

## What Roman Mars Can Learn About Con Law Weddings, Websites, and Forced Speech

**Roman Mars** [00:00:02] This conversation was recorded late last year, but due to some production snafus and regular life getting in the way, it's only coming out now. I swear it is still fresh and relevant. I am sorry for our absence. Okay. Today is Wednesday, December 21st at about 1:00. So, what are we going to talk about today?

**Elizabeth Joh** [00:00:23] The most famous barbecue joint in constitutional law was once located in Birmingham, Alabama. This was Ollie's Barbecue. Ollie's was a family-owned restaurant and, in the words of the Supreme Court, "one specializing in barbecued meats and homemade pies." Now Ollie's served white customers and Black customers. But like a lot of restaurants in the South before the 1960s, Ollie's would not serve its Black customers inside of the restaurant. Instead, Black customers could only order from the takeout counter. And as Ollie McClung, Jr., the owner of the barbecue, said in 2001, "it was known as a white restaurant." But when President Lyndon Johnson signed the Civil Rights Act of 1964, that kind of racially discriminatory treatment became illegal. Period. But Ollie McClung thought complying with the law would drive away his white customers. So, he sued. And in 1964, the Supreme Court ruled against Ollie's. Ollie's Barbecue--like every other restaurant, hotel, and other place open to the public--had to serve everyone equally. They couldn't exclude Black customers who wanted to sit down and eat inside at Ollie's. The Jim Crow laws of the South that had treated Blacks and whites differently violated federal law. Now, let's fast forward more than 50 years later. I think almost everyone agrees today with the policy upheld in the Ollie's barbecue case--that, you know, it's wrong for businesses to discriminate against customers because they're Black, Hispanic, Asian, or any other racial or ethnic background. Doing so sends a message that not everyone can participate equally in society, even if what's at stake is just barbecue or pies. But what if a business doesn't want to serve you because you and your partner are a same-sex couple? And what if the reason the business refuses to serve you is because that business says that serving you would violate their First Amendment rights? Who should win in a case like this?

**Roman Mars** [00:02:35] Oh, I know.

**Elizabeth Joh** [00:02:37] Well, let's try to be fair. Is it like the Ollie's Barbecue case? Exactly. Is it like something else? The Supreme Court has decided it's going to resolve this question. So, it's time to talk about cakes, websites, Santas, and the Constitution.

**Roman Mars** [00:02:53] Let's do it. This is What Roman Mars Can Learn About Con Law--an ongoing series of indeterminate length, where we look at the cases in front of the conservative majority Supreme Court and use them to examine our Constitution like we never have before. Our music is from Doontree Records. Our professor and neighbor is Elizabeth Joh. And I'm your fellow student and host, Roman Mars.

**Elizabeth Joh** [00:03:45] The type of law that the Supreme Court considered in the barbecue case--that's Title II of the Civil Rights Act of 1964. It's what's known as a "public accommodations law." So, Roman, are you familiar with that term?

**Roman Mars** [00:03:58] No, not at all.

**Elizabeth Joh** [00:03:59] Okay. So, in general, a public accommodation is a business that opens itself up to the public. So good examples are places like restaurants, hotels,

theaters, stores--places like that. Now, most states and the federal government have public accommodations laws. And these laws typically say it's illegal for these businesses to discriminate against their customers on the basis of some protected characteristic. Public accommodations laws, though, are not new. They've existed since the 1860s, and the first laws were meant to ensure that Black Americans could enjoy equal access to goods and services. Now, what is new is that over time, these state and federal laws have expanded the scope of who is covered. So, for example, the Federal Civil Rights Act of 1964 bans discriminatory treatment based on race, color, religion, or national origin in public accommodations. And some state laws have expanded their protections to cover sexual orientation, too. Now in 2012, Charlie Craig and Dave Mullins wanted a cake to celebrate their upcoming wedding. They are a same sex couple. They asked Jack Phillips, the owner and baker of Masterpiece Cakeshop near Denver, Colorado, to make a cake for them. Phillips refused. He is a devout Christian. Phillips said, "Look, I will sell cookies, brownies, or birthday cakes for LGBTQ customers. Just not wedding cakes." In the baker's view, making a custom wedding cake to celebrate a same-sex marriage would be in direct violation of his religious views. The baker said that making a wedding cake for a gay couple would go directly against the teachings of the Bible. The problem for the baker was Colorado's public accommodations law. So, Roman, I think you can see the conflict here.

