

DISCRIMINATION AS PROTECTED ARTISTIC EXPRESSION

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I. INTRODUCTION

This Article uses a recent, controversial incident involving a participatory art installation that included a discriminatory element as a catalyst to explore the relationship between artistic expression, discrimination, and the law. This Article also evaluates other attempts to use artistic expressions to circumvent generally applicable laws. This methodology provides a valuable legal framework for analyzing such an inherently subjective and nuanced topic. This Article also includes a pragmatic consideration of potential unintended consequences of including discriminatory elements in artistic expressions. Finally, the Article concludes by providing an analysis as to how these cases would likely be adjudicated based on legal precedent—a complex task given the paradoxical nature of the competing interests involved.

II. LADIES LOUNGE

In 2023, a peculiar art exhibit opened at the Tasmanian Museum of Old and New Art (“Mona”).¹ The exhibit was created by artist Kirsha Kaechele, whose husband owns the museum.² The work included an entire section of the museum entitled “Ladies Lounge.”³ This section of the museum was transformed into an elegant lounge including works by noted artists such as Pablo Picasso and Sidney Nolan.⁴ It also featured champagne served by male-only butlers who “live to serve.”⁵ All males were denied access to this exhibit, even after paying the full museum entry fee.⁶ Kaechele explained how the intent of the exhibit was to point out hypocrisy regarding how Australia historically allowed male-only areas.⁷ It is “a response to the lived experience of women forbidden from entering certain

¹ Tiffanie Turnbull, *Mona: Australian Art Museum Sued over Women’s-Only Exhibit*, BBC NEWS (Mar. 20, 2024), <https://www.bbc.com> [<https://perma.cc/S87G-W8Y3>].

² Kelly Burke, *Artist Behind Mona’s Ladies-only Lounge ‘Absolutely Delighted’ Man Is Suing for Gender Discrimination*, GUARDIAN (Mar. 20, 2024, 8:22 AM), <https://www.theguardian.com> [<https://perma.cc/WKK2-QV38>].

³ Turnbull, *supra* note 2.

⁴ Francesca Aton, *Australian Museum’s Women-Only Exhibition Must Admit Men to Avoid ‘Discrimination,’ Judge Says*, ARTNEWS (Apr. 9, 2024, 3:52 PM), <https://www.artnews.com> [<https://perma.cc/MAW8-6LAD>].

⁵ Turnbull, *supra* note 1.

⁶ Aton, *supra* note 4.

⁷ *Id.*

spaces throughout history,” said Kaechele.⁸ She further explained that the exhibit was intended as an “essential space for perspective and reset from this strange and disjointed world of male domination.”⁹

While some patrons found the notion of excluding men as part of an artistic expression “titillating,” at least one man did not and pursued legal recourse.¹⁰ As a result, an Australian court ruled in April 2024 that the museum exhibit would no longer be able to ban all men from attendance, as doing so violated Tasmania’s Anti-Discrimination Act.¹¹ Kaechele offered a unique defense against the gender discrimination lawsuit, arguing that what she created was a “participatory installation,” and that the act of banning men was a necessary part of the artistic experience.¹² She explained, “OK, [the men] experience the artwork differently than women, but men are certainly experiencing the artwork as it’s intended.”¹³ And Kaechele’s attorney argued that “[p]art of the experience is being denied something that is desired.”¹⁴ Therefore, by barring the artist from discriminating against men, the court was effectively barring people from experiencing the art installation as intended. As the museum’s lawyer explained, if the museum was forced to allow access to men, “it would fundamentally undermine the work.”¹⁵

Another unsuccessful argument made by the defense was that this particular form of discrimination at issue fits under a statutory exception. Tasmania’s Anti-Discrimination Act explicitly allows for discrimination if it is “designed to promote equal opportunity for a group of people who are disadvantaged or have a special need because of a prescribed attribute.”¹⁶ The defense argued that the female-only exhibit fits under this exception, as it is only for purposes of “positive discrimination,” not “negative discrimination.”¹⁷ The judge disagreed, ruling that the museum’s evidence that the artwork promoted equal opportunity was “inconsistent,” explaining, “[i]t is not apparent how preventing men from experiencing the art within the space of the Ladies Lounge, which is [the plaintiff’s] principal

⁸ Jordyn Beazley, *Mona Ordered to Allow People ‘Who Do not Identify as Ladies’ into Ladies Lounge Exhibit*, GUARDIAN (Apr. 9, 2024, 5:03 AM), <https://www.theguardian.com> [<https://perma.cc/C2PV-L49U>].

⁹ Turnbull, *supra* note 1.

