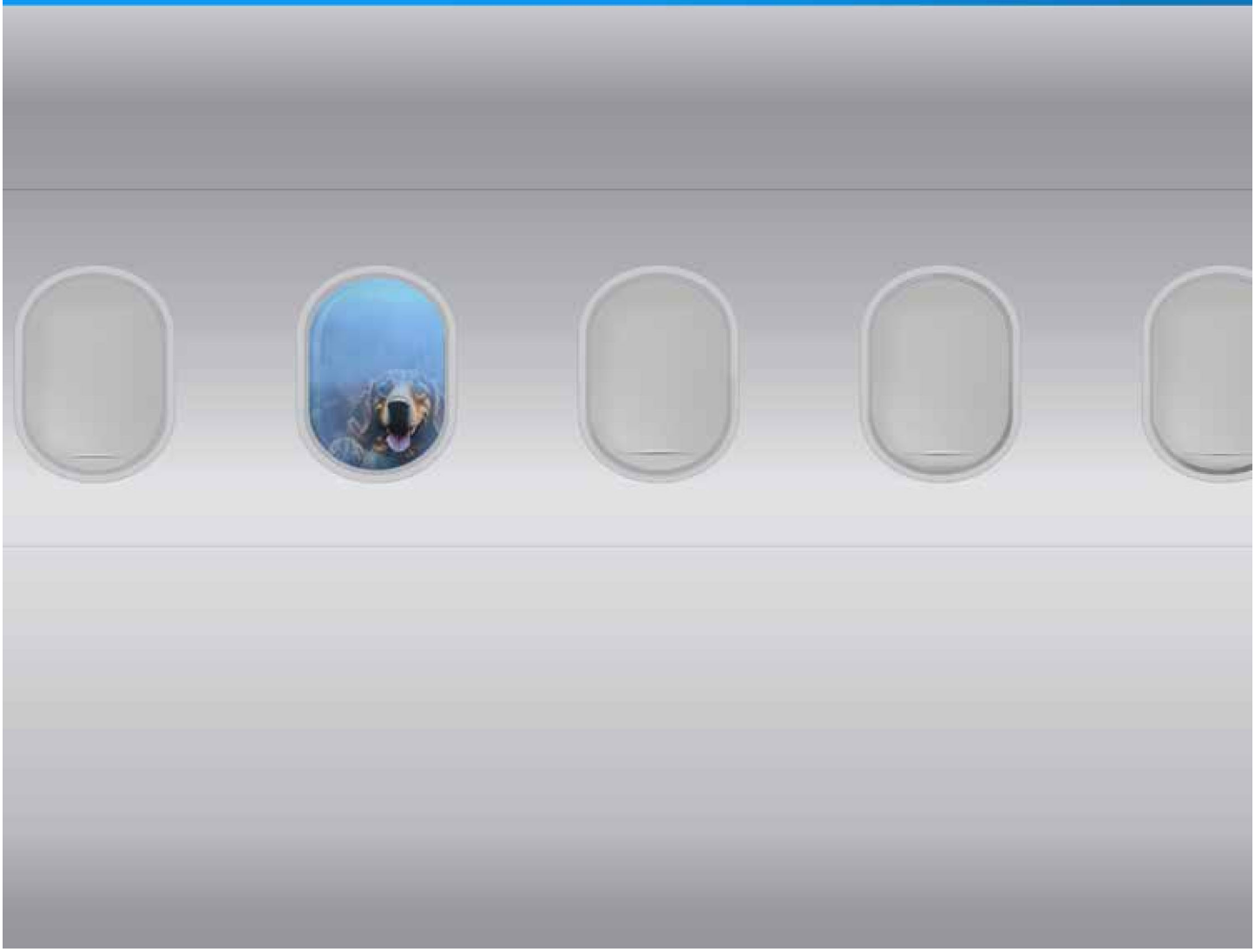
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## Flying With Fido: A Brief Survey of Federal Service Animal Law



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## THE PREROGATIVE TO UNSEAT: REMOVING COUNCILMEMBERS FROM COUNCIL COMMITTEES

*By: Stephen K. Postema, City Attorney Ret., Ann Arbor, Michigan and Jennifer A. Richards, Assistant City Attorney, Ann Arbor, Michigan*

Most city councilmembers comport themselves in a productive and cooperative manner. Occasionally, however, the city or county attorney will be called upon to evaluate the prospects for redressing unprofessional or unethical behavior by a councilmember. One such action may be to remove the member from a committee post. A thorough understanding of the rules and ramifications is required.