**Roman Mars** [00:05:58] Yeah. This is a public business. It falls in the purview of public accommodations law. This is a protected characteristic? Question Mark? In Colorado?

**Elizabeth Joh** [00:06:07] Yeah. That's exactly right. So, the state law says that businesses, like bakeries, have to be open to everyone. And in Colorado, they can't discriminate against customers based on their race, religion, disability, or sexual orientation. So, Charlie and Dave filed a complaint with the state commission that was in charge of investigating civil rights claims because that's what a public accommodations law is. It's a civil rights law. The commission decided in the couple's favor. That case eventually went to court and then the Supreme Court. The baker argued that making him comply with Colorado's law--or in other words, baking a cake for the couple--violated his rights to free speech and free exercise of religion, protected by the First Amendment. So, this looked like it would be a pretty big case. But in 2018, the Supreme Court, in a decision written by Justice Kennedy, avoided making any big decisions. The Court decided it wasn't going to address these big First Amendment issues. Instead, the Supreme Court decided that the commission had held a flawed proceeding. The baker won, but not in a way that changed the law in an important way. But in that case--which is called Masterpiece Cakeshop versus Colorado Civil Rights Commission--Justice Thomas issued a separate opinion, and he had a different take. Thomas said that when Colorado tells a baker to make a custom wedding cake for a same-sex couple in violation of his beliefs, that is unconstitutionally compelled speech.

**Roman Mars** [00:07:43] So what is the idea behind compelled speech?

**Elizabeth Joh** [00:07:47] Okay, so you and I have talked about a bunch of First Amendment cases in the past. And usually when we think about the First Amendment, I think most people imagine someone arguing, "Hey, the government's prohibiting me from speaking or is punishing me for speaking in a particular way." But the Supreme Court has also interpreted the First Amendment to mean that just as the government can't easily limit or punish you for speaking, it also can't force you to speak when you don't want to. And we've also talked before about maybe the most famous compelled speech case, and that's West Virginia versus Barnette. That's the case where the Supreme Court said that the state can't force children to salute the American flag. The challengers were Jehovah's

Witnesses, remember? And they argued that being forced to salute the flag violated their religious beliefs. And so, because being forced by the government to speak an unwanted message is treated like being punished for literally speaking, that means the government can only compel speech if it can pass a very high legal standard, which it usually can't. Now, the Masterpiece Cakeshop decision--the one that didn't decide very much--was in 2018. But after that case, the Supreme Court's composition changed. Justices Kennedy and Breyer retired, and, of course, Justice Ginsburg died. And that's how we get to websites. So, in 2016, a woman named Lorie Smith filed a lawsuit against Aubrey Elenis, the director of the Colorado Civil Rights Division and Federal Court. Smith is the owner of 303 Creative, a web design company. It's a solo business. Smith is also, according to her own words, "an evangelical Christian." She says her services constitute an expressive platform. She wants to create custom-made wedding websites, and she wants to use her creative services to promote her religious views that marriage is only between a man and a woman. But Smith says Colorado's public accommodations law will force her to speak in a way that she doesn't want to. She'll be required to provide wedding website services for same-sex couples, and that violates her First Amendment rights. So, this is very, very similar to the baker's case. In fact, it's literally the same lawyers who represented the baker who also represent this website designer. And this time, the Supreme Court decided it would also take this case--the website designer's case. Smith asked the Court to consider whether the Colorado Public Accommodations Law violated her free exercise of religion rights and her right not to be compelled to speak. But the Court said they would take the case, but only the compelled speech argument. That's important for reasons I'll get to in a minute. So, on December 5th, the Supreme Court heard arguments in the case of 303 Creative versus Aubrey Elenis. So, in the abstract, the website designer's argument sounds pretty plausible. And it goes something like this: "No one should be compelled by the government to speak a message that violates their core convictions." But there are some really big questions that the Court has to decide here. So, the first big one--is this really speech? So, Roman, I personally am going to confess I have no idea how to make a website. But when you design a custom wedding website, does it seem to you like that is speech? Just curious.

