THE SUCCESS OF PRE-ENFORCEMENT CHALLENGES TO ANTIDISCRIMINATION LAWS

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Formally, judicial analysis of a challenged statute's validity should be consistent, regardless of the challenge's pre- or post-enforcement posture. A post-enforcement posture arises when an aggrieved party defensively challenges a purportedly unconstitutional statute being enforced against them. Alternatively, a pre-enforcement posture arises when an impacted party strikes first, attacking the statute by asserting a credible threat that the law will be enforced against them in the future. Either way, judicial evaluation of a statute's validity should turn on its content and effect—not on whether it was challenged before or after enforcement.

This Article challenges that assumption, arguing that pre-enforcement challengers enjoy significant strategic advantages in court. To be sure, offensive, pre-enforcement challengers must establish that their suit presents a genuine case or controversy and convince decision-makers that they face a real harm. But on the other hand, attorneys planning pre-enforcement challenges often enjoy the opportunity to select their clients, control their suit's timing and forum, and shop for judges. And when challenging laws that protect beneficiaries from harms such as discrimination, pre-enforcement challengers likely benefit from the absence of identified victims in speculative lawsuits.

After identifying these potential advantages, this Article analyzes a set of factually similar challenges brought by wedding vendors against public accommodations laws that forbid discrimination against LGBTQ+ customers based on their sexual orientation. It explains that pre-enforcement challenges—including speculative cases brought by plaintiff businesses that had never received requests from LGBTQ+ customers—were consistently more

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successful than post-enforcement challenges arising from proceedings against defendant businesses that denied services to LGBTQ+ customers. Finally, this Article explores the implications of pre-enforcement advantages for standing doctrine, litigation strategy, and the proper role of courts in a democratic society.

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INTRODUCTION

> "This Court cannot be umpire to debates concerning harmless, empty shadows."
>
> Poe v. Ullman[1]

In the wake of the Supreme Court's landmark decision in *Obergefell v. Hodges*, that the fundamental right to marry applies without regard to the couple's sex,[2] courts across the country were asked to decide actual and potential disputes between same-sex couples and religious wedding vendors.[3] In many jurisdictions, vendors whose religious beliefs are in opposition to the weddings of same-sex couples are subject to state and local public accommodations laws prohibiting discrimination against LGBTQ+[4] customers.[5] These conflicting spiritual and secular obligations set the stage for complex free speech and free exercise litigation.[6]

The Supreme Court initially faced the issue in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*.[7] Justice Anthony Kennedy, who had authored the *Obergefell* majority opinion, wrote again for the Court and acknowledged both a baker's right to sincere religious beliefs about marriage and the rights of LGBTQ+ customers to seek goods and services without being subjected to "indignities."[8]

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1. 367 U.S. 497, 508 (1961).
2. 576 U.S. 644 (2015). *See also* Kenji Yoshino, *A New Birth of Freedom?:* Obergefell v. Hodges, 129 HARV. L. REV. 147, 147–48 (2015) (describing long-term impact of the *Obergefell* decision).
3. *See infra* notes 210–216 and accompanying text; *see also* Nelson Tebbe, *Religion and Marriage Equality Statutes*, 9 HARV. L. & POL'Y REV. 25, 25–27 (2015) (critically evaluating application of an exemption regime to marriage equality).
4. The Author and journal have opted for inclusive terminology in this piece. Not all public accommodations statutes necessarily create formal protections for all communities encompassed within inclusive terms such as LGBTQ+. *See infra* at 184–193.
5. *See, e.g.*, Caroline Mala Corbin, *A Free Speech Tale of Two County Clerk Refusals*, 78 OHIO ST. L.J. 819, 820–21 (2017) (noting challenges by business owners to antidiscrimination laws).
6. *See, e.g.*, Kathleen A. Brady, *Religious Freedom and the Common Good*, 50 LOY. U. CHI. L.J. 137, 139–42 (2018) (noting complex implications of conflicts regarding religious accommodations in the antidiscrimination context).
7. 138 S. Ct. 1719 (2018).
8. *Id.* at 1732; *see also* Elizabeth Sepper, *Free Speech and the "Unique Evils" of Public Accommodations Discrimination*, 2020 U. CHI. LEGAL F. 273, 280–86 (2020) (describing dignity interests protected by public accommodations laws).

Avoiding the core dispute between these competing visions of liberty,[9] the Court held that the baker, who had denied services to a same-sex couple planning their wedding, had not received fair treatment from Colorado's civil rights enforcement commission, reserving "further elaboration" of the underlying legal questions for another day.[10]

That day came after Justice Kennedy, a strong and consistent supporter of marriage equality, left the Court.[11] A new majority prioritized vendors' First Amendment rights in *303 Creative LLC v. Elenis*, another Colorado case brought by a website designer who "worrie[d] that, if she enters the wedding website business, the State will force her to convey messages inconsistent with her belief that marriage should be reserved to unions between one man and one woman."[12] Justice Neil Gorsuch, writing for a six-Justice majority, sided with the plaintiff and characterized the Colorado Anti-Discrimination Act[13] as potentially forcing "someone who provides her own expressive services to abandon her conscience and speak [the state's] preferred message instead."[14]

The merits of the *303 Creative* decision will almost certainly prove divisive in their own right.[15] But a significant feature of the

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9. *See* Austin Rogers, *A Masterpiece of Simplicity: Toward A Yoderian Free Exercise Framework for Wedding-Vendor Cases*, 103 MARQ. L. REV. 163, 167 (2019) ("In an area of jurisprudence already awash in words, the *Masterpiece* opinion added little to the conversation."); Brendan Beery, *Prophylactic Free Exercise: The First Amendment and Religion in A Post-Kennedy World*, 82 ALB. L. REV. 121, 121–22 (2019) ("It seems safe to say . . . that Justice Kennedy *caused* the result (or non-result, as it were) in the case."); *Chelsey Nelson Photography, LLC v. Louisville/Jefferson Cnty. Metro Gov't*, 624 F. Supp. 3d 761, 798 (W.D. Ky. 2022) (describing *Masterpiece* as an "unusual . . . fractured, narrow, record-specific, eye-of-the-beholder" decision).

10. *Masterpiece Cakeshop*, 138 S. Ct. at 1732*; see also* Klint W. Alexander, *The* Masterpiece Cakeshop *Decision and the Clash Between Nondiscrimination and Religious Freedom*, 71 OKLA. L. REV. 1069, 1107 (2019) (concluding that the "highly anticipated" *Masterpiece* case "dodged the question").

11. *See* Justin O'Neill, *The Queer Case of the LGBT Movement*, 41 U. HAW. L. REV. 27, 69 (2018); Russell K. Robinson, *Unequal Protection*, 68 STAN. L. REV. 151, 226 (2016) ("[T]he history of marriage equality litigation in the United States was shaped to its core by the presence of Anthony Kennedy."); Note, *Equal Dignity—Heeding Its Call*, 132 HARV. L. REV. 1323, 1323 (2019) (explaining Justice Kennedy's judicial attitude toward LGBTQ+ rights).

12. 600 U.S. 570, 580 (2023).

13. Colo. Rev. Stat. § 24-34-601 (2021).

14. *303 Creative*, 600 U.S. at 597.

15. *Compare* Meg Penrose, *The Public Accommodations Dilemma—Whose Right Prevails*, 13 CONLAWNOW 39, 39–40 (2022) (comparing religious liberty objections to LGBTQ+ rights laws with religious liberty objections to racial

case was its status as a speculative pre-enforcement action. This status attracted attention and controversy after media reports questioned the integrity of earlier filings by the plaintiff's attorneys.[16] *New Republic* writer Melissa Gira Grant investigated a district court filing attesting that the plaintiff received an inquiry about wedding content by a same-sex couple whose names and contact information were listed in district court documents.[17] According to Grant's reporting, upon contacting one of these men, she was told that he had never made any inquiries to the plaintiff's business, he did not identify as gay, and he had long been married to a woman.[18]

Although Grant's reporting added to the firestorm surrounding an already contentious litigation,[19] her allegations were formally irrelevant to the merits of the case. As a pre-enforcement

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desegregation), *and* Laura S. Underkuffler, *Plessy Redux: Why the Human Rights of Gay, Lesbian, and Transgender Citizens Lost to Religious Claims*, 71 EMORY L. J. 1611, 1631 (2022) (same), *with* Emilie Kao, 303 Creative LLC v. Elenis*: Can Stand-Alone Dignitary Harm Create a Right to Endorsement and Duty to Endorse?*, 2023 HARV. J. L. & PUB. POL'Y PER CURIAM 5, 6 (2023) (rejecting comparison to racial segregation and characterizing application of public accommodations laws in this setting as a "misuse of state power").

16. *See* Melissa Gira Grant, *The Mysterious Case of the Fake Gay Marriage Website, the Real Straight Man, and the Supreme Court*, THE NEW REPUBLIC (June 29, 2023), https://newrepublic.com/article/173987/mysterious-case-fake-gay-marriage-website-real-straight-man-supreme-court [https://perma.cc/XFE2-M3H6] (investigating validity of filings in the *303 Creative* case) [hereinafter Grant, *The Mysterious Case*]; Melissa Gira Grant, *The Christian Right is Making Up Wedding Websites to Attack LGBTQ People*, THE NEW REPUBLIC (June 28, 2023), https://newrepublic.com/article/173956/christian-right-making-wedding-websites-attack-lgbtq-people [https://perma.cc/UWA2-NVY8] (same).

17. Grant, *The Mysterious Case*, *supra* note 16.

18. *Id.*

19. The following sources report on and discuss the implications of Grant's reporting. *See, e.g.*, Areeba Shah, *Legal Scholars: SCOTUS Can't Be Forced to Reconsider "Made-Up" Case—but Lawyers Can Be Punished*, SALON (July 3, 2023), https://www.salon.com/2023/07/03/legal-scholars-scotus-cant-be-forced-to-reconsider-made-up-case--but-lawyers-can-be-punished [https://perma.cc/E2XC-6NDC]; Kristen Waggoner & Erin Hawley, *The Smearing of Lorie Smith*, WALL ST. J. (July 11, 2023), https://www.wsj.com/articles/the-smearing-of-lorie-smith-new-republic-free-speech-fake-case-pre-enforcement-2b1f362c (on file with the *Columbia Human Rights Law Review*); Ed Whelan, *Foolish Arguments Against Standing in 303 Creative*, NAT'L REV. (July 3, 2023), https://www.nationalreview.com/bench-memos/foolish-arguments-against-standing-in-303-creative-part-1 https://perma.cc/8ADA-YPET]; Emily Mae Czachor, *Man Cited in Supreme Court Case on Same-Sex Wedding Website Says He Never Contacted Designer. But Does It Matter?*, CBS NEWS (July 7, 2023), https://www.cbsnews.com/news/supreme-court-303-creative-case-stewart-wedding-website-lgbtq-free-speech [https://perma.cc/43DQ-KHGQ].

challenge, standing is based on a "credible threat" of future enforcement rather than immediate legal jeopardy arising from any customer's request for the plaintiff's services.[20] Nevertheless, the allegations highlighted the highly speculative nature of the plaintiff's challenge—an issue underscored by Justice Sonia Sotomayor, whose dissent emphasized three times that the challenger had never sold a wedding website to anyone when she filed her suit.[21]

Moreover, the speculative nature of this case was no exception. For example, reviewing a nearly identical suit brought by an online videographer—who had created only two wedding videos over the span of four years—the U.S. District Court for the District of Minnesota expressed sympathy for government attorneys "compelled to litigate what has likely been a smoke and mirrors case or controversy from the beginning, likely conjured up by Plaintiffs to establish binding First Amendment precedent rather than to allow them to craft wedding videos . . ."[22]

The recurrence of largely speculative pre-enforcement challenges to public accommodations laws, brought by online vendors who rarely created wedding content and seldom—if ever—received requests from LGBTQ+ customers, raises important questions about standing doctrine and litigation practice. In recent years, many businesses have genuinely denied services to LGBTQ+ persons protected by public accommodations laws and then faced likely or actual enforcement proceedings, creating analogous but far more tangible cases and controversies than the one decided in *303 Creative*.[23] Professor Netta Barak-Corren has demonstrated that discrimination against same-sex couples has increased since

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20. 303 Creative LLC v. Elenis, 600 U.S. 570, 580 (2023)*; see also* 303 Creative LLC v. Elenis, 6 F.4th 1160, 1172 (10th Cir. 2021), *rev'd*, 600 U.S. 570 (2023) (discussing plaintiff's standing).

21. *See 303 Creative LLC*, 600 U.S. at, 624, 633 n.11 (Sotomayor, J., dissenting) (noting that Petitioner "has never sold a wedding website to any customer" and that the record contains only a "mockup website").

22. Telescope Media Grp. v. Lucero, Civil No. 16-4094 (JRT/LIB), 2021 WL 2525412, at *3 (D. Minn. Apr. 21, 2021). Yet another similar case was brought in the Eastern District of Virginia by a photographer who "has never been approached by anyone seeking his photography for a same-sex wedding." Updegrove v. Herring, No. 1:20-CV-1141, 2021 WL 1206805, at *3 (E.D. Va. Mar. 30, 2021).

23. *See e.g.*, *Masterpiece Cakeshop*, 138 S. Ct. 1719, 1723 (2018); Lexington-Fayette Urb. Cnty. Hum. Rts. Comm'n v. Hands On Originals, 592 S.W.3d 291 (Ky. 2019); Cervelli v. Aloha Bed & Breakfast, 415 P.3d 919 (Haw. Ct. App. 2018).

Masterpiece,[24] and this increase likely presented even more viable opportunities for post-enforcement challenges.

Why, then, did interest groups seeking to challenge public accommodations laws[25] spend significant time and effort developing speculative lawsuits, where they faced real risks of losing (and sometimes did lose) on standing and ripeness grounds?[26] One possibility is that there are perceived or real advantages to pre-enforcement challenges as compared to analogous post-enforcement cases.

This Article contributes to earlier academic literature, which posited that pre-enforcement challenges may afford lawyers more opportunities to strategically control aspects of their cases,[27] by examining potential strategic advantages in more detail. These advantages could include greater ability to engage in advantageous forum shopping and judge shopping. Moreover, the absence of an

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24. Netta Barak-Corren, *A License to Discriminate? The Market Response to Masterpiece Cakeshop*, 56 HARV. C.R.-C.L. L. REV. 315, 345 (2021) [hereinafter Barak-Corren, *A License to Discriminate?*]; Netta Barak-Corren, *Religious Exemptions Increase Discrimination Toward Same-Sex Couples: Evidence from Masterpiece Cakeshop*, 50 J. LEGAL STUD. 75, 94–104 (2021) (demonstrating increases in discrimination against LGBTQ+ community following the *Masterpiece* decision) [hereinafter Barak-Corren, *Religious Exemptions Increase Discrimination Toward Same-Sex Couples*].

25. *303 Creative* and other wedding vendor cases were litigated by a prominent Christian legal organization, Alliance Defending Freedom ("ADF"). *See* Hannah Bailey, *A New Minority in the Courts: How the Rhetoric of Christian Victimhood and the Supreme Court Are Transforming the Free Exercise Clause*, 73 SYRACUSE L. REV. 199, 239 (2023). The organization is controversial among some scholars, in part because of its consistent opposition to LGBTQ rights. *See* Kyle C. Velte, *The Nineteenth Amendment as a Generative Tool for Defeating LGBT Religious Exemptions*, 105 MINN. L. REV. 2659, 2689 n.157 (2021) ("The ADF, a prominent legal advocacy group for the Religious Right, was founded to resist LGBT civil rights."); *see also* Michael A. Olivas, *Who Gets to Control Civil Rights Case Management? An Essay on Purposive Organizations and Litigation Agenda-Building*, 2015 MICH. ST. L. REV. 1617, 1622–23 (2015) (describing controversies around ADF); Berta Esperanza Hernández-Truyol, *Hope, Dignity, and the Limits of Democracy*, 10 NE. U. L. REV. 654, 686 (2018) (describing ADF's anti-LGBT activism). Despite these criticisms, the organization is well regarded by many conservative judges. *See, e.g.*, *Carter v. Transport Workers Union of Am., Local 556*, No. 17-cv-2278, 2023 WL 5021787, at *2 (N.D. Tex. Aug. 7, 2023) (ordering three lawyers employed at defendant Southwest Airlines to attend ADF classes on religious freedom).

26. *See, e.g.*, *Updegrove*, 2021 WL 1206805, at *5 (dismissing challenge to public accommodations law because the law had "never been enforced against Plaintiff or any other person").

27. *See infra* notes 111–114 and accompanying text (reviewing literature).

identified victim or a personified beneficiary of the challenged statute might benefit the challenger by abstracting the law's positive aspects. The advantages of a challenge's procedural posture, and the implications for the legal system, have yet to be fully explored.[28]

After reviewing jurisprudence on pre-enforcement challenges and identifying these structural factors, this Article then analyzes differences between pre- and post-enforcement actions across wedding vendor lawsuits against antidiscrimination laws, observing that pre-enforcement actions were generally more successful than post-enforcement actions. It then discusses whether any advantages for pre-enforcement challengers are socially desirable. Its claims are both descriptive (in identifying advantages for pre-enforcement challengers) and normative (in arguing that speculative pre-enforcement cases, like *303 Creative*, tip the scales against policymaking by the political branches and thus facilitate premature judicial interference).

