Sotomayor highlights, "the Court, for the first time in its history, grants a business open to the public a constitutional right to refuse to serve members of a protected class."[62] Sotomayor's dissent emphasizes that the "law in question targets conduct, not speech, for regulation, and the *act* of discrimination has never constituted protected expression under the First Amendment."[63] Justice Sotomayor's dissent captures the historic and unprecedented nature of the ruling in *303 Creative*. In categorizing website creation as "pure speech,"[64] and thus protected expression under the First Amendment, the Supreme Court threatens many of the protections previously provided to marginalized individuals through public accommodations laws.[65]

Responding to the majority's ostensible dismissal of the public accommodations law precedent, Justice Sotomayor's dissent details the importance and centrality of that precedent to the *303 Creative* case. As her dissent explains, "[a] 'public accommodations law' is a law that guarantees to every person the full and equal enjoyment of places of public

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evolution of First Amendment law that results in the current free exercise exceptionalism and observing the troubling outcome that state-funded religious institutions, rather than be bound by general nondiscrimination laws, will be free to openly discriminate against students, staff, teachers, and parents alike).

[61] *303 Creative LLC*, 600 U.S. 570 at 603 (Sotomayor, J., dissenting, quoting Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n., 138 S. Ct. 1719, 1727 (2018) (slip op. 2) (Sotomayor's dissent noting disregard for precedent set in *Masterpiece*)).

[62] *Id*. (Sotomayor, J., dissenting).

[63] *Id.* at 604 (emphasis in original).

[64] *See* Post*, supra* note 30 (addressing the different types of speech and why pure speech itself is important).

[65] *See, e.g*., Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964).

accommodation without unjust discrimination," making this precedent of great import to the realization of civil rights.[66] Justice Sotomayor underscores the insidiousness of the *303 Creative* decision by noting that "[o]ur constitution contains no right to refuse service to a disfavored group," and observing that, in the United States, public accommodations laws have served to protect individuals from discrimination "based on race, color, religion, national origin or disability."[67] Justice Sotomayor also exposes the decision as an outlier by indicating that "[a]ll but five States have analogous laws that prohibit discrimination on the basis of these and other traits, such as age, sex, sexual orientation, and gender identity."[68]

Significantly, Justice Sotomayor examines the two main purposes of public accommodations law. One is to "ensure[ ] equal access to publicly available goods and services," a resource of vital importance to marginalized and vulnerable groups that face discrimination.[69] Such access provides the targets of discrimination a "meaningful opportunity to benefit from all aspects of life in America … and society, in return, receives the benefits of wide participation in political, economic, and cultural life."[70] The other purpose is to "ensure[ ] *equal dignity* in the common market," a dignity denied by exclusion from public spaces, even if alternative providers of goods or services are available.[71] As Justice Sotomayor quoted in her dissent:

> Discrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public because of his [social identity]. It is equally the inability to explain to a child that regardless of education,

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66 *303 Creative LLC*, 600 U.S. 570 at 604–05.
67 *Id.* at 605.
68 *Id.*
69 *Id.*
70 *Id.*
71 *Id.* (emphasis in original).

> civility, courtesy, and morality he will be denied the right to enjoy equal treatment.[72]

As Part IV will elucidate, the majority's opinion is Asleep. Justice Sotomayor's dissenting opinion, on the other hand, is Awakened. Also Awakened, as discussed in Part III below, is the Inter-American regional human rights jurisprudence.

III. INTER-AMERICAN HUMAN RIGHTS—AN AWAKENED PATH

Given the Supreme Court's creation of a rights hierarchy that erodes LGBTQIA+ persons' legal protections, it is informative and inspirational to review the Inter-American system's evolution regarding LGBTQIA+ rights. In recent years, the Inter-American system generally, and particularly Latin American States, have hugely advanced LGBTQIA+ rights protections. Such developments reflect a progressive change, especially in light of conservative Latine traditions in the region.[73] This system of hemispheric justice thus provides support for the deployment of the Awakening paradigm presented in the next part of this essay.

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[72] *Id.* (Sotomayor, J., dissenting) (citations omitted). Justice Sotomayor further explained that:

> When a young Jewish girl and her parents come across a business with a sign out front that says, "'No dogs or Jews allowed,'" the fact that another business might serve her family does not redress that "stigmatizing injury," Or, put another way, "the hardship Jackie Robinson suffered when on the road" with his baseball team "was not an inability to find some hotel that would have him; it was the indignity of not being allowed to stay in the same hotel as his white teammates."

Id. (citations omitted).

[73] Hernández-Truyol, *Borders (En)Gendered*, *supra* note 6; *The Gender Bend*, *supra* note 6, at 1283.

The jurisprudence of the IACtHR[74] manifests the OAS's growing recognition of and respect for the rights of LGBTQIA+ persons.[75] A significant event in the region's trend of inclusiveness and equality for LGBTQIA+ individuals and their relationships is the 2017 IACtHR's issuance of an Advisory Opinion on Gender Identity, Equality, and Nondiscrimination against Same Sex Couples.[76] Costa Rica, recognizing the disparate nature of the laws in the region, requested the advisory opinion in order to obtain guidance with respect to numerous questions surrounding the treatment of LGBTQIA+ persons.[77]

The IACtHR accepted Costa Rica's request and concluded that any State party to the American Convention that has discriminatory laws targeting an individual's sexual orientation or gender identity violates Article 1, the equality and nondiscrimination provision of the American Convention on Human Rights.[78] The decision acknowledges that sexual orientation, gender

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[74] The Inter-American Court on Human Rights is the judicial mechanism of the Organization of American States. *Charter of the Organisation of American States*, THE UN REFUGEE AGENCY (Feb. 22, 2023, 8:55 PM), https://www.refworld.org/docid/3ae6b3624.html [https://perma.cc/2QEZ-F4RJ] (The American Convention on Human Rights established the Court. The Americas is the geographic region to which the United States belongs. While the United States has contested the jurisdictional authority of the IACtHR to enforce rulings against the United States, the United States has ratified the Charter on the Organization of American States—a treaty that places the United States under the IACtHR's jurisdiction).

[75] *See, e.g.*, Atala Riffo & Daughters v. Chile, Merits, Reparations, & Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239 (Feb. 24, 2012).

[76] *See* Advisory Opinion, *supra* note 8.

[77] Costa Rica specifically asked the IACtHR to address these issues: (1) "[T]he protection provided by Articles 11(2), 18 and 24 in relation to Article 1 of the [American Convention] to the recognition of a change of name in accordance with the gender identity of the person concerned." (2) "[T]he compatibility with Articles 11(2), 18 and 24, in relation to Article 1 of the Convention of the practice of applying Article 54 of the Civil Code of the Republic of Costa Rica, 9 Statute No. 63 of September 28, 1887, to persons wishing to change their name based on their gender identity." (3) "[T]he protection provided by Articles 11(2) and 24 in relation to Article 1 of the [America Convention] to the recognition of the patrimonial rights derived from a relationship between persons of the same sex." *Id.* at 3-4.