**Roman Mars** [00:11:17] To me, making a custom website means that you are getting the copy from the customer--the client--to put on there. You're not putting any original thought or speech into it. I mean, I don't even know why you would. So, I feel like you're a vessel for other people's speech. It's not your own speech.

**Elizabeth Joh** [00:11:37] Yeah, there's some aspect of it that it's, like, part of it is the customer's speech. It's the details of their wedding and what they want to say. That doesn't necessarily mean it can't be the creator of the website's speech. But how much creation is there really in a website? So that's kind of one of the big issues. It's not the fact that there's no talking. So, I want to clarify something. The Supreme Court has definitely said in different contexts that the First Amendment protects some conduct that's expressive but isn't literal speech. So, actions can be expressive and be protected by the First Amendment. Like, burning the American flag or wearing a black armband have been considered by the Court to be expressive conduct.

**Roman Mars** [00:12:18] Sure. Yeah, so I would say that a website--you know, independent of the words on it--is an expressive form. And you can make beautiful art as websites. You can make a really kind of blank slate as a website. I would call that speech. I think that as the website creator who is commissioned by a client, it's not your speech. It's theirs. It's the clients.

**Elizabeth Joh** [00:12:36] Yeah. So that's really the tricky question for the Court. I think one of the issues with the website designer's argument is whether designing a custom website is really different from any other business selling goods or services because the website designer is not arguing that every single business that offers a good or service is engaged in speech. Quite the opposite. So, in the legal brief for the designer, she said she's different from bartenders, hairstylists, landscapers, tailors, jewelers. And she says, "Look, they can be forced to serve a same-sex couple who wants to hire their services for a wedding." And Justice Kagan asked about this at oral argument. She said, "What about a business that provides chairs at a wedding? Can they say, 'We don't rent to same sex couples because it's against our beliefs'?" And the website designer's lawyer says, "No, that's different. That's not speech." So those services can be regulated by Colorado's public accommodations law. That wedding chair rental guy--he has to serve everyone. Instead, the website designer said that she is different because she is an artist who makes custom designed websites for people. It's her artistic speech. And so, if the state of Colorado forces her to offer her artistic services to same-sex couples, then it's changing her content. It's the government forcing her to create a particular message. And so, in the website designer's view, she doesn't object to the customers. No, she objects to the message she is being forced to express. And so, she's basically picking up where Justice Thomas left off in the wedding cake case. But this is somehow artistic expression protected by the First Amendment.

**Roman Mars** [00:14:22] I see.

**Elizabeth Joh** [00:14:23] I think it's a pretty hard distinction to make--you know, a website designer versus lots of other tradespeople.

**Roman Mars** [00:14:29] Totally. The chair rental is one example, but what if somebody made custom chairs?

**Elizabeth Joh** [00:14:34] Exactly. Or what about a hairstylist? You know, a hairstylist is pretty artistic. What about a tailor, right? And so even if the Court were to decide that the custom website designer is engaged in some artistic speech, then that would mean there are probably a lot of businesses that want to say the same thing--that they also want to be exempt from public accommodations laws because they're engaged in First Amendment protected expression. And "No, you can't force me to change my message." They don't want to make a custom-made suit for a same-sex wedding. They don't want to create a custom hairstyle for a same-sex wedding. So, unsurprisingly, the state of Colorado sees the issue totally differently. They say, "Look, the website designer can sell anything she wants. What she can't do is choose her customers based on their characteristics." So, Colorado says, "Yes. Lori Smith can put on every website she creates a statement at the bottom that says, 'Marriage is only between a man and a woman.' She can say on every website she creates that same-sex marriage is against God's will or something like that. But what the website designer can't do," says Colorado, "is offer a product and then decide to serve only some customers and not others because of who those customers are. And that's what's exactly going on in this case." In Colorado's view, this isn't about speech at all. And Colorado's particularly worried about allowing what it calls an "exemption." So, they say, "Look, if you allow this person to be excused from our civil rights law, that would be an excuse so sweeping"--that's their word--"that you could drive a truck through that excuse. Everybody could use the excuse."