Specifically, this Article argues that pre-enforcement challenges provide two significant advantages to litigants. First, they provide greater opportunities for those planning the litigation to strategically control parties, timing, venue, and, to some extent, judges. Advantages arising from forum shopping likely have the most impact when parties can more reliably predict how judges will rule in advance and choose venues accordingly. Second, a post-enforcement challenge arising from a concrete dispute will more clearly highlight the benefit the challenged provision provides to its intended beneficiaries. Challengers may be advantaged when their case can be presented more abstractly, without tangible examples of beneficiaries who are protected by the statute being attacked. Thus, in addition to forum shopping, pre-enforcement litigants may engage in "client shopping," selecting challengers whose conduct is abstract enough that it would be less likely to alienate decisionmakers.

These possible advantages may have played a role in the wedding vendor context. There, speculative actions not involving imminent or ongoing enforcement of challenged public accommodations laws were consistently more successful than similar actions where the challenger faced ongoing legal jeopardy. Although

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28. *Cf.* Michael Risch, *Procedural Posture and Social Choice*, 107 MINN. L. REV. 1621, 1622 (2023) ("[P]ractitioners' vague sense that [procedural] posture matters provides little theory to aid an analytical understanding of the system. We know posture is important but, except for occasional anecdotes about cases going awry, we do not know how or why.")

these results are arguably susceptible to multiple potential explanations, they are consistent with this Article's analysis that pre-enforcement challenges offer tangible advantages relative to post-enforcement attacks on comparable statutes.

This Article concludes by discussing the broader implications of these findings. Pre-enforcement challenges are appropriate and serve laudable goals in many areas. Indeed, they are absolutely critical when an unconstitutional statute authorizes harsh punishment, thereby deterring any and all potential challengers from risking post-enforcement review. However, when potential enforcement against litigating parties is truly hypothetical and speculative, courts may facilitate undesirable strategic gamesmanship by allowing them to proceed, rather than waiting for the development of clearer disputes. They also allow traumatic issues like discrimination to be presented formalistically, without the presence of beneficiaries to demonstrate the protective aspects of a challenged law. Formally, current doctrine already provides for the dismissal of overly speculative pre-enforcement challenges, but in practice, application of this doctrine appears uneven.

I. "I'D RATHER SEE US KNOCK THIS OUT": THE RISE OF PRE-ENFORCEMENT CHALLENGES—AND THEIR LIMITATIONS

A. The Evolution of a Doctrine

Federal courts are constitutionally empowered to decide cases or controversies, not "abstract questions."[29] Accordingly, a holder of a right cannot prevail on a "naked" contention that the enactment of a purportedly unconstitutional law violates that right.[30] Instead, some governmental action beyond the enactment of an improper law—such as an attempt to enforce it—must injure the right-holder and thereby

29. U.S. CONST. art. III, § 2, cl. 1; *see* Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 297 (1979); Pedreira v. Sunrise Children's Servs., Inc., 79 F.4th 741, 755 (6th Cir. 2023) (Bush, J., concurring) (discussing implications of Article III's "case or controversy" requirement).

30. *See* Massachusetts v. Mellon, 262 U.S. 447, 483 (1923) (dismissing attack on purportedly unconstitutional law where challenger had not been injured); Biden v. Nebraska, 143 S. Ct. 2355, 2385 (Kagan, J., dissenting) ("We do not allow plaintiffs to bring suit just because they oppose a policy.").

create a tangible case or controversy.[31] Although there is some intuitive appeal to the idea of recognizing an injury immediately upon the enactment of an unconstitutional law,[32] the requirement that a right-holder be more personally and directly impacted by a law before challenging it constrains the judiciary to its proper role in a democracy, leaving pure policy decisions to the political branches.[33]

Naturally, targets of governmental enforcement may defensively challenge the purportedly unconstitutional provision authorizing ongoing proceedings against them.[34] In early cases, post-

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31. There are, naturally, partial exceptions arising in particular fields of law. For example, the Court has recognized a limited avenue through which mere status as a taxpayer provides standing to challenge laws that violate the Establishment Clause. *See* Flast v. Cohen, 392 U.S. 83, 105–06 (1968). The *Flast* exception has been criticized and rarely invoked in the years since it was recognized. *See, e.g.*, Hein v. Freedom From Religion Found., Inc., 551 U.S. 587, 618 (2007) (Scalia, J., concurring) (asserting that *Flast* is "wholly irreconcilable with . . . Article III restrictions on federal-court jurisdiction"). Its continued viability is open to question. *Cf. id.* And in the context of First Amendment protected speech, a substantially overbroad statute that deters some people from engaging in protected speech may be challenged by litigants even without evidence that those litigants' *own* speech has been infringed. *See* United States v. Williams, 553 U.S. 285, 292–93 (2008) (describing overbreadth doctrine and its limitations); Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973) (describing overbreadth doctrine). The overbreadth doctrine is considered "strong medicine" to be employed only "as a last resort." New York v. Ferber, 458 U.S. 747, 769 (1982); *see also* Jennifer M. Kinsley, *Chill*, 48 LOY. U. CHI. L.J. 253, 283–84 (2016) (discussing and criticizing free-speech decisions where standing is based on hypothetical expression not before the court).

32. *See* Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 STAN. L. REV. 1209, 1224 (2010) (discussing implications of theory that the Constitution is violated upon the enactment of an unconstitutional law); *see also* Howard M. Wasserman, *Zombie Laws*, 25 LEWIS & CLARK L. REV. 1047, 1088 (2022) (discussing problems when "zombie laws" that are indisputably unconstitutional remain on the books for lack of an appropriate challenge).

33. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 116 (1st. ed. 1962) (linking injury requirement to theories of democratic legitimacy); *see also* Christian R. Burset, *Advisory Opinions and the Problem of Legal Authority*, 74 VAND. L. REV. 621, 621 (2021) (same); *Biden v. Nebraska*, 143 S. Ct. at 2385 (Kagan, J., dissenting) (same)*; but see* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 229 (1974) (Douglas, J., dissenting) (criticizing standing doctrine on the ground that it "protects the status quo by reducing the challenges that may be made to it and to its institutions").

34. Whole Woman's Health v. Jackson, 595 U.S. 30, 36 n.1 (2021) ("whatever a state statute may or may not say, applicable federal constitutional defenses always stand fully available when properly asserted"); John Harrison, *Jurisdiction, Congressional Power, and Constitutional Remedies*, 86 GEO. L.J.

enforcement, defensive challenges were the usual means by which interest groups and litigants sought judicial rulings that would strike down laws they opposed.[35] Thus, challengers might wait to be charged for violating a rule—or even engineer a test case that would trigger enforcement.

For example, the famous 1925 Scopes "Monkey Trial," a defensive challenge to a novel Tennessee law forbidding the teaching of evolution in public schools, was engineered by the relatively young American Civil Liberties Union.[36] To attack the law, the organization recruited a willing teacher who agreed to be arrested for teaching evolution.[37] Newspaper ads purchased by the ACLU promised a "friendly test case" that would not cost "a teacher his or her job."[38] John Scopes and his team of star attorneys challenged the law by risking his conviction—though fortunately for the young teacher, he was fined only one hundred dollars, which was ultimately thrown out on a technicality.[39]

An alternative strategy is to seek pre-enforcement relief, usually in the form of an action seeking a declaratory judgment or an injunction against a defendant obligated to enforce the law (and unprotected by sovereign immunity).[40] Though offensive challenges were advanced in some earlier cases,[41] they grew in prominence in

2513, 2516–17 (1998) ("When the executive brought an enforcement action against a private person the private person could interpose any factual or legal defense, including one based on the Constitution."); Casey N. Epstein, *Standing Up to the Treasury: Applying the Procedural Standing Analysis to Post-*Mayo*, Pre-Enforcement APA Treasury Challenges*, 105 MINN. L. REV. 1947, 1949 n.15 (2021) (describing standing as a "non-issue" for "*post*-enforcement challenges").

35. *See Whole Woman's Health*, 142 S. Ct. at 538 (noting that "pre-enforcement review under the statutory regime the petitioners invoke, 42 U.S.C. § 1983, was not prominent until the mid-20th century").

36. Scopes v. State, 289 S.W. 363 (Tenn. 1927); *see, e.g.*, ANDREW E. KERSTEN, CLARENCE DARROW: AMERICAN ICONOCLAST 207 (2011) (discussing recruitment of challenger who would agree to violate statute).

37. KERSTEN, *supra* note 36, at 207.

38. EDWARD J. LARSON, SUMMER FOR THE GODS: THE SCOPES TRIAL AND AMERICA'S CONTINUING DEBATE OVER SCIENCE AND RELIGION 83 (1997).

39. *See* Scopes v. State, 289 S.W. 363 (Tenn. 1927) (directing entry of nolle prosequi on ground that fine was determined by judge rather than jury); *see also* KERSTEN, *supra* note 36, at 207–11 (same).

40. *See Ex Parte* Young, 209 U.S. 123, 148 (1908) (holding that an action for an injunction against state officials acting under state law does not implicate state sovereign immunity).

41. *See, e.g.*, Vill. of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365, 386 (1926) (considering challenge to a zoning ordinance where complainant "had made no effort to obtain a building permit"); Terrace v. Thompson, 263 U.S. 197, 214

the middle of the 20th century,[42] as courts became increasingly receptive to lawsuits based on speculative harms that might arise from potential enforcement actions.[43] Thus, when an Arkansas anti-evolution statute, virtually identical to the Tennessee law challenged in *Scopes*, was attacked in 1968, the plaintiff schoolteacher Susan Epperson proceeded offensively by seeking a declaratory judgment that it was unconstitutional and personally risking little to bring the case.[44] The Supreme Court struck down the statute she challenged in *Epperson v. Arkansas*, holding that it violated the Establishment Clause by excluding a subject from the public school curriculum based on a religious objection.[45]

Justice Hugo Black raised concerns about the offensive challenger's standing and the hypothetical nature of the case, objecting that there had "never been even a single attempt by the State to enforce" the challenged law.[46] The Court had scheduled an hour for arguments, but they ended after only 35 minutes when both parties had said enough.[47] Perhaps reacting to this, Black contended that Arkansas's "pallid" and "unenthusiastic" defense of the case indicated that it would not enforce the law even should it "remain on the books for the next century."[48] He thus expressed strong doubts about whether the future enforcement Epperson's lawsuit envisioned was, in truth, purely imaginary.[49]

(1923) (holding that "[e]quity jurisdiction will be exercised to enjoin the threatened enforcement of a state law which contravenes the federal Constitution").

42. *See* Whole Woman's Health v. Jackson, 595 U.S. 30, 538 (2021) ("pre-enforcement review under the statutory regime the petitioners invoke, 42 U.S.C. § 1983, was not prominent until the mid-20th century.").

43. *Compare* Poe v. Ullman, 367 U.S. 497, 507–08 (1961) (declining to entertain pre-enforcement challenge to Connecticut law that had not been enforced for decades), *with* Epperson v. Arkansas, 393 U.S. 97, 101–02 (1968) (deciding pre-enforcement challenge to Arkansas law that had never been enforced).

44. *Epperson*, 393 U.S. at 98–103.

45. *Id.*

46. *Id.* at 109–10 (Black, J., concurring).

47. *See* Fred P. Graham, *Darwin and That Theory Are Back in Court*, N.Y. TIMES (Oct. 17, 1968) (on file with the *Columbia Human Rights Law Review*); John P. MacKenzie, *Supreme Court Justices Wrestling with Pesky Arkansas 'Monkey Law*,' WASH. POST (Oct. 20, 1968) (on file with the *Columbia Human Rights Law Review*) (stating that Epperson was "now a housewife in Oxon Hill, MD").

48. *Epperson*, 393 U.S. at 109–10 (Black, J., concurring).

49. *Id.*

His instincts were sharp; moreover, there is reason to believe that the case was actually moot.[50] Epperson's husband had since been assigned to the Pentagon, and she no longer even lived in Arkansas, much less taught in an Arkansas high school.[51] Now based in D.C., they had anonymously attended Supreme Court arguments in Epperson's case as local "tourists."[52] This was reported in the media at the time, and distantly echoed recent standing controversies sparked by media reports about *303 Creative*.[53]

Nevertheless, Black seemed to be the only Justice much concerned by the case's standing issues.[54] When he raised the state's lack of enforcement at oral argument, counsel for Epperson responded that the law created "uncertainty and fright" and "threats of prosecution."[55] Potential mootness notwithstanding, that seemed enough for the Court in 1968: Justice Abe Fortas, who wrote the majority opinion, privately responded to a law clerk's concern that the case was "simply too unreal" by writing, "maybe you're right—but I'd rather see us knock this out."[56] Interestingly, the Court had reached the opposite result in *Poe v. Ullman* just seven years earlier, declining to be made "umpire to debates concerning harmless, empty shadows" in a pre-enforcement challenge to an anti-contraceptive law that Connecticut had not enforced in 80 years.[57]

In the decades following *Epperson* and *Poe*, the Court gradually articulated clearer standards governing challenges against laws that had not been enforced against the challenger. In 1973, in *Doe v. Bolton*, the Court held that a pre-enforcement challenge to a Georgia law prohibiting most forms of abortion presented a justiciable

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50. *See, e.g.*, 13B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FED. PRAC. & PROC. JURIS. § 3533 (3d ed. 1998) ("the suit must remain alive throughout the course of litigation, to the moment of final appellate disposition").

51. *See* Randy Moore, *Thanking Susan Epperson*, 60 AM. BIOLOGY TEACHER 642, 646 (1998) (interview with Epperson) (mentioning that Epperson did not live in Arkansas).

52. *Id.*

53. *See* Graham, *supra* note 47 (detailing a hearing surrounding the case). Another plaintiff, a parent of an Arkansas schoolchild, had intervened in the case alongside *Epperson*, but Black argued that there was "not one iota of concrete evidence to show that the parent-intervenor's sons have not been or will not be taught about evolution." *Epperson*, 393 U.S. at 110 (Black, J., concurring).

54. *See* LARSON, *supra* note 38, at 255 (discussing internal debates on the Court).

55. *See* MacKenzie, *supra* note 47 (providing overview of oral argument).

56. LARSON, *supra* note 38, at 253.

57. *See* 367 U.S. 497, 507–08 (1961) (dismissing challenge based on standing concerns).

controversy.[58] *Doe* is a lesser-remembered companion case to *Roe v. Wade*;[59] both decisions were released on the same day. In holding that the challenge to Georgia's law was justiciable, the Court explained that the statute was "recent and not moribund," supposedly making the case "closer to *Epperson v. Arkansas*" than *Poe*.[60]

This retrospective characterization of *Epperson* and *Poe* was, in fact, exactly backwards.[61] Arkansas's *Scopes*-era anti-evolution law was hardly recent, had never been enforced, and certainly would not be enforced against a plaintiff who no longer taught in the state.[62] And the law in *Poe* was less moribund than it seemed: it was struck down after an actual attempt to enforce it four years later, in *Griswold v. Connecticut*.[63] But, the gloss that *Doe* placed on *Epperson* and *Poe* helped signal which types of pre-enforcement cases would be sufficient going forward—and indicated a growing acceptance of pre-enforcement challenges.

The next year, in *Steffel v. Thompson*, a group of protesters were confronted when distributing handbills opposing the Vietnam War in a DeKalb County, Georgia shopping center.[64] The plaintiff left after being threatened with arrest; his companion stayed and was arrested.[65] The Supreme Court held that, even though the plaintiff

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58. Doe v. Bolton, 410 U.S. 179, 188 (1973), *abrogated on other ground by Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

59. 410 U.S. 113 (1973), *abrogated by Dobbs*, 142 S. Ct. at 2228.

60. *Bolton*, 410 U.S. at 189.

61. *See* Mark Peter Henriques, *Desuetude and Declaratory Judgment: A New Challenge to Obsolete Laws*, 76 VA. L. REV. 1057, 1089 (1990) (comparing *Poe* and *Epperson* and noting that the "Supreme Court has varied considerably in determining what constitutes an 'actual threat' in declaratory actions"). Alexander Bickel viewed *Poe* as an appropriate judicial response to deadlock within the political branches, in a situation where the "influences that favor the objective of the statute cannot summon sufficient political strength . . . to cause it to be enforced" and the "influences which oppose the law cannot summon sufficient political strength to cause it to be repealed." Alexander M. Bickel, *The Supreme Court 1960 Term Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 60–61 (1961). But if that were the reality in *Poe*, it must have also been the reality in *Epperson*.

62. *See supra* notes 50–56 and accompanying text.

63. *See* Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965). Justice Black's objections to the *Griswold* decision were even more strident than his objections to *Epperson*—he had reached a stage of his career when he displayed, in the words of Richard Posner, a "quirky populist streak and an autodidact's dogmatism." Richard A. Posner, *In Memoriam: William J. Brennan, Jr.*, 111 HARV. L. REV. 9, 10 (1997).

64. Steffel v. Thompson, 415 U.S. 452, 454–56 (1974).

65. *Id.*

had not personally been arrested, his challenge to a state trespass statute was not based on impermissible "imaginary or speculative" threats.[66]

Again citing *Epperson* and writing for a unanimous Court, Justice William Brennan explained that a party need not "first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights."[67] Nevertheless, the Court noted that the district court on remand should determine whether the end of American military involvement in Vietnam had mooted the dispute between the parties.[68]

Five years later, the Court articulated a more concrete standard for pre-enforcement challenges when reviewing a case against a law prohibiting dishonest encouragements of boycotts to agricultural products. In *Babbit v. United Farm Workers*, it explained that a pre-enforcement challenger must allege "intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute" and "a credible threat of prosecution thereunder."[69] The Court cautioned, however, that a plaintiff must at least show "that a prosecution is remotely possible."[70] Later Supreme Court cases built upon this foundation, further establishing both that a proper plaintiff need not "bet the farm" by violating a law to test its validity and also that a threatened enforcement must not be entirely speculative.[71] The ideal challenger, then, would fall somewhere

66. *Id.* at 459.