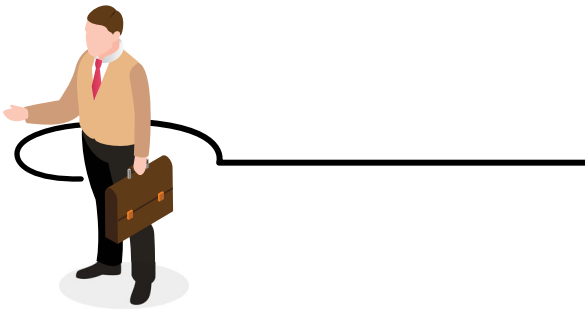
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## "WE'RE HIRING, WE JUST NEED YOUR SOCIAL MEDIA LOGINS AND PASSWORDS"

*By: Laura S. Burton, Police Attorney, Gastonia, North Carolina*

Checking a job applicant's social media activity can provide a wealth of information, potentially revealing troublesome behavior and helping to avoid future problems. But such an inquiry triggers statutory and even constitutional issues, and many jurisdictions prohibit searching through a job seeker's non-public online activity.

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# SUPREME COURT

*By:* MEGAN LUPTOWSKI,
*Assistant City Attorney,*
*Grand Rapids, Michigan*

## Revisiting the Intersection of Public Accommodations Law, the Freedom of Speech, and the Freedom of Religion

### INTRODUCTION

During its most recent Term, the United States Supreme Court had the opportunity to revisit issues it left open in 2018, due to a particularly peculiar set of facts in *Masterpiece Cakeshop Ltd, et al v. Colorado Civil Rights Commission et al*. In one of its last opinions of the 2022 Term, the Supreme Court held (6-3) in *303 Creative LLC et al v. Elenis et al* that the First Amendment prohibits Colorado, pursuant to the Colorado Anti-Discrimination Act, from forcing a website designer to create expressive designs speaking messages with which the designer disagrees based on her own religious beliefs. With this decision, the Court has made a major shift in public accommodations law in the name of staunchly defending the freedom of speech and implicitly the freedom of religion. This shift leaves states and local governments in a precarious position when deciding when to enforce their public accommodations laws.

**A. Background on Public Accommodations Laws.**

Laws guaranteeing every person the full and equal enjoyment of places of public accommodation without unjust discrimination are features of all levels of government.[1] As explained by a group of local governments and mayors who filed an amicus brief in support of the Colorado public accommodations law in *303 Creative*:

> These laws, which are features of cities, counties, and towns throughout the country, reflect a democratically determined commitment to equality and inclusion in the public sphere. They are informed by local experience and are designed to meet local needs. They are a crucial tool to ensure that all members of our communities—regardless of their religious beliefs, sexual orientation, or other characteristics—have the right to go to public establishments without worrying they will be turned away, given inferior service, or humiliated based on their identity.[2]

Such laws have been an important part of civil rights movements throughout our nation's history and have helped to fulfill the promise of our nation's founding—that all men are created equal.

Legal challenges to public accommodations laws and individuals seeking exemptions from them based on First Amendment rights are not new.[3] Justice Sotomayor's dissent in *303 Creative* gives a thorough history of challenges against public accommodations laws and civil rights in general in the U.S., so I will not go into too much detail here. Instead, I will highlight a few key examples. In *Heart of Atlanta Motel*, a motel owner attacked the constitutionality of Title II of the Civil Rights Act of 1964, which provides that "All 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. . . without discrimination or segregation on the ground of race, color, religion, or national origin."[4] The motel owner argued that requiring him to serve African Americans would deprive him of liberty or property without due process of law and take his property without just compensation.[5] The Court, as it had done in prior cases, "rejected the claim that the prohibition of racial discrimination in public accommodations interferes with personal liberty."[6] The Court would reject a similar challenge in *Newman v Piggie Park Enterprises*.[7] There, the owner of several eating establishments asserted that requiring him to "contribut[e]" to racial integration would violate his religious liberty. The Court found that challenge "patently frivolous."[8] In short, the Court has historically refused to recognize a right to discriminate in public accommodations.