**Roman Mars** [00:16:10] I mean, is this just about same-sex marriage? I mean, it seems to be, like, these two cases seem to be centered on this. But could the Supreme Court treat same-sex marriage differently and create this kind of narrow decision here?

**Elizabeth Joh** [00:16:23] It's very difficult to see how they could because, remember, even though the website designer said that her decisions are based on her religious views, the Supreme Court said it was only going to decide this case as a compelled speech issue not a religious freedom issue. So, the motivations for her speech--if it is in fact speech--doesn't matter for this legal argument. And so that means that if the Supreme Court decides in favor of the website designer, any business that says they ought to be excused from public accommodations laws could do so for any kind of reason. So, this gets to the biggest problem of all. What happens if the website designer wins? So, there's the "who's an artist" problem, right? Besides custom cake bakers and website designers. So, for instance, it's pretty easy to find a lot of people who say they are engaged in the art of barbecue. So, what if we could time travel back to 1964? Couldn't Ollie McClung have said, "Look, each plate of ribs or barbecue I serve is an instance of my creative expression. Some are made for white people to eat in the restaurant, and others aren't." Or "If you force me to serve Black customers inside my restaurant, that's forcing me to endorse racial integration. You're changing my message." The problem in the barbecue case was that offering a limited menu to Black customers was really treating them differently. And isn't that the real issue? And Justice Sotomayor raises this exact question on Ollie's barbecue question during the website designer's case. And because it's December, the hypotheticals naturally turn to Christmas. And Justice Jackson raises a hypothetical that is a doozy. So, you know the kind of business that lets you take a picture of your kid sitting on Santa's lap, right?

**Roman Mars** [00:18:18] Yeah. Sure.

**Elizabeth Joh** [00:18:20] Okay. Justice Jackson asked, "Let's say there is a business in a mall called Scenes with Santa, and they want to express their own nostalgic creations by reproducing Santa scenes from the 1940s and fifties." And in fact, she has a very specific idea in mind. Justice Jackson says, "You know, like, from It's a Wonderful Life." I'm sure you know that movie, right?

**Roman Mars** [00:18:42] Yeah. Well, yeah, I've never seen it, but I know its existence.

**Elizabeth Joh** [00:18:46] So it's the kind of movie that's on every year on TV.

**Roman Mars** [00:18:50] Yeah, somehow, I've managed to avoid it.

**Elizabeth Joh** [00:18:50] It's a classic Christmas movie. 1946. Jimmy Stewart is a guy who despairs over his failing community bank. And he feels terrible. But an angel visits him, and Jimmy Stewart realizes that, no, he shouldn't despair, and he really does have a wonderful life. And it is a classic Christmas movie. But I should point out that the main characters are all white. So, Justice Jackson says, "What if a mall Santa business says because they're trying to capture the feelings from this movie, their policy is that only white children can be photographed with Santa in this way." So, I think you can see where she's going with this. So, she's saying, "Look, these are customized pictures. They're artistic pictures. This is not an off the rack business." So, Justice Jackson added more detail to her example. She says, "Now this Santa business will take pictures of nonwhite families for other scenes, and they'll gladly refer you to the Santa business down the block. But you just can't take Santa pictures with us." Isn't that an Ollie's Barbecue takeout policy? So, if the website designer can say, "No same-sex marriage customers because that would