[78] *See* Advisory Opinion *supra* note 8, at 34.

identity, and expression (SOGIE) are categories protected by the American Convention's guarantees of equality and nondiscrimination.[79] The coverage of SOGIE categories under the Convention signifies that any State law or regulation that results in differential treatment of a person who is a member of a protected category, such as LGBTQIA+ persons, must satisfy a strict legal three-part test:[80] first, that the State measure must be essential; second, that the means to effect the State measure must be adequate and necessary; and third, that the State measure must be strictly proportional when the benefits are weighed against the restrictions imposed upon human rights.[81]

It is noteworthy that this three-part test is similar to the strict scrutiny test utilized in the United States for evaluating whether state legislation or the federal government has breached an individual's fundamental rights under the U.S. Constitution. Specifically, under a strict scrutiny analysis, a law can only survive if it is necessary to achieve a compelling government purpose, it is narrowly drawn, and there is no less intrusive alternative available.[82] Significantly, the strict scrutiny standard was the test utilized by the Supreme Court in *303 Creative*, with the majority and the dissent applying the same test but reaching diametrically divergent conclusions.[83] Justice Sotomayor's powerful dissent aligns with the hemispheric norm of generous protection of marginable populations pursuant to the conventional as well as the constitutional guarantees of equality and nondiscrimination.

In the Advisory Opinion, the IACtHR enumerated the existing hemispheric rights that individuals possess regarding gender identity as well as the equality and nondiscrimination rights of same-sex couples.[84] As

[79] *Id.*; *see also* American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, *entered into force* July 18, 1978 [hereinafter American Convention].
[80] *See* Advisory Opinion *supra* note 8, at 41.
[81] *Id.*
[82] *See* Sherbert v. Verner, 374 U.S. 398 (1963); *See generally* CHEMERINSKY, *supra* note 35, at 586–89.
[83] *See supra* text accompanying note 46 (giving the *303 Creative* majority analysis); *see supra* text accompanying notes 66-72 (giving the dissent's analysis).
[84] Advisory Opinion, *supra* note 8, at 31.

detailed in the following paragraphs, the IACtHR also specified how specific articles of the American Convention apply in instances that implicate LGBTQIA+ rights.[85] Moreover, the Advisory Opinion plainly articulates the obligations of OAS Member States concerning certain rights such as name changes and gender identity, as well as the rights of same-sex couples.[86]

The IACtHR's opinion is both far-reaching and comprehensive; it engages the overall notion of equality and nondiscrimination and addresses specific rights that exist under the Convention. To identify the rights of LGBTQIA+ persons, the IACtHR focused on the articulation of human rights in myriad provisions of the Convention, including the rights to identity, human dignity, life, privacy, and personal autonomy.[87] Significantly, the IACtHR ruled that freedom of expression (Article 13) protects the outward manifestation of one's gender identity, thereby securing comprehensive and expansive rights for the LGBTQIA+ community.[88]

The IACtHR further held that there exists a right to gender-affirming legal processes. In elucidating this right, the IACtHR clarified that processes must include procedures for matters such as name changes on government identification documents.[89] The IACtHR was unequivocal in that a State's failure to provide gender-affirming legal procedures constitutes discrimination on the basis of gender identity.[90]

Moreover, the decision provides that Articles 11 and 17, respectively protecting the right to privacy and family life, and the right to protection of the family, also extend to same-sex couples.[91] Thus, same-sex couples are

[85] *Id.* at 41–42.
[86] *See, e.g.*, *Id*. at 55.
[87] *Id.* at 43–45.
[88] *Id.* at 46.
[89] *Id.* at 50–52.
[90] *Id*.
[91] *Id.* at 75–76.

entitled to the benefits of marriage and family, including the right to succession, inheritance, and property rights; taxes; the authority to make medical decisions; workers' compensation benefits; health insurance; and custody of children.[92] Going beyond other regional and international human rights jurisprudence, Inter-American Court even found that alternative legal mechanisms for marriage, such as civil unions, are insufficient to attain equality, observing that such arrangements are "inherently different" and constitute discrimination on the basis of sexual orientation.[93]

Significantly, in light of *303 Creative*, the Inter-American Court acknowledged that discrimination against LGBTQIA+ persons is often religion-based.[94] Nonetheless, having recognized the express protection of human dignity in the Inter-American Convention, the IACtHR observed that religious beliefs cannot be grounds to deny human dignity.[95] This conclusion flows seamlessly from the international norm specifically addressing religion, which provides that "freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or *the fundamental rights and freedoms of others.*"[96] Such international framework, read together with the Advisory Opinion, suggests that when religion and LGBTQIA+ rights collide in the Inter-American region, unlike the conclusions reached by the majority in *303 Creative*, the Inter-American Court will find that the religious assertion for non-compliance with law will have to cede to equality and nondiscrimination standards such as the public accommodations norms included in CADA.

The force of the Advisory Opinion is evident in the numerous equality and nondiscrimination legal developments that followed the decision's

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92 *Id*.
93 *Id.* at 81.
94 *Id.* at 26.
95 *Id.*
96 *Id.* (emphasis added); *see also* International Covenant on Civil and Political Rights (ICCPR) art. 18, Dec. 16, 1996, 999 U.N.T.S. 171.

issuance, including numerous countries changing their internal laws to comply with the Advisory Opinion's mandates. For example, Caribbean countries have been notoriously slow in enacting progressive LGBTQIA+ legislation,[97] with countries such as Jamaica, Grenada, and St. Lucia still having laws on the books that prohibit same-sex relations.[98] Some of these laws had resulted in the imprisonment of LGBTQIA+ persons for up to ten years.[99] Yet, after the Advisory Opinion, numerous Caribbean countries have repealed their discriminatory laws, including laws that criminalize same-sex relations between consenting adults, and have expanded rights for LGBTQIA+ persons.

Some detailed examples of the momentous legal changes in the region are informative. In December 2022, the Supreme Court of Barbados made a historic declaration when it struck down the criminalization of same-sex relations among consenting adults.[100] The Barbados Supreme Court expressly recognized that the country had ratified several international human rights treaties protecting against discrimination on the grounds of sexual orientation.[101] The Supreme Court of Barbados noted that these

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[97] *See, e.g.*, Advisory Opinion, *supra* note 8, at 23.

[98] *Id.*

[99] *Id.*

[100] *Office of the Rapporteur on the Rights of LGBTI Persons: Newsletter April - July 2023*, Inter-American Commission on Human Rights (last accessed Dec. 15, 2023), https://www.oas.org/es/cidh/R/DLGBTI/Boletines/ newsletter-2023_04_07.html [https://perma.cc/39EX-RTLF] [hereinafter *IACHR Newsletter April-July 2023*].