67. *Id.* Brennan added more texture to this principle in another case decided the same term, writing in a footnote that decisions about threats of prosecutions should be decided on a case-by-case basis because, wherever enforcement is discretionary, "even a person with a settled intention to disobey the law can never be sure that the sanctions of the law will be invoked against him." Blanchette v. Conn. Gen. Ins. Corps., 419 U.S. 102, 143 n.29 (1974).

68. *Steffel*, 415 U.S. at 459–60.

69. Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 298 (1979).

70. *Id.* at 299 (quoting *Younger v. Harris*, 401 U.S. 37, 42 (1971), which dismissed parties who "do not claim that they have ever been threatened with prosecution, that a prosecution is likely, or even that a prosecution is remotely possible").

71. MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 129 (2007) ("we did not require . . . that the plaintiff bet the farm, so to speak, by taking the violative action"). For other Supreme Court cases following this principle, see Susan B. Anthony List v. Driehaus, 573 U.S. 149, 158–60 (2014), Holder v. Humanitarian L. Project, 561 U.S. 1, 15 (2010), and Virginia v. Am. Booksellers Ass'n, Inc., 484 U.S. 383, 392 (1988); *but see* Clapper v. Amnesty Int'l USA, 568 U.S. 398, 409 (2013) ("[W]e have repeatedly reiterated that 'threatened injury must be certainly

between Scopes—the teacher forced to risk criminal conviction to challenge a law—and Epperson—who was free to challenge a moribund law that could no longer be enforced against the challenger. As explained in *infra* Section I.B, while the threshold that pre-enforcement challengers must meet is not especially demanding, in modern litigation the federal courts of appeal affirm the dismissal of a nontrivial number of pre-enforcement challenges on the grounds that a plaintiff's allegations are overly speculative.

Most recently, the Supreme Court grappled with the question of whether plaintiffs have any *right* to pre-enforcement challenges in *Whole Woman's Health v. Jackson*,[72] which involved pre-enforcement challenges to a Texas anti-abortion law known as S.B. 8.[73] S.B. 8 is an unorthodox law deliberately designed to discourage pre-enforcement challenges and other forms of judicial review.[74] Roughly a year before the Court overruled its precedents recognizing a right to receive abortions before the point of fetal viability,[75] S.B. 8 authorized private

impending to constitute injury in fact,' and that '[a]llegations of possible future injury' are not sufficient" (quoting Whitmore v. Arkansas, 495 U.S. 149, 158 (1990)).

72. Whole Woman's Health v. Jackson, 595 U.S. 30 (2021).

73. Tex. Health & Safety Code Ann. § 171.204(a)-(c).

74. *See* David A. Strauss, *Rights, Remedies, and Texas's S.B. 8*, 2022 SUP. CT. REV. 81, 81 (2022) ("S.B. 8 then accompanied the prohibition with procedural rules that served no discernible purpose except to make it very difficult for anyone to challenge the law."); Rebecca Aviel & Wiley Kersh, *The Weaponization of Attorney's Fees in an Age of Constitutional Warfare*, 132 YALE L.J. 2048, 2061–62 (2023) (documenting how S.B. 8 forecloses judicial review by imposing one-sided risk of massive attorney's fees judgments, thereby depriving potential litigants of representation); Carliss Chatman, *We Shouldn't Need Roe*, 29 UCLA J. GENDER & L. 81, 94 (2022) ("Even a cab or ride share driver who transports someone to get an abortion could be included in a lawsuit.")

75. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022); Nina Varsava, *Precedent, Reliance, and Dobbs*, 136 HARV. L. REV. 1845, 1911 (2023). After *Dobbs*, the unique enforcement provisions of S.B. 8 "are no longer necessary for its survival," because Texas's "trigger law" banning abortion upon the overturning of *Roe* went into effect. *See* Julie C. Suk, *A World Without Roe: The Constitutional Future of Unwanted Pregnancy*, 64 WM. & MARY L. REV. 443, 462–63 (2022). However, S.B. 8 might continue to authorize private actions against third parties who facilitate out of state abortions. *See Dobbs*, 142 S. Ct. at 2318 (Breyer, J., dissenting) ("[A]s Texas has recently shown, a State can turn neighbor against neighbor, enlisting fellow citizens in the effort to root out anyone who tries to get an abortion, or to assist another in doing so.").

citizens in Texas to seek damages against anyone assisting a woman in obtaining an abortion after six weeks of pregnancy.[76]

This private enforcement system made it difficult for plaintiffs to identify a proper defendant unshielded by the state's sovereign immunity. The classic mechanism of pursuing an injunction against a state official charged with enforcing a challenged law[77] did not neatly apply to a law primarily enforced by "private bounty hunters."[78] Nevertheless, Texas abortion providers brought a pre-enforcement action against a group of state officials, including judges and clerks who would help process and decide private actions.[79]

The outcome was mixed. The Court held that some of the state defendants were shielded by sovereign immunity while others were not.[80] The case also led to vigorous debate between the Justices about whether access to pre-enforcement review is a fundamentally important value.

Separately concurring in part and dissenting in part, Chief Justice John Roberts and Justice Sonia Sotomayor both argued that pre-enforcement review was especially important because of S.B. 8's chilling effect on a federal constitutional right (here, the since-overturned right to certain abortion procedures).[81] Justice Clarence Thomas countered that "there is no freestanding constitutional right to pre-enforcement review in federal court," arguing that it is insufficient for a party to merely "feel inhibited" by a law or present a "vague allegation" of potential enforcement.[82] Justice Sotomayor

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76. *Whole Woman's Health*, 595 U.S. at 35–36 (Gorsuch, J.) & 61 (Sotomayor, J., dissenting).

77. Ex parte Young, 209 U.S. 123 (1908).

78. 595 U.S. at 62 (Sotomayor, J., dissenting).

79. *Id.* at 35.

80. *Id.* at 37–44.

81. *See id.* at 61–62 (Roberts, C.J., concurring in part and dissenting in part) ("The clear purpose and actual effect of S.B. 8 has been to nullify this Court's rulings . . . and "[i]t is emphatically the province and duty of the judicial department to say what the law is.") (quoting *Marbury v. Madison*, 5 U.S. 137, 177 (1803)), and *id.* at 62–63 (Sotomayor, J., concurring in part and dissenting in part) ("This Court should have put an end to this madness months ago . . . federal courts can and should issue relief when a State enacts a law that chills the exercise of a constitutional right and aims to evade judicial review.").

82. *See id.* at 52–57 (Thomas, J., concurring in part and dissenting in part) ("To sustain suit against the licensing officials . . . petitioners must show at least a credible and specific threat of enforcement . . . . Even if the licensing-official respondents had enforcement authority, the chance of them using it is, at present, entirely 'imaginary' and 'speculative.'" (internal quotations omitted)).

conceded that "[n]o one contends . . . that pre-enforcement review should be available whenever a state law chills the exercise of a constitutional right," but argued that it is necessary when the penalties proscribed are so "enormous" as to effectively prohibit post-enforcement review.[83]

Writing for the majority, Justice Gorsuch largely aligned with Thomas's position, explaining that "many paths exist to vindicate the supremacy of federal law," including the assertion of post-enforcement defenses.[84] He emphasized that parties are "not always able to pick and choose the timing and preferred forum for their arguments" and that many federal rights are typically asserted as post-enforcement defenses rather than pre-enforcement challenges.[85] For a pre-enforcement action to be appropriate, Gorsuch emphasized, the Court required "proof of a more concrete injury and compliance with traditional rules of equitable practice."[86]

Was a more concrete injury present two years later, when the Court reached the merits of *303 Creative*? As discussed above, the plaintiff had never created a wedding website for anyone.[87] And if media reports are accurate, her only identified inquiry supposedly related to any LGBTQ+ content creation did not actually originate from an LGBTQ+ person, if it happened at all.[88] Nevertheless, perhaps future enforcement against the plaintiff's online business was plausible—after all, Colorado did have a record of enforcing its statute against brick-and-mortar wedding vendors that denied services to gay couples.[89] History suggests, however, that pre-enforcement requirements are sometimes relaxed when—to paraphrase Justice Fortas—a judge or justice would rather see a statute "knocked out."[90]

83. Whole Woman's Health v. Jackson, 595 U.S. 30, 68 n.3 (2021) (Sotomayor, J., dissenting).

84. *Id.* at 48–50

85. *Id.*

86. *Id.* at 50.

87. *See supra* notes 14–21 (reviewing reports that cast doubt on plaintiff's factual assertions).

88. *Id.*

89. *See* Masterpiece Cakeshop v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (reviewing enforcement action against business brought under Colorado's public accommodations law).

90. *See supra* note 56 and accompanying text.

B. Pre-Enforcement Cases in the Lower Courts

Contemporary application of the Supreme Court's jurisprudence discussed in *supra* Section I.A demonstrates that pre- and post-enforcement status affects practical outcomes for litigants in the lower federal courts.

Several authorities imply that bringing a case pre-enforcement adds little, if any, extra difficulty for the challenger. The Second Circuit, for example, has described the Supreme Court's pre-enforcement jurisprudence as "quite forgiving to plaintiffs" and setting only a "low threshold," because courts are generally willing to presume that the government will enforce at least its recent laws against violators.[91] Other circuits have provided similar analysis.[92]

At the same time, federal courts consistently emphasize that pre-enforcement standing cannot be established "on a whim."[93] Some circuits have raised further barriers to pre-enforcement actions or rejected such actions for relatively opaque reasons.

For example, the D.C. Circuit recently held that pre-enforcement review is only available where the relevant statute is challenged on constitutional grounds.[94] In the Fifth Circuit, a panel allowed political plaintiffs to challenge the Texas Open Meeting Act based on a threat of future prosecution, explaining that the "standard—encapsulated in the phrase 'credible threat of

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91. *See* Cayuga Nation v. Tanner, 824 F.3d 321, 331 (2d Cir. 2016) (quoting Hedges v. Obama, 724 F.3d 170, 197 (2d Cir. 2013)). *Hedges* explains that a plaintiff whose rights are implicated by a statute need not wait for its enforcement, so long as the statute is not "moribund" (quoting Doe v. Bolton, 410 U.S. 179, 189 (1973)).

92. *See* Robinson v. Att'y Gen., 957 F.3d 1171, 1177 (11th Cir. 2020) (describing credible-threat requirement as "quite forgiving," quoting Wollschlaeger v. Governor, 848 F. 3d 1293, 1305 (11th Cir. 2017)); *see also* Mobil Oil Corp. v. Att'y Gen., 940 F.2d 73, 76 (4th Cir. 1991) ("We see no reason to assume that the Virginia legislature enacted this statute without intending it to be enforced.").

93. Daly v. McGuffey, No. 21-3266, 2021 WL 7543815, at *2 (6th Cir. Nov. 15, 2021); *see also* Lopez v. Candaele, 630 F.3d 775, 785–86 (9th Cir. 2010) (noting that even pre-enforcement plaintiffs must satisfy "rigid" requirements for standing).

94. *See* Muthana v. Pompeo, 985 F.3d 893, 911 (D.C. Cir. 2021) (holding that pre-enforcement "review is not a vehicle to settle questions of statutory interpretation unconnected with matters of constitutional right"). Muthana, a father wishing to send support to his daughter who had joined ISIS, challenged the potential application of a statute forbidding the provision of material support for terrorism. The court affirmed dismissal of the pre-enforcement challenge.

prosecution'—is quite forgiving."[95] But the circuit then heard the case en banc and dismissed it as moot in a one-sentence opinion—accompanied by a vigorous dissent by the author of the panel decision—providing no further explanation as to why the standard had not been met.[96]

In practice, even if the formal standards for pre-enforcement challenges are relatively forgiving, litigants who are not facing a "looming" enforcement action when they file suit run a real risk of seeing their case dismissed.[97] This Author has identified[98] five decisions by federal appellate courts since 2022,[99] and a further 24 since 2016,[100] holding that a pre-enforcement challenger failed to

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95. Rangra v. Brown, 566 F.3d 515, 518–19 (5th Cir. 2009), *rev'd en banc* 584 F.3d 206 (quoting N.H. Right to Life Pol. Action Comm. v. Gardner, 99 F.3d 8, 14 (1st Cir. 1996)).

96. *Rangra*, 584 F.3d at 206.

97. *See* Toni M. Massaro, *Chilling Rights*, 88 U. COLO. L. REV. 33, 60–63 (2017) (distinguishing between pre-enforcement challenges anticipating "looming" enforcement actions from challenges reacting to "ink-barely-dry" laws that have never been enforced).

98. Cases were identified by searching for federal appellate decisions, through 2023, that cited the major pre-enforcement cases discussed in the previous section. The search may be underinclusive but is not overinclusive. Its findings thus support the assertion that overly speculative challenges face real hurdles.

99. *See* Unified Data Servs., LLC v. FTC, 39 F.4th 1200, 1210–11 (9th Cir. 2022) (finding telemarketing plaintiffs' allegations insufficient to establish that they would actually violate FTC rule or that FTC was likely to enforce rule against them); Davis v. Colerain Twp., 51 F.4th 164, 172–73 (6th Cir. 2022) (holding that plaintiff challenging rule against posting offensive comments on public Facebook group failed to show that she would make such comments or that rule would likely be enforced against her); Sch. of the Ozarks, Inc. v. Biden, 41 F.4th 992, 998–1000 (8th Cir. 2022) (rejecting allegations of likely enforcement that were based on a "highly attenuated chain of possibilities"); Missouri v. Yellen, 39 F.4th 1063, 1069–70 (8th Cir. 2022) (holding that plaintiff failed to adequately allege intent to engage in conduct that would violate challenged provision); Christian Action League of Minn. v. Freeman, 31 F.4th 1068, 1074–75 (8th Cir. 2022) (holding that plaintiff lacked standing to challenge statute because the plaintiff's intended future actions would not constitute a violation).

100. *See* Sweeney v. Raoul, 990 F.3d 555, 560 (7th Cir. 2021); Clark v. Stone, 998 F.3d 287, 295 (6th Cir. 2021); Stagg, P.C. v. U.S. Dep't of State, 983 F.3d 589, 602–05 (2d Cir. 2020); Speech First, Inc. v. Killeen, 968 F.3d 628, 644 (7th Cir. 2020), *as amended on denial of reh'g and reh'g en banc* (Sept. 4, 2020); Baker v. USD 229 Blue Valley, 979 F.3d 866, 873–74 (10th Cir. 2020); Zimmerman v. City of Austin, 881 F.3d 378, 390–91 (5th Cir. 2018); Abbott v. Pastides, 900 F.3d 160, 176–77 (4th Cir. 2018); Clark v. City of Seattle, 899 F.3d 802, 812–813 (9th Cir. 2018); Vonderhaar v. Vill. of Evendale, 906 F.3d 397, 402 (6th Cir. 2018); Reddy v. Foster, 845 F.3d 493, 500, 502 (1st Cir. 2017); Matthew A. Goldstein, PLLC v.

establish a credible threat that the enactment they sought to challenge would be enforced against them. Together, these 29 decisions show that the standing requirements for pre-enforcement actions are more than a mere formality. Thus, notwithstanding frequent dicta characterizing the credible threat standard as forgiving, federal courts are regularly willing to reject actions deemed overly speculative.

An example from this larger set demonstrates how the standards for pre-enforcement review pose genuine obstacles for litigants when they are rigorously applied. In *Adam v. Barr*, the Second Circuit rejected a pre-enforcement action for declaratory and injunctive relief to prevent the federal government from enforcing the Controlled Substances Act (CSA)[101] against the plaintiff.[102] The challenger argued that his sincere religious beliefs required ritual use of cannabis and that enforcement of the CSA against him would contravene the Religious Freedom Restoration Act.[103] To support his assertion of a credible threat of prosecution, he pointed to a 2018 memorandum by the U.S. Attorney General announcing a policy favoring prosecution of cannabis possession as well as to other cases where the CSA had been enforced.[104]

Nevertheless, the Second Circuit rejected his challenge as overly speculative.[105] The court acknowledged that the challenger planned to use marijuana and that the federal government enforces the CSA against some possessors of the drug, but held that the

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U.S. Dep't of State, 851 F.3d 1, 4–5 (D.C. Cir. 2017); Crawford v. U.S. Dep't of Treasury, 868 F.3d 438, 460 (6th Cir. 2017); Miller v. City of Wickliffe, 852 F.3d 497, 507 (6th Cir. 2017); Brown v. Buhman, 822 F.3d 1151, 1165, 1176 (10th Cir. 2016); Colo. Outfitters Ass'n v. Hickenlooper, 823 F.3d 537, 548 (10th Cir. 2016); McKay v. Federspiel, 823 F.3d 862, 870 (6th Cir. 2016); Phillips v. DeWine, 841 F.3d 405, 416 (6th Cir. 2016); Wilson v. Lynch, 835 F.3d 1083, 1090 (9th Cir. 2016); Daly v. McGuffey, No. 21-3266, 2021 WL 7543815, at *6 (6th Cir. Nov. 15, 2021); Pipito v. Lower Bucks Cnty. Joint Mun. Auth., 822 F. App'x 161, 165 (3d Cir. 2020); Saleh v. Barr, 801 F. App'x 384, 392 (6th Cir. 2020); Adam v. Barr, 792 F. App'x 20, 23 (2d Cir. 2019); Plunderbund Media, L.L.C. v. DeWine, 753 F. App'x 362, 369–71 (6th Cir. 2018); Blankenship v. Buenger, 653 F. App'x 330, 344 (5th Cir. 2016). *See also* Am. Petroleum Inst. v. U.S. Dep't of Interior, 823 F. App'x 583, 587 (10th Cir. 2020) (holding that failure to allege intention to violate rule deprived challenger of standing regardless of rule's enforcement).