¹⁰ *Id.*

¹¹ ‘Sadness’ as Australian Court Rules Against ‘Women Only’ Art Exhibit, BARRON’S (Apr. 11, 2024), <https://www.barrons.com> [<https://perma.cc/EZC2-VGE8>].

¹² *Id.*; Aton, *supra* note 4.

¹³ Burke, *supra* note 2.

¹⁴ Aton, *supra* note 4.

¹⁵ Burke, *supra* note 2.

¹⁶ Aton, *supra* note 4.

¹⁷ *Id.*

complaint, promotes opportunity for female artists to have work displayed.”¹⁸

Kaechele’s desire to create art that encompasses far more than traditional paintings and sculptures was on display at the trial, which was an artistic expression in itself. A group of twenty-five women, wearing matching outfits and matching makeup, sat together in the courtroom and performed synchronized movements during the trial.¹⁹ After the trial, they all conspicuously left the building performing a choreographed dance routine in a conga line to audio from Robert Palmer’s song, “Simply Irresistible.”²⁰

Kaechele was initially “absolutely delighted” that the issue was going to court because she felt such legal action served to further the intention behind the art.²¹ Even after receiving the judgment against the exhibit, Kaechele mentioned that the court’s ruling only furthers the point of the exhibit, explaining, “[i]f you were just looking at it from an aesthetic standpoint, being forced to close would be pretty powerful.”²² This claim seems to have merit, as the male plaintiff was able to end the exhibit’s discriminatory practice against men, while women in the past were not afforded the same ability—thus further providing a sharp juxtaposition between the experience of men and women. Furthermore, the existence of the lawsuit itself could be interpreted to demonstrate male entitlement to female spaces.²³

A potential further layer of interpretation regarding the art exhibit is one perhaps not even considered by Kaechele or the museum. This is illustrated by comments from some of the female patrons who entered the Ladies’ Lounge. One such patron recounted how “absolutely delightful it is to be in a women’s only gathering.”²⁴ This is an informative comment, because the historically male-only spaces that this artwork is commenting on likely had numerous male patrons who expressed similar sentiment regarding the exclusion of women. In this way, the exhibit could also serve to cause reflection on the enticement of discriminatory actions and the importance of consistency—whether intentional or not.

¹⁸ Beazley, *supra* note 8.

¹⁹ *Id.*

²⁰ Turnbull, *supra* note 1.

²¹ Beazley, *supra* note 8.

²² Aton, *supra* note 4.

²³ Turnbull, *supra* note 1.

²⁴ Burke, *supra* note 2.

III. ANALOGOUS INCIDENTS

A. AFFIRMATIVE ACTION BAKE SALES

Some conservative college groups have created “affirmative action bake sales” in an effort to express criticism of university affirmative action policies.²⁵ One such incident was conducted by the Young Conservatives of Texas (YCT) chapter at the University of Texas at Austin in 2016.²⁶ The bake sale utilized tiered pricing based on the customers race, which was designed to mimic the university’s affirmative action admissions preferences.²⁷ The YCT chapter claimed that the performative expression was designed to highlight how affirmative action admissions policies “demeans minorities on our campus by placing labels of race and gender on their accomplishments.”²⁸ The university president called the expression “hate-filled,” and the student government proposed legislation calling for action to be taken against the YCT.²⁹ While the bake sale was ultimately permitted to occur at the University of Texas,³⁰ a similar bake sale at Bucknell University was not.³¹ There, the demonstration was shut down, but students were told they could obtain a permit to hold the event later.³² However, the students were then told that such a bake sale constitutes illegal discrimination and further that affirmative action could not be discussed on campus.³³

The effect that these affirmative action bake sales have, and the intended result of the promoters, appears to be comparable to the Ladies Lounge. As Kaechele explains, when a man becomes angry at the notion of being denied entry somewhere based solely on his gender, he is experiencing exactly what the artistic expression intended—what women in

²⁵ See Nell Gluckman, *Why an ‘Affirmative-Action Bake Sale’ Prompted This President to Speak Up*, CHRON. HIGHER EDUC. (May 6, 2019), <https://www.chronicle.com> [https://perma.cc/XU6F-TYEC].

²⁶ Daniel Funke, *UT Young Conservatives Threaten School with Legal Action After Controversial Bake Sale*, USA TODAY (Nov. 2, 2016, 4:30 PM), <https://www.usatoday.com> [perma.cc/FAY6-Z2HF].

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ Robert Shibley, *A ‘Bake Sale’ Protest at Aquinas College (Bucknell, Are You Listening?)*, FOUND. FOR INDIVIDUAL RTS. & EXPRESSION (Feb. 2, 2012), <https://www.thefire.org> [perma.cc/MFU2-7PBW].