[101] René Holder-McClean-Ramirez v. Attorney General of Barbados, No. CV 0044 of 2020 at 32-33, https://img1.wsimg.com/blobby/go/a7f16581-69e1-4468-b311-ad73a44ca9dc/downloads/RAMIREZ%20(fINAL).p df?ver=1685123732351. For example, in addition to the IACHR, Barbados has ratified the following U.N. Human Rights treaties: International Covenant on Civil and Political Rights (ICCPR), G.A. Res. 2200A (XXI) (Dec. 16, 1966), https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights; International Covenant on Economic, Social and Cultural Rights (ICESCR), G.A. Res. 2200A (XXI) (Dec. 16, 1966), https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights; Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), G.A. Res. 34/180 (Dec. 18, 1979), https://www.ohchr.org/en/instruments-

statements of international human rights norms were "not a force superseding domestic law, but a body of laws to be given the consideration and respect due to them."[102] Antigua, Barbuda, Cuba, Saint Kitts, and Nevis all repealed similar anti-same-sex laws.[103] The various post-Advisory Opinion decisions recognized that the previous legislation prohibiting same-sex relations and marriage contravened contemporary human rights norms. These recent events show progress towards recognizing same-sex relationships and affording LGBTQIA+ representation and equality, even in formerly hostile States.

Similarly, Central American States also have progressed in their recognition of LGBTQIA+ rights, although progress has been inconsistent in this part of the Inter-American region. As of October 26, 2022, the State of Tamaulipas legalized marriage equality, finally guaranteeing the right to marriage between persons of the same sex in all of Mexico's States.[104] Moreover, countries such as Costa Rica and El Salvador have also adopted more progressive legislation.[105] Costa Rica revised its Criminal Code to

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mechanisms/instruments/convention-elimination-all-forms-discrimination-against-women; Convention on the Rights of Persons with Disabilities (CRPD), G.A. Res. A/RES/61/106 (Dec. 12, 2006), https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-persons-disabilities; Convention on the Rights of the Child (CRC), G.A. Res. 44/25 (Nov. 20, 1989), https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child; International Convention on the Elimination of All Forms of Racial Discrimination (CERD), G.A. Res. 2106 (XX) (Dec. 21, 1965), https://www.ohchr.org/en/instruments-mechanisms/instruments/international-convention-elimination-all-forms-racial. *See also* IJRCenter.org, Barbados Factsheet, https://www.ijrcenter.org/wp-content/uploads/2018/04/Barbados-Factsheet.pdf; *see also* United Nations, The Core International Human Rights Instruments and Their Monitoring Bodies, https://www.ohchr.org/en/core-international-human-rights-instruments-and-their-monitoring-bodies.

[102] *Holder-McClean-Ramirez*, No. CV 0044, at 32-33.

[103] *Office of the Rapporteur on the Rights of LGBTI Persons: Newsletter July - December 2022*, Inter-American Commission on Human Rights, (last accessed Dec. 15, 2023), https://www.oas.org/es/cidh/r/dlgbti/boletines/newsletter-2022_07_12.html [https://perma.cc/NX3P-YBHF] [hereinafter *IACHR Newsletter July-December 2022*].

[104] *Id.*

[105] *Id*.

provide that aggravated homicides motivated by sexual orientation, gender identity, or gender expression would be designated as hate crimes.[106] Likewise, El Salvador has taken progressive leaps forward in its recognition of gender identity.[107] In 2022, the Salvadoran Supreme Court ruled in favor of a lawyer and human rights activist who wanted to have her gender identity recognized.[108] Notwithstanding this hopeful ruling, El Salvador has failed to meet the Salvadoran Supreme Court's deadline to create a legal process for gender recognition.[109]

With regard to the enactment of LGBTQIA+ legislation in Latin America, South American countries have seen the most progress, with States committing to strongly support marriage between people of the same sex and recognize gender identity.[110] For example, Peru ordered the National Registry to register marriage between two people of the same sex.[111] And, concerning gender identity, legislation passed in Colombia, Argentina, and Chile has made significant strides towards the recognition of transgender and non-binary persons.[112] Argentina has created enrollment forms within the education system that recognize the gender identity of trans and non-binary students.[113] In Chile, following a judicial decision, the first non-binary person received a gender-neutral identity document.[114]

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[106] *Office of the Rapporteur on the Rights of LGBTI Persons: Newsletter April - June 2022*, Inter-American Commission on Human Rights, (last accessed Dec. 15, 2023), https://www.oas.org/es/cidh/R/DLGBTI/Boletines/newsletter-2022_04_06.html [https://perma.cc/82N7-ZKUT].
[107] *See IACHR Newsletter July-December 2022*, *supra* note 103.
[108] *Id*.
[109] *El Salvador Fails to Meet Deadline for Trans Rights Ruling*, HUM. RTS. WATCH (Feb. 23, 2023, 6:00 AM), https://www.hrw.org/news/2023/02/23/el-salvador-fails-meet-deadline-trans-rights-ruling [https://perma.cc/6SPH-AX9W].
[110] *See IACHR Newsletter April-July 2023*, *supra* note 100.
[111] *Id*.
[112] *See IACHR Newsletter July-December 2022*, *supra* note 103.
[113] *Id*.
[114] *Id.*

Significantly, on July 27, 2023, Colombia charged its first crime against humanity due to gender persecution.[115]

The LGBTQIA+ inclusive legislation adopted in the Caribbean, Central American, and South American States highlights the region's determination and commitment to develop, expand, and transform LGBTQIA+ rights in this region. However, the climate for LGBTQIA+ persons is not yet quite utopian. Notwithstanding the Inter-American Court's decision, States still have discriminatory laws.[116] Even so-called "Westernized" countries and those perceived as "progressive" in South America, such as Brazil, continue to weaponize the government against LGBTQIA+ people.[117]

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[115] *Id*.

[116] For example, Jamaica has failed to repeal a colonial-era law criminalizing same-sex relations between men, one of numerous dubbed "anti-buggery laws" in numerous conservative Caribbean countries. The Inter-American Commission on Human Rights found Jamaica in violation of a right to privacy, equal protection, humane treatment, and freedom of movement after two LGBTQIA+ citizens were forced to flee the country. One victim was beaten numerous times by Jamaican police forces, and the other victim was shot twice due to her status as a lesbian. Despite the Inter-American Commission on Human Rights' recommendation, the Jamaican government proceeded to keep the law and argue that it does not enforce the 1864 anti-sodomy laws. Even though they may not be enforced by the government, keeping the laws on the books perpetuates discrimination in Jamaica. *See* Gareth Henry & Simone Carline Edwards, *Report No. 400/20 Case 13.637*, Inter-American Commission on Human Rights (Dec. 31, 2020), https://www.oas.org/en/iachr/decisions/2020/JM_13.637_EN.PDF [https://perma.cc/54BP-956C]; *see also* T.B. & S.H., *Report No. 401/20 Case 13.095,* Inter-American Commission on Human Rights (Dec. 31, 2020), https://www.oas.org/en/iachr/decisions/2020/jm_13.095_en.pdf [https://perma.cc/7Q4Q-35LB].