101. 21 U.S.C. §§ 801–971.

102. *See Adam*, 792 F. App'x at 21–23 (rejecting pre-enforcement challenge to the Controlled Substances Act).

103. *Id.*

104. *Id.*

105. *Id.*

challenger's assertions that the CSA would likely be enforced against *him* were too "amorphous."[106] The panel explained that it would "consider the extent of . . . enforcement in determining whether a credible threat of prosecution exists," noting that there was no specific evidence of the CSA being enforced against "personal religious use" of cannabis.[107] Because the plaintiff had not "particularize[d] the CSA's enforcement in relation to" his conduct, he was "at risk just like any other person in the country who might violate the CSA."[108] Although the CSA is not a moribund law,[109] and there is no reason to doubt that the plaintiff genuinely used cannabis, his challenge failed.

Thus, although the formal standards governing pre-enforcement challenges appear relatively permissive, many plaintiffs do fail to meet the hurdles posed by the credible threat requirement, even when attempting to challenge recent enactments that cannot be written off as moribund.[110] This suggests that pre-enforcement litigants face at least some disadvantages compared to post-enforcement litigants.

Nevertheless, plaintiffs and interest groups devote substantial resources to pre-enforcement cases like *303 Creative*. In Part II, this Article explains why plaintiffs might nonetheless opt to bring speculative pre-enforcement challenges rather than wait for enforcement—even when punishments authorized by a statute are relatively mild.

106. *Id.* at 22.

107. *Id.* at 23.

108. *Id.*; *see also* Vitagliano v. Cnty. of Westchester, 71 F.4th 130, 139 (2d Cir. 2023) (discussing the *Adam* decision).

109. *See Vitagliano*, 71 F.4th at 139 (noting the CSA's "extensive enforcement history"). *See generally* Erwin Chemerinsky, Jolene Forman, Allen Hopper & Sam Kamin, *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74 (2015) (discussing complex federalism issues arising from CSA's ban on marijuana, especially given shifting federal stances on enforcement leniency, and various state laws that have legalized possession of the drug).

110. *See supra* note 100 (compiling cases where pre-enforcement challenges were rejected).

II. SHOPPING FOR CASES: POTENTIAL STRATEGIC ADVANTAGES OF PRE-ENFORCEMENT LITIGATION

A. Theoretical Discussions of Pre-Enforcement Cases

Scholars who have written about pre-enforcement challenges have suggested that they provide better opportunities for litigants to strategically control their case. For example, although they acknowledge that pre-enforcement suits can face standing difficulties and are not "systemically preferred," Professors Howard Wasserman and Charles "Rocky" Rhodes explain that offensive suits allow litigants "to control the time, forum, and posture" of the case.[111] Relatedly, Professor James Pfander has noted that the "careful recruitment of litigants" can mitigate hurdles to justiciability,[112] an observation with implications for pre-enforcement litigants.

More broadly, Professor Michael Risch has recently urged the application of social choice theory[113] to litigation analysis, noting that, "[f]rom who files the initial complaint (and where) through appellate decisions, litigants have many opportunities to shape the order that issues are heard to their advantage."[114] Risch's insightful analysis of the opportunities available throughout litigation to shape the way issues are decided has direct relevance to pre-enforcement cases, which offer plaintiffs more of these opportunities than do post-enforcement cases.

The advantages identified by these scholars would seem to most benefit interest-group litigants, who are often repeat players in strategic litigation. In the words of Professor Nancy Levit, these

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111. *See* Howard M. Wasserman & Charles W. Rhodes, *Solving the Procedural Puzzles of the Texas Heartbeat Act and Its Imitators: The Limits and Opportunities of Offensive Litigation*, 71 AM. U. L. REV. 1029, 1052, 1084–85 (2022) (suggesting potential advantages of pre-enforcement litigation); *see also* Charles W. Rhodes & Howard M. Wasserman, *Solving the Procedural Puzzles of the Texas Heartbeat Act and Its Imitators: The Potential for Defensive Litigation*, 75 SMU L. REV. 187 (2022).

112. *See* James E. Pfander, *Forum Shopping and the Infrastructure of Federalism*, 17 TEMP. POL. & CIV. RTS. L. REV. 355, 360–61 (2008) (suggesting potential advantages of pre-enforcement litigation for individuals opposing new state laws).

113. Studying the relationship between individual preferences and collective decision making. *See* Richard H. Pildes & Elizabeth S., Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121, 2122–2135 (1990).

114. Risch, *supra* note 28, at 1624.

litigants advance goals by "cull[ing] model plaintiffs, issu[ing] planned media blitzes, and try[ing] to control the timing and geography of test cases."[115] In contrast, opportunities for strategic planning are less likely to benefit one-off litigants.

On the other hand, some scholars have identified disadvantages for pre-enforcement litigants. Notably, Professors Lisa Pruitt and Marta Vanegas, writing about abortion law, have noted that providers who challenged abortion restrictions "before they came into force . . . lacked a highly personal story to give a human face to the legal arguments."[116]

Post-enforcement challengers might receive some other advantages of their own. They need not convince a court that they meet the "credible threat" standard established in pre-enforcement cases. Moreover, enforcement of any statute or ordinance does not always proceed perfectly. Governmental enforcement may be infected with animus or bad faith and may thus be invalidated on grounds not available before enforcement has begun.[117] In other words, in some cases, issues that develop during enforcement proceedings might provide a challenger with alternative means to win their case. A tangible example of this came in *Masterpiece Cakeshop*, where the Court held that specific comments made by commissioners during administrative hearings against the challenger demonstrated impermissible hostility toward religion.[118] Thus, factual developments from the enforcement proceedings benefited a post-enforcement challenger.

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115. Nancy Levit, *Theorizing and Litigating the Rights of Sexual Minorities*, 19 COLUM. J. GENDER & L. 21, 23 (2010); *see also* Pfander, *supra* note 112, at 361 ("Well-informed and well-financed interest groups can certainly work around the standing and ripeness hurdles to some extent through the careful recruitment of litigants.").

116. Lisa R. Pruitt & Marta R. Vanegas, *Urbanormativity, Spatial Privilege, and Judicial Blind Spots in Abortion Law*, 30 BERKELEY J. GENDER L. & JUST. 76, 153 n. 359 (2015).

117. *See* William D. Araiza, *Why Bother (with Animus)?*, 74 ALA. L. REV. 649, 651 (2023) ("animus doctrine remains a viable doctrinal path for judges and litigants")*; but see* David E. Pozen, *Constitutional Bad Faith*, 129 HARV. L. REV. 885, 888–89 (2016) (arguing that good faith norms are unevenly enforced in U.S. constitutional law).

118. Masterpiece Cakeshop v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1729–31 (2018); *see* Dale Carpenter, *The Dead End of Animus Doctrine*, 74 ALA. L. REV. 585, 617–18 (2023) (explaining that, while the *Masterpiece* decision did not use the term "animus," the case concerned "shielding people from malignity in governmental decision making" like other animus cases).

The existing literature thus leaves room for further productive explanation about the extent to which pre- or post-enforcement litigants systematically enjoy advantages over those proceeding in the alternative posture. Sections II.B and II.C, *infra*, will identify structural advantages enjoyed by pre-enforcement litigants before examining the results of pre- and post-enforcement cases in the wedding vendor context.

B. Opportunities for Pre-enforcement Litigants to Select Forums—and Judges

Case outcomes may vary depending on whether a statute is challenged in state or federal court and the district, or venue, in which the case is brought. The exercise of these choices, where available, is generally referred to as forum shopping.

To some extent, the term "forum shopping" contains negative connotations because it implies a heightened degree of manipulability[119] within a legal system that strives toward ideals of impartiality.[120] Nevertheless, scholars agree that venue options and choices to proceed in either federal or state courts are inherent

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119. *See* John B. Corr, *Thoughts on the Vitality of Erie*, 41 AM. U. L. REV. 1087, 1111 (1992) ("The term 'forum shopping' connotes something at least vaguely disreputable."); Note, *Forum Shopping Reconsidered*, 103 HARV. L. REV. 1677, 1677 (1990) (explaining that forum shopping is "disfavored because it reveals an element of manipulability in the legal system that challenges the ideal of law as the embodiment of impartial justice or fairness"); Friedrich K. Juenger, *Forum Shopping, Domestic and International*, 63 TUL. L. REV. 553 (1989) ("[C]ounsel, judges, and academicians employ the term 'forum shopping' to reproach a litigant who, in their opinion, unfairly exploits jurisdictional or venue rules to affect the outcome of a lawsuit."); *see also* Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2162, 2259 (2002) (employing the negative connotations of forum-shopping in noting that forum-shopping options "exacerbate incentives for manipulation and bias the process towards the groups organized and wealthy enough to game the process by forum shopping and settling cases that begin in a bad forum.").

120. *See, e.g.*, Raymond J. McKoski, *Reestablishing Actual Impartiality as the Fundamental Value of Judicial Ethics: Lessons from "Big Judge Davis"*, 99 KY. L.J. 259, 261 (2011) (stating that "modern rules of judicial conduct" emphasize "the image of the impartial judge" as "the primary vehicle for sustaining judicial legitimacy"); Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 891 (2009) (Roberts, C.J., dissenting) ("All judges take an oath to . . . apply the law impartially, and we trust that they will live up to this promise."); Asha Amin, *Implicit Bias in the Courtroom and the Need for Reform*, 30 GEO. J. LEGAL ETHICS 575, 582–89 (2017) (explaining that a "majority of judges may not realize they have implicit biases, or they may refuse to accept it.").

features of the American system.[121] Dean Mary Algero identified venue choices as "an intrinsic part of the American judicial system," noting examples such as the choice to file in a jurisdiction with more favorable statutes of limitations.[122] Likewise, Professor Debra Lyn Bassett has argued that forum shopping "is a legitimate, expressly authorized action when more than one forum satisfies the requisite legal criteria."[123] And Professor Kimberly Norwood has described several examples of venue shopping to secure a more favorable jury as a trial tactic.[124]

On the other hand, despite nearly unanimous acknowledgement that the preferences of individual judges affect case outcomes,[125] shopping for *judges* is far more disfavored and generally seen as having more serious implications for the legal system's basic integrity.[126] Accordingly, most courts use a random assignment system to prevent judge shopping[127] and reserve the authority to

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121. *See* Debra Lyn Bassett, *The Forum Game*, 84 N.C. L. REV. 333, 335 (2006) (exploring the ethics of forum shopping and defending the practice); Mary Garvey Algero, *In Defense of Forum Shopping: A Realistic Look at Selecting a Venue*, 78 NEB. L. REV. 79, 79–82 (1999) (noting the overlap between necessary forum *selection* and disdained forum *shopping*); Christopher C. French, *Forum Shopping Covid-19 Business Interruption Insurance Claims*, 2020 U. ILL. L. REV. ONLINE 187, 191 (2020) ("[t]the law arguably even encourages forum shopping"); Risch, *supra* note 28, at 1656–58 (identifying forum choices regularly available to litigants).

122. Algero, *supra* note 121, at 82, 95–98.

123. Bassett, *supra* note 121, at 335.

124. *See* Kimberly Jade Norwood, *Shopping for a Venue: The Need for More Limits on Choice*, 50 U. MIAMI L. REV. 267, 276–281 (1996) (describing cases in which plaintiffs used joinder and jurisdictional rules to bring cases in venues perceived as likely to have more favorable juries).

125. *Id.* at 302–03; *see also* ANDREW J. RUZICHO ET AL., 2 EMPLOYMENT LAW CHECKLISTS AND FORMS § 21:1 (2023) (describing considerations for judge shopping and jury shopping in Age Discrimination in Employment Act ("ADEA") claims).

126. *See, e.g.,* Adam J. Levitin, *Judge Shopping in Chapter 11 Bankruptcy*, 2023 U. ILL. L. REV. 351, 352 (2023) ("Judge shopping is fundamentally contrary to any notion of judicial impartiality."); United States v. Cooley, 1 F.3d 985, 993 (10th Cir. 1993) (noting Congress's concern over abuse of statutes for judge-shopping purposes); People v. Bilsky, 734 N.E.2d 341, 344 (N.Y. 2000) (describing procedures designed to lessen "the potential for inappropriate 'Judge shopping'"); Law Offices of Herssein & Herssein v. United Servs. Auto. Ass'n, 271 So.3d 889, 893 (Fla. 2018) (construing disqualification rules to prevent process from being abused for purposes of judge shopping).

127. *See* United States v. Mavroules, 798 F. Supp. 61, 61 (D. Mass. 1992) (noting that a "blind, random draw selection process . . . prevents judge shopping by any party, thereby enhancing public confidence in the assignment process"); *see*

issue sanctions for egregious attempts to bypass randomization within a venue.[128] Moreover, litigants may not always be able to easily predict any one judge's likely sympathies in many areas of the law.[129]

Ethical controversy aside, judge shopping can be extremely effective where litigants can both predict judges' views of a case in advance and influence the odds of their case being assigned to preferred judges or groups of judges. An extreme example of effective judge shopping is found in complex chapter 11 corporate reorganization cases.[130] Professor Lynn LoPucki has extensively documented how, during the 1980s, a large portion of major publicly held companies filed for bankruptcy in New York, regardless of their place of incorporation or principal place of business.[131] The 1990s, however, saw a striking migration of these complex cases to

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also Adam M. Samaha, *Randomization in Adjudication*, 51 WM. & MARY L. REV. 1, 5 (2009) ("Random case assignment takes place hundreds of thousands of times every year in courts across the country, and many administrative agencies follow suit.").

128. *See, e.g.*, Harsman v. Cincinnati Children's Hosp. Med. Ctr., No. 1:21-CV-597, 2022 WL 4357476, at *4 (S.D. Ohio Sept. 20, 2022) (issuing sanctions against attorneys "based solely on their abuse of the judicial system through their strategic dismissal and re-filing of claims to thwart potentially unfavorable rulings by engaging in confessed judge shopping"); Vaqueria Tres Monjitas, Inc. v. Rivera Cubano, 230 F.R.D. 278, 279 (D.P.R. 2005) (issuing sanctions against attorney who filed and then dismissed numerous complaints until he was assigned a preferred judge).

129. For example, Ronald Reagan was a vocal critic of the post-*Epperson* consensus that evolution could not be prohibited in public school classrooms. *See, e.g.*, Randy Moore, *Creationism in the United States: IV. Demanding "Balanced Treatment"*, 61 AM. BIOLOGY TCHR. 175, 179 n.9 (1999). Nevertheless, Reagan appointees wrote significant opinions upholding the application of *Epperson* to various attempts to add creationism to public school curricula. *See* Aguillard v. Edwards, 765 F.2d 1251 (5th Cir. 1985); Doe v. Porter, 188 F. Supp. 2d 904 (E.D. Tenn. 2002), *aff'd* 370 F.3d 558 (6th Cir. 2004).

130. 11 U.S.C. § 1101 et seq.

131. *See* LYNN M. LOPUCKI, COURTING FAILURE: HOW COMPETITION FOR BIG CASES IS CORRUPTING THE BANKRUPTCY COURTS 25–48 (2005) [hereinafter LOPUCKI, COURTING FAILURE]; Lynn M. LoPucki, *Where Do You Get Off? A Reply to* Courting Failure*'s Critics*, 54 BUFF. L. REV. 511, 514 (2006) [hereinafter Lopucki, *Where Do You Get Off?*]; Theodore Eisenberg & Lynn M. LoPucki, *Shopping for Judges: An Empirical Analysis of Venue Choice in Large Chapter 11 Reorganizations*, 84 CORNELL L. REV. 967, 968 (1999); Lynn M. LoPucki & William C. Whitford, *Venue Choice and Forum Shopping in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 1991 WIS. L. REV. 11, 12 (1991) (explaining mechanisms allowing large Chapter 11 case placers to select preferred judges).

Delaware, which captured an 87% "market share" by 1996.[132] LoPucki argued that, despite no formal change in governing law, Delaware attracted large, publicly held filers by leading the way in adopting new practices, including higher professional fees and rapid approval of prepackaged bankruptcies.[133] During much of the period when Delaware won its "market share," its bankruptcy court was staffed by a single judge, meaning judge shopping could be achieved merely by filing in the district.[134]

More recently, Professor Adam Levitin has argued that "judge shopping has become standard practice in large chapter 11 bankruptcy cases," presenting the eye-opening statistic that, in 2020, "55% of large, public company bankruptcy filings were heard before just *three* of the nation's 375 bankruptcy judges."[135] There are many potential explanations for this phenomenon of apparent judge shopping, but one is simple and economically straightforward: in chapter 11 cases, where incumbent management typically retains control of a debtor during proceedings, judges' reputations for ruling in certain ways attract major bankruptcy "case placers."[136] Judge shopping has also been noted in patent cases, arguably due to judges' receptiveness to certain types of plaintiffs. Perhaps surprisingly, Waco, Texas is home to the country's busiest patent court, as opposed to geographical areas with far greater concentrations of tech or pharma firms.[137] Professors J. Jonas Anderson and Paul R. Gugliuzza have argued that the Western District of Texas' divisional assignment system allows plaintiffs to select a judge who is likely to move cases

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132. *See* LoPucki, *Where Do You Get Off?*, *supra* note 131, at 514–15 ("[T]he Delaware court captured an 87% market share in 1996").