³² *Id.*

³³ *Id.*

Australia historically felt.³⁴ Likewise, students being angered by seeing race used as a basis to determine who gains access to a product³⁵ is exactly what the YCT group wanted. The YCT conducted the performative expression in the hopes that it would cause these same people to view affirmative action admissions policies in a negative light.³⁶ This is illustrated by how the University of Washington’s president responded to an affirmative action bake sale on her campus with great displeasure, explaining that “there was an allusion that people were worth different amounts.”³⁷

B. “TAKE THE MONEY AND RUN”

In 2021, a Danish museum awarded artist Jens Haaning the equivalent of \$84,000 to create a modern art painting.³⁸ Haaning submitted two blank canvases, titled, “Take the Money and Run.”³⁹ The artist admitted it was a breach of contract—as it is not the specific project initially agreed to—but explained that the “breach of contract is part of the work.”⁴⁰ “The work is that I have taken their money,” said the artist.⁴¹ He further explained that this is to encourage people in miserable working conditions who are being asked to give money to go to work to likewise take the money and run.⁴² Even the museum curator appears to appreciate the two blank canvasses, describing them as “a provocative piece of work” and that while the artist previously turned money into art, “[t]he new work reminds us that we work for money.”⁴³ The museum further compared the work to that of Banksy and Bjorn Norgaard.⁴⁴ Regardless, the museum sued the artist to recover the money, and in 2023, a court agreed and ordered the artist to repay the money.⁴⁵ Even after the court order, the artist stated that he did not repay

³⁴ Burke, *supra* note 2.

³⁵ “Many Texas students were furious with the bake sale, arguing that it was racist.” Scott R. Stroud & Morgan Malouf, *Free Speech and the Ethics of Protest*, U. TEX. AT AUSTIN CTR. FOR MEDIA ENGAGEMENT (Mar. 14, 2018), <https://mediaengagement.org> [<https://perma.cc/PH8F-FSAL>].

³⁶ Funke, *supra* note 26.

³⁷ Gluckman, *supra* note 25.

³⁸ Bill Chappell, *For \$84,000, an Artist Returned Two Blank Canvasses Titled ‘Take the Money and Run,’* NPR (Sept. 29, 2021, 11:53 AM), <https://www.npr.org> [<https://perma.cc/M7BS-SZEL>].

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Marc Tracy, *‘Take the Money and Run’ Artist Must Repay Danish Museum*, N.Y. TIMES (Sept. 19, 2023), <https://www.nytimes.com> [<https://perma.cc/KF7B-8YJA>].

⁴⁵ *Id.*

the money because keeping the money is itself the artistic expression.⁴⁶ He explained, “[t]he two empty frames are actually a representation of the concept. So more important than the absence of money is that I’ve taken the money.”⁴⁷

C. *WONDER WOMAN* MOVIE SCREENINGS FOR WOMEN-ONLY

AUDIENCES

In 2017, a big-budget *Wonder Woman* movie was released.⁴⁸ In an effort to promote the rare occurrence of a female-led superhero movie with a female director, and to promote a sense of female community, some movie theaters advertised that certain screenings of the movie would bar males from attending.⁴⁹ The Alamo Drafthouse posted on its website, “Apologies, gentlemen, but we’re embracing our girl power and saying ‘No Guys Allowed’ for one special night at the Alamo Ritz.”⁵⁰ The Alamo Ritz also ensured that all employees working that night would be female⁵¹ and pledged to give a portion of the proceeds to the League of Women Voters.⁵²

While these women-only screenings sold out,⁵³ they also sparked criticism and an official complaint to the city of Austin Equal Employment/Fair Housing Office filed by Albany Law School anti-discrimination law professor J. Stephen Clark.⁵⁴ The complaint alleges that this was “a rather cynical corporate effort to exploit the ideal of women’s empowerment for crass profit by exploiting it as a means of boosting commercial ticket sales on a slow movie night [. . .].”⁵⁵ Additionally, the complaint alleges that by allowing only female employees to work at these screenings, the Drafthouse has engaged in employment discrimination.⁵⁶

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Wonder Woman*, IMDB, <https://www.imdb.com> (last visited May 29, 2024) [<https://perma.cc/KR9C-JBN3>].

⁴⁹ *Women-only Wonder Woman Showings Sell Out Despite Outcry*, THE GUARDIAN (May 27, 2017, 2:27 PM), <https://www.theguardian.com> [<https://perma.cc/6QP6-4RD5>].