History tends to repeat itself; as the LGBTQ community has made strides in securing the rights intended to be enjoyed by all citizens of the United States, they have been met with backlash just like other minorities have in the not-too-distant past. As public accommodations laws have been expanded to include more businesses and protect more people, like the LGBTQ community, concerns about how this rec-

ognition impacts the right of others have been raised. In 2015, the Supreme Court recognized the right to marry as a fundamental liberty that could not be denied to same-sex couples.[9] Justice Thomas, in dissent in that case, forebodingly stated that recognizing the right of same-sex couples to marry would inevitably lead to conflict between the rights of LGBTQ individuals and religious liberty "as individuals . . . are confronted with demands to participate in and endorse civil marriages between same-sex couples."[10] Thus, we reach the modern challenges to public accommodations laws in *Masterpiece Cakeshop* and *303 Creative*.

B. ***Masterpiece Cakeshop.***

In 2018, the Court considered the intersection of public accommodations law, the freedom of speech, and the freedom of religion in *Masterpiece Cakeshop*. The question presented was whether the application of Colorado's Anti-Discrimination Act to effectively compel a cake maker to design and make a cake that violates his sincerely held religious beliefs about same-sex marriage violates the Free Speech or Free Exercise Clauses of the First Amendment.[11]

There, a same-sex couple looking to order a cake for their wedding reception was denied service and told by the owner of a bakery that he would not create a cake for their wedding because of his religious opposition to same-sex marriage.[12] While the same-sex couple viewed this as a violation of Colorado's public accommodations law by a business open to the public selling goods and services, the baker argued his cakes were a form of expressive speech and that to require him to bake and decorate a cake in celebration of a same-sex wedding would violate his religious beliefs.[13]

The Court deftly sidestepped the stickier constitutional questions. To do so, the Court found the Colorado Civil Rights Commission had been expressly hostile to religion based on comments during the public hearings that the Court viewed as disparaging of the baker's religion.[14] The Court also highlighted the difference in treatment between that baker's case and other bakers who had objected to requests for cakes based on the messages they would convey. The baker who refused to bake a cake for a same-sex wedding was found to have violated the Colorado law, whereas the other bakers who refused to bake cakes with decorations that demeaned gay persons or gay marriage were found to have appropriately declined to create those messages.[15]

Avoiding the underlying major issues, the Court held (7-2) with Justice Kennedy writing for the majority, that "[w]hatever the confluence of speech and free exercise principles might be in some cases, the Colorado Civil Rights Commission's consideration of this case was inconsistent with the State's obligation of religious neutrality."[16] Thus, the Court did not determine whether baking a wedding cake is speech under the First Amendment, what the difference between status discrimination and message discrimination is, or whether religious beliefs can entitle someone to an exception to generally applicable public accommodations laws. *Masterpiece Cakeshop*, although presenting the possibility of substantial change, did not make waves in public accommodations laws.

C. ***303 Creative.***

Five years later, these same issues were back before a very different Court with a somewhat better vehicle, and an entirely different outcome. In *303 Creative*, website designer Lorie Smith, through her graphic design business, 303 Creative LLC, sought an injunction against the State of Colorado to prevent enforcement of the Colorado Anti-Discrimination Act against her.[17] Ms. Smith wanted to expand her business to the creation of wedding websites. However, she worried that if she refused to create wedding websites for same-sex couples based on her religious beliefs, she would be penalized under Colorado law.[18] The Colorado Anti-Discrimination Act—the same law at issue in *Masterpiece Cakeshop*—prohibits all "public accommodations" from denying "the full and equal enjoyment" of their goods and services to any customer based on race, creed, disability, sexual orientation, or other statutorily enumerated trait.[19]