make me say something that I don't want," then why can't the white Santa companies say, "No black kids, no Hispanic kids, no Asian kids"? Isn't that where this is going? The website designer's lawyer does not have a good answer to this. But then the Santa example took an even weirder turn. Later, in the oral argument, Justice Alito asked the lawyer for Colorado this question--Alito says, "So if there's a Black Santa at the other end of the mall, and he doesn't want to have his picture taken with a child who's dressed up in a Ku Klux Klan outfit, does that Black Santa have to do that?" Now, of course, this is a completely bizarre argument for lots of reasons. Mainly, the public accommodations laws protect classes of people because they've historically faced discrimination. The Klan is not one of those groups. But Alito cannot help himself. He goes on--he says, "And what if the kid wearing the Klan outfit, sitting on the lap of the Black Santa, is also himself Black? Does he still have to take him? Is the Black Santa forced to accept that customer?" Very weird. So apparently Alito thinks that there is a real problem with Black children wearing Klan outfits at Christmas who want to sit on Santa's lap. Nobody else thinks that this is a problem.

**Roman Mars** [00:21:28] Yeah. And it's not the race of the kid that's the thing that's being discriminated against. It's, you know, the Klan outfit, which is not a protected class.

**Elizabeth Joh** [00:21:40] Exactly. But in the actual case, the conservative Justices seem pretty receptive to the website designer's arguments that she can't be forced to comply with a law designed to ensure equal access to the state's goods and services. But if the Court rules in her favor, it would be, as Justice Sotomayor said during oral argument, "the first time in the Court's history that it said that a business open to the public could refuse to serve a customer based on race, sex, religion or sexual orientation."

**Roman Mars** [00:22:14] Wow. That's chilling. So, Lorie Smith--is she preemptively suing this Colorado civil rights--? Like, has somebody tried to commission her for a website and...?

**Elizabeth Joh** [00:22:27] No, she hasn't actually started to offer them yet. She raised what's called a "pre-enforcement challenge." So, in other words, someone who says, "I'm about to do this. And I know pretty certainly that if I offer this service, then I'm going to be penalized for it." And there was some back and forth before the case went up to the Supreme Court about whether she has the ability to bring this kind of case, but it was resolved in her favor. So, we are assuming before the Supreme Court that this is okay for the Court to consider her case. So, pre-enforcement challenges do happen, and that's an example of them. But that's right; she doesn't have a customer who's been refused yet.

**Roman Mars** [00:23:04] I see. Does the Supreme Court routinely take those preemptive challenges? Because that seems like, you know, nothing has happened yet.

**Elizabeth Joh** [00:23:12] Yeah, it does definitely. I wouldn't call it a "preemptive" challenge. It's pre-enforcement challenges.

**Roman Mars** [00:23:17] Oh, sorry. Sorry.

**Elizabeth Joh** [00:23:17] It's sort of like I'm about to engage in this conduct and I'm dead certain, let's say, that I'm going to be punished criminally if it's a criminal law or I'm going to be punished civilly. And because of that, I need to know now--she was seeking an injunction in other words--that the law not be applied to her. So that's sort of the posture in which it's come. So, it's not that unusual.

**Roman Mars** [00:23:39] Yeah. Okay.

**Elizabeth Joh** [00:23:40] Now, the website case, I think, reflects this increasingly diverse society and the fact that states are trying to provide equal access to the law for everybody. But as civil rights laws have expanded to recognize more categories of protected groups, you also see this kind of conservative backlash against that expansion. It's also why marriage equality in general--and I think the Obergefell decision in particular--is also in danger. That's the 2015 Supreme Court decision that recognizes a constitutionally protected right to same-sex marriage. But thanks to Justice Thomas, that's in some question. So now, Roman, we've talked about the Dobbs decision a bunch of times now. Dobbs, of course, overturned Roe versus Wade. And as a result, there's no longer a constitutionally protected right to an abortion. But in Dobbs, Justice Thomas wrote a separate opinion to say that the Court should also reconsider its previous decision in Obergefell about same-sex marriage. Now, the reason why he mentions this is because both what had been the constitutional right to an abortion and the existing right to same-sex marriage were based on the same constitutional provision--that's the due process clause--and the same kind of constitutional interpretation. So, for Thomas, it's really simple. If abortion goes, so should same-sex marriage. But as long as Obergefell survives, no state can prohibit same-sex marriage. But because that case or that decision now seems so vulnerable, Congress acted very quickly in response. And on December 13th, Biden signed the Respect for Marriage Act into law.