133. *Id.* at 512–18.

134. LOPUCKI, COURTING FAILURE, *supra* note 131, at 49–77. Bankruptcy cases are subject to a permissive venue statute, which allows a debtor to file in any district containing its domicile, residence, principal place of business, or principal assets, as well as any district where an affiliate, general partner, or partnership has already filed. *See* 28 U.S.C. § 1408. Given Delaware's traditional role as the preferred state of incorporation for corporate America, *see* FRANK EASTERBROOK & DANIEL FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 212–13 (1991), it is generally a venue option for large corporate debtors.

135. Levitin, *supra* note **Error! Bookmark not defined.**, at 354.

136. *See* LOPUCKI, COURTING FAILURE, *supra* note 131, at 137–81 (outlining structural incentives that lead to judge shopping in bankruptcy).

137. *See* J. Jonas Anderson & Paul R. Gugliuzza, *Federal Judge Seeks Patent Cases*, 71 DUKE L.J. 419, 421–22 (2021) (explaining prevalence of judge shopping in patent cases).

rapidly and deny motions to dismiss, thereby increasing plaintiffs' leverage in settlement negotiations.[138]

Perhaps most strikingly, judge shopping has brought a string of controversial cases to two divisions within the U.S. District Court for the Northern District of Texas, where an unusual assignment system allows litigants in smaller divisions to know with virtual certainty which judge will be assigned to their case—and where particular district court judges are seen as being reliably sympathetic to controversial cases brought by conservative interest groups.[139]

As a result, contentious, "hot button" cases with nationwide impact are now regularly litigated before the same two judges in either the Wichita Falls or Amarillo Divisions of the Northern District of Texas. These include a challenge to Title IX protections for transgender students,[140] a challenge to loan forgiveness programs for farmers from socially disadvantaged racial or ethnic groups,[141] a challenge to healthcare rules designed to ensure access to abortions

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138. *See id.* at 476; *see also* J. Jonas Anderson, *Court Competition for Patent Cases*, 163 U. PA. L. REV. 631, 670–72 (2015) (explaining prevalence of judge shopping in patent cases).

139. *See* Note, *Immigration and Nationality Act—Administrative Law-Review of Administrative Action*—Biden v. Texas, 136 HARV. L. REV. 460, 467–68 (2022) ("[B]y filing in the Amarillo Division of the Northern District of Texas, . . . partisan actors 'all but guaranteed' that their challenge . . . would be heard by Judge Kacsmayrak, a controversial Trump appointee."); Ashton Hessee, *Another Opinion by Judge Kacsmaryk: Certifying A Class Action Challenging ACA Regulations on Gender-Affirming Care*, 2022 LGBT L. NOTES 5, 6 (2022).

> This case, in common with other LGBT-related cases before Judge Kacsmaryk, are examples of brazen judge-shopping. There is no particular reason to sue defendants in Amarillo, Texas, other than the fact that suing there with the appropriate timing of judicial rotation schedules virtually guaranteed the assignment of the case to Trump-appointee Kacsmaryk, who is on record as having stated that transgender people are suffering from a delusion and transgender status is in some sense not real.

See also Alex Botoman, *Divisional Judge-Shopping*, 49 COLUM. HUM. RTS. L. REV. 297, 299 (2018) (discussing phenomenon of judge shopping by filing in small divisions); N.D. Tex. Spec. Order 3-344 (Sept. 14, 2022) (assigning all cases filed in Amarillo Division to Judge Kacsmaryk).

140. Texas v. United States, 201 F. Supp. 3d 810, 815–16 (N.D. Tex. 2016), *order clarified*, No. 7:16-CV-00054-O, 2016 WL 7852331 (N.D. Tex. Oct. 18, 2016) (O'Connor, J.).

141. Miller v. Vilsack, No. 4:21-CV-0595-O, 2021 WL 11115194, at *1 (N.D. Tex. July 1, 2021), *amended by* No. 4:21-CV-0595-O, 2021 WL 11115227 (N.D. Tex. Oct. 18, 2021) (O'Connor, J.).

and gender-transition procedures,[142] two challenges to federal COVID-19 vaccine requirements,[143] a qui tam action on behalf of the United States against Planned Parenthood for abortion work,[144] a Religious Freedom Restoration Act challenge against the Affordable Care Act's contraceptive coverage mandate,[145] a challenge to federal gun control laws,[146] a challenge to the Biden Administration's immigration policies,[147] and a challenge to the FDA's past approval of mifepristone, a long-prescribed medication abortion drug.[148] Many of these cases involved regulatory challenges that, in the absence of judge shopping, would seem far more at home in the D.C. Circuit than in Amarillo.[149]

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142. Franciscan All., Inc. v. Becerra, 553 F. Supp. 3d 361, 365 (N.D. Tex. 2021), *amended by* No. 7:16-CV-00108-O, 2021 WL 6774686 (N.D. Tex. Oct. 1, 2021) (O'Connor, J.), and *aff'd in part, dismissed in part*, 47 F.4th 368 (5th Cir. 2022).

143. Texas v. Becerra, 575 F. Supp. 3d 701, 710 (N.D. Tex. 2021) (Kacsmaryk, J.); U.S. Navy SEALs 1-26 v. Biden, 578 F. Supp. 3d 822, 826 (N.D. Tex. 2022) (O'Connor, J.).

144. United States v. Planned Parenthood Fed'n of Am., Inc., 601 F. Supp. 3d 97, 103 (N.D. Tex. 2022), *reconsideration denied*, No. 2:21-CV-022-Z, 2022 WL 2718612 (N.D. Tex. July 13, 2022) (Kacsmaryk, J.).

145. DeOtte v. Azar, 393 F. Supp. 3d 490, 495 (N.D. Tex. 2019), *judgment entered*, No. 4:18-CV-00825-O, 2019 WL 3786545 (N.D. Tex. July 29, 2019) (O'Connor, J.), and *vacated sub nom.* DeOtte v. Nevada, 20 F.4th 1055 (5th Cir. 2021).

146. Mock v. Garland, No. 4:23-CV-00095-O, 2023 WL 2711630, at *1 (N.D. Tex. Mar. 30, 2023) (O'Connor, J.).

147. Texas v. Biden, No. 2:21-CV-067-Z, 2021 WL 5399844, at *2 (N.D. Tex. Nov. 18, 2021) (Kacsmaryk, J.).

148. All. for Hippocratic Med. v. FDA, No. 2:22-CV-223-Z, 2023 WL 2825871, at *2 (N.D. Tex. Apr. 7, 2023) (Kacsmaryk, J.), *aff'd in part, vacated in part*, 78 F.4th 210 (5th Cir. 2023).

149. *See, e.g.*, Richard J. Pierce, Jr., *The Special Contributions of the D.C. Circuit to Administrative Law*, 90 GEO. L.J. 779, 779 (2002) (noting that the D.C. Circuit "has long dominated and played a major role in shaping" administrative law); Aaron-Andrew P. Bruhl, *Hierarchy and Heterogeneity: How to Read a Statute in a Lower Court*, 97 CORNELL L. REV. 433, 499 n.131 (2012) ("The D.C. Circuit . . . has expertise in regulatory processes and a partly specialized bar."); Michael E. Solimine, *Judicial Stratification and the Reputations of the United States Courts of Appeals*, 32 FLA. ST. U. L. REV. 1331, 1354 (2005) (noting that the "D.C. Circuit has long decided a disproportionate number of appeals from often complicated decisions from federal administrative agencies"); John A. Rogovin & Rodger D. Citron, *Lessons from the* NextWave *Saga: The Federal Communications Commission, the Courts, and the Use of Market Forms to Perform Public Functions*, 57 ADMIN. L. REV. 687, 714 n.154 (2005) (noting that the D.C. Circuit is "known for its expertise in administrative law").

A baseline amount of forum shopping, then, can be seen as universal and unexceptional—something to be expected where attorneys are obligated to zealously represent their clients.[150] Judge shopping, in contrast, is ethically controversial[151]—but it too plays a major role in particular areas of the law where litigants possess both the ability to identify favorable judges and influence the likelihood of them hearing a particular case.[152] Lying somewhere in between is the choice of a forum based on the likelihood of a case being assigned to a particular judge within that forum's pool.[153]

Both forum shopping and, to some extent, judge shopping are available to pre-enforcement litigants. In contrast, *targets* of enforcement actions have far less choice over the forum of and judge hearing their case—they are generally forced to litigate wherever proceedings are brought against them.

In speculative wedding vendor cases like *303 Creative*, pre-enforcement challengers may have enjoyed the possibility of a degree of effective judge shopping. Specifically, the table below demonstrates that, in federal cases at the district, appellate, and Supreme Court level, *no* judge or Justice appointed by a Democratic president has *ever* sided with challengers to a public accommodations law. Among Republican appointees, results were mixed at the district-court level (and Justice Kennedy famously steered the Court to a middle ground in *Masterpiece Cakeshop*), but at the circuit-court level Republican appointees always sided with the challengers.

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150. *See* Algero, *supra* note 121 (explaining the role of forum shopping in the American litigation system).

151. *See supra* note 127 and accompanying text (discussing the ethical controversy surrounding the practice of judge shopping).

152. *See, e.g.*, notes 130–135 and accompanying text (discussing an example of effective judge shopping).

153. *Cf.* Levitin, *supra* note **Error! Bookmark not defined.**, at 354 (discussing judge shopping in districts where large Chapter 11 cases are assigned to one of three judges).

Judicial Decisions and Partisan Appointments

	With Challenger	Against Challenger
Democratic Appointee	0	8[154]
Republican Appointee	10[155]	2[156]

Thus, in federal wedding vendor cases, the party of the president who appointed a judge signaled to litigants how that judge would likely rule in their case.[157] Informed by such signaling, pre-enforcement litigants can steer their cases accordingly.

To be sure, outside of one-judge divisions like the Amarillo and Wichita Falls Divisions of the Northern District of Texas, litigants rarely know with certainty to which judge they will initially be assigned. But attorneys seeking to challenge a state law in federal court can calculate which federal district within that state has the most favorable partisan makeup and search for pre-enforcement clients in that district.

Indeed, a pre-enforcement challenge against New York's public accommodations law was brought in the Western District of

154. 303 Creative LLC v. Elenis (*303 Creative III*), 600 U.S. 570, 604 (2023) (Sotomayor, J., dissenting, joined by Kagan & Jackson, JJ.); Telescope Media Grp. v. Lucero (*Telescope II*), 936 F.3d 740, 762 (2019) (Kelly, J., concurring in part and dissenting in part); 303 Creative LLC v. Elenis (*303 Creative II*), 6 F.4th 1160, 1167 (Briscoe, J., joined by Murphy, J.); Telescope Media Grp. v. Lindsey, (*Telescope I*), 271 F. Supp. 3d 1090, 1097 (2017) (Tunheim, C.J.); Emilee Carpenter, LLC v. James, 575 F. Supp. 3d 353, 364 (W.D.N.Y. 2021) (Geraci, J.).

155. *303 Creative III*, 600 U.S. at 577 (Gorsuch, J., joined by Roberts, C.J., & Thomas, Alito, Kavanaugh & Barrett, JJ.); *Telescope Media Grp. v. Lucero*, 936 F.3d at 746 (Stras J., joined by Shephard, J.); *303 Creative II*, 6 F.4th at 1190 (Tymkovich, C.J., dissenting); Chelsey Nelson Photography, LLC v. Louisville/Jefferson Cnty. Metro. Gov't, 624 F. Supp. 3d 761, 771 (W.D. Ken. 2022) (Beaton, J.).

156. 303 Creative v. Elenis (*303 Creative I*), 405 F. Supp. 3d 907, 908 (D. Colo. 2019) (Krieger, J.); Updegrove v. Herring, No. 1:20-CV-1141, 2021 WL 1206805 at *1 (E.D. Va. Mar. 30, 2021) (Hilton, J.).

157. The table includes only federal decisions and federal judges. It excludes state supreme court justices because the process for selecting state judges varies widely, making comparison difficult. In some states, for example, supreme court justices are elected in nonpartisan elections. *See, e.g.*, Katherine A. Moerke, *Must More Speech Be the Solution to Harmful Speech? Judicial Elections After* Republican Party of Minnesota v. White, 48 S.D. L. REV. 262, 326 n. 29 (2003).

New York.[158] Each of New York's three other federal districts had a majority of district court judges appointed by Democratic presidents, and judges appointed by Democratic presidents were much more likely to uphold public accommodations laws.[159] By identifying a client in the Western District, challengers were able to proceed in a forum with an even partisan split.

C. Pre-enforcement Litigants and Client Shopping

In addition to forum and judicial selection, control over the posture and timing of a case may allow litigants to showcase—or minimize—actors that are likely to generate sympathy with decision-makers. This could work two ways.

First, a challenger may select and showcase more sympathetic litigants. Specifically in the context of religion-based litigation, pre-enforcement challenges allow interest groups to prioritize parties whose religious beliefs are more likely to be taken seriously and elicit sympathy. Formally, a court is not to question a party's sincere religious beliefs, whatever they may be.[160] Be that as it may, in practice, some assertions about religious beliefs—particularly those that are difficult to distinguish from pure animus—receive little sympathy or protection from modern courts (to say nothing of society at large).[161] Famously, the claim by the owners of

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158. *See* Emilee Carpenter, LLC v. James, 575 F. Supp. 3d 353, 361 (W.D.N.Y. 2021) (challenging New York public accommodation law).

159. Based on export of judicial biographical information from the Federal Judicial Center, https://www.fjc.gov/history/judges/biographical-directory-article-iii-federal-judges-export.

160. *See* Hernandez v. C.I.R., 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds."); Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026, 1062 (2003) (noting that, "over the years, the Court extended the potential zone of free exercise protection to cover even idiosyncratic, seemingly not fully consistent beliefs, as well as beliefs that may not be central to people's religions, partly because the Justices concluded that secular courts cannot properly inquire into the religious beliefs' centrality and consistency"); *but see* Adeel Mohammadi, *Sincerity, Religious Questions, and the Accommodation Claims of Muslim Prisoners*, 129 YALE L.J. 1836, 1886 (2020) (explaining gaps between "the official doctrine" that "content of religious beliefs is off-limits" for judicial inquiry and actual practice of accommodations claims by Muslim prisoners).

161. *See* Abner S. Greene, *The Dilemma of Liberal Pluralism*, 70 BUFF. L. REV. 1637, 1729–30 (2022) (observing that "virtually no one would want to accommodate a baker who refused to bake a cake based in religious belief about race").

Piggie Park restaurants that racial integration "contravenes the will of God" was rejected as "not even a borderline case."[162]

In the context of challenges to public accommodations laws, claims based on more specific beliefs about the nature of marriage may have been easier to cast as principled and faith-based than more generalized claims based on negative beliefs about persons in same-sex relationships. For example, a successful pre-enforcement challenge in Arizona involved a wedding calligrapher who alleged specific beliefs about the religious nature of marriage, citing biblical verses about the creation of men and women by God.[163] In contrast, an unsuccessful post-enforcement challenge in Hawaii involved a bed-and-breakfast owner who flatly alleged "that she is Catholic; that she believes that homosexuality is wrong" and that she therefore refused to serve any same-sex couple.[164]

In both cases, the challenger was represented by interest-group attorneys from Alliance Defending Freedom.[165] However, the pre-enforcement Arizona case afforded attorneys the opportunity to select a client whose beliefs could more easily be distinguished from simple hostility and animus. In contrast, in the post-enforcement Hawaii case, the challenge was raised by a defendant who was brought into court by others. Naturally, other factors almost certainly contributed to different results between these two cases—but the pre-enforcement challengers enjoyed an advantage in framing their case.

Perhaps just as significantly, post-enforcement actions necessarily showcase the beneficiaries of the challenged law in addition to the regulated parties. Post-enforcement challenges to antidiscrimination laws inevitably begin when a challenger refused to serve an LGBTQ+ couple, often inflicting significant distress, humiliation, and hardship on real people. Post-enforcement challenges to public accommodations laws involving denials of service to LGBTQ+ customers thus regularly reveal facts highlighting the protections these laws provide to their intended beneficiaries.

In *Washington v. Arlene's Flowers*, for example, a couple who was denied service at their favorite flower store on account of their

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162. Newman v. Piggie Park Enters., 390 U.S. 400, 402 n.5 (1968) (per curiam).

163. Brush & Nib Studio, LC v. City of Phoenix (*Brush & Nib III*), 448 P.3d 890, 897–98 (Ariz. 2019).

164. Cervelli v. Aloha Bed & Breakfast, 415 P.3d 919, 924 (Haw. Ct. App. 2018).

165. *See Brush & Nib III*, 448 P.3d at 933; *id* at 894 (listing counsel).

sexual orientation "lost enthusiasm for a large [wedding] ceremony," fearing further rejections by other vendors and the possibility of attracting protesters.[166] They ultimately scaled down their planned wedding.[167] In *Klein v. Oregon Bureau of Labor and Industries*, a couple planning their wedding was left crying, feeling "shame and anger" after being denied service by a bakery.[168]

In contrast, in pre-enforcement cases where a challenger's injury arises from hypothetical future interactions with hypothetical customers, litigants likely benefit from the resulting abstraction of the protections provided by the challenged law. For example, in *Chelsey Nelson Photography v. Louisville/Jefferson County*, a wedding photographer who had not been asked to photograph any weddings of same-sex couples brought a successful pre-enforcement challenge to a public accommodations ordinance.[169] Lacking record evidence of concrete events of discrimination, the city sought to submit expert testimony statistically demonstrating that the plaintiff's requested relief would result in more discrimination in the city—but the district court rejected the admissibility of that testimony.[170] The case was thus decided formally and clinically, without reference to tangible examples of discrimination in the real world.[171]

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166. State v. Arlene's Flowers, Inc. (*Arlene's Flowers III*), 441 P.3d 1203, 1211 (Wash. 2019).