While the language of the Colorado Anti-Discrimination Act has not significantly changed since the Court decided *Masterpiece Cakeshop*, the composition of the Court has. Since the Court's decision in *Masterpiece Cakeshop*, three new justices have been appointed to the United States Supreme Court: Justice Kavanaugh, Justice Barrett, and Justice Jackson. Conversely, the Court has lost both Justice Kennedy (who wrote the majority opinions in *Obergefell v. Hodges* and *Masterpiece Cakeshop*, and is often touted for his legacy of being a voice for LGBTQ rights on the Court) and Justice Ginsberg (who worked at the ACLU Women's Rights Project prior to joining the Court and dissented in *Masterpiece Cakeshop*). As Justice Sotomayor has noted in some of her recent dissents, "What a difference five years makes."[20]

The majority opinion in *303 Creative*, written by Justice Gorsuch, holds that the First Amendment prohibits Colorado, pursuant to the Colorado Anti-Discrimination Act, from forcing a website designer to create expressive designs speaking messages with which the designer disagrees based on her own religious beliefs.[21] Although recognizing that public accommodations laws "vindicate the deprivation of personal dignity that surely accompanies denials of equal access to public establishments", the majority finds that "public accommodations statutes can sweep too broadly when deployed to compel speech."[22] Where *Masterpiece Cakeshop* left room to dispute whether baking and decorating a wedding cake was speech, here there is no wiggle room. The majority focuses on the stipulation of the parties that Ms. Smith's wedding websites "will be expressive in nature, using text, graphics, and in some cases videos to celebrate and promote the couple's wedding and unique love story."[23] Thus, the Court concludes that by attempting to compel Ms. Smith to create a wedding website for same-sex couples, "Colorado seeks to force an individual to speak in ways that align with its views but defy her conscience about a matter of major significance."[24] The case involves what the majority calls "pure speech," and therefore the burdens on speech cannot be viewed as incidental. The Court asserts that this aligns with prior cases such as *Hurley v. Irish-American Gay, Lesbian*

*Continued on page 32*



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**Public Accommodations** *cont'd from page 31*

*and Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995), *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), and *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943). The Court in *303 Creative* does not broadly strike down public accommodations laws. Rather, it stated, "When a state public accommodations law and the Constitution collide, there can be no question which must prevail."[25]

Justice Sotomayor, who joined the dissent in *Masterpiece Cakeshop*, now writes the dissent in *303 Creative* joined by Justice Kagan and Justice Jackson. Unlike the focus on the freedom of speech in the majority, the dissent's focus is on public accommodations law. She discusses the two core purposes of public accommodations law: to ensure equal access and equal dignity. Illustrating the importance of equal dignity, she cites to the concurring opinion of Justice Goldberg in *Heart of Atlanta Motel*:

> 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, civility, courtesy, and morality he will be denied the right to enjoy equal treatment.[26]

To the dissent, the Colorado Anti-Discrimination Act's Accommodation Clause is a valid regulation of conduct, not speech;[27] this seems to be the critical point of contention between the majority and the dissent. According to the dissent, "it is well settled that a public accommodations law like the Accommodation Clause does not 'target speech or discriminate on the basis of its content.'"[28] When a business chooses to open itself up to the public, it assumes a duty to serve the public without unjust discrimination.[29] This reading of the Court's precedents did not carry the day, and so the dissent notes: "Today, 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."[30]

**D. Conclusion and Implications for Local Governments.**

Given that so many local governments and states have public accommodations laws, there will certainly be litigation and questions going forward following the Court's decision in *303 Creative*. On the freedom of speech front, what can be considered "expressive" enough to warrant First Amendment protections and entitle businesses to an exemption from public accommodations law will no doubt engender creative arguments. Local governments will have to grapple with fact intensive assessments when making enforcement decisions. The Court's decision to view the Colorado law as an attempt to compel speech, rather than an attempt to regulate conduct, may have implications outside of the public accommodations context. As the majority opinion emphasized the Freedom of Speech, there is also still a question regarding how religious liberty interacts with public accommodations laws. While underlying *303 Creative* was the idea that Ms. Smith did not want to convey messages in support of same-sex weddings because it went against her belief that marriage should be reserved to unions between one man and one woman, religious liberty does not appear to have factored into the Court's decision. As often seems to be the case, the Court's decision may have upended what seemed to be a fairly settled area of law and left us with more questions than answers.