⁵⁰ Kate Winkle, *Alamo Drafthouse Admits Violation for Women-Only ‘Wonder Woman’ Screening*, KXAN (Aug. 9, 2017, 3:38 AM), <https://www.kxan.com> [<https://perma.cc/6YVS-DPMF>].

⁵¹ Complaint filed by Jack Stephen Clark with the Austin Equal Emp./Fair Hous. Off. 4 (June 2, 2017), <https://www.documentcloud.org> [<https://perma.cc/22EW-Z7F9>].

⁵² Winkle, *supra* note 50.

⁵³ *Id.*

⁵⁴ Complaint, *supra* note 51, at 3.

⁵⁵ *Id.* at 2.

⁵⁶ *Id.* at 3.

The complaint goes so far as to allege that the Drafthouse engaged in retaliatory harassment by maintaining a public comment field to its Facebook post in which it “has allowed, condoned, and in some instances encouraged customers who support its discriminatory screenings to harass, defame, malign, belittle, and gender-stereotype any individual who attempts to criticize or oppose the discriminatory screenings, and Drafthouse has in some instances participated in this retaliatory harassment itself.”⁵⁷ The Austin Equal Employment/Fair Housing Office closed its investigation into the matter after the Drafthouse agreed to update its anti-discrimination policies.⁵⁸

D. CANCELLED PERFORMANCES

Some artists have cancelled performances or refused to render services as a protest. Bruce Springsteen cancelled a concert in North Carolina due to the state’s new anti-LGBTQ+ legislation.⁵⁹ Springsteen stated that canceling the show was “the strongest means I have for raising my voice in opposition to those who continue to push us backwards instead of forwards.”⁶⁰ In 2021, Major League Baseball moved the All-Star game from Georgia to Colorado to protest Georgia’s voting law.⁶¹ In 2019, some actors and filmmakers refused to film in Georgia to protest the state’s restrictions on abortion.⁶² In 2017, ten major fashion designers pledged to not design an inauguration dress for incoming First Lady Melania Trump.⁶³ Matisyahu, a Jewish rapper and supporter of Israel, has had concerts cancelled in 2024 allegedly due to venue employees refusing to show up.⁶⁴ While such cancellations and refusals may implicate disputes arising out of contract

⁵⁷ *Id.* at 2.

⁵⁸ Elizabeth Findell, *Austin Closes Book on One Alamo Drafthouse ‘Wonder Woman’ Complaint*, AUSTIN AM.-STATESMAN (Sept. 25, 2018, 11:14 AM), <https://www.statesman.com> [<https://perma.cc/97EW-R94V>].

⁵⁹ Amanda Hopluch, *Bruce Springsteen Pulls out of North Carolina Concert over Anti-LGBT Law*, THE GUARDIAN (Apr. 9, 2016, 4:24 AM), <https://www.theguardian.com> [<https://perma.cc/LW5Y-E9QA>].

⁶⁰ *Id.*

⁶¹ Bill Chappell, *MLB Moves All-Star Game to Colorado Amid Uproar Over Georgia Voting Law*, NPR (Apr. 6, 2021, 2:13 PM), <https://www.npr.org> [<https://perma.cc/3YSG-WHVB>].

⁶² Abigail Weinberg, *Actors and Filmmakers Are Refusing to Work in Georgia Because of Its Latest Abortion Restriction*, MOTHER JONES (May 10, 2019), <https://www.motherjones.com> [<https://perma.cc/5W3Z-GW64>].

⁶³ Mehera Bonner, *Here’s the Growing List of Designers Who Refuse to Dress Melania Trump*, MARIE CLAIRE (Mar. 12, 2017), <https://www.marieclaire.com> [<https://perma.cc/8PL9-KJNQ>].

⁶⁴ Angel Eduardo, *The Recent Concert Cancellations of Jewish Rapper Matisyahu Reflect a Continuing Threat to Free Expression*, FOUND. FOR INDIVIDUAL RTS. & EXPRESSION (Feb. 23, 2024), <https://www.thefire.org> [<https://perma.cc/KS6R-UHT9>].

law, they do not appear to violate any anti-discrimination laws. The fact that Matisyahu is Jewish would be a protected class, but he is not a customer being denied service.⁶⁵

E. REFUSAL TO PERFORM WEDDING SERVICES

There have been a number of recent cases involving businesses open to the public that refused to perform custom services for same-sex weddings. The most prominent of these is *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, in which a baker refused to create a custom wedding cake for a same-sex marriage.⁶⁶ The Supreme Court ruled in favor of the baker 7-2 but unfortunately provided little guidance as to the main issue in the case, “[w]hether applying Colorado’s public accommodations law to compel Phillips to create expression that violates his sincerely held religious beliefs about marriage violates the Free Speech or Free Exercise Clauses of the First Amendment.”⁶⁷