[117] For instance, Brazil's Bolsonaro Administration ended in June of 2023; however, the LGBTQIA+ community faces the aftermath of President Bolsonaro's vehement and public hatred towards their community. In a TV interview, President Bolsonaro stated that "if [he] [spotted] two men kissing in the street, [he'd] beat them up," and that if a "kid begins to look gay-ish, you just beat him up really bad and this will fix him." This abhorrent language created an onslaught of discrimination and violence towards LGBTQIA+ Brazilians. According to Brazilian anthropologist and professor at Universidade Federal de Bahia, Luiz Mott, an LGBTQIA+ person was murdered or took their own life every 26 minutes in the year 2020. *See* The Conversation*, Jair Bolsonaro's administration is hurting the lives of LGBTQ+ sex workers in Brazil*, (Jan. 20, 2022, 1:09 PM), https://theconversation.com/jair-bolsonaros-administration-is-hurting-the-lives-of-lgbtq-sex-workers-in-brazil-173706 [https://perma.cc/4V5Z-3EZM].

Nonetheless, the Advisory Opinion and the subsequent State actions reveal that the hemisphere has both made progress in and established normative standards for the protection of LGBTQIA+ equality and nondiscrimination rights. In addition to recognizing their role in past wrongs toward the LGBTQIA+ community, international bodies such as the Inter-American Commission on Human Rights and the IACtHR have developed and interpreted the regional norms to strengthen protections for LGBTQIA+ persons and their relationships. This recognition of institutionalized discrimination and sanctioned violence towards the LGBTQIA+ community is essential both to healing and acceptance in traditionally conservative Latin America.

In sum, as the next section will show, the Advisory Opinion is Awakened. It has deconstructed and realigned the hemispheric perceptual playbook—the legal, historical, and cultural heteronormative status quo that permeated the region and deployed the trope that LGBTQIA+ identity is undesirable[118]—to attain justice where history saw ridicule, criminalization, and marginalization.[119] The Advisory Opinion reads as a creed for the recognition and embrace of the human rights of LGBTQIA+ persons and their relationships.[120] The IACtHR unambiguously ruled that neither sexual orientation nor gender identity can be used to discriminate against an individual.[121] The rights that extend to LGBTQIA+ persons and their relationships include the rights to identity, human dignity, life, privacy, and personal autonomy.[122] Based on these rights, the prohibition against discrimination against LGBTQIA+ persons is extensive and reaches the lack of equal treatment with respect to the right to health, education,

[118] *See, e.g.*, Hernández-Truyol, *The Gender Bend*, *supra* note 6; Hernández-Truyol, *Borders (En)Gendered*, *supra* note 6. *See infra* Part IV (discussing the concept of a "perceptual playbook").
[119] Hernández-Truyol, *The Gender Bend*, *supra* note 6, at 1283.
[120] *See supra* text accompanying notes 84-96.
[121] *See* Advisory Opinion, *supra* note 8, at 34.
[122] *Id.* at 42–45.

employment, housing, freedom of expression, and freedom of association.[123] Importantly—and bearing in mind *303 Creative*—religion cannot be used as a pretext to discriminate, as religious beliefs cannot be grounds to deny human dignity.[124]

IV. AWAKENING THE LAW[125]—A NEW PARADIGM

An Awakened analysis serves to unearth skewed origins, interpretations, and presumptions in law, legal principles, and legal structures to unveil their consequent subordinating[126] and marginabilizing effects. Marginability exposes that those outside of the playbook-created hierarchies are vulnerable to and marginalized by the ingrained biases embedded in the individual and structural, or legal, perceptual playbooks. Awakening signifies reaching intentional consciousness.

I have imagined the notion of intentional consciousness as a pathway to justice. The idea embraces educator Paolo Freire's concept of "critical consciousness" which conveyed his desire to act on real circumstances with the goal of effecting positive change. Freire developed the model in the field of education while working with socioeconomically disadvantaged students in Brazil. He utilized the framework to identify factors that interfered with learning.[127] In law, I utilize the intentional consciousness

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123 *See Id*. at 101.

124 *Id*. at 81.

125 This section is based upon the first and full articulation and development of the Awakening the Law paradigm; *See also* Berta Esperanza Hernández-Truyol, *Awakening the Law: A LatCritical Perspective*, 20 SEATTLE J. FOR SOC. JUST. 927 (2022) [hereinafter Hernández-Truyol, *Awakening the Law: A LatCritical Perspective*]; *see also* Hernández-Truyol, *Awakening the Law: Unmasking Free Exercise Exceptionalism*, *supra* note 5, at 1064.

126 Antisubordination unearths the existence and nature of hierarchies and hierarchical ideologies and assumptions embedded in individual and structural perceptual playbooks. Hernández-Truyol, *Awakening the Law: A LatCritical Perspective*, *supra* note 125; *see generally* Berta Esperanza Hernández-Truyol, *Who's Afraid of Being Woke?–Critical Theory as Awakening to Erascism and Other Injustices*, 1 J. CRITICAL RACE & ETHNIC STUD. 19–52 (2024).

127 PAOLO FREIRE, PEDAGOGY OF THE OPPRESSED (1970).

concept to unveil factors in individuals' lives as well as in the legal processes and structures that interfere with achieving justice. Once exposed, the elements in law and life that effect injustice can be re-evaluated and we can awaken.

Myriad disciplines—such as political science, religion, psychology, education, economics, and sociology—embrace and advance the concept of Awakening. In these fields, Awakening represents attaining increasing consciousness of the world outside of oneself; and heightened awareness of issues that may be overlooked by others in society, in the family, and relational experiences. Thus, Awakening magnifies and deepens mindfulness about one's surroundings; it enables the appreciation of and relation to the world and the problems suffered by others in a more profound way. This article utilizes the Awakening concept to scrutinize the decision of the Court in *303 Creative* that myopically elevated religion above the fundamental rights to equality and nondiscrimination.[128]

A significant component of Awakening is the recognition that our perceptual playbooks guide all our actions and interactions. These playbooks are the collection of systems of beliefs and cognitive scripts that have been created and passed down by our families, religious traditions, cultures, and the societies in which we live. This is true in all settings—social, legal, familial, cultural, educational, and religious. In law, perceptual playbooks are reinforced as truth by the laws, legal system, and developed jurisprudence. Each of our perceptual playbooks is enmeshed with ideas, theories, and tropes that not only define us as individuals but guide how we perceive human interactions.