## Notes

1. *See*, e.g., Allentown, Pa., Code § 27-6 (2022); Austin, Tex., Code of Ordinances § 50201 *et seq*. (2022); Brookhaven, Ga., Code of Ordinances § 15-595 (2022); Chi., Ill., Mun. Code § 2-160-070 (2022); Driggs, Idaho, Code of Ordinances § 5-5-3.B (2022); Iowa City, Iowa, Code of Ordinances § 2-3-2 (2022); Ketchikan, Alaska, Mun. Code § 9.08.020 (2022); L.A., Cal., Mun. Code § 51.03.A (2022); Omaha, Neb., Code of Ordinances § 13-84 (2022); N.Y.C., N.Y., Admin. Code § 8-107.4 (2022); S.F., Cal., Police Code § 3305 (2022); Shreveport, La., Code of Ordinances § 39-2 (2022); South Bend, Ind., Code of Ordinances § 2-127.1(a) (2021); Grand Rapids, Mich., Code of Ordinances § 176-9.960 (2022). Traverse City, Mich., Code of Ordinances § 605.04 (2022); Tucson, Ariz., Code of Ordinances § 17-12(h) (2022); Whitefish, Mont., City Code § 1-10- 4 (2022).
2. Brief of Local Governments and Mayors as Amicus Curiae, p. 3, 303 Creative LLC, et al v Aubrey Elenis, et al. __ U.S. ___ (2023).
3. *See e.g.*, Heart of Atlanta Motel, Inc. v United States, 379 U.S. 241 (1964); Katzenback v McClung, 379 U.S. 294 (1964); Newman v Piggie Park Enterprises, Inc., 390 U.S. 400 (1968) (*per curiam*); Roberts v United States Jaycees, 468 U.S. 609 (1984); Hishon v King & Spalding, 467 U.S. 69 (1984).
4. 42 U.S.C. § 2000a
5. Heart of Atlanta Motel, 379 U.S. at 244
6. *Id.* at 260-61 (citing District of Columbia v. John R. Thompson Co., 346 U.S. 100 (1953).
7. 390 U.S. 400 (1968) (*per curiam*).
8. *Id.*
9. Obergefell v. Hodges, 576 U.S. 644 (2015).
10. *Id.* at 734 (Thomas, J., dissenting); see also *Masterpiece Cakeshop*, 584 U.S. ___; 138 S.Ct. 1719 (2018) (Thomas, J., concurring).
11. *Masterpiece Cakeshop,* 584 U.S. ___; 138 S. Ct. 1719, 1720 (2018).
12. *Id.* at 1724.
13. *Id.* at 1725-26.
14. *Id.* at 1729-30.
15. *Id.* at 1728.
16. *Id.* at 1723.
17. *303 Creative*, 600 U.S. ___ (2023) (slip op., at 3).
18. *Id.* at 2.
19. Colo. Rev. Stat. §24–34–601(2)(a).
20. Carson v Makin, 593 U.S. ___; 142 S.Ct. 1987 (2022) (Sotomayor, J., dissenting); *303 Creative*, 593 U.S. ___ (2023) (Sotomayor, J., dissenting).
21. *303 Creative*, 600 U.S. ___ (2023) (slip op., at 2).
22. *Id.* at 12-14 (citing *Heart of Atlanta Motel*, 379 U.S. at 250.)
23. *Id.* at 2.
24. *Id.* at 25.
25. *Id.* at 14.
26. *Id.* at 5 (Sotomayor, J., dissenting).
27. *Id.* at 26 (Sotomayor, J., dissenting).
28. *Id.* (Sotomayor, J., dissenting) (citing Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557, 572 (1968)).
29. *Id.* at 7 (Sotomayor, J., dissenting) (citing J. Singer, No Right To Exclude: Public Accommodations and Private Property, 90 Nw. U. L. Rev. 1283, 1298 (1996) (Singer)).
30. *Id.* at 1 (Sotomayor, J., dissenting).