In the 2023 Supreme Court case of *303 Creative LLC v. Elenis*, a website designer open to the public refused to design a custom website promoting a same-sex wedding.⁶⁸ The Supreme Court ruled 6-3 in favor of the website designer on the grounds that this was compelled speech.⁶⁹ Since the artistic expression in *Masterpiece Cakeshop* was not addressed by the Court, and because *303 Creative* was decided on compelled speech grounds, it is unclear how future cases involving refusals by photographers, hairstylists, and florists will be decided.

F. BANKSY’S SHREDDED PAINTING

In 2018, street artist Banksy performed what some have referred to as “the ultimate art-world prank.”⁷⁰ Banksy first arranged to have one of his framed paintings auctioned at Sotheby’s.⁷¹ After the auctioneer slammed the hammer to finalize the \$1.4 million winning bid, the painting started to

⁶⁵ *Know Your Rights: Religious Freedom*, ACLU, <https://www.aclu.org/know-your-rights> (last visited Jan. 15, 2025) (explaining that under Title II of the Civil Rights Act, places of public accommodations are barred from discriminating against customers based on their religion).

⁶⁶ Erwin Chemerinsky, *Not a Masterpiece: The Supreme Court’s Decision in Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 43 HUM. RTS., no. 4, Oct. 2018, at 11.

⁶⁷ *Id.* at 12 (quotation marks omitted).

⁶⁸ *303 Creative, LLC v. Elenis*, 600 U.S. 570, 602-03 (2023).

⁶⁹ *Id.*

⁷⁰ Shira Wolfe, *Iconic Artworks: Banksy’s Shredded Painting – Art or Prank?*, ARTLAND MAG. <https://magazine.artland.com/banksy-shredded-painting> [<https://perma.cc/9LPM-WPLD>].

⁷¹ *Id.*

lower itself through a shredder hidden in the frame.⁷² Sotheby's later claimed that the now shredded version of the painting is a work of art that was created at the auction by the shredder.⁷³ The now shredded painting, retitled "Love is in the Bin," was sold at auction in 2021 for around \$23 million.⁷⁴

G. SMOKING IN A BAR LOOPHOLE

Reality television show *Nathan for You* demonstrates the potential for stretching the definition of an artistic expression to subvert an otherwise applicable law. The episode involves a real-life California bar whose business was greatly reduced after legislation banned smoking in businesses.⁷⁵ The legislation did provide an exception for a "theatrical production, if smoking is an integral part of the story."⁷⁶ The scheme for circumventing the law involved adding a small "audience" section to the bar and then classifying every bar patron as an "actor" in a "free-form play," thus allowing them to smoke.⁷⁷ The title of the play was conveniently called *Smokers Allowed*, providing the additional benefit of being able to put up a sign outside the business stating "Smokers Allowed."⁷⁸

This incident did not result in any litigation and therefore no definitive case law as a result. However, it does illuminate nuanced issues, such as the ability to use an artistic expression to subvert an otherwise applicable law and the inherent subjectivity of what constitutes art. A court would perhaps view the incident as a clear pretext to circumvent the anti-smoking law.

But to further complicate matters, the fact that the entire incident was conducted as part of a reality television show may add an additional layer of artistic expression. This is because the television show is a comedy, where the absurdity of turning a mundane bar scene into a theatrical production was intended for comedic effect, which in itself could be classified as a work of art.⁷⁹ Additionally, some of the people who came to see the play—which only consisted of regular bar patrons smoking in the bar—believed that it had artistic value. One person praised the show by

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ Comedy Central, *Nathan for You's Best Bar Schemes*, YOUTUBE (July 18, 2023), [https://youtu.be/\[https://perma.cc/Q3ZD-QDY5\]](https://youtu.be/[https://perma.cc/Q3ZD-QDY5]).