167. *Id.*

168. *See* Klein v. Or. Bureau of Lab. & Indus. (*Klein II*), 506 P.3d 1108, 1115 (Or. 2022)*; but see* Jeremiah A. Ho, *Queer Sacrifice in* Masterpiece Cakeshop, 31 YALE J.L. & FEMINISM 249, 286–300 (2020). Professor Ho contrasts the "queerness" of the same-sex couple in the *Masterpiece Cakeshop* litigation with the "assimilated, respectable, and mainstream-aligned identities" of the couples in *Obergefell*, arguing that the former were "unable to avail themselves to Kennedy's dignity jurisprudence" to the same extent. *Id.* This analysis suggests that some LGBTQ+ couples may receive less sympathy from decision-makers than others, depending on their degree of assimilation with mainstream culture. *See id.*

169. Chelsey Nelson Photography, LLC v. Louisville/Jefferson Cnty. Metro Gov't, 624 F. Supp. 3d 761, 774-75 (W.D. Ky. 2022).

170. *See id.* at 797–800. *See also* Linda H. Edwards, *Telling Stories in the Supreme Court: Voices Briefs and the Role of Democracy in Constitutional Deliberation*, 29 YALE J.L. & FEMINISM 29, 70–81 (2017) (analyzing what role, if any, non-party stories should play in judicial decision-making).

171. *Cf.* Laura E. Little, *Negotiating the Tangle of Law and Emotion*, 86 CORNELL L. REV. 974, 977 (2001) (noting "law's tradition of formality, neutrality, and impartiality" and the competing idea that "a deepening of understanding . . . will occur when the legal thinker experiences feeling").

The potential impact of the presence of human beneficiaries is further supported by empirical research performed in the context of sexual harassment disputes. Specifically, Professors Netta Barak-Corren and Daphna Lewinsohn-Zamir have demonstrated that third parties are more sympathetic to offenders who are identified by name, compared to those who are anonymous.[172] Human decision-makers are influenced by the presence of identified and personified human beings—and human victims are necessarily lacking in entirely speculative cases like *Chelsey Nelson Photography* and *303 Creative*.

In sum, pre-enforcement cases offer litigants the ability to select a preferred forum based on the likelihood of a case being assigned to a sympathetic judge, to showcase particular clients, and to focus on cases where the protections that challenged laws provided to beneficiaries remain abstract and distant. At least when relatively close issues are being litigated, these advantages may benefit plaintiffs who pursue more speculative actions.

III. Pre- and Post-enforcement Challenges by Wedding Vendors to Public Accommodations Laws

This Part evaluates the hypothesis of Section II.C by using a set of First Amendment challenges brought by wedding vendors against public accommodations laws to analyze the success rates of pre- and post-enforcement challenges.[173] It first explains the legal background to these cases before analyzing the observed results.

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172. *See* Netta Barak-Corren & Daphna Lewinsohn-Zamir, *What's in a Name? The Disparate Effects of Identifiability on Offenders and Victims of Sexual Harassment*, 16 J. EMPIRICAL LEGAL STUD. 955 (2019) (presenting empirical findings). In contrast, female victims were penalized when they actively identified themselves, potentially reflecting gender biases. *Id.* at 975, 978–79. *See also* Heather Walter-McCabe, 303 Creative: *The Public Perils of Ignoring Public Health Harms in LGBTQ Rights Cases*, 27 J. HEALTH CARE L. & POL'Y 188, 196–201 (2024) (documenting health impacts of discrimination upon LGBTQ+ communities).

173. Separate issues are presented when state governmental officials refuse to perform duties relating to same-sex couples. *See, e.g.*, Ermold v. Davis, 936 F.3d 429, 432 (6th Cir. 2019) (discussing county clerk who refused to issue marriage licenses for same-sex couples), *cert. denied*, 141 S. Ct. 3 (2020); Meg Penrose, *Equal Justice Under Law: Navigating the Delicate Balance Between Religious Liberty and Marriage Equality*, 61 WASHBURN L.J. 191, 210–14 (2021). Those cases are not discussed here.

A. The Origins and Operation of Public Accommodations Laws

The origin of public accommodations laws can be traced to rules governing innkeepers and other "public" professions, which the common law prohibited from denying services to customers without a valid reason.[174] Beginning with Massachusetts after the Civil War, states began to codify statutes guaranteeing customers access to public places without regard to race.[175] Opponents of racial equality fought against these laws, both in courts and in southern state legislatures.[176] But during the Civil Rights Movement, the Supreme Court rejected various constitutional challenges,[177] including ones based on theories of religious free exercise,[178] to laws requiring public businesses to serve all customers regardless of race. Over time, the scope of these statutes expanded, both with regard to the types of spaces they applied to and the types of discrimination they prohibited.[179]

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174. *See* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 571 (1995); *303 Creative LLC*, 143 S. Ct. at 2326 (Sotomayor, J., dissenting) (citing Lane v. Cotton 88 Eng. Rep. 1458 (KB 1701)).

175. *See Hurley*, 515 U.S. at 571–72; *see* Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1352 (1996) (outlining history of public accommodations laws).

176. *See, e.g.*, The Civil Rights Cases, 109 U.S. 3 (1883) (striking down federal Civil Rights Act of 1875, which required equal access to public accommodations such as inns and places of public amusement without regard to race); *see also 303 Creative LLC*, 600 U.S. 570, 610–12 (Sotomayor, J., dissenting) (summarizing history of public accommodations laws).

177. *See, e.g.*, Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 261 (1964) (rejecting argument that the Civil Rights Act of 1964, as applied to a hotel, exceeded Congressional authority under the Commerce Clause); Katzenbach v. McClung, 379 U.S. 294, 298 (1964) (rejecting argument that the Civil Rights Act of 1964, as applied to a restaurant, exceeded Congressional authority under the Commerce Clause); Newman v. Piggie Park Enters., 390 U.S. 400, 400 (1968) (per curiam) (holding that the Civil Rights Act of 1964 applied to drive-in restaurants and successful plaintiffs were entitled to attorney fees).

178. *See Piggie Park Enters.*, 390 U.S. at 402 n.5 (rejecting claim that public accommodations law "contravenes the will of God"); *cf.* Bob Jones Univ. v. United States, 461 U.S. 574, 602–03 (1983) (rejecting contention that federal policy against extending tax benefits to discriminatory entities could not constitutionally be applied to religious private schools); Louise Melling, *Religious Refusals to Public Accommodations Laws: Four Reasons to Say No*, 38 HARV. J.L. & GENDER 177, 182 (2015) (discussing free exercise objections to racial integration).

179. *See* Roberts v. U.S. Jaycees, 468 U.S. 609, 624–25 (1984) ("Like many other States, Minnesota has progressively broadened the scope of its public accommodations law in the years since it was first enacted, both with respect to

Today, the vast majority of Americans engaged in commercial activities are protected by, and subject to, public accommodations laws—though these laws vary widely in their scope. Federal laws, such as the Civil Rights Act of 1964[180] and the Americans with Disabilities Act,[181] ensure access to certain goods and services without regard to race, national origin, religion, or disability status. All but five states have enacted statewide public accommodations laws.[182] And, many cities prohibit discrimination through public accommodations ordinances.[183] Critically, though, not all of these laws shield against discrimination on the basis of sexual orientation.[184]

These laws operate in largely similar ways.[185] First, they identify categories of businesses that are public accommodations, usually embracing sweeping definitions that include most commercial activities available to the general public.[186] Some also expressly

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the number and type of covered facilities and with respect to the groups against whom discrimination is forbidden."); *see also* Elizabeth Sepper & Deborah Dinner, *Shared Histories: The Feminist and Gay Liberation Movements for Freedom in Public*, 54 U. RICH. L. REV. 759, 762 (2020) (discussing efforts to expand public accommodations laws to protect women and LGBTQ people).

180. *See* 42 U.S.C. § 2000a(a) (mandating equal access to enumerated types of public accommodations "without discrimination or segregation on the ground of race, color, religion, or national origin").

181. *See* 42 U.S.C. § 12182 (mandating equal access to enumerated types of public accommodations without discrimination on the basis of disability).

182. *See 303 Creative LLC*, 600 U.S. 570, 605 (Sotomayor, J., dissenting) (outlining history and status of state public accommodations laws); *see also* Elizabeth Sepper, *A Missing Piece of the Puzzle of the Dignitary Torts*, 104 CORNELL L. REV. ONLINE 70, 72, 72 n.8 (2019) (listing five states that have not guaranteed access to public accommodations without regard to race, religion, sex, or disability).

183. *See, e.g.*, Carcaño v. Cooper, 350 F. Supp. 3d 388, 418 (M.D.N.C. 2018) (referencing public accommodations ordinance in Charlotte, North Carolina); *but see* J. Levi Stoneking, *The Death of a HERO: How Equality Opponents Repealed the Houston Equal Rights Ordinance by Fueling Trans-Panic with Tested Tactics*, 26 TUL. J.L. & SEXUALITY 101 (2017) (discussing enactment and then repeal of public accommodations ordinance in Houston, Texas).

184. *See* 42 U.S.C. § 2000a; Mo. Ann. Stat. § 213.065(1) (protecting categories that do not include sexual orientation).

185. *But see* Lucien J. Dhooge, *Public Accommodation Statutes, Sexual Orientation and Religious Liberty: Free Access or Free Exercise?*, 27 U. FLA. J.L. & PUB. POL'Y 1, 58 (2016) (arguing for greater uniformity across state public accommodations laws).

186. *See, e.g.*, 43 Pa. Stat. Ann. § 954(l) ("[A]ny accommodation, resort or amusement which is open to, accepts or solicits the patronage of the general public," and providing a voluminous and non-exclusive list of examples); Mich.

identify entities that are exempted; for example, some public accommodations laws explicitly exempt religious corporations,[187] while others exempt only religious nonprofits.[188]

Public accommodations laws also identify protected categories of persons. Some state laws and local ordinances go well beyond the categories protected under federal law, including groups such as sexual orientation, gender expression, veteran status, or status as a breastfeeding parent.[189] Others do not.[190] Finally, these laws mandate that public accommodations may not deny services to customers on the basis of membership in any protected category.[191] In addition to

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Comp. Laws 37.2301(a) (defining public accommodation as "a business, or an educational, refreshment, entertainment, recreation, health, or transportation facility, or institution of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages, or accommodations are extended, offered, sold, or otherwise made available to the public").

187. *See, e.g.* Mo. Ann. Stat. § 213.065(3) (providing that public accommodations law does not apply to "a place of accommodation owned by or operated on behalf of a religious corporation, association or society"); *see also* 775 Ill. Comp. Stat. Ann. 5/5-102.1 (providing that lawyers and health care professionals may deny services to individuals for non-discriminatory reasons).

188. *See, e.g.*, Conn. Gen. Stat. § 46b-35a (providing exemption for "a religious organization, association or society, or any nonprofit institution or organization operated, supervised or controlled by or in conjunction with a religious organization"); *but see* Elizabeth Sepper, *The Role of Religion in State Public Accommodations Laws*, 60 ST. LOUIS U. L.J. 631, 653–54 (2016) (explaining that public accommodations "statutes tend to grant no special accommodation to religion" and that those provisions tend to be the result of "changes wrought by marriage equality").

189. *See, e.g.*, Wash. Rev. Code Ann. § 49.60.215 (barring discrimination on the basis of "race, creed, color, national origin, citizenship or immigration status, sexual orientation, sex, honorably discharged veteran or military status, status as a mother breastfeeding her child, the presence of any sensory, mental, or physical disability, or the use of a trained dog guide or service animal by a person with a disability"); Haw. Rev. Stat. Ann. § 489-3 (barring discrimination on the basis of "race; sex, including gender identity or expression; sexual orientation; color; religion; ancestry; or disability, including the use of a service animal"); 775 Ill. Comp. Stat. Ann. 5/1-102 (barring discrimination on the basis of "race, color, religion, sex, national origin, ancestry, age, order of protection status, marital status, physical or mental disability, military status, sexual orientation, pregnancy, or unfavorable discharge from military service").

190. *E.g.*, Mo. Ann. Stat. § 213.065.

191. *See, e.g.*, La. Stat. Ann. § 51:2247 (forbidding "a person to deny an individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation, resort, or amusement"); 775 Ill. Comp. Stat. Ann. 5/5-102 (barring discrimination on basis of protected categories "in connection with employment, real estate transactions, access to financial credit, and the availability of public accommodations").

these core operations, public accommodations laws generally also prohibit behaviors associated with discrimination, such as posting signs designed to turn away customers based on their membership in protected categories.[192]

One notable structural difference between various public accommodations statutes is that some laws allow private enforcement while others do not.[193] In jurisdictions where public accommodations laws allow for suits by private parties, private "testers" who seek out discriminatory businesses may be able to incorporate strategic considerations into litigation planning much as pre-enforcement challengers might.[194] Similarly, private "testers" likely face some of the same hurdles that pre-enforcement challengers face, if their allegations about their future intent to patronize a business are overly speculative.[195]

The application of these laws to prohibit discrimination against LGBTQ+ customers where that discrimination is motivated by sincere religious beliefs has been highly controversial—both in courtrooms and in academic literature.[196] Many point out similarities

192. *See, e.g.*, N.Y. Civ. Rights Law § 40 (barring publication or circulation of communications "to the effect that any of the accommodations, advantages, facilities and privileges of any such place shall be refused, withheld from or denied to any person on account of race, creed, color or national origin, or that the patronage or custom thereat, of any person belonging to or purporting to be of any particular race, creed, color or national origin[] is unwelcome, objectionable or not acceptable, desired or solicited").

193. *Compare, e.g.*, Jarvis v. Dist. Taco, LLC, No. CV DKC 23-1029, 2023 WL 4085872, at *2 (D. Md. June 20, 2023) (no private right of action under Maryland public accommodations law) *with, e.g.*, Humphrey v. Tharaldson Enterprises, 95 F.3d 624, 627 (7th Cir. 1996) (private right of action created by Wisconsin's public accommodations law).

194. *Cf.* Stephen E. Haydon, *A Measure of Our Progress: Testing for Race Discrimination in Public Accommodations*, 44 UCLA L. REV. 1207, 1235–1241 (1997) (discussing the use of testers under certain antidiscrimination laws).

195. *See* Harty v. W. Point Realty, Inc., 28 F.4th 435, 443 (2d Cir. 2022) (affirming dismissal of private action by ADA tester who claimed he would use a noncompliant hotel website to book a room "in the near future," and explaining that "[s]uch 'some day' intentions" do not support a finding of imminent injury).

196. *See* Greene, *supra* note 161, at 1721–23 (discussing different views on whether segregation is distinguishable from sexual-orientation discrimination); Douglas NeJaime, *Bigotry in Time: Race, Sexual Orientation, and Gender*, 99 B.U. L. REV. 2651, 2652–54 (2019) (discussing conflicts over the analogy between segregation and opposition to LGBTQ equality, and noting that "consensus about whether a particular view is considered bigoted . . . emerges only after decades of conflict over the status of a marginalized group"); James M. Oleske, Jr., *The Evolution of Accommodation: Comparing the Unequal Treatment of Religious*

between today's religious objections to serving LGBTQ+ customers and yesterday's religious objections to public accommodations laws asserted by segregationists,[197] which the Warren Court found to be "patently frivolous."[198] Others, though, have pushed back against analogizing modern objections to those made by segregationists, arguing that today's context is different and the motivations of today's religious objectors are categorically more legitimate than those of objectors during segregation.[199] Regardless of one's view of that comparison, the rise of public accommodations laws that prohibit sexual orientation discrimination and the Court's recognition of marriage equality created an environment in which a variety of

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Objections to Interracial and Same-Sex Marriages, 50 HARV. C.R. C.L. L. REV. 99, 101–02 (2015) (analyzing why the legal academy has been more solicitous to religious objections by businesses opposed to marriage between same-sex couples than it was to religious objections by opponents of interracial marriage).

197. *See* 303 Creative LLC v. Elenis, 600 U.S. 570, 633-34 (2023) (Sotomayor, J., dissenting) (comparing wedding vendor cases with segregation cases); Kyle C. Velte, *Recovering the Race Analogy in LGBTQ Religious Exemption Cases*, 42 CARDOZO L. REV. 67, 129–35 (2020) (arguing that analogy between racial discrimination and LGBTQ discrimination is supported by plain language of public accommodations laws and by legislative intent). *Cf.* Yoshino, *supra* note 2, at 148–49 (comparing *Obergefell*'s establishment of marriage equality for same-sex couples with *Loving v. Virginia*, 388 U.S. 1 (1967), which established marriage equality for interracial couples).

198. Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 403 n.5 (1968); *but see* Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453, 1455, 1516–17 (2015) (arguing that the "patently frivolous" language partially resulted from the Warren Court's rejection of the concept of "religious liberty of for-profit corporations"—a concept the current Court is less likely to reject given its embrace of "the ideal of private ordering and . . . resistance to redistribution").

199. *See* Brush & Nib Studio, LC v. City of Phoenix, 448 P.3d 890, 896 (Ariz. 2019) (rejecting comparison between wedding vendor case and segregation cases); Richard F. Duncan, *Seeing the No-Compelled-Speech Doctrine Clearly Through the Lens of Telescope Media*, 99 NEB. L. REV. 58, 82 (2020) (contrasting those "acting on the indecent and dishonorable bigotry of white supremacy" with "religious wedding vendors . . . standing on reasonable, decent, and honorable principles"); Andrew Koppelman, *Gay Rights, Religious Liberty, and the Misleading Racism Analogy*, 2020 B.Y.U. L. REV. 1, 3–5 (2020) (arguing that analogy between "religious heterosexism" and racism is misleading, and is a "conversation-stopper"); Douglas Laycock, *The Broader Implications of Masterpiece Cakeshop*, 2019 B.Y.U. L. REV. 167, 190–92 (2019) (distinguishing between historical realities of segregation and sexual-orientation discrimination). *See also* Greene, *supra* note 161 ("[N]o one would want to accommodate a baker who refused to bake a cake based in religious belief about race . . . [but] there's a case to be made that the cultural moment in which we find ourselves regarding queer rights is different from where we are (or were) regarding race.").

businesses, represented by religious advocacy groups,[200] advanced pre- and post-enforcement challenges.

Although religious exercise was inextricable from the vendors' claims in these cases, by and large these challenges were brought primarily under the First Amendment's Free Speech Clause, under theories of compelled speech or content-based restriction—either of which trigger demanding strict scrutiny review of the challenged statute.[201]

Litigants typically also brought religious liberty claims under the First Amendment's Free Exercise Clause.[202] These claims rarely played a central role in cases (at least formally speaking), because free exercise challenges to neutral laws of general applicability are reviewed under the more lenient rational basis standard.[203] Thus, free exercise claims only triggered the same demanding level of scrutiny as free speech claims when brought in states that had enacted state level religious freedom restoration acts.[204] Nevertheless,

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200. *See supra* note 25 (discussing involvement of ADF in similar challenges).

201. *See 303 Creative II*, 6 F.4th (10th Cir. 2021), *rev'd*, 600 U.S. 570 (2023) (providing an example of this); *see generally* Note, *Two Models of the Right to Not Speak*, 133 HARV. L. REV. 2359 (2020) (discussing compelled speech doctrine).

202. *See 303 Creative II*, 6 F.4th at 1177–78 (discussing speech and free exercise claims).

203. *See* Emp. Div., Dep't Hum. Res. Or. v. Smith, 494 U.S. 872, 879 (1990) (holding that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)'").

204. *See Brush & Nib Studio III*, 247 Ariz. at 298 (ruling on free speech claim and free exercise claim brought under Arizona's Free Exercise of Religion Act). The federal Religious Freedom Restoration Act, 42 U.S.C. § 2000bb, establishes a heightened "compelling interest" standard for free exercise claims against actions by the federal government. After the Supreme Court held that RFRA's application to state law exceeded Congress's authority under Section 5 of the Fourteenth Amendment, (*see* City of Boerne v. Flores, 521 U.S. 507, 519–20 (1997) (striking down RFRA as applied)), supporters of a more robust free exercise regime turned to state legislatures to enact state-level RFRA analogues. *See generally* Christopher C. Lund, *Religious Liberty After* Gonzales*: A Look at State RFRAs*, 55 S.D. L. REV. 466, 466–67 (2010) (describing state RFRAs). Twenty-three states have enacted RFRA-analogues on the books—and thirteen more have no place for a RFRA statute because their state constitutions already accomplish similar ends. *See* WILLIAM W. BASSETT ET AL., RELIGIOUS ORGANIZATIONS AND THE LAW § 3:26 (2d ed.) (surveying state responses to *City of Boerne*). In these jurisdictions, a free exercise challenge to a public accommodations law might be reviewed under a similar level of scrutiny as a free speech challenge. *Brush & Nib Studio III*, 247 Ariz. at 298.

by advancing religious exercise theories alongside free speech theories, plaintiffs both laid the groundwork for hybrid rights arguments[205] and reinforced the presentation of their clients' objections to antidiscrimination laws as faith-based.[206] Moreover, some recent analysis suggests that, at the Supreme Court level, speech claims have enjoyed more success when brought by religious litigants.[207]

B. Pre-Enforcement Status and Litigation Success in the Wedding Vendor Cases

Wedding vendor challenges to public accommodations laws present a rare opportunity to analyze outcomes driven by jurisprudence on pre- and post-enforcement actions. Their legal theories, and the laws they challenged, are similar enough to be comparable to each other.[208] And public accommodations laws, while

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205. *See, e.g.*, *Smith*, 494 U.S. at 883; *see also* Dan T. Coenen, *Reconceptualizing Hybrid Rights*, 61 B.C. L. REV. 2355, 2414 (2020) (arguing that hybrid rights claims are consistent with particular schools of constitutional interpretation).

206. For further discussion and analysis of the relationship between wedding vendors' speech and free exercise claims, see Amy J. Sepinwall, *Free Speech and Off-Label Rights*, 54 GA. L. REV. 463, 468–69 (2020) (casting vendors' speech arguments as an "off-label rights exercise" where religious-exercise claims that would fail under free exercise jurisprudence are repackaged as speech claims); Sonya G. Bonneau, *The Romantic Author as Compelled Speaker*, 97 TUL. L. REV. 53, 57–58 (2022) (arguing that wedding vendor cases are better viewed as implicating free-exercise rights because the compelled speech argument relies on a "romantic author trope" that leads to "distortive assumptions").

207. *See* Weldon P. Sloan & Joseph M. Capobianco, *Faith, Federal Courts, and Free Speech: Do Federal Courts Protect Religious Speech More Than Non-Religious Speech?*, 22 FIRST AMEND. L. REV. 147, 187 (2024) ("[R]eligious liberty litigants at the Supreme Court level have seen a lot of success . . . [and] even a moderate increase in religious liberty litigant success at the Supreme Court level deserves our notice.").

208. *See* State v. Arlene's Flowers, Inc., 441 P.3d 1203, 1213 (Wash. 2019) (noting similarities between two wedding vendor cases); Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272, 281 (Col. Ct. App. 2015) (same), *rev'd sub nom.* Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n, 138 S. Ct. 1719 (2018).

In contrast, for example, pre-*Dobbs* state restrictions on abortions took a variety of different and unorthodox forms, making direct comparisons difficult. *Compare supra* text accompanying notes 72–86 (discussing Texas law authorizing private enforcement actions against anyone who aided a woman in receiving an abortion after roughly six weeks of pregnancy) *with* Phoebe Varunok, *The Georgia Life Act: Limiting Women's State Constitutional Right to Privacy*, 28 AM. U. J. GENDER, SOC. POL'Y & L. 247, 254–55 (2020) (discussing Georgia law making unborn children with "embryonic or fetal cardiac activity" part "of the official

serious, are not so draconian as to completely deter rational actors from violating them first and challenging them defensively; this is in contrast to the punishments authorized by laws like S.B. 8.[209] Thus, wedding vendors collectively brought meaningful numbers of challenges both pre- and post-enforcement, allowing a useful comparison.[210] Moreover, many of the pre- and post-enforcement actions were litigated by the same interest group counsel.[211] This consistency reduces the likelihood that confounding factors—such as different litigation strategies followed by interest group counsel compared to private counsel—would have influenced the results.

Among twenty-two dispositive publicly available court decisions,[212] pre-enforcement challenges were successful in five

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Georgia population" and forbidding doctors to perform abortion-related medical procedures in most circumstances); Cynthia Soohoo, *An Embryo Is Not A Person: Rejecting Prenatal Personhood for A More Complex View of Prenatal Life*, 14 CONLAWNOW 81, 103 (2023) (discussing "general personhood provisions" that require "all laws of the state be interpreted to include a zygote-embryo-fetus in the definition of a person or human being").

209. S.B. 8 created nearly unlimited liability for abortion providers and those who help them, while also forcing them to litigate anywhere in the state and creating one-sided liability for attorneys' fees. B. Jessie Hill, *Response to* Wasserman *and* Rhodes*: The Texas S.B. 8 Litigation and "Our Formalism"*, 72 AM. U. L. REV. F. 1, 5 (2022); Kimberley Harris, *How Do You Solve a Problem Like S.B. 8? Flagrantly Unconstitutional Laws, Procedural Scheming, and the Need for Pre-Enforcement Offensive Litigation*, 89 TENN. L. REV. 829, 869 (2022). In contrast, a typical public accommodations law in the state of Hawaii imposes a fine of between $500 and $10,000 per incident. HAW. REVISED STAT. § 489-8. Fines for violation of Colorado's public accommodations law likewise range from $50 to $500 per violation. COLO. REV. STAT. ANN. § 24-34-602.

210. In contrast, for example, religious-liberty challenges to COVID-19 measures that temporarily restricted the size of public gatherings were nearly all brought pre-enforcement. *See, e.g.*, Roman Cath. Diocese of Brooklyn v. Cuomo, 592 U.S. 14, 16 (2020) (pre-enforcement challenge to public health restrictions by houses of worship that "complied with all public health guidance"); Ryan Houser & Andrés Constantin, *Covid-19, Religious Freedom and the Law: The United States' Case*, 49 AM. J.L. & MED. 24, 28 (2023) (collecting cases).

211. *Compare, e.g.*, *Arlene's Flowers III*, 441 P.3d at 1206 (Wash. 2019) *with* Telescope Media Grp. v. Lucero, 936 F.3d 740, 746 (8th Cir. 2019). *See also supra* note 25 (describing Alliance Defending Freedom, a group with significant involvement in several major wedding vendor cases). *See generally* Jon Swaine & Beth Reinhard, *Inside the Tactics that Won Christian Vendors the Right to Reject Gay Weddings*, WASH. POST (Sept. 28, 2023), https://www.washingtonpost.com/investigations/2023/09/24/alliance-defending-freedom-wedding-lawsuit/ (on file with the *Columbia Human Rights Law Review*) (describing tactics used in this litigation).

212. Identified through Westlaw searches and cross-checked against the websites of interest-group participants. The identified cases include only disputes

judgments—winning relief against application of the challenged law[213]—and unsuccessful in seven.[214] By contrast, post-enforcement challenges were successful in only a single, state trial-level case[215] and were unsuccessful nine times.[216]

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over the application of public accommodations laws to wedding vendors seeking to avoid serving LGBTQ+ couples. It does not include cases arising from analogous but factually distinct situations, such as discrimination in the foster-care context. *See, e.g.*, Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021) (exemplifying such a case). The search excluded administrative proceedings and decisions on requests for preliminary relief.

213. *See 303 Creative III*, 600 U.S. at 602–03 (holding that public accommodations law could not be applied to plaintiff's potential conduct); Telescope Media Grp. v. Lucero, 936 F.3d 740, 747 (holding that pre-enforcement challengers were entitled to preliminary injunction); *Brush & Nib III*, 448 P.3d at 926 (ruling in favor of pre-enforcement challengers); Chelsey Nelson Photography, 624 F. Supp. 3d 761, 807–08 (granting summary judgment to pre-enforcement challenger); Amy Lynn Photography Studio, LLC v. City of Madison, No. 17-CV-555 (Wis. Cir. Ct. Dane Cnty. Aug. 11, 2017) (holding that public accommodations law did not apply to pre-enforcement challenger).

214. *See* Emilee Carpenter, LLC v. Hames, 575 F. Supp. 3d 353, 361–62 (denying pre-enforcement challenger's motion to dismiss); *303 Creative II*, 6 F.4th at 1168 (affirming summary judgment against pre-enforcement challenger); *303 Creative I*, 405 F. Supp. 3d 907, 908–09 (granting summary judgment to pre-enforcement challenger); Brush & Nib Studio, LC v. City of Phoenix (*Brush & Nib II*), 418 P.3d 426, 431 (Ariz. Ct. App. 2018) (affirming summary judgment in favor of city against pre-enforcement challenger); Brush & Nib Studio, LC v. City of Phoenix (*Brush & Nib I*), CV2016-52251 (Ariz. Super. Ct.) (granting summary judgment against pre-enforcement challenger; Telescope Media Grp. v. Lindsey, 271 F. Supp. 3d 1090, 1097 (D. Minn. 2017) (dismissing pre-enforcement challenge to public accommodations law); Updegrove v. Herring, No. 1:20-CV-1141, 2021 WL 1206805, at *5 (E.D. Va. Mar. 30, 2021) (dismissing pre-enforcement challenge).

215. *See* Dep't of Fair Employment & Housing v. Cathy's Creations, Inc., No. BCV-18-102633, 2022 WL 18232316 (Cal. Super. Dec. 27, 2022) (granting judgment in favor of defendant in post-enforcement action). The *Masterpiece Cakeshop* litigation, which presented similar issues but was decided on other grounds—namely, the inappropriateness of certain comments made by commissioners—is not included in any categories. Justice Kennedy's majority opinion is widely regarded as avoiding the underlying issue by ruling on alternative grounds. *See supra* note 9.

216. *See Klein II*, 506 P.3d at 1114 (Or. 2022) (upholding application of public accommodations law); Klein v. Or. Bureau of Lab. & Indus. (*Klein I*), 410 P.3d 1051, 1057 (Or. App. 2017) (same); *Arlene's Flowers III*, 441 P.3d at 1209 (same); Washington v. Arlene's Flowers, Inc., (*Arlene's Flowers II*), 389 P.3d 543, 548 (Wash. 2017) (same); Washington v. Arlene's Flowers, Inc. (*Arlene's Flowers I*), No. 13-2-00871-5, 2015 WL 720213 (Wash. Super. Ct. Feb. 18, 2015) (granting summary judgment against wedding vendor); Elane Photography, LLC v. Willock (*Elane III*), 309 P.3d 53, 59 (N.M. 2013) (affirming summary judgment in favor of customer who filed discrimination claim); Elane Photography, LLC v. Willock

These numbers include decisions and then subsequent appeals of the same case—entries that may be influenced by each other. While appellate decisions involved *de novo* review and thus did not formally defer to lower-court decisions, earlier decisions within a particular litigation might nevertheless influence later ones in unpredictable ways. Moreover, these cases reflect decisions by different types of courts and judges with different levels of expertise in constitutional cases—arguably apples and oranges.[217]

To account for these factors, the table below focuses more narrowly on terminal published opinions by appellate panels, state supreme courts, and the U.S. Supreme Court, thus including only the final decision in any given litigation. All decisions in this table were independent from all others, in that no court was bound to follow a prior precedent when it issued its ruling. By necessity, these more restrictive standards result in a small sample size, with only seven entries. However, despite the small sample size, the trend is

(*Elane II*), 284 P.3d 428, 432 (Ct. App. N.M. 2012) (same); Elane Photography, LLC v. Willock (*Elane I*), No. CV-2008-06632, 2009 WL 8747805 (N.M. Dist. Dec. 11, 2009) (granting summary judgment to customer who filed discrimination claim); Gifford v. McCarthy, 137 A.D.3d 30, 34 (N.Y. App. Div. 2016) (affirming award of damages to customer who suffered discrimination).

217. For example, a California Superior Court decision held that a wedding cake baker could provide "full and equal access" to LGBTQ+ customers by referring them to *another* baker that would not deny them services. *See Cathy's Creations*, 2022 WL 18232316, at *7–8 (finding that baker's "offer to refer" customers to another baker "was almost simultaneous with" her "discovery that she was being asked to design a wedding cake at odds with her Christian faith" and "her immediate offer to refer them to a comparable, good bakery was reasonable and timely," providing "full and equal access"). This holding does not reflect the reasoning of other courts, as a denial of services to a customer that would otherwise violate a public accommodations law cannot be cured merely by a referral to a supposedly equivalent nondiscriminatory business. The court in *Cathy's Creations* relied on authorities from the medical context which held that physicians with religious objections to performing particular procedures could refer patients to other physicians without such objections. *Id.* at *7. But in the context of access to public spaces, the injury to customers is not the mere inability to buy a particular service but also the indignity of being subjected to separate treatment on the basis of a protected category. *See* Heart of Atlanta Motel v. U.S., 379 U.S. 241, 291–93 (Goldberg, J., concurring) ("The primary purpose of the Civil Rights Act of 1964, however, as the Court recognizes, and as I would underscore, is the vindication of human dignity and not mere economics."). *See also generally* Angela C. Carmella, *When Businesses Refuse to Serve for Religious Reasons: Drawing Lines Between "Participation" and "Endorsement" in Claims of Moral Complicity*, 69 RUTGERS U. L. REV. 1593 (2017) (distinguishing between complicity claims in the health care context and endorsement claims by vendors).

consistent with the structural analysis in *infra* Part II, suggesting that pre-enforcement cases enjoyed certain advantages.