Our perceptual playbooks are our dictionaries and our compasses; they define and delineate how we comprehend society and the world. Thus, Awakening insists that we both identify and become conscious of our perceptual playbooks. The Awakening process serves to expose the

[128] 303 Creative LLC v. Elenis, 600 U.S. 570 (2023).

personal biases neatly packaged in our perceptual playbooks. Awakening reveals that our perceptual playbooks constitute the foundation for our viewpoints and that, to be just and to seek as well as perform justice successfully, we must both unveil and dispose of those biases. To shed prejudices, we must perform an intentionally and critically conscious analysis to expose, name, and discard the biased foundations of our perceptual playbooks.

Awakening the law necessitates three major moves for the attainment of justice: one, achieving awareness of and rejecting learned cognitive biases by lawmakers, judges, and lawyers to avoid replicating biased viewpoints in the law; two, the excision of prejudices from existing law as well as legal structures and systems; and, three, the re-creation of law as well as legal systems and structures without embedded prejudices—i.e., systems and structures that promote justice for all. Awakening is a continuous process of critical deconstruction of the thoughts and actions that are grounded upon our learned (and biased) perceptual playbooks.

Through Awakening, we expose a self who is guided by inherited tropes. Such exposure allows the emergence of an authentic self who becomes cognizant of existing patterns, interrogates those patterns as well as their sources, systemically challenges and dismantles the playbooks, and creates new narratives as well as counternarratives. By reaching deep awareness, Awakening facilitates the analysis and resolution of conflicts arising from constitutional rights collisions in a way that will achieve just outcomes. It attains justice because this novel framework details—intentionally conscientizes—the factors that allow for a holistic analysis of the rights collision thus allowing for all voices whose rights are threatened to be heard. As such, it exposes considerations that fail to account for the interests of all whose rights are vulnerable.

Awakening analysis enables systemically challenging as well as dismantling and reconstructing perceptual playbooks through a 4-step process: (1) **Recognition**—acknowledging the problem; (2) **Exposure**—

investigating and unveiling the biases inherent in the problem; (3) **Deliberation**—carefully listening to narratives and counternarratives to ascertain the gravamen of the bias causing or contributing to the problem; and (4) **Solution**—proposing a resolution that eliminates the unearthed injustice. This process bears the inherent biases of the perceptual playbook(s) upon which the quandary relies in order to appear neutral and consider alternatives that do not embed biases into law.[129]

This 4-step Awakened methodology is to be applied to a substantive framework[130] comprised of one essential factor (Dignity) and three pillars—Antisubordination,[131] Multidimensionality,[132] and Centering the Marginable[133]—that together create an analytical checklist for an Awakened law. Applying an Awakened methodology to *303 Creative* reveals the Asleep state of the majority's opinion and the Awakened nature of Justice Sotomayor's dissent.

V. A LATCRITICAL ANALYSIS–GLOCALIZING JUSTICE

There is a tension between the values of freedom of religious speech on the one hand, and the right of protected classes to be free from

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[129] *See* Hernández-Truyol, *Awakening the Law: A LatCritical Perspective*, *supra* note 125, at 955–56; *see also* Hernández-Truyol, *Awakening the Law: Unmasking Free Exercise Exceptionalism*, *supra* note 5, at 1064.

[130] *See* Hernández-Truyol, *Awakening the Law: A LatCritical Perspective*, *supra* note 125, at 956–57.

[131] Antisubordination unearths the existence and nature of hierarchies and hierarchical ideologies and assumptions embedded in individual and structural perceptual playbooks; *see Id.* (illustrating that an antisubordination analysis unearths embedded hierarchical systems of beliefs both on the individual and structural levels); *see also supra* text accompanying note 126 (defining antisubordination).

[132] Multidimensionality acknowledges that a person is the sum of their identities and enables a multilayered exploration of the possible locations of bias in the perceptual playbooks; *see Id.* (discussing the importance of a multidimensionality analysis to explore locations of bias).

[133] Finally, marginability exposes that those outside of the playbook-created hierarchies are vulnerable to and marginalized by the ingrained biases embedded in the individual and structural playbooks. *See Id.* at 958 (focusing this third layer of analysis on the effects of perceptual playbooks in establishing hierarchies).

discrimination on the other; these are both highly protected values in state laws, the U.S. Constitution, and the Inter-American human rights system.[134] International law uses a relational approach to resolve conflicts when highly protected values clash with religion: a religious person's right to act on the basis of their religious beliefs is unprotected once the actions taken based upon those religious beliefs effect unlawful discrimination against others,[135] especially in the public sphere.[136] Thus international methodology suggests a balancing approach to resolve conflicts concerning high-value rights in collision: the right to exercise one's rights must be weighed against the impact that exercise has on other protected rights.

To be sure, tensions in civil society based on religion are nothing new. Most religions promote peace, harmony, and coexistence, yet insist that

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[134] Berta Esperanza Hernández-Truyol, *Religion: Rites vs. Rights - Resolving Tensions between LGBT Equality and Religious Liberty* (2018) [hereinafter Hernández-Truyol, *Rites vs. Rights*]; The Oxford Handbook of International LGBTI Law - Sexual Orientation, Gender Identity, Gender Expressions and Sex Characteristics (SOGIESC) Law from an International-Comparative Perspective (forthcoming 2024), University of Florida Levin College of Law Research Paper No. 19-2, SSRN: https://ssrn.com/abstract=3309831; *see also* Post, *supra* note 30, at 3 (noting that before *303 Creative* "[t]he Court has sought to negotiate a respectful path between the two fundamental values of nondiscrimination and freedom of speech").

[135] *International Covenant on Civil and Political Rights*, U.N. HUM. RTS. OFF. OF THE HIGH COMM'R (Dec. 16, 1966), https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights [https://perma.cc/KKM5-AH7K].

[136] *See* Hernández-Truyol, *Awakening the Law: Unmasking Free Exercise Exceptionalism*, *supra* note 5, at 1087–88. Beyond the recent Advisory Opinion, a study of international, regional, and foreign jurisprudence reveals a refusal to subordinate LGBTQIA+ rights to religious rights in instances of public accommodations. From this jurisprudence, four principles can be articulated: (1) Discrimination by public servants is tantamount to discrimination by the state and should be prohibited, (2) Private service providers doing business in the marketplace or offering public accommodations should abide by general anti-discrimination laws; (3) Exceptional circumstances should be required even for religiously affiliated institutions to be exempt from general laws and provision of services once they are open to the public, and (4) Religious institutions are free to discriminate based upon their religious tenets in terms of performance of their ministry. These four principles can be utilized in the awakening framework to resolve conflicts between high-value rights. *See* Hernández-Truyol, *Rites vs. Rights*, *supra* note 134.