**Roman Mars** [00:25:20] So what does the Respect for Marriage Act do?

**Elizabeth Joh** [00:25:23] Yeah, it's really important, I think, to understand what the law does and doesn't do. And in part because a lot of the press coverage has kind of broadly described it as, you know, law that enshrines marriage equality into federal law. I would say that's not entirely correct. What the law does do is prepare for a world after Obergefell if the Supreme Court decides to overturn it.

**Roman Mars** [00:25:48] Wow.

**Elizabeth Joh** [00:25:49] When the Supreme Court decided that there was a constitutionally protected right to same-sex marriage, what that meant practically is that existing state bans on same-sex marriage were unenforceable. Those laws didn't go away, they were just unenforceable. It's kind of similar to what happened to abortion when the Court decided Roe versus Wade in 1973. But if Obergefell is overturned by the Supreme Court, those laws could go into effect again. Existing bans on same-sex marriage could be enforced, and states would be free to pass new bans on same-sex marriage, just like abortion. That would also be true if the Court decided that interracial marriage was not a right protected by the Constitution; states could ban them too. So, the Respect for Marriage Act does a couple of different things, but I just want to focus on the main part of it. So, let's say that the Supreme Court overturns Obergefell versus Hodges. So that would mean there is no constitutionally protected right to same-sex marriage. And let's say that you and your same-sex partner get legally married in California, but then move to Texas. And imagine that Texas has banned same-sex marriage. The Respect for Marriage Act says that Texas is still required to recognize that California marriage. That's the case even if Texas doesn't allow its own citizens to enter into same-sex marriages under Texas law. However--this is the important part--the new federal law does not require any state to allow same-sex couples to marry. So, if you live in a state where same-sex marriage is likely to be banned in a post-Obergefell world, you'd have to travel to another state to get

married--just like with abortion. So right now, the federal law doesn't have any practical importance, but if Obergefell is overturned and the Respect for Marriage Act starts to force unwilling states to recognize out-of-state same-sex marriages, you can guarantee that there will be Court challenges to the law. But it does provide, I think, some assurance for marriage equality if the Court decides to go in that direction.

**Roman Mars** [00:27:58] Have these extremely fanciful hypotheticals always been a part of Supreme Court arguments?

**Elizabeth Joh** [00:28:05] Yeah. I mean, they're a part of Supreme Court arguments. They're part of, you know, any Court's arguments. And they're just a part of actual legal education, right? You're thinking through the limits. Part of what's so crazy about Alito and the kid in the KKK outfit is like, you know, "Is that really helpful in this context?" Because, you know, the state of Colorado is thinking through some of the practical problems. I mean, there are going to be--if the case goes in the way that I think it will--all kinds of service providers who say, "Hey, I'm engaged in speech. I don't have to serve these people. I don't have to serve these customers. And I'm not discriminating against them. This is about my speech." But again, you know, prior to the current era, we never thought that that was a legitimate way to reject civil rights laws, right? You know, Ollie's Barbecue was not a case where we thought, "Maybe he has a speech right there." You know, there's a benefit to the Court having recognized more and more categories of nonliteral speech that are protected by the First Amendment. But that means that it raises many more instances in which somebody says, "Hey, this is speech," and it gets protected, even if it seems non-obvious to many people.

**Roman Mars** [00:29:15] Yeah. Or, like, campaign donations...

**Elizabeth Joh** [00:29:18] Right. Just to name an example.

**Roman Mars** [00:29:22] What a mess this is all going to be. Is there an overall feeling that the law shouldn't countenance bigotry? You know what I'm saying? Or is that just left out of the calculation?

