Christopher Jackson

Partner
303.295.8305
Denver
cmjackson@hollandhart.com

Supreme Court Poised to Issue Blockbuster Decision on Free Speech

Insight — November 15, 2022

Thomson Reuters Westlaw Today

Republished with permission, originally appeared in Thomson Reuters Westlaw Today on November 15, 2022

Christopher Jackson of Holland & Hart LLP discusses the free speech issues before the U.S. Supreme Court in *303 Creative, LLC v. Elenis*, involving a website designer's refusal to develop a website for a same-sex wedding.

Earlier this year, the U.S. Supreme Court agreed to hear *303 Creative, LLC v. Elenis*, an appeal brought by a Colorado website designer who claims she has a First Amendment right to refuse to make websites for same-sex weddings. The case is shaping up to be a free speech blockbuster.

Case background

The website designer, Lorie Smith, is the founder and owner of a local business, 303 Creative, which creates graphics and websites for its customers. Smith is willing to work with anyone regardless of sexual orientation, but because she believes that same-sex marriage conflicts with God's will, she will not build websites for a same-sex wedding.

All parties agree that if Smith were to make websites for opposite-sex couples but refuse to do so for same-sex couples, she would be in violation of Colorado's public accommodations law. Specifically, the Colorado Anti-Discrimination Act prohibits businesses from refusing to serve someone on the basis of certain characteristics, including "sexual orientation."

In Smith's view, that legal prohibition violates her First Amendment rights. She argues that creating a wedding website is a form of speech that expresses approval of the marriage, and that as a result, she cannot be compelled to offer those services to same-sex couples. According to Smith, the Constitution doesn't allow the government to compel artists like her to speak messages that violate their deeply held beliefs.

Colorado makes two arguments in response. First, it contends that the Act does not require businesses to sell any particular product. It only requires that *if* a business offers a good or service to the public, it must sell that good or service without regard to a customer's sexual orientation. Put

another way, the Act doesn't regulate speech; it only regulates the way that goods and services are sold. As a result, the law only targets commercial conduct, and is therefore outside of the First Amendment's purview.

Second, the state argues that even if Smith's free speech rights are implicated in some way, the Act serves a compelling governmental interest. Laws like the one at issue in this case have a long and storied history — one that predates the Founding — of protecting consumers from the evils of discrimination on the basis of categories like race, religion, and disability.

The facts of this case might sound a little familiar. That's because they track pretty closely with another Supreme Court case from 2018, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*. There, a baker alleged that the very same Colorado law violated his Free Exercise Clause rights by requiring him to make wedding cakes for same-sex couples. But in that case, the Court punted on the important constitutional question and resolved the case on a particularly narrow ground — namely, certain comments from state officials that the Court said expressed "hostility to religion."

The Supreme Court takes the case

Lorie Smith lost before the 10th U.S. Circuit Court of Appeals, and she filed a petition for certiorari asking the Supreme Court to take up her case. In February, the high court granted her petition, and the case is set for oral argument in early December.

There are a few key questions the Supreme Court will have to answer. At the outset, it must decide whether Colorado's Act is a form of compelled speech. The 10th Circuit agreed with Smith on that point, holding that the Act did implicate her First Amendment rights. But Colorado has consistently maintained that the mere act of selling something — even something expressive — "is not itself expressive conduct." In Colorado's telling, "the Act regulates sales, and not the products or services sold."

To answer this question, the Court will have to engage in some pretty difficult line-drawing about what qualifies as "speech." Whether making a website counts, what about providing flowers for a wedding? Or taking pictures? Or renting the venue itself? These are of course just a few wedding-related examples, but they point up how hard it is to make a principle distinction between speech and non-speech.

If the Court sides with Smith on that first question, it will have to decide if Colorado's Act can pass either intermediate or strict scrutiny, *i.e.*, whether the Act is appropriately tailored to serve a compelling government interest.

In essence, the case pits two competing values against each other. On the one hand, state governments have a compelling interest in protecting their citizens from unjust discrimination and ensuring equal access to publicly available goods and services. On the other, the First Amendment protects every person's right to speak freely — even and perhaps especially when

that speech is unpopular.

Where the court might be headed

Over the last few decades, the Supreme Court has tried to draw careful and nuanced distinctions to protect these two competing values — in cases like *O'Brien* (1968), *Hurley* (1995), and *FAIR* (2006). But in *303 Creative*, we are likely to see a substantive shift in the Court's First Amendment jurisprudence.

With the recent appointments of Justices Brett Kavanaugh and Amy Coney Barrett, the Court has moved sharply to the right — particularly on First Amendment issues. As other commentators have noted, last Term we saw a number of cases expanding the scope of the First Amendment, including two involving the role of religion in public life.

It isn't just the recent change in the Court's makeup that signals a shift. About 80 different amicus curiae briefs have been filed in this case from a wide-ranging list of organizations including the ACLU, the NAACP, Americans for Prosperity and the Christian Legal Society. Many of those briefs don't just advocate for one side or the other, but instead put forward potential new legal tests to balance the competing interests in this case. The assumption underlying these briefs is that the Court is poised to adopt a new test and dramatically alter its First Amendment jurisprudence.

By all accounts, the Court appears poised to side with the petitioners in 303 Creative and rule that public accommodations laws don't just regulate commercial conduct, but also impermissibly restrict protected speech — at least in some situations. No one can say for sure where exactly the Court is headed, but it might give us a clue during oral arguments, which are scheduled for Dec. 5.

Christopher Jackson is a partner in Holland & Hart LLP's appellate practice group, in Denver. He has handled matters before the U.S. Supreme Court, most of the federal circuit courts, and in state appellate courts across the country.

---

questions as to the application of the law to your activities, you should seek the advice of your legal counsel.