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Nathan for You*, IMDB, [https://www.imdb.com/\[https://perma.cc/J3CE-WYHX\]](https://www.imdb.com/[https://perma.cc/J3CE-WYHX]) (listing *Nathan for You* as a comedy).

explaining, “[i]t’s so nothing in a way, but incredibly profound. It reminded me of Sam Shephard.”⁸⁰

H. *HAMILTON* NON-WHITE CASTING CALL

In 2016, the Broadway musical *Hamilton* put out a casting call that explicitly excluded all white performers.⁸¹ In response to the controversial casting call, Actors Equity, a Broadway union, rebuked the decision, explaining that “producers agree that auditions for all productions [. . .] will be conducted in such a manner as to provide full and fair consideration to actors of all ethnicities.”⁸² The producer of *Hamilton* initially stated his intention to stand by the casting call, claiming that it was legal.⁸³ However, the casting call was quickly changed to allow white people to audition.⁸⁴

This incident brings up an interesting issue regarding the ability to engage in racial and gender discrimination to cast performers in parts when the race and/or gender is relevant to the artistic creation. For example, the fact that *Hamilton* uses all-minority performers to play the roles of the founding fathers provides artistic commentary on how the founding fathers were all white.⁸⁵ The producers of *Hamilton* have explained that “[i]t is essential to the storytelling of ‘Hamilton’ that the principal roles, which were written for nonwhite characters (excepting King George), be performed by nonwhite actors.”⁸⁶ And, indeed, this decision is often cited as a reason for the musical’s widespread success.⁸⁷

⁸⁰ Comedy Central UK, *Smokers Allowed | Nathan for You*, YOUTUBE (Nov. 22, 2018), <https://www.youtube.com> [<https://perma.cc/T254-8PA2>].

⁸¹ Nigel M. Smith, *Broadway Hit Hamilton Under Fire After Casting Call for ‘Non-White’ Actors*, THE GUARDIAN (Mar. 31, 2016, 1:38 PM), <https://www.theguardian.com> [<https://perma.cc/MH8S-9ZGQ>]. For a related case where a white performer was cast to perform the role intended for an Asian performer in *Miss Saigon*, see Jennifer L. Sheppard, *Theatrical Casting – Discrimination or Artistic Freedom?*, 15 COLUM.-VLA J.L. & ARTS 267 (1991).

⁸² *Broadway Union Takes Issue with ‘Hamilton’ Casting Call for ‘Non-White’ Performers*, CBS NEWS N.Y. (Mar. 29, 2016, 11:18 PM), <https://www.cbsnews.com> [<https://perma.cc/C5Z7-6LP2>].

⁸³ *Id.*

⁸⁴ Michael Paulson, *‘Hamilton’ Producers Will Change Job Posting, but not Commitment to Diverse Casting*, N.Y. TIMES (Mar. 30, 2016), <https://www.nytimes.com> [<https://perma.cc/2LK5-352M>].

⁸⁵ Kylie Umehira, *All Hammed Up: How Hamilton: An American Musical Addresses Post-Racial Beliefs*, 9 BOS. UNIV. ARTS & SCI. WRITING PROGRAM 103-11 (2016), <https://www.bu.edu/writingprogram> [<https://perma.cc/6BHY-U4MV>].

⁸⁶ Paulson, *supra* note 84.

⁸⁷ *Id.*

However, mere customer preference is generally not a legitimate defense to a discrimination claim.⁸⁸ This would likely need to fall under a Bona Fide Occupational Qualification (“BFOQ”) to be permissible.⁸⁹ BFOQs allow for discrimination against a female applicant to clean a men’s washroom,⁹⁰ against male nurses in obstetrics and gynecology,⁹¹ and perhaps even a female waitress at Hooters.⁹² The Supreme Court has held that to qualify as an exception, a BFOQ must bear a “demonstrable relationship to successful performance of the jobs for which [they are] used.”⁹³ But this standard begs the question as to what exactly is included in the “successful performance” of someone in a theatrical play. Is gender a requirement for the successful performance of playing the role of a historical figure such as Martin Luther King? Is race a requirement to the successful performance of playing the role of the biological son of two Black parents? It is standard practice for casting calls to explicitly specify the gender, race, and age range of the characters.⁹⁴

Title VII of the Civil Rights Act does provide an explicit exception for discrimination “on the basis of [. . .] religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.”⁹⁵ And the Equal Employment Opportunity Commission provides an exception for sex discrimination when “it is necessary for the purpose of authenticity or genuineness [for example] an actor or actress.”⁹⁶ This would cover the practice of excluding from consideration men in casting the lead role in the musical *Annie*.⁹⁷ However, race is not included in this exception. Furthermore, the nature of the discrimination involved in the *Hamilton* casting call would likely work against the producer. Instead of casting for a specific race to play a specific

⁸⁸ *Wilson v. Sw. Airlines Co.*, 517 F. Supp. 292, 298, 304 (N.D. Tex. 1981) (rejecting Southwest Airline’s claim that being female was a BFOQ for flight attendant positions because the mostly male customers at the time preferred female flight attendants).