their tenets contain the only truth to lead to salvation, which thus creates tension vis-à-vis the rights to nondiscrimination and equality. For example, religion has been used both to justify and oppose matters such as sex discrimination, racial segregation, the inhumane institution of enslavement, and the denial of marriage equality. Indeed, until 2015, LGBTQIA+ persons were denied the right to marry based on their sexuality; and, historically, race was also utilized to deny the right to marry the partner of your choice. For example, enslaved persons were not allowed to marry, and anti-miscegenation laws existed in the United States until 1967.[137]

In the 21st century Christian Nationalism, a political ideological movement that deploys a "conservative interpretation of Christianity" and centers an anti-LGBTQIA+ narrative, is insisting on their "one truth."[138] Christian Nationalists have sought, with some success, to transmogrify the law to reflect their "Christian" anti-LGBTQIA+ religious principles and beliefs.[139] For example, citing the Free Exercise Clause, actors in the public

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[137] *See* Loving v. Virginia, 388 U.S. 1, 3 (1967) (describing trial judge's use of religion as a justification for anti-miscegenation laws) (Judge Bazile's opinion for the lower court stated that "[t]he fact that [God] separated the races shows that he did not intend for the races to mix"); *see generally* Hernández-Truyol, *Rites vs. Rights*, *supra* note 134; Hernández-Truyol, *Awakening the Law: Unmasking Free Exercise Exceptionalism*, *supra* note 5; *see also* FREDERICK DOUGLASS, MY BONDAGE AND MY FREEDOM 409 (1855) (noting denial of marriage to slaves by a country "boasting of its [C]hristianity").

[138] Michelle Goldberg, *What Is Christian Nationalism?*, HUFFPOST: THE BLOG (May 25, 2011), https://www.huffpost.com/entry/what-is-christian-nationa_b_20989 [https://perma.cc/3GYX-EJJ5] (explaining the coining of the term in her book *Kingdom Coming: The Rise of Christian Nationalism*). Goldberg explains that it is "a *political ideology* that posits a Christian right to rule." *Id.* (emphasis added).

[139] *See* Sophie Bjork-James, *Christian Nationalism and LGBTQ Structural Violence in the United States*, 7 J. RELIGION & VIOLENCE 278-302 (2019); Terry Gross, *How One Christian Legal Group is Shaping Policy, from Abortion to LGBTQ Rights*, NPR (Oct. 18, 2023, 1:32 PM), https://www.npr.org/2023/10/18/1206760032/how-one-christian-legal-group-is-shaping-policy-from-abortion-to-lbgtq-rights; Adam Gabbatt, *Well-Funded Christian Group Behind US Effort to Roll Back LGBTQ+ Rights*, THE GUARDIAN (June 19, 2023, 6:00 AM), https://www.theguardian.com/world/2023/jun/19/alliance-defending-freedom-lgbtq-rights-america; David D. Kirkpatrick, *The Next Targets for the Group that Overturned Roe: Alliance Defending Freedom Has Won Fifteen Supreme Court Cases. Now It Wants*

square—including photographers, doctors, printers, flower shop owners, adoption agencies, inns, wedding venues, child welfare providers, pharmacists, and hospitals—have refused to provide services to LGBTQIA+ persons that they otherwise offer to the public.[140] Similarly, schools have refused to abide by nondiscrimination norms, and individual teachers are increasingly claiming religion as a reason to discriminate against particular students.[141] These entities all share one motive for such rejection: offering services to LGBTQIA+ persons offends their sincerely held religious beliefs.[142]

The religious—really, political—objectors insist that if they provide these services to or engage in certain employment relationships with LGBTQIA+ persons, they are accepting—and thus, being complicit in—behavior that their brand of Christianity finds sinful.[143] The resulting impetus is to impose a Christian Nationalist ideology on everyone—different- and non-believers alike—to ensure their salvation. In *303 Creative*, the ADF, Ms. Smith's legal counsel, instigated (and indeed, some

Religious Exemptions to Anti-Discrimination Laws—and is Going After Trans Rights, NEW YORKER (Oct. 9, 2023), https://www.newyorker.com/magazine/2023/10/09/alliance-defending-freedoms-legal-crusade [https://perma.cc/WG7P-BN9Y].

[140] *See, e.g.*, Elaine Photography, LLC. v. Willock, 309 P.3d 53, 59 (N.M. 2013); *see also* Mark Joseph Stern, *Anti-Gay Doctor Refuses to Treat Lesbian Parents' 6-Day-Old Baby*, SLATE (Feb. 19, 2015, 1:04 PM), https://slate.com/human-interest/2015/02/doctor-refuses-to-treat-baby-of-lesbian-parents-because-theyre-gay.html [https://perma.cc/LMK9-QLVM]; *see also* Lexington-Fayetteville Urban Cnty. Hum. Rts. Comm'n v. Hands On Originals, 592 S.W.3d 291, 297 (Ky. 2019); *see also* Minton v. Dignity Health, 39 Cal. App. 5th 1155 (2019).

[141] Meriwether v. Hartop, 992 F.3d 492, 517–18 (6th Cir. 2021).

[142] *Id.*; *see also* Hernández-Truyol, *Awakening the Law: Unmasking Free Exercise Exceptionalism*, *supra* note 5, at 18.

[143] *See* Thomas B. Edsall, *The Capitol Insurrection Was as Christian Nationalist as It Gets*, N.Y. TIMES (Jan. 28, 2021), https://www.nytimes.com/2021/01/28/opinion/christian-nationalists-capitol-attack.html?action=click&module=Opinion&pgtype=Homepage [https://perma.cc/4NXP-P3NH] (describing Christian Nationalism as a political movement that "is as ethnic and political as it is religious").

say fabricated)[144] the litigation that not only resulted in *303 Creative*'s win at the Supreme Court but rendered LGBTQIA+ persons as fully second-class citizens given the *303 Creative* conclusion that the First Amendment trumps statutory anti-discrimination protections.[145] The organization is proud of its record, claiming responsibility for 13 successful anti-LGBTQIA+ cases in recent history.[146]

Because the *303 Creative* majority limned the speech and religion First Amendment doctrines in its "wobbly" category of pure speech, it is instructive to review the constitutional mandate regarding the religion clauses. The First Amendment provides that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."[147] This mandate creates an internal contradiction because whenever the government acts to protect free exercise, it inevitably advances religion. While the Amendment itself creates no hierarchy, the Supreme Court, through myriad decisions, has embraced Free Exercise Exceptionalism ("FEE")—the idea that free exercise is a right above all others—by giving primacy to the Free Exercise Clause over all other constitutional and statutory rights.[148]

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144 *See* Melissa Gira Grant, *The Mysterious Case of the Fake Gay Marriage Website, the Real Straight Man, and the Supreme Court*, NEW REPUBLIC (Jun. 29, 2023), https://newrepublic.com/article/173987/mysterious-case-fake-gay-marriage-website-real-straight-man-supreme-court [https://perma.cc/T25F-LW9X].