**Elizabeth Joh** [00:29:39] That's what these state and federal civil rights laws do, right? You're trying to change the marketplace against the bigoted decisions of some service providers. But what's happened is that this particular Court, I think, has decided that religious freedom is kind of a value that will outweigh many other values in a lot of these controversial cases. I mean, we're seeing this in the website case. You know, during COVID, we saw a lot of decisions in favor of religious freedom over public health. You know, these are all putting a thumb on the scale of religious freedom. That's what this particular conservative majority cares a lot about.

**Roman Mars** [00:30:24] Yeah. I just feel like the concept of religious freedom that leads down a path of bigotry--there should be limits to that. That's all.

**Elizabeth Joh** [00:30:33] That's right. You know, you think about the origins of the compelled speech stuff, like thinking about the Jehovah's Witness case. I think a lot of people kind of understand that because there aren't any larger consequences here for them to exercise their religious freedom. They exercise it, they just don't participate. But this is an example of religious freedom having ripple effects throughout the whole society if you're allowed to say, "You can't come here. You need to go to a different business." That that just is religious freedom permitting a kind of stratified society.



**Roman Mars** [00:31:05] Yeah. And that should be considered when you're talking about religious freedom because you can make a religion have any type of tenets that you could rally around. And obviously, there has to be some limits to it. I mean, it's ridiculous. But religion has this shield for all decisions, behavior, and things that have consequence to lots of other people. It should be considered differently than a religious conviction that has no effect on anybody.

**Elizabeth Joh** [00:31:29] Yeah, and that's the tough thing with, like, the system we have, where the Supreme Court is kind of the ultimate arbiter of the Constitution. You could say, like, "Well, why can't we just have Democratic politics take care of this? Like, Colorado voters decided that they want this enshrined in law." It's okay, though, when those views are on your side.

**Roman Mars** [00:31:45] Yeah, exactly. I mean, that's the whole point of the laboratory of democracy of these states, where Alito seemed perfectly content that the populace of each state could determine the morality of abortion. In this case. You know, Colorado has determined that the protected class of sexual orientation is a valid one. And therefore, you know, if she wants to go practice her art of building websites, she should do it in another state.

**Elizabeth Joh** [00:32:10] That's right.

**Roman Mars** [00:32:12] I don't know. It's hard to get an abortion in another state.

**Elizabeth Joh** [00:32:14] If they are to seriously take this case--I mean, if they take the case seriously--there's two ways you can get rid of the case, right? To say--number one--that there is no exemption to civil rights laws. Or even the more basic one--"This isn't speech. You know, when you bake a cake, it's not speech. Or when you add some things onto a website, that's not speech." That's also a different way to get rid of it because most of the stuff where people would want to be discriminatory is not even close to being speech, right? The guy who runs out the chairs, or the guy who sells you flowers--it's really hard to say that that's speech. And it's just because they're willing to say, "This is a custom-made website," as opposed to just, like, "You plug in stuff yourself--a DIY website--that is her speech as opposed to solely the customer's speech."

**Roman Mars** [00:33:03] Yeah. Yeah. People should use Squarespace.

**Elizabeth Joh** [00:33:09] That's how you're going to fit in the ad.

**Roman Mars** [00:33:12] You can save 10% off a website or domain. Thank you, Elizabeth. I appreciate it.

**Elizabeth Joh** [00:33:18] Thanks, Roman.

**Roman Mars** [00:33:35] This show is produced by Elizabeth Joh and me, Roman Mars. You can find us online at [learnconlaw.com](http://learnconlaw.com). All the music in What Roman Mars Can Learn About Con Law is provided by Doomtree Records, the Midwest Hip Hop Collective. You can find out more about Doomtree, get merch, and learn about their monthly membership exclusives at [doomtree.net](http://doomtree.net). We are part of Stitcher and SiriusXM podcast Family.