⁸⁹ *Norwood v. Dale Maint. Sys.*, 590 F. Supp. 1410, 1421 (N.D. Ill. 1984).

⁹⁰ *Id.* at 1423.

⁹¹ *Backus v. Baptist Med. Ctr.*, 510 F. Supp. 1191, 1195-96 (E.D. Ark. 1981) (stating that “requiring labor and delivery nurses to be female is a bona fide occupational qualification (BFOQ) [. . .]”).

⁹² See Michael Conklin, *Unlocking the Beauty from Within Title VII: Arguing for An Expansive Interpretation of Title VII to Protect Against Attractiveness Discrimination*, 31 AM. U. J. GENDER, SOC. POL’Y & L. 25, 58 (2023).

⁹³ *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

⁹⁴ Paulson, *supra* note 84.

⁹⁵ 42 U.S.C. § 2000e-2(e)(1).

⁹⁶ 29 C.F.R. § 1604.2(a)(2).

⁹⁷ See Sheppard, *supra* note 81, at 276.

role, the *Hamilton* production was willing to consider any non-white race. Therefore, this is less like saying only Black people may apply for the role of Martin Luther King and more like saying anyone except Hispanic people may apply for the role of Martin Luther King. In the latter example, the willingness to accept White people, Black people, Asian people, and Native Americans indicates that there likely is not a valid BFOQ for excluding Hispanic people.

IV. PRAGMATISM OF SUCH DISCRIMINATORY ACTS

It is important to distinguish between what is legally permissible and what is beneficial. Therefore, this Section discusses the pragmatic effects of the discriminatory practices described in this Article. The intentions of the acts described in this Article are largely noble, one of which sought to bring awareness to Australia's discriminatory past, and another to create a communal event for women to celebrate a rare female-led superhero movie. However, under the law of unintended consequences, these good intentions are largely irrelevant when it comes to the actual effects of the policies. Furthermore, these unintended consequences may be difficult to foresee and may serve to undermine the very goals of the act.

For example, creating and promoting a women-only screening of *Wonder Woman* could potentially lead to numerous, counterproductive consequences. It could promote the notion that the movie is primarily for women, thus resulting in fewer male viewers being exposed to the positive portrayal of women and commentary on gender discrimination contained in the movie. This notion would also result in diminished box office sales, resulting in fewer such movies in the future—an unfortunate phenomenon this genre has historically suffered from.⁹⁸ Treating customers differently based on their genders, regardless of intention, could serve to promote harmful notions of gender differences that may have ramifications far beyond movies. This is because these notions of differences are at the heart of much of the more harmful discrimination in society.⁹⁹ These same unintended consequences would potentially be at play in the Ladies Lounge example, as the practice of barring men from a given area in an effort to create a unique experience is contingent on notions of gender differences.

The position of former U.S. Supreme Court Justice Ruth Bader Ginsburg on these well-intentioned forms of gender discrimination is

⁹⁸ Michael Conklin, *Why Are Female Superheroes so Rarely Cast in Lead Roles?*, DENVER POST (Aug. 5, 2016, 12:00 PM), <https://www.denverpost.com> [<https://perma.cc/HW65-F6R3>].

⁹⁹ See *Gender Stereotypes and Stereotyping and Women's Rights*, UNITED NATIONS HUM. RTS. OFF. OF THE HIGH COMM'R (Sept. 2014), <https://www.ohchr.org> [<https://perma.cc/S6PN-QFQE>].

helpful to consider. Justice Ginsburg clearly understood the importance of consistently fighting against all forms of gender discrimination in order to advance women's rights. Even when the gender discrimination was rooted in a stereotype flattering to women, as in *Craig v. Boren*,¹⁰⁰ Justice Ginsburg understood that this was counterproductive in the long run. Anti-discrimination advocacy is not a zero-sum game in which protecting men from discrimination results in fewer protections for women.¹⁰¹ To the contrary, we benefit from a synergistic effect when we consistently fight against all forms of gender discrimination.¹⁰²

The pragmatism of Justice Ginsburg's strategy is that it could even be effective in persuading those who are only concerned with what's best for men. As the American Civil Liberties Union Director of Women's Rights Project explained, "[b]y representing [Charles Moritz who was discriminated against for being a man], Ginsburg was able to show male judges that sex discrimination hurt men as well as women."¹⁰³ Additionally, promoting male discrimination as a permissible exception to anti-discrimination laws could serve as a powerful recruitment tool for anti-women groups.¹⁰⁴

