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Supreme Court Rules First Amendment Permits the Sale of 'Expressive' Goods and Services from Compliance with Anti-discrimination Laws

303 Creative, LLC v. Elenis, 143 S. Ct. 2298 (June 30, 2023)

In a 6-3 ruling, the U.S. Supreme Court has written another chapter in the ongoing story of balancing free speech in the marketplace against anti-discrimination laws. At least where certain artistic expression is concerned, the Court held that anti-discrimination laws must give way to the First Amendment.

In *303 Creative, LLC v. Elenis*, Lorie Smith, a web designer, challenged Colorado's Anti-Discrimination Act (CADA), which prohibits the denial by a public accommodation business of "the full and equal enjoyment" of any good or service on the basis of race, creed, disability, sexual orientation, or other defined criteria. Smith's company, 303 Creative LLC, offers wedding websites. For each wedding website, Smith intended to create an announcement celebrating the couple's union as a "marriage." And although she would design ordinary websites for any member of the public, Smith would not create a wedding announcement for same-sex unions on account of her religious belief that a "marriage" exists only between one man and one woman.

Refusing to create websites on this basis would likely result in an enforcement action by the state for violating CADA. (Colorado had brought a similar enforcement action against a cake designer in the *Masterpiece Cakeshop* litigation, which the Supreme Court addressed in 2018.) So, Smith sued for declaratory relief: to the extent Colorado would seek to compel her under CADA to design an announcement stating that a same-sex union was a "marriage," that state action would violate the First Amendment's Free Speech

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Clause. Colorado maintained that if Smith offered web-design services to the public, she could not refuse those services to members of a protected class. The district court granted summary judgment in favor of Colorado, and the U.S. Court of Appeals for the Tenth Circuit affirmed.

In a majority opinion authored by Justice Gorsuch, the Supreme Court held that the First Amendment's Free Speech Clause forbids Colorado from compelling Smith "to create websites celebrating marriages she does not endorse." The Court began its analysis by establishing that Smith's services constitute "speech" for purposes of the First Amendment. Unlike "ordinary" commercial goods or services, Smith's websites (as the parties agreed) would be custom-made to express a particular message, both on behalf of the clients and Smith herself. For instance, to create her wedding websites, Smith intended to consult with a couple to learn their "love story" and then, using that "source material," produce a final "story" using her own words and original "artwork." In this way, the Court likened her wedding websites to a painting and the wedding announcement to a script.

The Court then concluded that an enforcement action against Smith would impermissibly "force" Smith "to abandon her conscience and speak [Colorado's] preferred message instead." The Court drew on three First Amendment precedents, which held: (1) the government may not force parade organizers to accept participants who alter the parade's message; (2) the government may not dictate who joins an "expressive association" or club; and (3) the government may not compel school children to recite a pledge that violates their beliefs. So, too, Colorado may not "compel speech Ms. Smith does not wish to provide."

The Court hastened to offer two qualifications. First, "ordinary," non-expressive products—such as Smith's non-wedding websites—may still be subject to public-accommodation laws. Second, the Court distinguished the designer's case from governmentally -imposed "incidental" burdens on speech. For example, the First Amendment permits laws requiring businesses to disseminate purely factual information, particularly in the context of commercial advertising. Compelling the designer to recite a

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message that violated her beliefs was not, the Court held, an "incidental" burden on her speech.

Joined by Justices Kagan and Jackson, Justice Sotomayor dissented. After surveying the history and purpose of anti-discrimination laws, particularly in the context of public accommodations, the dissent asserted that the First Amendment does not allow Smith and her company to "escape" CADA "by claiming an expressive interest in discrimination." Smith and her company "remain free to advocate" for their views and even include those views on their websites; they just may not refuse to provide websites to members of a protected class.

Key Takeaways

- Public-accommodation laws may still compel businesses to provide "ordinary" commercial goods or services to a member of a protected class. But public-accommodation laws may not compel creative professionals to provide goods or services that are "expressive" in nature but violate their conscience, regardless of a customer's protected status.
- Although the web designer in *303 Creative, LLC* relied on her religious convictions, the Court did not resolve her challenge under the First Amendment's Free Exercise Clause; it invalidated Colorado's application of its public-accommodations law under the First Amendment's Free Speech Clause. While noting that the designer's *religious beliefs* were sincerely held, the Court advised that a speaker's *motives* are generally irrelevant under the Free Speech Clause.

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