145 303 Creative LLC v. Elenis, 600 U.S. 570 (2023) (slip op. at 5) (providing that "[w]hen Colorado's public accommodations law and the Constitution collide, there can be no question which must prevail").

146 *Alliance Defending Freedom Extremist Group Info*, S. POVERTY L. CTR., https://www.splcenter.org/fighting-hate/extremist-files/group/alliance-defending-freedom [https://perma.cc/A39U-MB9]; *see also ADF at the Supreme Court*, ALLIANCE DEFENDING FREEDOM, https://adflegal.org/us-supreme-court [https://perma.cc/Q6ZR-7967].

147 U.S. CONST. amend. I, § 1.

148 *See* Hernández-Truyol, *Awakening the Law: Unmasking Free Exercise Exceptionalism*, *supra* note 5, at 1070-82 (discussing cases that show the elevation of religion over other constitutional and statutory rights).

The consequent supremacy of religion over all rights generally, as well as the limning of the free speech and free exercise doctrines in *303 Creative* specifically, highlight the precarity of collisions between religious rights on the one hand and liberty, equality, and nondiscrimination rights on the other.[149] Although it is by no means limited to, this is especially true for the LGBTQIA+ community. FEE has metamorphosed the right to religious liberty from a shield against religious discrimination to a sword that eviscerates the rights to liberty, equality, and nondiscrimination by allowing the religious to discriminate openly and freely. *303 Creative*'s ostensible collapse of religious protections into the free speech doctrine has the same transmogrifying effect on the rights of LGBTQIA+ individuals, potentially wholesale denying LGBTQIA+ persons access to public services as well as obliterating their protections under public accommodations laws.

Recent decisions—the Advisory Opinion in the Inter-American system and *303 Creative* in the United States—show divergent approaches to resolving a religion and free speech versus equality and nondiscrimination conflict.[150] The IACtHR's opinion takes a both-and approach and protects the values of equality and nondiscrimination while still recognizing the protection of religion. The *303 Creative* majority, however, takes an either-or approach that results in the Court indulging the desires of the owner of a private business (open to the public) to exclude LGBTQIA+ persons from her (non-existent) wedding web design services. The decision values "pure speech" over equality and nondiscrimination. The "pure speech" and equality tensions in *303 Creative*, though, could have been resolved by deploying a more holistic approach. An analysis using an Awakened, glocalized[151] paradigm would embrace not only First Amendment rights,

[149] The liberty, equality and nondiscrimination rights are protected by the 5th and 14th Amendments as well as by statutory laws such as Colorado's CADA.

[150] *See* Advisory Opinion, *supra* note 8; *see also 303 Creative LLC*, 600 U.S. at 570.

[151] Glocalization is a term I have coined to reflect the bringing of the global into the local to effect justice. *See* Berta Esperanza Hernández-Truyol, *Glocalizing Women's Health and Safety: Migration, Work, and Labor*, 15 SANTA CLARA J. INT'L L. 48 (2017).

but also the correspondingly significant liberty as well as equality and nondiscrimination statutory, constitutional, and international human rights[152] interests that the Court's myopic analysis obscures.

Significantly, this idea of relational—Awakened—consideration of high-value constitutional interests is not foreign to U.S. legal analysis. In *District of Columbia v. Heller*,[153] Justice Breyer's dissent noted that he would have adopted an interest-balancing inquiry, emphasizing that "'where a law significantly implicates competing constitutionally protected interests in complex ways,' the Court balances the proportional benefits and burdens."[154] Justice Breyer highlighted that the Court has utilized a "proportionality" approach in various constitutional contexts, including election law, speech, and due process cases.[155] Such a relational approach, unlike *303 Creative*, is Awakened, as it considers all stakeholders of all the important values at issue.

An Awakened analysis recognizes whether the rights of a protected group are being trammeled; exposes if the framing of the problem is biased; deliberates on the recognized problem from the perspective of the inclusion of all rights affected; and seeks a solution that considers all the pertinent rights. Considering this novel 4-step paradigm, an analysis of the opinions

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[152] The international framework includes documents and caselaw that protect a person against discrimination based on religion as well as based on sex, a mark of identity that the International Human Rights Committee has pronounced includes sexuality. *See* Toonen v Australia, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994). The U.N. Charter, the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESR)—all core human rights documents—require equality and prohibit discrimination based on sex and or religion.

[153] District of Columbia v. Heller, 554 U.S. 570, 689 (2008) (Breyer, J., dissenting).

[154] "[T]he Court generally asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests. Any answer would take account both of the statute's effects upon the competing interests and the existence of any clearly superior less restrictive alternative." *Id*. at 689–90.

[155] *Id.*

in *303 Creative* reveals that the majority is Asleep, while the dissenters are Awakened.

Specifically with respect to the majority, the analysis fails every element of Awakening.

First, it fails the Recognition element. The Court disregarded the very real public accommodations concerns thereby, at best, hugely discounting and, at worst, erasing the value of equality and nondiscrimination. The Court myopically reviewed Ms. Smith's claim as one of "pure speech,"[156] while claiming not to question "the vital role public accommodations laws play in realizing the civil rights of all Americans."[157] Nonetheless, in its narrow, one-sided analysis, the Court effectively invalidated the "vital role" of public accommodation law by subordinating them, and thus the rights to equality, to speech rights.

Next, the Court's majority was unsuccessful at analyzing the element of Exposure. The majority failed to investigate the facts surrounding Ms. Smith's claim, blindly accepting the parties' stipulations which are neither complete nor outcome determinative. The record needed to be more fully developed in order to investigate Ms. Smith's claims more accurately. For example, the stipulations do not establish that the websites reflect Ms. Smith's speech or that others would perceive the websites as reflecting her speech—a precondition embraced by the Court for the websites to

[156] Post, *supra* note 30, at 59 (stating that the Court's "vast and careless overreach of the concept of 'pure speech' likely derives from the Court's urgent need to protect what it regarded as Smith's genuine conscientious objection to publishing websites announcing same-sex marriages" and noting the irrelevance of conscience claims to free speech doctrine).

[157] 303 Creative LLC v. Elenis, 600 U.S. 570, 590 (2023). (the Court is not hesitant about its holding although it purports to "recognize[]" prior decisions holding that "the governments in this country have a 'compelling interest' in eliminating discrimination in places of public accommodation" and "that public accommodations laws 'vindicate the deprivation of personal dignity that surely accompanies denials of equal access to public establishments'") (citations omitted).

constitute "pure speech."[158] It is well settled that commercial speech receives a lower level of deference than pure speech. And there is no question that *303 Creative* is a for-profit business.[159]

The key element of deliberation appears to be wholly lacking in the court's decision. The Court neglected to consider the narratives of all the interests involved; it did not reflect upon the tensions involved in the conflicting rights. The Court even failed to contemplate that while Ms. Smith's purported concerns deserved analysis and consideration, the interests of potential clients—the exclusion and subordination of the rights of persons protected by public accommodations laws—should weigh on the outcome.

