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303 Creative: SCOTUS Rules First Amendment Protects Colorado Website Designer from Creating 'Expressive' Wedding Websites For Same-Sex Couples

On June 30, 2023, the U.S. Supreme Court decided a case emanating from Colorado, with nationwide implication, *303 Creative LLC v. Elenis*. SCOTUS held, by a 6-3 majority, that "the First Amendment prohibits Colorado from forcing a website designer to create expressive designs speaking messages with which the designer disagrees" – specifically, websites for same-sex marriages. The website designer successfully challenged the same Colorado anti-discrimination law at issue in the 2018 highly publicized decision in *Masterpiece Cakeshop v. Colorado Civil Rights Commission* wherein SCOTUS held that Colorado violated a baker's First Amendment rights when it did not exercise religious neutrality in determining the baker must design a custom wedding cake for a same-sex couple.

Background

The owner of Colorado-based 303 Creative LLC, Lorie Smith, planned to expand her business to create wedding websites. Before offering such wedding-related services, Ms. Smith preemptively filed a lawsuit against the state of Colorado, seeking to enjoin it from compelling her to create websites celebrating same-sex marriages. Ms. Smith also sought to post a notice on 303 Creative's website announcing she would not create wedding websites for same-sex marriages. At the inception of the case, Ms. Smith stipulated she was "willing to work with all people regardless of classifications," such as sexual orientation, and would create websites for LGBTQ+ individuals, but she drew the line at creating expressive content contrary to her sincerely held convictions that marriage is between one man and one

woman. Ms. Smith argued there existed a credible threat that Colorado would use the Colorado Anti-Discrimination Act (CADA) to compel her, in violation of the First Amendment, to create websites celebrating same-sex marriages, which she believes, as a Christian witness, are "'false,' because 'God's true story of marriage' is a story of a 'union between one man and one woman.'" (Note this is in contrast to the facts underlying the *Masterpiece Cakeshop* decision, where Colorado had already determined that the baker violated CADA and issued specific orders related to that conclusion.)

As relevant to this case, CADA prohibits all "public accommodations," which include any businesses offering retail or services to the public, from denying "the full and equal enjoyment" of its goods and services to any customer (or employee) based on their race, creed, disability, sexual orientation, or other statutorily enumerated trait. Colo. Rev. Stat. §24–34–601(2)(a). CADA also makes it unlawful to advertise that services "will be refused, withheld from, or denied," or that an individual is "unwelcome" at a place of public accommodation, based on the same protected traits. Colo. Rev. Stat. §24–34–601(2)(a).

The U.S. District Court for the District of Colorado granted summary judgment for the state of Colorado, holding Ms. Smith was not entitled to the injunction sought. The Tenth Circuit Court of Appeals affirmed the district's court's decision, noting that "faith that enriches society in one way might also damage society in other, particularly when that faith would exclude others from unique goods or services…[Ms. Smith's] Free Speech and Free Exercise rights are, of course, compelling. But so too is Colorado's interest in protecting its citizens from the harms of discrimination. And Colorado cannot defend that interest while also excepting [Ms. Smith] from CADA." The Supreme Court reversed.

SCOTUS's Majority Decision

Justice Gorsuch—joined by Chief Justice Roberts and Justices Thomas, Alito, Kavanaugh, and Barrett (the "Majority")—explained that the wedding websites Ms. Smith seeks to create "involve *her* speech" (emphasis in original). Specifically, Ms. Smith intends to "vet" each prospective project to determine whether it is one she is willing to endorse and intends to consult with clients to discuss "their unique stories as source material." She will then produce a final story for each couple using her own words and her own "original artwork." The parties to the case had stipulated that Ms. Smith's services were "expressive" in nature. The Majority concluded that Colorado, via its anti-discrimination law, could not compel Ms. Smith's expressive speech to "align with its views but defy her conscience about a matter of major significance."

The Majority cited Supreme Court precedent that protects individuals' rights to speak their mind regardless of whether the government considers their speech sensible and well intentioned or deeply "misguided." Further, generally, the government may not compel a person to speak the government's own preferred messages. The Supreme Court has previously found that governments impermissibly compelled speech in violation of the First Amendment when they tried to force speakers to accept a message with which they disagreed, and the Majority held that "[h]ere, Colorado seeks to put Ms. Smith to a similar choice."

The Majority clarified that states may "protect gay persons, just as [they] can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public." On this point, the Majority cited the parties' stipulation that Ms. Smith was not opposed to accepting clients of all protected classes, including LGBTQ+ individuals. When Colorado's public accommodations law and the Constitution collide, however, "there can be no question which must prevail."

Justice Sotomayor's Dissent

In the dissent, Justice Sotomayor—joined by Justices Kagan and Jackson (the "Dissent")—disagreed that the First Amendment shields Ms. Smith's business from a generally applicable law that prohibits discrimination in the sale of publicly available goods and services. The Dissent explained that CADA targets conduct—not speech—for regulation, and "the act of discrimination has never constituted protected expression under the First Amendment."

Further, the Dissent asserted that a public accommodations anti-discrimination law has two core purposes. First, the law ensures equal access to publicly available goods and services. Second, it ensures equal dignity in the common market. Per the Dissent, the concept of a public accommodation embodies a simple, but powerful, social contract: A business that chooses to sell to the public assumes a duty to serve the public without unjust discrimination. Therefore, the Dissent stressed that "the refusal to deal with or to serve a class of people is not an expressive interest protected by the First Amendment," and Ms. Smith was not compelled to offer her expressive services to the public and therefore subject her business to the public accommodations law.

As applicable to Ms. Smith, the Dissent reasoned the First Amendment does not entitle her to a special exemption from a state anti-discrimination law requiring her to serve all members of the public on equal terms. Moreover, per the Dissent, CADA does not directly regulate Ms. Smith's speech, and she "may not escape the law by claiming an expressive interest in discrimination." Accordingly, the Dissent also found the First Amendment likewise does not exempt her from CADA's prohibition on posting a notice stating she will deny goods or services based on sexual orientation. Lastly, the Dissent was not persuaded that Ms. Smith's willingness to accept an LGBTQ+ individual as a client advanced her position, and likened it to historical challenges to racial integration in the United States where different services were offered to Black people yet found to be unlawfully discriminatory by the Supreme Court.

Conclusion

303 Creative LLC v. Elenis is a fact-specific decision holding that the First Amendment creates a narrow exception to the state of Colorado's anti-discrimination law for a website developer whose work involves creating "expressive designs" and selecting customers to convey the designer's message. That being said, it remains to be seen to what extent courts may apply the Majority's reasoning to other public facing businesses who provide "expressive design"-type services, and the decision may produce similar challenges to the applicability of CADA and similar state and local public accommodations laws across the country. The parties to *303 Creative LLC v. Elenis* did not dispute that Ms. Smith's speech was "expressive," but future challenges may focus on meeting this threshold requirement justifying heightened protection of an individual's speech or conduct.

Authors

This GT Alert was prepared by:

- Naomi G. Beer | +1 303.572.6549 | beern@gtlaw.com
- Hannah Caplan | +1 303.572.6500 | Hannah.Caplan@gtlaw.com
- Martine Tariot Wells | +1 303.685.7434 | Martine.Wells@gtlaw.com
- Julia (Julie) Mitarotondo | +1 303.572.6555 | Julie.Mitarotondo@gtlaw.com

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