Among the decisions meeting the standards described above, challengers *never won* a post-enforcement challenge and *never lost* a pre-enforcement challenge. This suggests that litigants in this area received a more favorable outcome when they challenged a public accommodations law before it was enforced.[218]

Terminal Appellate Judgments

	Challenger Successful	Challenger Unsuccessful
Pre-enforcement	3[219]	0
Post-enforcement	0	4[220]

What makes this trend even more noteworthy is that the pre-enforcement victories did not involve "looming" challenges[221] where enforcement was imminent. Supporters of religious exemptions to public accommodations laws had long warned, for example, of

218. The pattern is apparent, with no post-enforcement success or pre-enforcement failures, even without resort to statistical analysis. Whether statistical analysis is appropriate for this type of data is debatable, depending in part on the independence of the data points. No court in the set was formally bound to follow a previous ruling at the time its decision was issued. But if, for example, one line of reasoning in an earlier published opinion meaningfully influenced judicial deliberations in subsequent cases, the observations may be non-independent and thus unsuited for statistical analysis. Accordingly, whether these data can be formally analyzed depends in part on one's view of the role of persuasive precedent in judicial decision making.

To the extent that the data are non-independent, Fisher's Exact Test can be used to determine if there is a significant association between two categorical variables, and the test is appropriate when sample sizes are small, as they are here. *See, e.g.*, Bridgeport Guardians, Inc. v. City of Bridgeport, 735 F. Supp. 1126, 1131–32, nn. 8–9 (D. Conn. 1990) (discussing utility of Fisher's Exact Test when applied to small sample sizes), *aff'd*, 933 F.2d 1140 (2d Cir. 1991). Fisher's Exact Test results in a P-value of 0.02857, implying a statistically significant association between pre-enforcement status and success. Calculations were performed using R software.

219. *303 Creative III*, 143 S. Ct. at 2322; Telescope Media Grp. v. Lucero, 936 F.3d 740, 740; *Brush & Nib III*, 448 P.3d at 926.

220. *Klein II*, 506 P.3d at 1128; *Arlene's Flowers III*, 441 P.3d 1203, 1237–38 (Wash. 2019); *Elane III*, 309 P.3d at 77; *Gifford*, 137 A.D.3d at 37.

221. *See* Massaro, *supra* note 97*,* at 60–63 (2017) (distinguishing between "looming" challenges where enforcement against the plaintiff appears likely and "ink barely dry" challenges against a provision that has yet to be enforced against anyone).

political bodies "singl[ing] out Christians" and "us[ing] these laws as swords to strike out at their perceived opponents."[222] On the contrary, though, many cases were initiated by vendors, and each of these was a speculative case.

As noted, in *303 Creative*, the plaintiff had never created a wedding website for anyone, and journalists have questioned a party representation that she received a general inquiry from potential LGBTQ+ customers.[223] Likewise, in *Telescope Media Group v. Lucero*, after the Eighth Circuit resolved the merits of the case, the district court characterized the litigation as a "smoke and mirrors" case by a plaintiff who had created only two wedding videos in four years.[224] Nor was *Brush & Nib Studio LC v. City of Phoenix* precipitated by any interaction between the plaintiff and LGBTQ+ customers.[225]

One potential objection to this analysis of the identified trend might be that the composition of the Supreme Court changed between the earlier and later cases within this set. As noted above, Justice Kennedy's departure from the Court deprived advocates for LGBTQ+ rights of a consistently sympathetic vote. Had the Court's composition

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222. Charles J. Russo, *Kicking the Can Down the Road in* Masterpiece Cakeshop*: Is Finding A Happy Medium Possible, or Will the Solution Remain Half-Baked?*, 44 U. DAYTON L. REV. 399, 438–39 (2019); Duncan, *supra* note 199, at 59 (stating that "in recent years *government has required* . . . calligraphers to create wedding invitations for same-sex weddings" but citing to a pre-enforcement action initiated by the calligraphers (emphasis added)); *cf.* Matthew A. Brown, Masterpiece Cakeshop*: A Formula for Legislative Accommodations of Religion*, 53 AKRON L. REV. 177, 179 (2019) (asserting that wedding vendors "*were taken to court* when they refused to serve same-sex weddings on religious grounds" (emphasis added)); Antony Barone Kolenc, *Essay: Veritatis Splendor and State Accommodation of Religious Freedom*, 21 AVE MARIA L. REV. 55, 59 (2023) (discussing conscience issues that arise "where the State enforces nondiscrimination laws, such as those involving LGBTQ+ rights"); Douglas Laycock, *The Religious Freedom Restoration Act*, 1993 B.Y.U. L. REV. 221, 225–26 (1993) (arguing that "[c]ulturally conservative churches . . . are under constant attack on issues" of "homosexuality" and "moral standards for sexual behavior" and would be subjected to "interest group attacks on religious liberty"); *see also* Noa Ben-Asher, *Faith-Based Emergency Powers*, 41 HARV. J.L. & GENDER 269, 278 (2018) (linking the "idea that Christianity is under attack by liberal politicians and lawmakers" with "many contemporary arguments for religious exemptions from marriage equality").

223. *See supra* notes 16–18 & accompanying text (discussing reporting on case).

224. *See supra* note 22 (discussing speculative nature of case).

225. *See Brush & Nib III*, 448 P.3d at 899 (explaining that challenger's injury arose from supposed threat of enforcement).

remained the same after *Masterpiece*, the *303 Creative* decision might have been different—or certiorari might not have been granted at all.

But as explained in Part II, *supra*, pre-enforcement litigants' superior ability to make litigation decisions based on evaluations of and predictions about judges and court composition is one of several advantages available to them. While post-enforcement litigants must respond to cases as brought by their adversaries, pre-enforcement litigants can make key decisions about when and where to litigate, litigating in response to changes in court composition. Thus, the significance of changes in court compositions is generally compatible with the theory that pre-enforcement challengers enjoy significant advantages.

In conclusion, Part II suggested that, in speculative cases, the challenger enjoys advantages they would not have enjoyed when litigating more concrete disputes. Recent outcomes in the wedding vendor context appear consistent with that analysis.

IV. IMPLICATIONS AND CONCLUSIONS: "FLESH-AND-BLOOD FACTS" AND "THE NATION'S SECOND THOUGHT"

In *The Least Dangerous Branch*,[226] Alexander Bickel grappled with tensions between democracy and the counter-majoritarian practice of judicial review—a topic that has dogged American legal thinkers since the days of James Bradley Thayer and Oliver Wendell Holmes, Jr.[227] How, precisely, should we conceptualize this bedrock feature of the American judicial system, wherein unelected judges are empowered to strike down enactments of the political branches?[228] In evaluating the legitimacy of judicial review, Bickel acknowledged the "passive virtues" of courts, which are able to:

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226. *See* ALEXANDER BICKEL, *supra* note 33 (discussing the "root difficulty . . . that judicial review is a counter-majoritarian force in our system").

227. *See, e.g.*, FREDERIC R. KELLOGG, OLIVER WENDELL HOLMES, JR.: LEGAL THEORY AND JUDICIAL RESTRAINT 4–5 (2007) ("There is a renewed concern among legal scholars that the public, in our litigious society, is being left out of the shaping of constitutional law and hence of our most fundamental rights."); Evan H. Caminker, *Thayerian Deference to Congress and Supreme Court Supermajority Rules: Lessons from the Past*, 78 IND. L.J. 73, 79–94 (2003) (questioning appropriate levels of deference that unelected judges owe to the elected branches).

228. *But see* Todd D. Rakoff, *Statutory Interpretation as a Multifarious Enterprise*, 104 NW. U. L. REV. 1559, 1571–72 (2010) (noting that most state judges who give state statutes their final interpretations are elected, thus questioning the standard account of the relationship between democratic theory and interpretive methodology).

relate a legislative policy to the flesh-and-blood facts of an actual case, and thus to see and portray it from a different vantage point, to observe and describe in being what the legislature may or may not have foreseen as probable—this opportunity as much as, or more than, anything else enables the Court to appeal to the nation's second thought.[229]

Drawing from and extending Bickel's argument, when courts consider pre-enforcement challenges based on highly speculative assertions about potential enforcement, judicial review is much further distanced from "flesh-and-blood" facts arising out of a statute's application.[230]

The lack of "flesh-and-blood" facts in pre-enforcement cases is especially important when the challenged statute protects beneficiaries from discrimination. Challengers to those laws benefit when the visceral harms they address and prevent are abstracted; the defense of those laws benefits when evidence from the parties' conduct provides a tangible reminder of the reality of discrimination.[231]

Moreover, courts favor as-applied challenges to specific applications of a statute over facial challenges seeking total invalidation for similar reasons.[232] Because a statute "may be invalid as applied to one state of facts and yet valid as applied to another,"[233] the Court will normally "try not to nullify more of a legislature's work than is necessary."[234] But to the extent that a preference for as-

229. BICKEL, *supra* note 33, at 116–17.

230. Put another way, in the words of a recent dissent by Justice Kagan, the Court departs from "technical" standing requirements at the risk of becoming "an arbiter of political and policy disputes, rather than of cases and controversies." *See* Biden v. Nebraska, 143 S. Ct. 2355, 2385 (2023) (Kagan, J., dissenting) ("Those rules may sound technical, but they enforce "fundamental limits on federal judicial power' . . . . The Court acts as though it is an arbiter of political and policy disputes, rather than of cases and controversies.").

231. *Cf.* Barak-Corren, *A License to Discriminate?*, *supra* note 24, at 344–52; Barak-Corren, *Religious Exemptions Increase Discrimination Toward Same-Sex Couples*, *supra* note 24, at 94–104 (discussing relation between evidence of discrimination and constitutional holdings).

232. *But see* Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1336 (2000) (arguing that "[f]acial challenges are not sharply categorically distinct from as-applied challenges to the validity of statutes"); Luke Meier, *Facial Challenges and Separation of Powers*, 85 IND. L. J. 1557, 1598 (2010) (arguing that all challenges based on Congress's power to pass the challenged law should be facial).

233. Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282, 289 (1921).

234. Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320, 329 (2006).

applied challenges over facial challenges furthers a normative value of judicial restraint, any work being done by that preference is undone when the "state of facts" being analyzed has been imagined by the court and the parties before it.

Viewed through a more practical lens, pre-enforcement actions provide litigants—particularly those affiliated with ideological interest groups—with a range of important advantages when they seek to attack a disfavored enactment. The more receptive courts are toward speculative and hypothetical claims about likely enforcement, the more the scales are tilted in favor of legal challenges and against policies originating in the political branches. The cases examined above come from both ends of the spectrum: from truly speculative claims that have been allowed to relatively concrete claims that have been rejected.

In light of this analysis, the media controversy over *303 Creative*[235] was both formally irrelevant and highly significant. Its irrelevance stems from the case's pre-enforcement posture—the plaintiffs had never depended on actual requests for wedding websites from LGBTQ+ customers to establish standing, nor were they obligated to. And its significance derives from that posture as well—by even considering a case from a vendor who had never made a wedding website at all, the Court allowed the beneficiaries of the challenged policy to fade into the background, while the challengers enjoyed greater odds of success derived from strategic advantages afforded to offensive plaintiffs. For any concerned with the limitations on the proper role of the judiciary that arise out of Article III, speculative cases and the advantages they confer on challengers to legislation have serious implications.

On the other hand, the fury that erupted after Texas subjected anyone who helped facilitate an abortion to virtually unlimited liability also demonstrates how important pre-enforcement review of purportedly unconstitutional statutes can be.[236] Without it, bad actors in legislatures might insulate harmful laws from any review by mandating consequences so draconian that no rational

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235. *See supra* notes 16–19 & accompanying text (discussing reporting about plaintiffs' claims).

236. *See, e.g.*, Richard D. Rosen, *Deterring Pre-Viability Abortions in Texas Through Private Lawsuits*, 54 TEX. TECH L. REV. 115, 163–64 (2021) (noting consequences of Texas laws designed to thwart pre-enforcement review for women seeking abortions that were, at the time, federally protected).

actor would be willing to violate it.[237] And attempts by state legislatures to advance unconstitutional policies by foreclosing pre-enforcement challenges—as did S.B. 8—are deeply disturbing.[238] Moreover, it is not necessarily desirable for certainly unconstitutional laws to remain on the books for want of an appropriate challenger or an example of enforcement[239]—although the undesirability of retaining statutes that have fallen into desuetude[240] must be weighed against the undesirability of allowing courts to weigh in on speculative disputes.

These competing concerns have traditionally counseled for a jurisprudence cautiously open to pre-enforcement challenges but closed to litigants who cannot point to more than speculation or vague allegations about potential harm . Maintaining that careful balance both preserves individual rights while respecting democratic processes. The trend identified in this Article suggests that a correct balance is especially important, and that courts may be moving in the wrong direction.

This conclusion has at least two important implications. First, government attorneys defending against pre-enforcement challenges should vigorously argue standing and ripeness issues—and interest groups in favor of challenged policies should focus on standing and ripeness issues in amicus briefing. Some attorneys may be tempted to

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237. As Professors Rebecca Aviel and Wiley Kersh have explained, S.B. 8 is designed to foreclose judicial review in other ways—not just by foreclosing pre-enforcement challenges by relying on private enforcement. Specifically, S.B. 8 weaponizes attorneys' fees in a one-sided way, potentially creating liability even for "doctors defending against a lawsuit brought under S.B. 8 and asserting claims for declaratory or injunctive relief in a defensive posture." Aviel & Kersh, *supra* note 74, at 2061–62 (2023). S.B. 8 is thus a complex example—on the one hand, it clearly demonstrates the problems created when pre-enforcement review is not available. On the other hand, the statute is so radical in its attempt to evade judicial review that the issues it raises are (at least for now) essentially unique.

238. S.B. 8 may be only the first among many similar statutes that raise serious procedural and jurisprudential questions. Other states have passed copycat anti-abortion laws, and California passed a gun-control law creating an S.B. 8 modeled cause of action against gun dealers who violate particular requirements. *See* Allie Zunski, *Ducking the System: Examining the Efficacy of Bounty Hunting Statutes That Stifle the Free Exercise of Constitutional Rights*, 31 WM. & MARY BILL RTS. J. 267, 272 (2022) (identifying copycat "citizen deputy" statutes).

239. *See* Wasserman, *supra* note 32, at 1088 (discussing laws that remain on the books despite their acknowledged unconstitutionality).

240. State *ex rel.* Canterbury v. Blake, 584 S.E.2d 512, 516 (W.V. 2003).

focus most of their efforts on the merits of cases, viewing clashes over controversial issues like religious discrimination as inevitable, and seeing any pending case as an opportunity to achieve controlling precedent in their favor. They should, however, recognize that pre-enforcement challenges provide benefits to the challenger, and the defense of a statute will often be easier when the facts of a case include evidence about the statute's beneficiaries. Accordingly, it is in their interest to push for vigorous enforcement of the "credible threat" standard and to avoid making, in the words of Justice Black, "pallid" and "unenthusiastic" arguments over standing.[241]

For example, in *303 Creative*, no party challenged the conclusion that Colorado's public accommodations law could be invoked against the plaintiff if she did enter the wedding business, and an appellate court finding that Colorado had a history of past enforcement against "nearly identical conduct" (referencing *Masterpiece Cakeshop*) went uncontested.[242] Whether the conduct of the proprietor in *Masterpiece* was truly identical to the planned conduct of the proprietor in *303 Creative* seems contestable, but appears to have gone unexplored in the litigation.[243] Given the advantages that pre-enforcement litigants enjoy, potential threshold arguments should be engaged with rather than left on the table.

Relatedly, courts should be more skeptical when presented with pre-enforcement challenges based on purely speculative chains of hypotheticals. This would not necessarily involve any formal change in doctrine. Indeed, as circuit-court decisions such as *Adam v. Barr* demonstrate,[244] existing doctrine can be strictly construed, allowing courts to reject premature suits on the ground that they depend on extended chains of hypotheticals. But the speculative wedding vendor cases that were allowed to proceed demonstrate that this doctrine is subject to uneven application.

Justice Black's concurrence in *Epperson* points the way to a more restrained jurisprudence. Black was no great defender of religion in public schools—indeed, he authored the landmark opinion

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241. Epperson v. Ark., 393 U.S. 97, 109–10 (1968) (Black, J., concurring).

242. *303 Creative III*, 600 U.S. at 583 (2023).

243. *See* Lydia E. Lavelle, *Freedom of Speech: Freedom to Creatively Discriminate?*, 29 CARDOZO J. EQUAL RTS. & SOC. JUST. 69, 96 (2022) (discussing potential differences arising from the fact that *Masterpiece* involved in-person interactions at a brick-and-mortar retailer and *303 Creative* involved an online-only business and hypothetical communications over the internet).

244. *See supra* note 102–109 & accompanying text (discussing cases rejecting pre-enforcement challenge to CSA).

in *Everson v. Board of Education* that incorporated the Establishment Clause against the states, writing that the "wall between church and state" must "be kept high and impregnable."[245] But, when confronted with a speculative challenge to Arkansas's Scopes-era anti-evolution law, he saw the hypothetical threats invoked by the plaintiff as a significant problem.

He was right to do so. A post-enforcement challenge, like *Masterpiece Cakeshop*, presents a court with a full record—giving judges the opportunity to identify and rule on the narrowest possible ground, as Justice Kennedy did in that case. Doing so advances principles of judicial restraint and fulfills the duty of judges to respect the policymaking decisions of the political branches.

When courts err on the side of allowing challenges to popular legislation based on abstract and amorphous assertions of threatened harm, they facilitate strategic gamesmanship and tip the scales against democratic lawmaking and in favor of interest group litigants. In contrast, by rigorously applying the existing requirement that a pre-enforcement challenger demonstrate a credible threat that a law will actually be enforced against them, they can ensure a better balance between the need for courts to base decisions on "flesh-and-blood" disputes and the needs of litigants for access to justice.

245. Everson v. Bd. of Ed. of Ewing Twp., 330 U.S. 1, 18 (1947).