Lastly, the Court's solution is misguided. The resolution of the dispute not only subordinates a protected class but also removes that class from the protective umbra of public accommodations laws—even potentially eviscerating that body of laws. Moreover, the majority decision tramples on dignitarian rights and runs afoul of precedent that "recognized the 'serious stigma' that would result if 'purveyors of goods and services who object to gay marriages for moral and religious reasons' were allowed to put up signs saying 'no goods or services will be sold if they will be used for gay marriages.'" The court also disregarded public accommodations law precedent. Precedent notwithstanding, the majority in *303 Creative*, blinded by their perceptual playbooks, concluded that it is acceptable to stigmatize a marginalized group that constitutes a protected class.

The Awakened dissent in *303 Creative*, on the other hand, grapples with what the Asleep majority opinion avoids or intentionally ignores. Justice

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[158] Post, *supra* note 30, at 56 (stating that "[w]hether Smith's proposed websites should be categorized as commercial speech or as public discourse is a complex question, *difficult to resolve given the inchoate state of the record …"*) (emphasis added).

[159] Masterpiece Cakeshop v. Colo. Civ. Rts. Comm'n, 584 U.S. 617 (2018) (slip op. at 12).

Sotomayor's dissenting opinion deeply engages every element of this new paradigm.[160]

First, with respect to Recognition, the dissent acknowledges that the purpose of public accommodations laws is equal access to publicly available goods and services and equal dignity in the market.[161] The government, Justice Sotomayor acknowledges, has a compelling interest in "preventing the 'unique evils' caused by 'acts of invidious discrimination in the distribution of publicly available goods, services, and other advantages.'"[162] Given that compelling interest, the claims made by Ms. Smith to be able to discriminate in her business open to the public pale in comparison to the harm of discrimination. Indeed, as the Tenth Circuit recognized, Colorado had a compelling interest in eliminating discrimination and CADA was narrowly tailored to meet that interest.

Next, regarding Exposure, the dissenting opinion carefully investigates and unveils the bias in the majority's consideration of the legal quandary. The dissent discloses how the majority, by ruling for Ms. Smith, (a) tramples on the dignitarian, equality, and nondiscrimination rights of LGBTQIA+ persons; and (b) subordinates LGBTQIA+ interests to the religion embedded in the perceptual playbooks of those who are vocal and empowered, as not all religions condemn LGBTQIA+ identity and conduct.[163] The dissenting opinion, thus, brings to light the serious interests that were colliding.

Having uncovered and considered all the competing rights, the element of Deliberation is fully engaged. The dissent considers all sides: the legal and dignitarian interests of a protected class,[164] the compelling interest of the government in nondiscrimination,[165] and the interest of Ms. Smith to

160 *303 Creative*, 600 U.S. at 603.
161 *Id.* at 606.
162 *Id.* at 608 (citing Roberts v. U.S. Jaycees, 468 U.S. 609 at 624, 628 (1984)).
163 *Id.* at 616.
164 *Id.*
165 *Id.* at 609.

provide services in accordance with her conscience.[166] With all interests in full display the dissent proceeds to contemplate a just outcome.

In arriving at a just Solution, the dissenting opinion considers all the interests on the table. Reviewing the matters considered in its deliberation, the dissent notes that the case is about commerce, not pure speech. Having ascertained that the speech involved in the dispute is commercial—the speech is about the creation of a website for pay—the dissent considers the other interests at stake, namely, the statutory rights of LGBTQIA+ persons under CADA to be free from discrimination in places of public accommodations and the State's interest in enacting CADA to eradicate discrimination. Noting that the State has a compelling interest in ending discrimination and that CADA is narrowly tailored to effectuate the State's interest, the dissent would uphold the statute. The dissenters conclude that Ms. Smith is not entitled to discriminate or publish her desire to discriminate and that, consequently, she is not entitled to pure free speech protections.[167]

Applying the Awakening model—beyond the methodological analysis—where the dissent flourishes and the majority fails is in the consideration of the substantive Awakening elements. The majority paid lip service to dignitarian concerns and wholly failed to consider antisubordination, multidimensionality, or marginability. The majority simply focused on pure speech and dictated the First Amendment's superiority over nondiscrimination protections. It failed to consider the casualties of such a cavalier (and contrary to precedent) approach.

On the other hand, the dissent fully evaluated all the substantive elements. Specifically, Justice Sotomayor detailed the importance of the protection of dignitarian rights considering the country's history of oppressing "othered" groups, especially in the context of the public

[166] *Id.* at 620.
[167] *Id.* at 625.

accommodations law at issue.[168] Providing the history of such laws, the dissent wholly comprehends the significance of upholding the dignitarian interests of those who historically have been excluded, subordinated, or marginalized—in particular, the LGBTQIA+ community. The Awakened analysis recognizes the multidimensional aspects of exclusion in light of public accommodations laws; it details how communities marginalized on the basis of race, gender, sexuality, and even religion have often been sidelined from participating in the public sphere. Finally, the dissent exposes how the decision is marginabilizing; it unveils how the majority perpetuates the vulnerability and marginalization of those outside of the hierarchies created by heteronormative perceptual playbooks.

VI. CONCLUSION

An Awakened critical exploration of *303 Creative* reveals that the Court's myopic approach fails to offer any protection of rights to the non-normative as defined and designed by the dominant perceptual playbooks that have invented the existing status quo. Considering the mutually reinforcing Awakening and glocalized human rights analysis, it becomes patently clear that the *303 Creative* Majority aborted justice. Awakened glocalized hemispheric justice—as imagined by the Awakening the Law paradigm, and as effected by the dissenting opinion—is reinforced and buoyed by the Inter-American Convention as interpreted by the IACtHR.

Intentional Awakened justice requires the hearing and acknowledging of all voices as well as the protection of the rights of those who will be affected by a decision. An Awakened decision in *303 Creative*, if the goal were justice, would have arrived at a wholly different result—the outcome that the dissent proposed. Once a business owner chooses to enter the marketplace, they need to obey the law, in *303 Creative* public

[168] *See supra* text accompanying notes 22-28 (explaining that CADA specifically prohibits discrimination on the basis of sexual orientation and gender identity).

accommodation norms, and serve all those who come to their establishment without any discrimination. This was true with Ollie's BBQ,[169] it was true with Heart of Atlanta Motel,[170] it was true with Piggie Park,[171] and it should have been true with *303 Creative*.

[169] Katzenbach v. McClung, 379 U.S. 294 (1964) (based on public accommodations law, restaurant owner cannot refuse service to Black persons).
[170] Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (based on public accommodations law, motel owner could not exclude Black persons).
[171] Newman v. Piggie Park Enters., 390 U.S. 400 (1968) (public accommodations law include drive-in restaurants and owner cannot exclude Black persons).