V. CONCLUSION

The Ladies Lounge and related incidents elicit fruitful discussion regarding competing interests. There is a balance between the First Amendment rights of artists to create provocative and transgressive artistic experiences and the enforcement of antidiscrimination laws at public accommodation establishments. To further complicate the already amorphous balancing act, there are two paradoxical natures to consider. First, banning a discriminatory experience such as the one implemented in the Ladies Lounge concurrently precludes men from experiencing the

¹⁰⁰ *Craig v. Boren*, 429 U.S. 190, 196 (1976) (involving a male who sued regarding Oklahoma's statute that allowed women to purchase beer starting at age eighteen, while men could not until age twenty-one). Justice Stevens, in his concurring opinion, explained that the unjustified gender discrimination by the state was likely based on "nothing more than the perpetuation of a stereotyped attitude about the relative maturity of the members of the two sexes in this age bracket." *Id.* at 213 n.5 (Stevens, J., concurring).

¹⁰¹ See Michael Conklin, *Inadvertently Demonstrating the Importance of Consistency in Feminist Jurisprudence: Julie C. Suk's After Misogyny*, 43 QUINNIPIAC L. REV. 101, 107.

¹⁰² *Id.*

¹⁰³ Ria Tabacco Mar, *Ruth Bader Ginsburg's Fight for Gender Equity Was for All of Us*, ACLU (Sept. 22, 2020), <https://www.aclu.org> [<https://perma.cc/RA25-B3F4>].

¹⁰⁴ This is similar to how discrimination against white people has been used as a powerful recruitment tool for white supremacist groups. See Olga Khazan, *How White Supremacists Use Victimhood to Recruit*, ATLANTIC (Aug. 15, 2017), <https://www.theatlantic.com> [<https://perma.cc/S9HY-EXFR>].

artistic creation as intended. Second, it could be argued that the more significance that is placed on the harm from discrimination, the more important it is to allow such artistic expressions. This means that the strong distain against discrimination could be an argument for how powerful it is as an artistic expression, and thus a powerful impetus for social commentary, challenging norms, and provoking experiential learning that should be allowed.¹⁰⁵

Ultimately, however, if the Ladies Lounge was attempted to be implemented in the United States, and a legal challenge was brought, it is unlikely that it would survive scrutiny. It simply does not fall under any of the existing exceptions.¹⁰⁶ Additionally, there are alternative, nondiscriminatory means to reach a similar desired end. For example, one could imagine developing an experience whereby male customers consent to being exposed to experiences similar to those experienced by women historically. This could include being initially told that they could not enter certain areas of the museum, role-playing what it is like to not be allowed to enter certain professions, and experience being judged by unattainable beauty standards. If the men were then allowed to enter all areas of the museum, and allowed to opt out of the discriminatory parts, then the only discriminatory element would be optional and therefore likely allowed.

In addition to the pragmatic aspects discussed in this Article in Part IV, one must consider that whatever standard is applied, it will largely be applied equally to all artistic expressions with a discriminatory element. Meaning, while some people may be comfortable with the Ladies Lounge because it discriminated against men in an effort to illuminate discrimination against women, such legal precedent would likely be equally applicable to another artist who discriminated against a traditionally marginalized group in order to illustrate a less-popular message. Therefore, once such a discrimination loophole is created, even if initially intended to be narrow, it could potentially become very broad after attempts to exploit such a loophole begin.

¹⁰⁵ See *What Is Experiential Learning and Why Is It Important?*, KENT ST. UNIV., <https://www.kent.edu> [<https://perma.cc/734A-2GMV>].

¹⁰⁶ In limited scenarios, businesses may be permitted to lawfully discriminate against customers. See, e.g., *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 584 U.S. 617 (2018) (holding that a religiously affiliated business could potentially decline to perform functions that violate their religious beliefs); Rudri Bhatt Patel, *Vaccinations, Masks, and Small Business Rights*, LEGAL ZOOM (Apr. 7, 2023), <https://www.legalzoom.com> [<https://perma.cc/L953-MJHV>] (explaining that during the COVID-19 pandemic businesses could generally require customers to wear masks and show proof of vaccination); *Good Question: Why Can Some Clubs Discriminate?*, CBS NEWS (Aug. 20, 2012, 11:22 PM), <https://www.cbsnews.com> [<https://perma.cc/8ED9-R9G7>] (explaining that some private clubs may discriminate against who they permit as members).

By examining the legality of discriminatory artistic expressions, this Article provides a valuable framework for assessing the balancing of such nuanced issues. This framework will hopefully serve as a powerful catalyst to ignite future research into this novel area of the law. As demonstrated in this Article, this is important given the multifaceted nature of balancing the competing interests and the potential for unintended consequences.